JAGAT SINGH

*v.*

STATE OF H. P.

(Criminal Appeal No. 1145 of 2010)

JANUARY 3,2011

**[HARJIT SINGH BEDI, P. SATHASIVAM AND CHANDRAMAULI KR. PRASAD, JJ.]**

*Penal Code, 1860:*

*s.323 – Altercation between two sides over a land dispute – Free fight between them – One person on complainant's side died of 'Gatra' injuries inflicted by two out of the four accused – Complainant as also the accused received injuries – Acquittal by trial court – Appeal by State – One accused died pending appeal – High Court convicting one of the accused u/ss 302 and 307 r/w s.34 IPC and acquitting the remaining two – HELD: Trial Court has rightly observed that a free fight had taken place in which members of both the sides got injured and one died – Considering the medical evidence as regards the injuries sustained by the deceased, the complainant and the appellant-accused, and the statements of the accused u/s 313 CrPC that they inflicted injuries in self defence, trial court has rightly held that there was no requisite intention u/s 300 to kill the deceased – The main blow in the chest of the deceased was given by the accused who died pending appeal and other two have been acquitted by the High Court – In the circumstances conviction of appellant is converted from s.302 to s. 323 – He has served about one year and seven months of sentence – Considering his age being 82 years and other ailments, the period already undergone would be sufficient – Code of Criminal Procedure, 1973 – s.313.*

**The appellant (A-1) along with three others (A 2 to A-**





**4) was prosecuted for commission of offences punishable u/ss 302/34 and 307/34 IPC. The prosecution case was that A-1 had a land dispute with P.W.1 and on the date of occurrence when the Assistant Settlement Officer accompanied by the Kanungo and the Patwari went to the village to demarcate the land, A-1 and A-2 as also P.W.1 and his brother 'BS' reached there. An altercation between the parties took place upon which the officials left the place. Thereafter, A-1 and A-2 took out their respective 'Gatras' and stabbed 'BS' on his chest. When P.W.1 tried to save his brother, he was also injured by both the accused by 'Gatras'. Accused A-3 and A-4 gave fist blows to 'BS'. Meanwhile the family members of the victims reached the scene and all the accused fled away. PW1 and 'BS' were taken to the hospital, but 'BS' died on the way. The trial court acquitted all the accused. During the pendency of the appeal before the High Court, A-2 died. The High Court convicted and sentenced A-1 u/ss 302 and 307 read with s.34 IPC. The appeal filed by the State was dismissed as regards A-3 and A-4. Aggrieved, A-1 filed the appeal.**

**Allowing the appeal in part, the Court**

**HELD: 1.1. The trial court has rightly observed that a perusal of the statements of PWs 1 and 3 and the doctors leave no scope for doubt that a free fight had taken place in which members of both sides got injured and one person succumbed to the injuries. The statements recorded u/s 313, CrPC, more particularly, the statement of appellant-A-1 has thrown light as to in what manner the fight ensued and ended. It is also clear and as narrated by the accused u/s 313 that both A1 and A2 happened to be baptized Sikhs and as per religious necessity they have to carry 'Gatra' on their persons. In order to save themselves from the clutches of the deceased and the complainant, free blows were**

**exchanged through 'Gatras'. It is also seen from the evidence that the main blow on the chest of the deceased was caused by A-2 who died during the pendency of the appeal before the High Court. [para 7] [10-D-H]**

**1.2. Considering the evidence of the doctor with regard to the injuries sustained by the deceased, the complainant (PW-1) as well as the appellant/ accused and the evidence of the doctor (DW-1) who examined the accused, the trial court has rightly observed that the accused had no requisite intention to kill the deceased as envisaged u/s 300 IPC. On account of meddling with the enquiry conducted by the ASO, both the parties sustained injuries out of which the deceased succumbed to the injuries. [para 7] [10-H; 11-A-B]**

**1.3. From the materials placed by the prosecution as well as the defence, taking note of the fact that the trial court has acquitted A-3 and A-4 and (A-2) died during the pendency of the appeal before the High Court, considering the nature of the injuries sustained by the deceased as opined by the doctor (PW-15), and the injuries sustained by the appellant (A-1) as explained by the doctor (DW-1), it would be evident that at the most, the appellant could be held guilty for offence punishable u/s 323 IPC for causing hurt on the person of the deceased. There is no acceptable evidence to the fact that he had voluntarily caused hurt on the person of the deceased. Considering all these events and taking note of the fact that the persons in both the groups, namely, the complainant and the accused sustained injuries in a free fight and also the fact that the appellant alone is before this Court, the ends of justice would be met by altering the conviction from s. 302 to s. 323 IPC. It is brought to the notice of the Court that the appellant had served about a year in prison (pending trial) and is in prison for approximately seven months after conviction**



**by the High Court; he is aged about 82 years and is also suffering from asthma and other old age ailments. In the circumstances, the period undergone is sufficient. [para 8] [11-C-G]**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1145 of 2010.

From the Judgment & Order dated 5.5.2010, 26.5.2010 of the High Court of Himachal Pradesh at Shimla, in Criminal Appeal No. 270 of 1998.

R.K. Kapoor, H.C. Pant, Rajat Kapoor, Anis Ahmed Khan for the Appellant.

Kiran Bala Sahay, M.P. Jha for the Respondent.

The Judgment of the Court was delivered by

**P. SATHASIVAM, J.** 1. This appeal is filed against the final order and judgment dated 05.05.2010/26.05.2010 of the High Court of Himachal Pradesh at Shimla in Criminal Appeal No. 270 of 1998 whereby the High Court reversed the order of acquittal of the appellant passed by the Sessions Judge, Una and convicted him under Sections 302 and 307 read with Section 34 I.P.C.

2. The brief facts leading to the filing of this appeal are as follows:

(a) Vikram Singh, the complainant (PW-1), his brother Bachittar Singh (since deceased) and Jagat Singh, appellant/accused (A-1), are residents of village Dehlan. Vikram Singh had a land dispute with the accused for the last 4/5 years. Rattan Singh – accused No.2 filed an application before the Assistant Settlement Officer (in short "ASO"), Una for demarcation of the land in dispute. On 29.04.1997, the ASO accompanied by Kanungo and Patwari had come to the spot for carrying out the

demarcation of the said land. Jagat Singh (A-1), and Rattan Singh (A-2) also reached there. The field which was to be demarcated was situated by the side of the house of one Sehdev Singh. On learning that the accused have brought the ASO for demarcating the disputed land which has already been settled in the Court, Vikram Singh, the Complainant (PW-1), and his brother Bachittar Singh (the deceased), also reached there. On seeing them, Jagat Singh (A-1) and Rattan Singh (A-2) started abusing them. At that stage, the ASO left the place and the demarcation of the land did not take place.

(b) As soon as ASO left the place in a jeep, Jagat Singh (A-1) and Rattan Singh (A-2) took out their respective 'Gatras' and stabbed the deceased on his chest. On seeing this, when Vikram Singh – the Complainant (PW-1), stepped forward to save his brother, Jagat Singh (A-1) stabbed him on the elbow of his right arm. Rattan Singh (A-2) also gave a blow on the right side of his chest. In the meanwhile, Avtar Kaur-wife, Gurdeep Kaur-daughter, Sarabjit Kaur-daughter-in-law of the deceased accompanied by Harnek Singh – son of Vikram Singh (PW-1) reached the place of incident. On seeing them, the accused persons ran away from the spot. Bachittar Singh and Vikram Singh were taken to the District Hospital, Una at about 3.30 p.m. However, Bachittar Singh died on the way while he was being taken to the hospital at Una. The complainant - (PW-1), after being given medical first aid was referred to Dayanand Medical College, Ludhiana. The matter was reported to the police over telephone. The police recorded the statement of Vikram Singh (PW-1) and on that basis, FIR was registered at Police Station, Una. During the course of investigation, one Gatra was recovered pursuant to the confession made by Jagat Singh (A-1). Another Gatra was handed over to the Investigator of the case by Gurdip Kaur, daughter of the deceased.



(c) On completion of the investigation, the final report was filed in the Court of Chief Judicial Magistrate, Una on 24.07.1997. On 03.11.1997, the trial Court framed the charges against the accused for committing offences punishable under Sections 302, 307, 324 read with Section 34 I.P.C. The trial Court, by judgment dated 01.04.1998, acquitted all the accused persons.

(d) Against the judgment of acquittal passed by the Trial Judge, Una, the State of H.P. filed an appeal before the High Court of Himachal Pradesh at Shimla. The High Court, by the impugned judgment dated 05.05.2010, set aside the order of acquittal passed by the Sessions Judge, Una and convicted Jagat Singh (A-1) and Rattan Singh (A-2) under Sections 302 and 307 read with Section 34 I.P.C. However, the appeal filed by the State against Parminder Singh (A-3) and Balwant Singh (A-4) was dismissed. On 26.05.2010, the High Court, while passing the order with regard to the quantum of sentence, sentenced Jagat Singh (A-1) to undergo imprisonment for life and to pay a fine of Rs. 2000/- and in default to undergo imprisonment for a further period of six months for the offence punishable under Section 302 read with Section 34 I.P.C. As regards the offence under Section 307/34 I.P.C., the appellant shall undergo rigorous imprisonment for five years and to pay a fine of Rs.1000/-, in default to undergo simple imprisonment for a further period of six months. Since A-2 was expired on 29.03.2009, the appeal against him was abated. Against the said order of conviction and sentence, the appellant (A-1) has filed this appeal before this Court.

3. Heard Mr. R.K. Kapoor, learned counsel for the appellant and Ms. Kiran Bala Sahay, learned counsel for the respondent-State.

4. The prosecution case, as narrated by Vikram Singh (PW-1) is that he had a land dispute with the accused for the

past four or five years. The second accused i.e Rattan Singh (A-2) filed an application for demarcation of the land in dispute before the ASO. It is not in dispute that on 29.04.1997, the ASO accompanied by Kanungo and Patwari had come to the spot for carrying out the demarcation of the said land. At that time, the Complainant, PW-1, his brother - Bachittar Singh (the deceased), his son Harnek Singh and all the four accused were present there. As soon as the ASO started for demarcation, A-1 and A-2 started abusing the complainant and his brother. On seeing the wordy quarrel, the ASO left the scene of occurrence. Immediately after his departure, Jagat Singh (A1) and Rattan Singh (A2) took out their respective Gatras and the other two accused, namely, Parminder Singh (A3) and Balwant Singh (A4) gesticulated towards the complainant party with their fists. In the course of such event, Jagat Singh A-1 and Rattan Singh A-2 inflicted blows with their respective Gatras on the chest of the deceased. On seeing the deceased being stabbed, the complainant – (PW-1) stepped forward to save him. Rattan Singh (A-2) gave a blow to the complainant with his Gatra on the right side of his chest. Jagat Singh (A-1) also gave a blow with his Gatra on his right elbow. A-3 and A-4 gave fist blows to the deceased. On seeing him crying, his wife, Avtar Kaur, daughter, Gurdeep Kaur, daughter in law Sarbjit Kaur and complainant's son Harnek Singh (PW-3) reached the place of incident. On seeing these persons, all the accused ran away from the spot. The deceased, who was bleeding profusely and the complainant were taken to District Hospital, Una at about 3.30 p.m. However, Bachittar Singh succumbed to the injuries suffered by him on way to the hospital. The complainant, after being given medical first aid was referred to Dayanand Medical College, Ludhiana. Thereafter, the matter was reported to the police by the complainant and on that basis, FIR was registered being FIR No. 243 of 1997 at Police Station, Una. After trial, by order dated 01.04.1998, the trial Court acquitted all the accused. In the appeal filed by the State, (A-1) alone was convicted, as (A-2) died during the pendency of the case and the appeal against (A-3) and (A-4) was dismissed.



5. Before considering the case of the prosecution, as discussed by the trial Court and the High Court, it is useful to refer the stand of the appellant-Jagat Singh (A1) from his statement made under Section 313 of the Code of Criminal Procedure (hereinafter referred to as 'the Code'). He stated that he was working in the field when the ASO accompanied by Kanungo and Patwari came to their village. His brother Rattan Singh (A-2) had filed an application in which he had complained against the members of the staff of the Settlement Department. The ASO enquired his brother Rattan Singh. When the ASO was enquiring his brother, Bachittar Singh (the deceased) and Vikram Singh (PW-1) came there and started using abusive language against them. On seeing the situation, the ASO along with his staff left the village, however Vikram Singh and Bachittar Singh did not leave the courtyard of one Sehdev Singh and they continued using abusive language against them for about 20 minutes. Thereafter, Bachittar Singh pounced upon Rattan Singh (A-2), Vikram Singh (PW-1) had pounced upon him. Though he wanted to run away he found himself overpowered. Vikram Singh (PW-1) laid him down on the ground and started throttling him. He requested Vikram Singh to release him from his clutches but of no use. He continued throttling him. Since he is an asthma patient and realizing that Vikram Singh was not going to release him then he took out his gatra Ext.P-12 and tried to frighten him by showing it to him but he did not release him. When he apprehended that Vikram Singh may kill him, he gave a Gatra blow, firstly, on his shoulder then on his chest but he continued to throttle him. Then he inflicted some more blows on his person. After receiving the blows, his grip loosened on his neck and then he managed to get up and ran away. Though similar statements were made by other accused, there is no need to refer the same.

6. We have to find out whether the act of the appellant along with the other accused was deliberate and pre-planned in order to do away the life of the deceased or the offences

alleged to have been committed have arisen from a free fight which had erupted at the spur of the moment. It is also relevant to ascertain whether the accused exceeded their right of private defence. It is not in dispute that in the fight between the persons belonging to the complainant and the accused, Bachittar Singh lost his life. Vikram Singh (PW-1) sustained injuries on his chest. The offences alleged to have been committed are the result of the same sequence of events which took place on 29.04.1997 at 2.30 p.m., near the house of Sehdev Singh at Village Dehlan. There is no dispute that the accused Jagat Singh (A-1) had filed a suit for permanent injunction against Vikram Singh (PW-1), Bachittar Singh (the deceased) and Smt. Thakri widow of Dina Nath. The said suit was compromised to the effect that none of the parties shall raise any construction over the land measuring 4 Marlas comprising of Khasra No. 2857 till the same is partitioned. When the ASO came to the spot in order to rectify wrong settlement work as claimed by the parties, a heated wordy quarrel started which ended with loss of life of one person. There is no controversy that during the course of fight, Bachittar Singh (the deceased) sustained injuries on account of which he died. The post-mortem examination of the dead body of the deceased was performed by Dr. R.S.Dadhwal (PW-15) and he opined that the deceased died due to shock resulting from massive hemorrhage and injuries on the vital organs. The doctor noticed six wounds on the person of the deceased, on the nose, below the tip of left shoulder, posterior, on the right of the midline of the chest, on the left side of the chest and on the interior to the left axilla on the mis axillary line. Apart from the above injuries of the deceased as well as PW1, it is also relevant to note that the appellant Jagat Singh (A-1) and his brother Rattan Singh (A-2) also sustained injuries in the same commotion. Dr. Mrs. S. Sharma (DW-1), medically examined all the four accused and copies of which are marked as Exs. DA to DD respectively. Here again, we are concerned with the injuries on the person of Jagat Singh-appellant alone.



1. There was a reddish brown small bruise of the size of 2 cms x 1 cm on the chest on the left side of the lower one third of sternum.

2. There was bluish bruise on the left hip of the size of 8 cm x 7 cm.

3. There was bluish bruise 10 cm x 1/3cms with intervening healthy area on the left side of the abdomen 5 cms above the left iliac crest.

4. He had complained of pain on the right fore-arm. The injured was referred for treatment of bronchial asthama."

7. As rightly observed by the trial Judge, the perusal of the statement of PWs 1 and 3 and the doctors leave no scope for doubt that a free fight had taken place in which members of both sides got injured and one person succumbed to the injuries. We have already adverted to the statement recorded under Section 313 of the Code, more particularly, the statement of the appellant-Jagat Singh which have thrown light that in what manner the fight ensued and ended. We have already mentioned that from the evidence of prosecution side as well as the statement by the accused recorded under Section 313 of the Code, it is very much clear that a free fight had taken place. It is also clear and as narrated by the accused under Section 313 of the Code that to save themselves, they stabbed the deceased and the complainant. Both A1 and A2 happened to be baptized Sikhs and as per religious necessity they have to carry Gatra on their persons and in order to save them from the clutches of the deceased and the complainant, free blows were exchanged through Gatras. It is also seen from the evidence that the main blow on the chest of the deceased was caused by Rattan Singh who died pending appeal before the High Court. (A-3) and (A-4) were acquitted by the trial Court and the High Court dismissed the appeal against them. Considering the evidence of the doctor with regard to the

injuries sustained by the deceased, the complainant (PW-1) as well as the appellant/ accused and the evidence of (DW-1) who examined the accused, the trial Court has rightly observed that they had no requisite intention to kill the deceased as envisaged under Section 300. As discussed earlier, on account of meddling with the enquiry conducted by the ASO, both the parties sustained injuries out of which the deceased succumbed to the injuries.

8. From the materials placed by the prosecution as well as the defence, taking note of the fact that the trial Court has acquitted (A-3) and (A-4) and (A-2) died during the pendency of the appeal before the High Court, considering the nature of the injuries sustained by the deceased as opined by Dr. R.S. Dadhwal, (PW-15), and the injuries sustained by the appellant (A-1) as explained by Dr. Mrs. S. Sharma (DW-1), we hold that at the most, the appellant could be held under Section 323 IPC for causing hurt on the body of the deceased. We are also of the view that there is no acceptable evidence to the fact that the appellant had voluntarily caused hurt on the person of the deceased. Considering all these events and taking note of the fact that the persons in both the groups, namely, complainant and the accused sustained injuries in a free fight and also of the fact that the appellant A1 alone is before us, we feel that the ends of justice would be met by altering the conviction from Section 302 to Section 323. It is brought to our notice that he had served about a year in prison (pending trial) and is in prison for approximately seven months after conviction by the High Court, aged about 82 years and also suffering from asthma and other old age ailments. Considering all these aspects, we feel that the period undergone is sufficient and he be released forthwith if he is not required in any other offence. The appeal is allowed to this extent.

R.P. Appeal partly allowed.



BRIJ MOHAN & ORS.
*v.*
HARYANA URBAN DEVELOPMENT AUTHORITY & ANR.
(Civil Appeal No. 1 of 2011)

JANUARY 03, 2011

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

*Land Acquisition Act, 1894 – Land acquisition for development of a city – Formulation of Scheme by State Urban Development Authority - Allotment of land to land losers/outsees – Rate to be charged in regard to such allotment – Actual land cost plus development charges for the plots allotted to oustees/land losers or market price/normal allotment price – Held: The Statute contemplates only benefits like solatium, additional amount and higher rate of interest to the land losers and not allotment of plots at cost price – State Government or HUDA also does not have any scheme providing for allotment of plots at actual cost to land losers - HUDA scheme requires the land loser-allottee to pay the normal allotment rates for the plots to be allotted to them under the scheme – Thus, land owners should be allotted plots under the scheme at the initial price at which the Layout/ Sector plots were first offered for sale after the acquisition – Merely because HUDA delayed the allotment in spite of the applications of the outsees and the order of the High Court, and made the allotments only after a contempt petition was filed, does not mean that the outsees become liable to pay the allotment price prevailing as on the date of allotment – HUDA directed to charge for the allotted plots only the rate of Rs.1032/- per sq.m. (or Rs.863/- per sq.yd.) and not the rate as revised in 1993 ,namely Rs.1122/- per sq.yd.*

*'Normal allotment rate' – Meaning of.*

**Certain lands belonging to the appellants were**

**acquired for the development of the city. The award was passed and thereafter, the possession of the land was taken. The first respondent-State Urban Development Authority formulated a Scheme for allotment of plots to land losers/oustees at the normal allotment rates. The claims of the outsees were to be invited before the Sector was floated for the sale. The first respondent developed a layout for the benefit of general public in the acquired lands and offered the residential plots in that Sector for allotment at the specified rate. The appellants were not allotted plots. They filed writ petition seeking direction to the first respondent to allot each of them plot developed by the respondents at cost on 'no profit and no loss basis'. The appellants were allotted plots at the normal allotment rate which was being charged from any ordinary allottee to whom the plots were allotted in that Sector. The appellants again filed a writ petition seeking direction that the allotment should be made at cost plus development charges basis and not at market price. The writ petition as also the appeal were dismissed. Therefore, the appellants filed the instant appeal.**

**Partly allowing the appeal, the Court**

**HELD: 1.1 If there was any statutory provision in the Land Acquisition Act, 1894 or other scheme, providing for allotment at cost price, a land loser could certainly claim allotment in terms of the scheme. But the Statute contemplates only benefits like solatium, additional amount and higher rate of interest to the land losers and not allotment of plots at cost price. Nor does the State Government or HUDA have any scheme providing for allotment of plots at actual cost to land losers. [Para 10] [22-E-G]**

**1.2 Where there is a scheme but it does not regulate the allotment price, it may be possible for the court to direct the State Government/Development Authority to**



**allot plots to land losers at a reasonable cost, and in special and extra-ordinary circumstances, it may also indicate the manner of determining the allotment price. But where the scheme applicable specifies the price to be charged for allotment, its terms cannot be ignored. If any land loser has any grievance in regard to such scheme, he may either challenge it or give a representation for a better or more beneficial scheme. But he cannot ask the court to ignore the terms of an existing or prevailing scheme and demand allotment at cost price. The scheme of HUDA contemplates allotment of plots only in terms of the scheme, that is at normal allotment rates. This benefit is extended in addition to the benefits under Sections 23(1A), 23(2) and 28 of the Act, and, therefore, the scheme provides for allotment at normal allotment rate. Necessarily, the allotment and the price to be charged, would have to be strictly in accordance with such HUDA Scheme. In the instant case, the HUDA scheme requires the land loser-allottee to pay the normal allotment rates for the plots to be allotted to them under the scheme. Therefore, a land loser cannot claim allotment of a plot at acquisition cost of land plus development cost or at any other lesser price. [Para 11] [23-C-F]**

*Hansraj H. Jain v. State of Maharashtra* **1993 (3) SCC 634 – distinguished.**

**2.1 The scheme requires the allottees under the scheme for land-losers/oustees, to pay the *normal allotment rates* for the allotted plots. No doubt, the term 'normal allotment rate' would ordinarily refer to the allotment rate prevailing at the time of allotment. In the instant case, the application for allotment was made in 1990. On 09.09.1991, HUDA advertised the residential plots in the sectors developed from the acquired lands for allotment, wherein the allotment rate was shown as**

**Rs.1032 per sq.m. (Rs.863/- per sq.yd) for plots of 300 sq. m. In the year 1993, the allotment price was increased to Rs.1342/- per sq.m. (Rs.1122/- per sq.yd.) and the appellants are required to pay the 1993 price instead of paying the rate in vogue when the layout was ready for allotment. [Para 11] [24-B-G]**

**2.2 The policy clearly states that "claims of the oustees would be invited before the sector is floated for sale". This is also reiterated in the subsequent scheme dated 19.3.1992. It is, therefore, evident that the land loser-applicants for allotment should be given the option to buy first, before the applications for allotment are invited from the general public. This means that the prices to be charged would be the rate which is equal to the rate that is fixed when the sector was first floated for allotment. In the instant case, when the sector was floated for sale, the rate that was fixed in regard to plots of 300 sq.m. or less, was Rs.1032/- per sq. m. (Rs.863/- per sq.yd). The appellants had made the applications in 1990 and approached the High Court in 1992. There was even a direction by the High Court to consider their applications within a fixed time. The appellants should, therefore, be allotted plots under the scheme at the initial price at which the Layout/Sector plots were first offered for sale after the acquisition. Merely because HUDA delayed the allotment in spite of the applications of the appellants and the order of the High Court, and made the allotments only after a contempt petition was filed, does not mean that the appellants become liable to pay the allotment price prevailing as on the date of allotment. Having regard to the terms of the scheme which clearly requires that the land losers would be invited to apply for allotment before the sector is floated for sale, it is clear that the initial price alone should be applied provided the land losers had applied for allotment at that time. In the instant case, such applications were in fact made by the**



**appellants. Therefore, the respondents could charge for the allotted plots only the rate of Rs.1032/- per sq.m. (or Rs.863/- per sq.yd.) and not the rate as revised in 1993 namely Rs.1122/- per sq.yd. [Para 12] [24-H; 25-A-G]**

**2.3 The orders of the Division Bench and the Single Judge of the High Court are set aside and the respondents are directed to charge for the six plots allotted to the appellants at a price of Rs.1032/- per sq.m. (or Rs.863/- per sq.yd) instead of Rs. 1342/- per sq.m. Each of the appellants would be entitled to costs of Rs.2500/- from HUDA. [Para 13] [25-H; 26-A-B]**

**3. The submission that allotment of plots to land losers should be at actual cost (acquisition cost of land plus development cost), appears to be reasonable and attractive. That should be the ultimate goal in a changing scenario favouring acquisitions which are land loser-friendly. The arguments of the appellants do certainly make out a case for such a scheme to create a better settlement and rehabilitation policy in regard to land acquisitions. The State of Haryana is now proposing to introduce a more attractive and land-loser friendly rehabilitation and resettlement policy, which contemplates allotment of bigger residential/commercial/ industrial plots to land losers and oustees. But that is for the future. [Para 10] [22-E-H; 23-A-B]**

**Case Law Reference:**

| | | |
|---|---|---|
| **1993 (3) SCC 634** | **Distinguished** | **Para 10** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. : 1 of 2011.

From the Judgment & Order dated 20.05.2009 of the High Court of Punjab & Haryana at Chandigarh in L.P.A. No. 220 of 2009.

Punit Dutt Tyagi for the Appellants.

Neeraj Kumar Jain, Sanjay Singh, Urga Shankar Prasad for the Respondents.

The Judgment of the Court was delivered by

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

2. The first respondent Haryana Urban Development Authority (for short HUDA) formulated a Scheme vide Circular dated 10.9.1987 (as clarified by circular dated 9.5.1990) for allotment of plots to land losers/oustees at normal allotment rates. The said scheme inter alia provides for allotment of a plot measuring 250 sq. yd. to a landowner whose acquired land measures between 500 sq. yd. to one acre. It also provides that where there are a number of owners in respect of an acquired land, efforts should be made to accommodate each of them subject to a limit of one plot of 250 sq. yd., for every acre of land acquired. It requires that "claims of the oustees shall be invited before the sector is floated for sale". A revised policy/ scheme was introduced by HUDA by circular dated 18.3.1992 which *inter alia* provided as follows :

> "(vi) Allotment of plots to the oustees will be made at the allotment rates advertised by the Haryana Urban Development Authority for that sector Land-owners will be given compensation for their land which is acquired.
>
> (vii) Claims of the oustees for allotment of plots under this policy shall be invited by the Estate officer, Haryana Urban development Authority concerned before the sector is floated for sale."

3. The appellants 1 to 6 were the owners of 38 bighas and 3 biswas of land in Hudbust No.1, Kasba Karnal. Their lands were acquired for development and utilization of land as residential and commercial area of Karnal under a preliminary notification issued in 1989 followed by final notification issued in the year 1990. On making the award, possession was taken on 19.12.1990. The appellants made an application to HUDA



for allotment of plots under the aforesaid oustees policy on 28.12.1990.

4. HUDA developed a layout (Sector-4 Part-II) for the benefit of general public in the acquired lands and offered the residential plots in that sector for allotment at the rate of Rs.1032/- per sq. m. (Rs.863/- per sq. yd.) for 300 sq. mtr. plots and Rs.1135/- per sq. m. for 420 sq.m. plots. As the appellants were not allotted plots, they filed a writ petition (CWP No.2596/ 1992) seeking a direction to HUDA to allot to each of them a plot measuring 250 sq.yd. in Sector 4 or 5 which were being developed by the respondents, at cost on "no profit no loss basis". The said writ petition was disposed of by order dated 29.7.1992 recording the statement of the respondents that the case of the appellants was under consideration and they will be allotted plots, with a direction to the respondent to decide the matter expeditiously preferably within six months. As the order dated 29.7.1992 was not complied with, the appellants filed a contempt petition (COCP No.240/1993). Only thereafter, the second respondent (Estate Officer, HUDA) sent letters of allotment dated 13.9.1993 to each of the appellants allotting a plot measuring 209 sq.m. (250 sq.yd.) at a cost of Rs.280,478/ - which works out to Rs.1342/- per sq.m. (Rs.1122/- per sq.yd.). In view of the said allotments, the contempt petitions were disposed of recording the submission that all the appellants have been allotted plots.

5. The appellants again approached the High Court by filing a writ petition (CWP No.12240/1993) contending that the allotments should be made at cost plus development charges basis and not at market price. The appellants also sought quashing of the demand for payment of a price of Rs.280,478/ - for each of the plots allotted to the appellants. A learned Single Judge of the High Court by order dated 10.11.2008 dismissed the writ petition on the ground that the matter was governed by the policy dated 10.9.1987; that under that policy, the oustees - allottees were liable to pay the normal allotment rate, which

meant the prevailing rate that was being charged from any ordinary allottee to whom plots were allotted in that sector; and that as the allotment rates charged to the appellants were the same as the allotment rates charged to other alltotees, there was nothing irregular or illegal in the demand for payment of Rs.280,474/- as cost of each plot.

6. Feeling aggrieved, the appellants filed an appeal (Letters Patent Appeal No.220/2009) contending that having regard to the terms of the Scheme, even if the allotment rate had to be paid, that should have been at Rs.863/- per sq.yd. which was the rate of allotment under the HUDA Advertisement dated 9.9.1991. They also contended that HUDA deliberately delayed the allotment of plots to appellants and then charged them a higher allotment rate which came into effect subsequently. A Division Bench of the High Court by impugned judgment dated 20.5.2009 dismissed the appeal. The said judgment is challenged in this appeal by special leave.

7. There is no doubt that the appellants were entitled to allotment of plots. In fact, each of them has been allotted a plots (that is plots bearing Nos.63, 62, 61, 64, 54 and 53 in sector No.4, Part-II), each measuring 209 sq.m. or 250 sq.yd. The only issue that arises for consideration in this appeal is about the rate to be charged in regard to such allotment. On the contentions urged the following questions arise for our consideration :

(i) Whether HUDA should charge only the actual land cost plus development charges for the plots allotted to oustees/ land losers, and not the market price/normal allotment price?

(ii) What is the meaning of the words 'normal allotment rate' used in the scheme for allotment to oustees?

**Re : Question (i)**

8. It is submitted by the appellants that the Scheme for



allotment of developed plots was made recognizing the fact that the oustees lose their lands, and many of them also lose their place of residence. The appellants therefore contend that the oustees/land losers whose lands were acquired and who claimed allotment of plots under the HUDA's Scheme for allotment of plots to oustees, stand on a different footing when compared to normal applicants for allotment. They relied upon the observations of this Court in *Hansraj H. Jain v. State of Maharashtra* [1993 (3) SCC 634] in support of their contentions that the allotments to land losers should be at cost of land plus development charges. In that case the government of Maharashtra had evolved a policy to offer alternative plots/sites to affected land owners. The policy did not however contain any specific provision relating to price to be charged. This Court noticed the following arguments addressed on behalf of the State and the land losers :

"On the question of price of the alternative site, the learned Solicitor has submitted that after acquisition the lands in New Bombay have been vested in CIDCO for development and disposal. All the costs incurred on the development are to be met by disposing the saleable land. In the process, the Corporation has to spend huge amounts on development of infrastructure in the form of roads, water supply, sewerage, electricity, transport etc. For the purpose of disposal of saleable land, certain lands are required to be provided to the social institutions, project affected persons, economically weaker sections and lower income group at nominal and subsidized rate and the shortfall accruing from such subsidized disposal has to be recovered by the sale of other lands. The commercial areas are sold by the Corporation by tender system and such areas draw much higher rate. The learned Solicitor has submitted before us that unfortunately the ratio of such disposal at higher rate in the entire process is around 1% only. He has, however, submitted that the concerned authorities are keen to give relief to the affected

land owners by charging reasonable price as far as practicable. The learned counsel for the appellants have, however, submitted that although the award for acquiring land was made at rs.4 per sq. mtr., the developed lands for alternative sites for building houses for the affected land owners are being offered @ Rs. 13,200 per sq. mtr."

This Court on considering the contentions, held that on the special facts and circumstances, allotments should be made to the land losers by charging the cost of acquisition plus actual cost of development. The relevant observations are extracted below :

"We, therefore, direct the concerned authorities to offer the alternative site as per the scheme framed in 1976 referred to hereinbefore to the affected land owners on the basis of the actual cost of development by charging the cost of the acquisition and the development charges and no more. Such direction, we feel, is required to be made particularly *in view of the fact that acquisition proceedings had been pending for a number of years, as a result of which the amount of compensation for the acquisition being referable to the period when notices under Section 4 of the Land Acquisition Act were issued, became insignificant and it is reasonably apprehended that unless the land by way of alternative site as per the scheme is offered to the affected land owners at a subsidized rate as indicated hereinbefore, it will not be possible for the land owners to take such allotment by paying usual prices* intended to be changed from them and the offer of alternative site will for all practical purposes be illusory."

(emphasis supplied)

9. Placing strong reliance on the said observations in *Hansraj H. Jain*, the appellants contended that the price of plots allotted was almost as much as the compensation that was



given to them for the entire acquired area. According to them, an extent of 3836 sq. yds. of land was acquired from each of appellants 1 to 5 and the compensation awarded to each of them was Rs.302,473/- (slightly more was acquired from sixth appellant). As against it, each was required to pay Rs.280,478/- for a plot of 250 sq.yds which was almost the entire compensation they got. They submitted that the compensation awarded for the acquired land (of about an acre) was less than the price that was demanded by HUDA for each plot that was allotted to them; and that if the compensation paid to a land loser for an acre of land (less legal and other expenses) would be insufficient to buy even a small plot, let alone construct a house therein, even a scheme for allotment will only be a mirage for most of the small land holders. They also submitted that as the allotment of a plot is a part of the resettlement and rehabilitation package given to the land losers, as an incentive to accept the acquisition without protest and co-operate with the State Government, the allotment should be at a realistically reasonable cost, that is actual cost of land plus development charges.

10. No doubt, the contention that allotment of plots to land losers should be at actual cost (acquisition cost of land plus development cost), appears to be reasonable and attractive. That should be the ultimate goal in a changing scenario favouring acquisitions which are land loser-friendly. The arguments of the appellants do certainly make out a case for such a scheme to create a better settlement and rehabilitation policy in regard to land acquisitions. If there was any statutory provision in the Land Acquisition Act, 1894 ('Act' for short) or other scheme, providing for allotment at cost price, a land loser could certainly claim allotment in terms of the scheme. But the Statute contemplates only benefits like solatium, additional amount and higher rate of interest to the land losers and not allotment of plots at cost price. Nor does the State Government or HUDA have any scheme providing for allotment of plots at

actual cost to land losers. We are informed that State of Haryana is now proposing to introduce a more attractive and land-loser friendly rehabilitation and resettlement policy, which contemplates allotment of bigger residential/commercial/ industrial plots to land losers and oustees. But that is for the future.

11. Where there is a scheme but it does not regulate the allotment price, it may be possible for the court to direct the State Government/Development Authority to allot plots to land losers at a reasonable cost, and in special and extraordinary circumstances, it may also indicate the manner of determining the allotment price. But where the scheme applicable specifies the price to be charged for allotment, its terms cannot be ignored. If any land loser has any grievance in regard to such scheme, he may either challenge it or give a representation for a better or more beneficial scheme. But he cannot ask the court to ignore the terms of an existing or prevailing scheme and demand allotment at cost price. The scheme of HUDA contemplates allotment of plots only in terms of the scheme, that is at normal allotment rates. This benefit is extended in addition to the benefits under sections 23(1A), 23(2) and 28 of the Act, and therefore the scheme provides for allotment at normal allotment rate. Necessarily, the allotment and the price to be charged, will have to be strictly in accordance with such HUDA Scheme. In this case the HUDA scheme requires the land loser-allottee to pay the normal allotment rates for the plots to be allotted to them under the scheme. Therefore, a land loser cannot claim allotment of a plot at acquisition cost of land plus development cost or at any other lesser price. The decision in *Hansraj H. Jain* was a case where the scheme did not provide for any allotment price, and the price demanded was Rs.13,200/- per sq.m. as against the compensation of Rs.4 per sq.m. which in effect was 3300 times the acquisition price. It was on those peculiar facts and circumstances, this court thought it fit to direct the respondents therein to adopt the



acquisition cost plus development cost as the allotment price. That principle will not apply where there is a specific scheme which provides the rate of allotment.

**Re : Question (ii)**

11. As noticed above, the scheme requires the allottees under the scheme for land-losers/oustees, to pay the *normal allotment rates* for the allotted plots. The question is what is the meaning of the term 'the normal allotment rate'. No doubt, the term would ordinarily refer to the allotment rate prevailing at the time of allotment. If an acquisition is made in 1985 and the developed layout in the acquired lands is ready for allotment of plots in 1990, and allotments are made in the years 1990, 1991, 1992, 1993, 1994 and 1995 at annually increasing rates, a land- loser who is allotted a plot in 1990 will naturally be charged a lesser price. But if his application is kept pending by the Development Authority for whatsoever reason and if the allotment is made in 1992, he may have to pay a higher price; and if the allotment is made in 1995 he may have to pay a much higher price. The question is whether any discrimination should be permitted depending upon the whims, fancies and delays on the part of the authority in making allotments. To take this case itself, the application for allotment was made in 1990. On 9.9.1991, HUDA advertised the residential plots in the sectors developed from the acquired lands for allotment, wherein the allotment rate was shown as Rs.1032 per sq.m. (Rs.863/- per sq.yd) for plots of 300 sq. m. In the year 1993, the allotment price was increased to Rs.1342/- per sq.m. (Rs.1122/- per sq.yd.) and the appellants are required to pay the 1993 price instead of paying the rate in vogue when the layout was ready for allotment. Should the land loser who promptly made the application in 1990 be made to suffer, because of the inaction on the part of HUDA in making the allotment? We get the answer in the HUDA scheme itself.

12. The policy clearly states that "claims of the oustees

shall be invited before the sector is floated for sale". This is also reiterated in the subsequent scheme dated 19.3.1992 which provides that "claims of the oustees for allotment of plots under this policy shall be invited by the Estate Officer, HUDA concerned, before the sector is floated for sale". It is therefore evident that the land loser-applicants for allotment should be given the option to buy first, before the applications for allotment are invited from the general public. This means that the prices to be charged will be the rate which is equal to the rate that is fixed when the sector was first floated for allotment. In this case, it is not in doubt that when the sector was floated for sale, the rate that was fixed in regard to plots of 300 sq.m. or less, was Rs.1032/- per sq. m. (Rs.863/- per sq.yd). The appellants had made the applications in 1990 and approached the High Court in 1992. There was even a direction by the High Court to consider their applications within a fixed time. The appellants should therefore be allotted plots under the scheme at the initial price at which the Layout/Sector plots were first offered for sale after the acquisition. Merely because HUDA delayed the allotment in spite of the applications of the appellants and the order of the High Court, and made the allotments only after a contempt petition was filed, does not mean that the appellants become liable to pay the allotment price prevailing as on the date of allotment. Having regard to the terms of the scheme which clearly requires that the land losers shall be invited to apply for allotment before the sector is floated for sale, it is clear that the initial price alone should be applied provided the land losers had applied for allotment at that time. In this case such applications were in fact made by the appellants. We are therefore of the view that the respondents could charge for the allotted plots only the rate of Rs.1032/- per sq.m. (or Rs.863/- per sq.yd.) and not the rate as revised in 1993 namely Rs.1122/- per sq.yd.

13. We therefore allow this appeal in part and set aside the orders of the division bench and the learned Single Judge



of the High Court and direct the respondents to charge for the six plots allotted to the appellants at a price of Rs.1032/- per sq.m. (or Rs.863/- per sq.yd) instead of Rs. 1342/- per sq.m. Each of the appellants will be entitled to costs of Rs.2500/- from HUDA.

N.J. Appeal partly allowed.

S. GANESAN
*v.*
RAMA RAGHURAMAN & ORS.
(Criminal Appeal No. 989 of 2003)

JANUARY 3, 2011

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

*Penal Code, 1860:*

*s.304(Part-II)/34 – Culpable homicide not amounting to murder – A married couple beating the victim and causing his death – Circumstantial evidence – Conviction by trial court u/s 302 r/w s.120-B – Acquittal by High Court – HELD: The High Court neither dealt with any of the incriminating circumstances pointed out by the prosecution nor did it address itself to the relevant issues involved in the appeal – Therefore, judgment of the High Court suffers from perversity and is set aside – Victim died of injuries in the house of accused – Doctor opined that the injuries, which could be caused by the weapon (hammer) found in the house of accused, were sufficient in the ordinary course of nature to cause the death – The accused were the only persons who could have explained as to the circumstances and the manner in which the victim suffered the grievous injuries on vital parts of his body – Thus, the court has to draw its own inference considering the totality of the circumstances – Prosecution did not establish any motive to commit the crime – There are circumstances in favour of the accused to show that in spite of the fact that they had committed the offence they did not intend to kill the deceased, but exceeded their right of self-defence – They are accordingly convicted u/s 304(Part II)/34 IPC with a sentence of 5 years RI – Sentence/Sentencing – Mitigating circumstances – Evidence – Circumstantial evidence – Criminal Law – Motive – Right of self defence –*





*Appeal against acquittal – Constitution of India, 1950 – Article 136.*

*Criminal Law:*

*Framing of charge – Accused charged with offences punishable u/s 302 read with s.120-B IPC – Conviction by Supreme Court u/s 304(Part II)/34 IPC – HELD: Unless parties satisfy the court that there has been failure of justice from non-framing of charge under a particular provision and some prejudice has been caused to them, conviction under such provision of law is sustainable – Penal Code, 1860 – s.304(Part-II)/34.*

**Respondents 1 and 2 (A-1 and A-2), the wife and the husband respectively, were prosecuted for causing the death of one 'GA', who was known to them and was residing in their flat at the time of the occurrence. The prosecution case, as revealed from the statement of A-1 made to the Sub-Inspector of Police (PW1), was that when, on the day of occurrence at about 9.00 A M, A-1 went to wake up 'GA', he misbehaved with her and as she could not get her out of his clutches, she took the hammer lying in the room and hit him on his head. On hearing her cries, A-2 reached there and also hit the victim on his head several times with the same hammer. A-1 then called the doctor (PW-3) and on his advice both the accused took the injured to the hospital. Initially, a case for the offence punishable u/s s.307 IPC was registered against both the accused, but on the death of the victim the following day, the case was altered from s.307 IPC to s.302 IPC. The trial court considered the incriminating circumstances, namely, i) the deceased was with the accused in their flat on the fateful day; ii) the deceased received fatal injuries in the same flat which ultimately led to his death; iii) A.1 approached the doctor (PW.3), immediately after the incident and brought him to**

**the flat and PW.3 deposed that the deceased was lying in a pool of blood, the doors and windows were closed and there was complete darkness inside at 9 O' Clock in the morning; iv) the weapon i.e., a hammer, (M.O.1), seized at the instance of A.1, though such a hammer is not generally found in the household; v) the seizure of blood stained articles which had been used for mopping/ cleaning the place of occurrence; vi) the panchnama and the evidence of PW.3 made it clear that there were the circumstances of cleaning of the blood of the deceased before his arrival; that none other than the accused were living in that flat and no other person had an opportunity to clean the flat; and vii) it was fully established that the injuries suffered by the deceased could not be caused by a fall. The trial court found the chain of circumstances complete and pointing out towards the guilt of the accused. It rejected the defence case that P.W. 8 had come to the flat of the accused and quarrelled with the deceased, and hit him on the head. The trial court convicted both the accused u/s 302 r/w s.120-B, IPC and sentenced them to imprisonment for life, but the High Court acquitted them. Aggrieved, the complainant, the father of the deceased, filed the appeal.**

**Allowing the appeal, the Court**

**HELD: 1.1. It is true that unless there are substantial and compelling circumstances, the order of acquittal is not required to be reversed in appeal. However, in the instant case, in fact, the High Court neither dealt with any of the incriminating circumstances pointed out by the prosecution before the trial court, nor did it address itself to the relevant issues involved in the appeal. Therefore, the judgment and order of the High Court suffers from perversity and cannot be held to be sustainable in law. The High court failed to appreciate the grievous injuries**



**suffered by the deceased. PW.18 who conducted autopsy over the dead body of the deceased, noticed nine ante-mortem injuries on the person of the deceased. He opined that the deceased died due to head injuries and those injuries could be caused by a weapon like hammer (M.O.1). He further stated that the injuries were sufficient in the ordinary course of nature to cause the death of the deceased. [para 12,13 and 16] [43-F; 41-B-G; 42-A-B]**

*Dr. Sunil Kumar Sambhudayal Gupta & Ors. v. State of Maharashtra,* **JT 2010 (12) SC 287;** *Balak Ram & Anr. v. State of U.P.,* **1975 (1) SCR 753 = AIR 1974 SC 2165;** *Budh Singh & Ors. v. State of U.P.*, **2006 (2) Suppl. SCR 715 = AIR 2006 SC 2500;** *S. Rama Krishna v. S. Rami Reddy (D) by his LRs. & Ors.*, **2008 (6) SCR 1236 = 2008 AIR 2066;** *Arulvelu & Anr. v. State*, **2009 (14) SCR 1081 = (2009) 10 SCC 206;** *Babu v. State of Kerala*, **2010 (9) SCR 1039 = (2010) 9 SCC 189; and** *Shivaji Sahebrao Bobade & Anr. v. State of Maharashtra,* **1974 (1) SCR 489 = AIR 1973 SC 2622 – relied on.**

**1.2. The High Court unnecessarily showed misplaced sympathy in a case where conviction was eminent. In the facts and circumstances of the case, the respondents are the only persons who could explain as to under what circumstances the deceased suffered the grievous injuries on the vital parts of his body. The court has to draw its own inference considering the totality of the circumstances. [para 17] [45-F-H; 46-A]**

*State of U.P. v. Ram Swarup & Anr.*, **1975 (1) SCR 409 = AIR 1974 SC 1570 – relied on.**

**2. So far as the issue of setting aside the conviction u/s 120-B IPC against both the respondents is concerned, it has to be considered as to whether conviction under any other provision for which the charge has not been**

**framed, is sustainable in law. Unless the parties satisfy the court that there has been a failure of justice from non framing of charge under a particular penal provision, and some prejudice has been caused to them, conviction under such provision of law is sustainable. [para 14] [43-F-H; 44-A]**

*Amar Singh v. State of Haryana* **AIR 1973 SC 2221;** *Sanichar Sahni v. State of Bihar* **2009 (10) SCR 112 =AIR 2010 SC 3786;** *Topandas v. State of Bombay* **1955 SCR 881=AIR 1956 SC 33;** *Willie (William) Slaney v. State of M.P*. **1955 SCR 1140 =AIR 1956 SC 116;** *Fakhruddin v. State of Madhya Pradesh,* **AIR 1967 SC 1326;** *State of A.P. v. Thakkidiram Reddy,* **1998 (3) SCR 1088 = AIR 1998 SC 2702;** *Ramji Singh v. State of Bihar*, **AIR 2001 SC 3853; and** *Gurpreet Singh v. State of Punjab*, **2005 (5) Suppl. SCR 90 =AIR 2006 SC 191 – relied on.**

**3.1. In the instant case, the prosecution did not establish any motive to commit the crime. There is nothing on record to show as to whether A.1 had indulged in any physical intimacy with the deceased. The evidence of the doctor who examined the deceased, remained far from satisfactory and as he changed his version, he has been declared hostile. [para 16] [44-F-G]**

**3.2. Though the accused did not plead, if one goes by the case of the prosecution, the nature and number of injuries found on the body of the deceased itself established that A-1 and A-2 had exceeded their right of self-defence. However, the admitted facts remained that A-1 personally went to the nearby hospital and on the advice of the doctor (PW-3), took the deceased to the hospital. They not only got him admitted in the hospital, rather donated their own blood to save his life. A-1 informed the father of the deceased about his health conditions. Thus, these are the mitigating circumstances**



**in the case in favour of the respondents to show that in spite of the fact that they had committed the offence, they did not intend to kill the deceased. Thus, they are liable to be convicted u/s 304 (Part-II)/34 IPC. The judgment of the High Court is set aside and that of the trial court modified to the extent that the respondents are held guilty of the offence punishable u/s. 304(Part-II) r/w s.34 IPC and sentenced to five years rigorous imprisonment each. [para 19-20] [46-E-H; 47-A-C]**

**Case Law Reference:**

| | | |
|---|---|---|
| JT 2010 (12) SC 287 | relied on | para 13 |
| 1975 (1) SCR 753 | relied on | para 13 |
| 2006 (2) Suppl. SCR 715 | relied on | para 13 |
| 2008 (6) SCR 1236 | relied on | para 13 |
| 2009 (14) SCR 1081 | relied on | para 13 |
| 2010 (9) SCR 1039 | relied on | para 13 |
| 2008 (6) SCR 1236 | relied on | para 13 |
| AIR 1973 SC 2221 | relied on | para 14 |
| 2009 (10) SCR 112 | relied on | para 15 |
| 1955 SCR 881 | relied on | para 15 |
| 1955 SCR 1140 | relied on | para 15 |
| AIR 1967 SC 1326 | relied on | para 15 |
| 1998 (3) SCR 1088 | relied on | para 15 |
| AIR 2001 SC 3853 | relied on | para 15 |
| 2005 (5) Suppl. SCR 90 | relied on | para 15 |

**1974 (1) SCR 489 relied on para 17**

**1975 (1) SCR 409 relied on para 18**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 989 of 2003.

From the Judgment & Order dated 13.2.2003 of the High Court of Andhra Pradesh at Hyderabad, in Criminal Appeal No. 1088 of 2002.

R. Balasubramanian, B. Balaji, R. Rajeswaran for the Appellant.

V. Mohana for the Respondents.

The Judgment of the Court was delivered by

**DR. B.S. CHAUHAN, J.** 1. This appeal has been preferred by the complainant, father of the deceased, against the judgment and order dated 13.2.2003 in Criminal Appeal No. 1088 of 2002 passed by the High Court of Andhra Pradesh at Hyderabad acquitting the respondents of the charges under Sections 302 read with 120-B of Indian Penal Code (hereinafter referred to as "IPC") for committing the murder of G. Arulmozhi by hitting him with a hammer on his head.

2. Facts and circumstances giving rise to this appeal are as under:

(A) Rama Raghuraman (Accused 1)(hereinafter referred to as 'A-1') made a statement to Mr. V. Narasaiah, Sub-Inspector of Police (PW.1) that on 29.4.1997 at about 9.00 A.M., when she tried to wake up deceased, G. Arulmozhi, who was sleeping in the other room of the flat, he misbehaved with her and thus A-1 tried to get out of his clutches in order to save herself. As she could not succeed in her attempt, she got the hammer lying in the room and hit him on his head. On hearing her cries, her husband



Raghuraman (A.2) came at the spot and also hit deceased several times on his head with the same hammer and thus, the deceased suffered grievous injuries. Immediately, Rama Raghuraman (A.1) went to the nearby hospital and informed Dr. U. Srinivas (PW.3) that her brother was seriously injured on the head and she brought him to examine the deceased. Dr. U. Srinivas (PW.3) came to her flat and after examining the injured, he advised that he should be taken to the hospital immediately. An ambulance was called and with the help of two attendants, Rama Raghuraman (A.1) and Raghuraman (A.2) took the injured to the hospital. He was examined there by the doctors. The doctor also informed the police, on which Mr. V. Narasaiah, Sub Inspector of Police (PW.1) reached the hospital and recorded the statement of Rama Raghuraman (A.1) and lodged a complaint to Mr. K. Chakrapani, Station House Officer, (PW.16).

(B) On receiving such information, Crime No. 235 of 1997 under Section 307 IPC was registered against Rama Raghuraman (A.1) and Raghuraman (A.2). However, when the police came to the hospital to record the statement of the injured, he was found to be unconscious. Thereafter, Mr. K. Chakrapani (PW.16) proceeded to the place of occurrence and made a rough sketch of the site in the presence of witnesses Mr. Kamal Bukhada (PW.6) and Mr. Premchand (PW.7) and also seized M.Os. 2 to 12 from the place of occurrence. Mr. K. Chakrapani (PW.16) also examined PWs 2 to 5 and recorded their statements.

(C) On the next day i.e. 30.4.1997 at about 11.45 P.M., Mr. K. Chakrapani (PW.16) received the information that G. Arulmozhi had died and, therefore, he altered the case from Section 307 IPC to Section 302 IPC. He conducted the inquest over the body of the deceased in presence of two witnesses. Dr. Ramachander Rao, the Medical Officer

in NIMS Hospital (PW.9) examined the deceased and found four injuries on the person of the deceased. After the death of the deceased, Dr. M. Ravinder Reddy, the professor in Forensic Medicine, Gandhi Medical College, Hyderabad (PW.18), conducted an autopsy of the dead body of the deceased.

(D) Mr. T.V. Raja Gopal, Investigating Officer, (PW.17), took over further investigation and recorded the statements of a large number of witnesses and submitted the chargesheet. The Magistrate committed the matter to the Sessions Court, wherein the respondents pleaded not guilty and claimed trial. After concluding the trial and appreciating the evidence, oral as well as documentary, the trial court vide judgment and order dated 9.9.2002 in Sessions Case No. 40 of 1999 convicted both the respondents for offences punishable under Section 302 r/w Section 120-B IPC and awarded life imprisonment with a fine of Rs.5,000/- each and in default of payment of fine, they were directed to undergo further three months simple imprisonment.

3. Being aggrieved, the respondents preferred Criminal Appeal No. 1088 of 2002 before the High Court of Andhra Pradesh at Hyderabad, which has been allowed by impugned judgment and order dated 13.2.2003. Hence, this appeal.

4. Shri R. Balasubramanian, learned senior counsel, duly assisted by Shri B. Balaji, for the appellant, has submitted that the High Court committed an error by reversing the well reasoned judgment and order of the trial court, wherein, in absence of any eye-witness to the incident, both the respondents had been convicted for committing the murder of G. Arulmozhi; the chain of circumstances was complete and each circumstance pointed out towards the guilt of the respondents. The deceased was in the flat which has been taken by the respondents on rent. None of them denied their



presence at the relevant point of time, rather they had taken a false plea that Mr. N. Velayudham, brother-in-law of deceased, (PW.8), had come on the same day by air at Hyderabad and had tried to convince the deceased not to live with the respondents, instead to get married with the girl of the choice of his father, as his family members were under the belief that he had developed illicit relationship with the accused Rama Raghuraman (A.1). The defence taken by the accused was contrary to their own case pleaded in the bail application that the deceased tried to molest Rama Raghuraman (A.1) and, therefore, she became wild and lost all control and picked up a hammer lying in the room and caused injuries to the deceased. Even if the defence version is believed to be true, it was a clear cut case of exceeding the right of self defence. The hammer which was recovered on the disclosure of the Rama Raghuraman (A.1) from the place of occurrence is not generally used in the household. Before calling Dr. U. Srinivas (PW.3), the accused had cleaned the blood stained floor. Doors and windows were found closed and there was darkness inside the flat at 9 O'Clock in the morning. The High Court did not consider each and every circumstance considered by the trial court pointing out to the guilt of the accused. Rather the High Court took a sympathetic view and passed a cryptic order without giving sufficient reasons for acquittal. Hence, the appeal deserves to be allowed.

5. On the contrary Ms. V. Mohana, learned amicus curiae, appearing for the respondents-accused, has submitted that accused persons were highly qualified as both of them passed their engineering course from IIT, Bombay. They developed love and affection and got married. They had two children at the time of incident. Their son was five years old and the girl was 2-1/2 years old. The deceased himself was a computer engineer and an MBA from Indian Institute of Management, Ahmedabad. He had opened a company alongwith accused persons and had the accused had any intention to kill the deceased, they would not have called Dr. U. Srinivas (PW.3)

and further taken him to the hospital for treatment. The accused Rama Raghuraman (A.1) herself had informed the father of the deceased (the present complainant) about his health condition. There could be no motive for the respondents to harm the deceased. Investigation has not proceeded in accordance with law. There was nothing for them to hide. In absence of any evidence of conspiracy between the two accused, the High Court has rightly quashed their conviction under Section 120-B IPC. In such a fact-situation, if it cannot be determined as which of the accused had caused the injuries, conviction of either of them is not sustainable. If the prosecution case is taken to be true, the respondents had acted in self defence and are entitled to the benefit of the provisions of Section 100 and Exception II to Section 300 IPC. The High Court after taking into consideration all the facts and circumstances, reached the correct conclusion of acquittal of the accused. Hence, no interference is required with the impugned judgment and order of the High Court.

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

7. Admitted facts available on the record are that Rama Raghuraman (A.1) and Raghuraman (A.2) had passed out their engineering course from IIT, Bombay and got married on 10.9.1989. Out of this wedlock they had two children at the time of incident. They were not having good relations, as is evident from the averments contained in the divorce petition filed by Rama Raghuraman (A.1) against her husband Raghuraman (A.2) in the Family Court at Madras. The deceased had been employed in the Indian Oil Corporation as an Executive Assistant to the Executive Director. The deceased came in contact with Raghuraman (A.2) who had his own organization known as Pixel Graphics Multimedia at Madras. As the business of Raghuraman (A.2) was in trouble, the deceased helped him financially. The deceased resigned from his job and floated a company, namely, Indian Creations dealing in the



Multimedia presentation field alongwith Rama Raghuraman (A.1). The deceased shifted his residence from the Chennai to Hyderabad and started earning by way of contracts. In the meantime, Raghuraman (A.2) also joined Rama Raghuraman (A.1), patching up the differences with her. Admittedly, the incident occurred at the place of occurrence i.e. flat of the respondents and at the time alleged herein. The defence pleaded that Mr. N. Velayudham, (PW.8), had come there and as he quarreled with the deceased, he had hit him on the head. In fact the accused had furnished the same explanation to the staff at the Nizam's Institute of Medical Sciences, Hyderabad on the date of incident i.e. 29.4.1997 (Ex.P-6). This theory had been rejected by the trial court giving sufficient and cogent reasons and we do not see any reason to disturb the said finding of fact. Had it been so, the accused could have informed the police and also tried to save the deceased or to apprehend Mr. N. Velayudham, (PW.8)

8. The inconsistent pleas taken by the accused are apparent from the FIR that states that the deceased tried to molest Rama Raghuraman (A.1) when she went to wake him up. She got wild and beat him with a hammer. After hearing the hue and cry, Raghuraman (A.2) came there and also caused injuries to him. The same plea had been taken by Rama Raghuraman (A.1) in her bail application dated 8.5.1997. The contents of the bail application reveal that she was having some marital problems with her husband Raghuraman (A.2) which was in the knowledge of the deceased and, thus, he was hopeful of getting married to Rama Raghuraman (A.1) as and when she got separated from her husband, as the divorce petition was pending on the date of incident. The deceased was not merely the business partner but also a very close friend of Rama Raghuraman (A.1) and had fantasies about marrying her. However, she further pleaded that after causing injuries to the deceased, they realised what had happened and had suffered from utter shock. She immediately went and called a doctor from the nearby hospital and on his advice, shifted the

deceased to the hospital. The accused gave their own blood to him to save his life. Paragraph 11 of the bail application reads as under :

> "The petitioner respectfully submits that **e***ven going by the prosecution* case, she comes within the scope of Sec. 100(3) IPC wherein she exercised her right of self defence to ward off the attempts of the deceased to sexually assault her and rape her. The petitioner submits that what happened was sad and a great tragedy and neither she nor her husband had any idea that such a sort of thing would happen. They realised only after the incident happened."
>
> (Emphasis added)

9. The trial court rejected the evidence of Dr. Ramachander Rao (PW.9) for giving two different versions with regard to the weapons. However, the court considered the following incriminating circumstances against the accused :

> (I) The deceased was with the accused in their flat on the fateful day.
>
> (II) The deceased received fatal injuries in the same flat which ultimately led to his death.
>
> (III) Rama Raghuraman (A.1) approached Dr. U.Srinivas (PW.3) immediately after the incident and brought him to the flat and Dr. U.Srinivas (PW.3) deposed that the deceased was lying in a pool of blood and *the doors and windows were closed and there was complete darkness inside at 9 O'Clock in the morning.* Unless the accused had some guilty conscience, there was no need to close all the doors and windows at 9 A.M.
>
> (IV) The weapon i.e. MO. 1 seized at the instance of Rama Raghuraman (A.1), though such a hammer is not generally found in the household.



> (V) The seizure of MOs. 2 to 12 i.e. blood stained articles which consist of sarees, pants of the deceased and other items which had been used for mopping/cleaning the place of occurrence.
>
> (VI) The panchnama and the evidence of Dr. U.Srinivas (PW.3) made it clear that there were the circumstances of cleaning of the blood of the deceased before the arrival of Dr. U.Srinivas (PW.3) and as none other than the accused were living in that flat and as no other person had an opportunity to clean the flat and had the accused not had a guilty conscience, they would not have hurriedly cleaned the floor to ensure the disappearance of the blood stains.
>
> (VII) It was fully established that the injuries suffered by the deceased could not be caused by a fall.

10. On the basis of the aforesaid incriminating circumstances, the trial court found the chain of circumstances complete and the circumstances pointing out towards the guilt of the accused and thus convicted them accordingly.

11. The High Court dealt with the case having sympathetic attitude towards the respondents and decided the appeal in a very cryptic manner. After making reference to statements of some of the prosecution witnesses, the High Court reached the conclusion that as none of the witnesses had stated anything regarding the conspiracy being hatched between Rama Raghuraman (A.1) and Raghuraman (A.2) to do away with the life of the deceased, the question of their conviction under Section 120-B IPC could not arise; inconsistent pleas taken by the accused may not come as a help of the prosecution case as the prosecution has to prove its case beyond reasonable doubt by leading evidence in support of its case. The High Court was swayed by the fact that after the deceased suffered injuries, the accused had taken him to the hospital and Rama

Raghuraman (A.1) informed the father of the deceased about his health condition.

12. In fact, the High Court had not dealt with any of the aforementioned incriminating circumstances pointed out by the prosecution before the trial court. The court failed to appreciate the grievous injuries suffered by the deceased. Dr. M. Ravinder Reddy, Professor in Forensic Medicine, Gandhi Medical College, Hyderabad (PW.18), conducted autopsy over the dead body of the deceased. On examination, he noticed the following ante-mortem injuries on the person of the deceased :

(1) Sutured wound 3 cms long obliquely placed over the left frontal region.

(2) Sutured wound 1-1/2" cms long over right front parietal region.

(3) Sutured wound 10 cms long over the right front parietal region.

(4) Sutured wound with surrounding abraded laceration 4 x 2-1/2 cms with two sutured over left parietal region.

(5) Sutured wound 4 cms long over posterior left parietal region.

(6) Sutured wound 5 cms long over the occipital region.

(7) Three sutured wounds 2 cms 8 cms and 4 cms over occipital region.

(8) Abrasion 15 x ¼ cms over outer aspect of left upper arm.

(9) Contusion scalp over right frontal right parietal left parietal left frontal and occipital areas with parietal haemotoma.



Dr. M. Ravinder Reddy (PW.18) opined that the deceased died due to head injuries and those injuries could be caused by a weapon like M.O.1 hammer. He has further stated that all the injuries mentioned in the above post mortem report are sufficient in the ordinary course of nature to cause the death of the deceased.

13. This Court in *Dr. Sunil Kumar Sambhudayal Gupta & Ors. v. State of Maharashtra,* JT 2010 (12) SC 287, considered various aspects of dealing with a case of acquittal and after placing reliance upon earlier judgments of this Court particularly in *Balak Ram & Anr. v. State of U.P.,* AIR 1974 SC 2165; *Budh Singh & Ors. v. State of U.P.,* AIR 2006 SC 2500; *S. Rama Krishna v. S. Rami Reddy (D) by his LRs. & Ors.,* AIR 2008 SC 2066; *Arulvelu & Anr. v. State,* (2009) 10 SCC 206; *and Babu v. State of Kerala,* (2010) 9 SCC 189, held that :

"22. It is a well-established principle of law, consistently re-iterated and followed by this Court is that while dealing with a judgment of acquittal, an appellate court must consider the entire evidence on record, so as *to arrive at a finding as to whether the views of the trial Court were perverse or otherwise unsustainable. Even though the appellate court is entitled to consider,* whether in arriving at a finding of fact, the trial Court had placed the burden of proof incorrectly or failed to take into consideration any admissible evidence and/or had taken into consideration evidence brought on record contrary to law; the appellate court should not ordinarily set aside a judgment of acquittal in a case where two views are possible, though the view of the appellate court may be the more probable one. The trial court which has the benefit of watching the demeanor of the witnesses is the best judge of the credibility of the witnesses.

23. Every accused is presumed to be innocent unless his guilt is proved. The presumption of innocence is a human

right. Subject to the statutory exceptions, the said principle forms the basis of criminal jurisprudence in India. The nature of the offence, its seriousness and gravity has to be taken into consideration.

The appellate court should bear in mind the presumption of innocence of the accused, and further, that the trial court's acquittal bolsters the presumption of his innocence. Interference with the decision of the Trial Court in a casual or cavalier manner where the other view is possible should be avoided, unless there are good reasons for such interference.

24. In exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. A finding may also be said to be perverse if it is 'against the weight of evidence', or if the finding so outrageously defies logic as to suffer from the vice of irrationality."

Thus, unless there are substantial and compelling circumstances, the order of acquittal is not required to be reversed in appeal.

14. So far as the issue of setting aside the conviction under Section 120-B IPC against both the respondents and not framing the charge under any other penal provision is concerned - it has to be considered, as to whether conviction under any other provision for which the charge has not been framed, is sustainable in law. The issue is no longer *res integra* and has been considered by the Court from time to time. The accused must be aware as to what is the case against them and what defence they could lead. Unless the parties satisfy the Court that there has been a failure of justice from non framing of



charge under a particular penal provision, and some prejudice has been caused to them, conviction under such provision of law is sustainable. (Vide: *Amar Singh v. State of Haryana,* AIR 1973 SC 2221)

15. This Court in *Sanichar Sahni v. State of Bihar,* AIR 2010 SC 3786, while considering the issue placed reliance upon various judgments of this Court particularly in *Topandas v. State of Bombay,* AIR 1956 SC 33; *Willie (William) Slaney v. State of M.P.,* AIR 1956 SC 116; *Fakhruddin v. State of Madhya Pradesh,* AIR 1967 SC 1326; *State of A.P. v. Thakkidiram Reddy,* AIR 1998 SC 2702; *Ramji Singh v. State of Bihar,* AIR 2001 SC 3853; and *Gurpreet Singh v. State of Punjab,* AIR 2006 SC 191, and came to the following conclusion :

"17. Therefore,……. unless the convict is able to establish that defect in framing the charges has caused real prejudice to him and that he was not informed as to what was the real case against him and that he could not defend himself properly, no interference is required on mere technicalities. Conviction order in fact is to be tested on the touchstone of prejudice theory."

16. The case is required to be considered in the light of the aforesaid settled legal propositions.

In the instant case, the prosecution did not establish any motive to commit the crime. There is nothing on record to show as to whether Rama Raghuraman (A.1) had indulged in any physical intimacy with the deceased. The evidence of the doctor who examined the deceased, remained far from satisfactory and as he changed his version, he has been declared hostile. If the case of the prosecution is taken to be true, we have to examine as to whether the case of the respondents falls within the ambit of Section 100 and Exception II to Section 300 IPC and as to whether the High Court has dealt

with the same taking into consideration all these incriminating circumstances considered by the trial court.

Admittedly, the High Court did not deal with any of the incriminating circumstances considered by the trial court for the purpose of conviction of the respondent and did not address itself to the relevant issues involved in the appeal. Therefore, the judgment and order of the High Court cannot be held to be sustainable in law and it suffers from perversity.

17. In *Shivaji Sahebrao Bobade & Anr. v. State of Maharashtra,* AIR 1973 SC 2622, this court held :

> "…Thus too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless. For all these reasons it is true to say, with Viscount Simon, that "a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent ..." In short our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing chance possibilities as good enough to set the delinquent free and chopping the logic of preponderant probability to punish marginal innocents. We have adopted these cautions in analysing the evidence and appraising the soundness of the contrary conclusions reached by the courts below. Certainly, in the last analysis reasonable doubts must operate to the advantage of the appellant…"

We are of the considered view that the High Court unnecessarily shown misplaced sympathy in a case where conviction was eminent.

In the facts and circumstances of the case, the respondents are the only persons who could explain as under what circumstances the deceased suffered the grievous injuries



on the vital parts of his body. The court has to draw its own inference considering the totality of the circumstances.

18. In *State of U.P. v. Ram Swarup & Anr.,* AIR 1974 SC 1570, this Court held:

> *"……. the Civil Law rule of pleadings does not govern the rights of an accused in a criminal trial. Unlike in a civil case, it is open to a criminal court to find in favour of an accused on a plea not taken up by him and by so doing the Court does not invite the charge that it has made out a new case for the accused. The accused may not plead that he acted in self-defence and yet the Court may find from the evidence of the witnesses examined by the prosecution and the circumstances of the case either that what would otherwise be an offence is not one because the accused has acted within the strict confines of his right of private defence or that the offence is mitigated because the right of private defence has been exceeded….."*

19. Though the accused did not plead, if we go by the case of the prosecution the nature and number of injuries found on the body of the deceased itself established that Rama Raghuraman (A.1) and Raghuraman (A.2) had exceeded their right of self defence. However, admitted facts remained that the respondents No.1 personally went to the nearby hospital and on the advice of Dr. U. Srinivas (PW.3), had taken the deceased to the hospital. They not only got him admitted in the hospital, rather donated their own blood to save his life. Respondent No.1, Rama Raghuraman informed father of the deceased about his health conditions. Thus, these are the mitigating circumstances in the case in favour of the respondents to show that in spite of the fact that they had committed the offence they did not intend to kill the deceased. Thus, they are liable to be convicted under Section 304 Part-II IPC read with Section 34 IPC.

20. In view of above, appeal succeeds and is allowed. Judgment and order dated 13.2.2003 passed by the High Court of Andhra Pradesh at Hyderabad in Criminal Appeal No. 1088 of 2002 is hereby set aside and the judgment and order dated 9.9.2002 in Sessions Case No. 40 of 1999 passed by the trial court is modified to the extent that respondents are held guilty for the offence punishable under Section 304 Part-II r/w Section 34 IPC and sentenced to five years rigorous imprisonment each. There is nothing on record to show as to whether the respondents have served any period during the trial or during the pendency of their appeal before the High Court. In case, they have served some period, it shall be set-off in accordance with law.

Before parting with the case, we record our appreciation for the efforts made by Ms. V. Mohana, learned advocate, for rendering full assistance to the Court on being appointed as amicus curiae.

R.P. Appeal allowed.



HIMANSHU @ CHINTU
*v.*
STATE OF NCT OF DELHI
(Criminal Appeal No. 560 of 2010)

JANUARY 4, 2011

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

*Penal Code, 1860: ss.302/34 – Murder – Previous enmity of A-2 with the victim-deceased – A-2 came on the spot with other accused and pointed towards the deceased – One of the boys accompanying A-2 fired a shot at the deceased – Conviction of A-1 to A-4 by courts below –Appeal by A-2 and A-3 – Held: Evidence of eye-witness was duly corroborated by other witnesses – Discrepancies in the depositions of the prosecution witnesses were minor and not material to shake their trustworthiness and involvement of A-2 and A-3 – Complicity of A-2 and A-3 was duly established by medical and other evidence – Conviction upheld.*

*FIR: Delay in lodging – Plea that FIR was registered belatedly and the time was used to falsely implicate the accused because of previous enmity – On facts, held: Plea not tenable – The sequence of facts did not lead to an inference that there was delay in registration of FIR or it lacked spontaneity.*

*Witness: Hostile witness – Testimony of – Admissible value – Held: The evidence of a hostile witness remains the admissible evidence and it is open to the court to rely upon the dependable part of that evidence which is found to be acceptable and duly corroborated by some other reliable evidence available on record.*

**The prosecution case was that on the day of incident, the deceased was standing with his brother (PW-11), PW-7 and PW-8. A-2 came on a motor cycle at 9.20 p.m. with**

**one person and threatened the deceased that he would kill him. After about 5-10 minutes, A-2 came again with his associates and pointed towards the deceased. One of the boys accompanying A-2 took out a revolver and fired a shot at the deceased. Thereafter all the accused ran away from the spot. PW-11 telephoned at the police station at 9.34 p.m. The head constable (PW-3) received the telephonic message. The message was communicated to concerned police Station. On receiving the said communication, Sub-Inspector (PW-24) left immediately for the place of incident along with the Head Constable (PW-19). PW-11 was present at the spot. PW-24 recorded his statement (Exhibit PW-11/A) which took about 10 minutes. PW-24 and PW-19 rushed to the hospital where they came to know that the deceased was brought dead. Thereafter, the FIR was lodged at 11.50 p.m. The trial court held A-1 to A-4 guilty under Section 302 IPC r.w. Section 34 IPC. A-4 was convicted under Section 27 of Arms Act as well. A-5 was acquitted. The High Court maintained the conviction. In so far as the appeal of A-4 was concerned, his conviction under Section 27 of Arms Act, 1959 was altered to the offence under Section 25 of the Arms Act. The instant appeals were filed by A-2 and A-3 challenging the order of the High Court.**

**Dismissing the appeals, the Court**

**HELD: 1. It was incorrect to say that the FIR was registered belatedly and the said time was used to falsely implicate the accused because of their previous enmity. The sequence of facts did not lead to an inference that there was delay in the registration of FIR or it lacked spontaneity. As a matter of fact, in Exhibit PW-11/A, which was recorded within 20-25 minutes of the receipt of the communication of the incident, the details of the incident were narrated and the specific names of A-2 and A-3**



**figured with A-1 and A-4. It cannot, therefore, be said that the time of two hours was used to falsely implicate the accused due to their previous enmity. [Para 15] [57-E-G; 58-A-C]**

*Rajendra and Anr. v. State of Uttar Pradesh* **(2009) 13 SCC 480 – referred to.**

**2.1. The evidence of PW-7, PW-8 and PW-11 was thoroughly examined and analysed by the trial court and also by the High Court at great length. The High Court was alive to the situation that PW-8 was declared hostile and PW-7 and PW-11 were subjected to leading questions by the public prosecutor. The High Court took into consideration the discrepancies, omissions and contradictions pointed out by defence and on careful consideration of their evidence held that the presence of these three witnesses at the time and place of occurrence was not doubtful and the evidence of PW-11 was corroborated by PW-7 and PW-8 with regard to the manner in which the crime was committed. The evidence of a hostile witness remains the admissible evidence and it is open to the court to rely upon the dependable part of that evidence which is found to be acceptable and duly corroborated by some other reliable evidence available on record. The High Court and the trial court cannot be said to have erred in acting on the evidence of PW-11 which was duly corroborated by the other reliable evidence on record. [Paras 19, 20, 23] [59-G-H; 61-G-H; 62-A; 65-C-D]**

*Ram Babu v. State of Uttar Pradesh* **(2010) 5 SCC 63 – relied on.**

**2.2. Ordinarily, this Court does not enter into an elaborate examination of the evidence in a case where the High Court has concurred with the findings of fact recorded by the trial court. As a matter of fact, there is no**

**justification for departure from that rule in the instant case. The conclusions recorded by the trial court and confirmed by the High Court concerning A-2 and A-3 cannot be said to suffer from any factual or legal error or that such conclusions could not reasonably be arrived at by those courts. The fact that statement of PW-11 was taken down by PW-24 at the place of occurrence within 20-25 minutes of the incident was clearly established. Although the defence was able to point out certain discrepancies and omissions in his deposition, but such discrepancies and omissions were only minor and not very material and in any case did not shake his trustworthiness. It is true that the public prosecutor had also put leading questions to him but that did not obliterate his evidence from the record. His deposition that he informed the Police Control Room from STD booth whereas statement of PW-3 that the information about the incident was received from the mobile phone did not affect the material part of his evidence concerning the crime and the involvement of A-2 and A-3. Yet another discrepancy in the evidence of PW-11 that the deceased had not taken dinner whereas the evidence of PW-5 and the post-mortem report suggested that the deceased had taken some eatables about 1½ to 2½ hours prior to his death was no discrepancy at all. What PW-11 had deposed was that the meals were under preparation by his mother when the deceased had left home. This would not rule out the possibility of the deceased having taken something earlier. The evidence of PW-11 clearly nailed A-2 and A-3 for the murder of the deceased. He was a truthful witness and can be safely relied upon. His evidence was corroborated insofar as A-2 is concerned by the other eye-witnesses PW-7 and PW-8. His evidence was also corroborated from the evidence of PW-5 and PW-24. The complicity of A-3 is also established by the evidence of PW-11 which was duly corroborated by medical and other evidence although PW-7 and PW-8 did**



**not specifically name him. The concurrent finding of the High Court and the trial court that the prosecution evidence is sufficient to bring home the guilt of A-3 as well beyond any reasonable doubt is upheld. [Para 21] [62-F-H; 63-A-H]**

*Prithi v. State of Haryana* **(2010) 8 SCC 536 – relied on.**

**Case Law Reference:**

| | | |
|---|---|---|
| **(2009) 13 SCC 480** | **referred to** | **Para 13** |
| **(2010) 5 SCC 63** | **relied on** | **Para 21** |
| **(2010) 8 SCC 536** | **relied on** | **Para 22** |

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 560 of 2010.

From the Judgment & Order dated 25.5.2009 of the High Court of Delhi at New Delhi in Crl. Appeal No. 1012 of 2008.

WITH

C.A. No. 561 of 2010

K.T.S. Tulsi, Priyanka Agarwal, Niraj Gupta, Dimple, Deepak Sharma, Jaspreet Gogia for the Appellant.

A. Mariaputtam, Priyanka Mathur Sardana, Yusuf Khan, Priya Hingorani, Anil Katiyar for the Respondent.

The Judgment of the Court was delivered by

**R.M. LODHA, J.** 1. These two appeals, by special leave, are directed against the judgment of the High Court of Delhi whereby the Division Bench of that Court affirmed the judgment of the Additional Sessions Judge, Delhi. The Additional Sessions Judge convicted the appellants for the offence punishable under Section 302 read with Section 34 IPC and sentenced them to suffer imprisonment for life.

2. On July 8, 2006, Dharam Pal (PW-3)—Head

Constable—was on duty at Police Control Room in Police Headquarters from 8.00 p.m. to 8.00 a.m. At about 9.34 p.m., a telephonic message was received in the control room from telephone No. 9210325051 that a person had been shot at A-450, Shastri Nagar. The said telephonic message was reduced to writing in the PCR Form (Exhibit PW-3/A) and communicated to the Police Station, Sarai Rohilla. Subhash Chand (PW-24), Sub-Inspector, on receiving the said communication (DD No. 31/A), left immediately for the place of incident with Head Constable Vijay Pal (PW-19). PW-24 and PW-19 reached the spot in front of Ahuja Clinic, 'A' Block, Shastri Nagar within 15 minutes of the receipt of the communication.

3. Raju (PW-11) was present at the spot. PW-24 recorded his statement (Exhibit PW-11/A) which took about 10 minutes. From there, PW-24 and PW-19 rushed to Hindu Rao Hospital where they came to know that Murari was brought dead. PW-24 collected the MLC (Exhibit PW-30/A); made endorsement on Exhibit PW 11/A and handed it over to PW-19 for taking the same to the Police Station for registration of the case. Based on Exhibit PW 11/A, the first information report (FIR) was registered at Police Station, Sarai Rohilla at 2350 hours.

4. Inspector V.S. Rana (PW-35), on the registration of FIR, commenced investigation. He reached the spot, got the photographs taken; seized the blood and bloodstained soil and also prepared the site plan.

5. On the next day, i.e., July 9, 2006 at about 12.00 noon the postmortem on the dead body of Murari was conducted by Dr. C.B. Dabas (PW-5) at Hindu Rao Hospital, Delhi. In the postmortem report (Exhibit PW-5/A), he recorded the following external injury on the person of the deceased:

> "One Fire arm entry wound, round in shape, measuring 2.2x 2.2 cm & surrounded by a collar of Abrasion in area of 3x3 cm, located over left side, lateral aspect of Chest, 19 cm outer to midline and 12.0 cm outer to - below left NIPPLE and 120 cm above (L) heel. The wound is surrounded by Singeing, blackening and tattooing."



The track of Injury No. 1 has been noticed in the postmortem report as under :

> "Injury No. 1 has entered the chest cavity after piercing through (L) chest wall, and then perforated through (L) pleura, Lower Lobe of (L) lung and pericardium, and then through and through walls of left Ventricle and then (R) Ventricle, then crossed the midline and perforated through and through middle lobe of (R) lung and (R) pleura and entered the chest wall from inside and exited through 5th inter costal space, fracturing the 6th rib of chest cage and then travelled under the skin and ended in subcutaneous tissues of "post axillary fold where one "copper coated lead tipped bullet is found lodged. It is removed and preserved. The direction of fire being from Left to Right and upwards."

The aforenoted injury on the body of the deceased was found to be ante-mortem and recent. In the opinion of PW-5, Murari died due to haemorrhage and shock consequent to Injury No. 1 which was sufficient to cause death in the ordinary course of nature.

6. On July 9, 2006, PW-35 and PW-24 along with PW-11 proceeded in search of the accused persons. Himanshu @ Chintu (A-2) was apprehended on that day itself. A-2's disclosure statement was recorded on July 10, 2006 vide Exhibit 24/B. Sunil Nayak @ Fundi (A-1) was arrested on July 15, 2006. Ramesh @ Dudhiya (A-4) was arrested on July 26, 2006. Shesh Bahadur Pandey (A-3) was arrested on October 16, 2006. On the basis of his disclosure statement, the Katta (weapon of offence) was recovered. Sunil Kumar (A-5) surrendered in the Court on November 9, 2006 and on that day itself, he was arrested.

7. PW-35 took all necessary steps towards investigation and after collecting the necessary materials and on completion of the investigation the charge sheet was filed. On October 16, 2006, the Metropolitan Magistrate, Delhi committed the accused to the Court of Sessions for trial.

8. The accused were tried in the Court of Additional Sessions Judge, Delhi. The prosecution examined 35 witnesses and also got exhibited the various documents. The trial judge recorded the statement of the accused under Section 313 Cr.P.C. The accused denied their role in the crime and examined two witnesses, namely, S.C. Kalra (DW-1) and Atul Katiyar (DW-2) in their defence.

9. The Additional Sessions Judge, Delhi after hearing the parties and on the basis of the evidence on record vide her Judgment dated September 30, 2008 held A-1, A-2, A-3 and A-4 guilty of the offence under Section 302 read with Section 34 IPC and sentenced them to suffer imprisonment for life and a fine of Rs. 5000/- each with a default stipulation. A-4 was convicted for the offence punishable under Section 27 of the Arms Act, 1959 as well. He was sentenced to rigorous imprisonment for three years and a fine of Rs. 2000/- with a default stipulation on that count. No offence against A-5 was proved beyond reasonable doubt and he was acquitted.

10. A-1, A-2, A-3 and A-4 filed four separate appeals before the High Court of Delhi. These four appeals were heard together by the Division Bench and vide judgment dated May 25, 2009, the appeals preferred by A-1, A-2 and A-3 were dismissed. Insofar as appeal of A-4 was concerned, the Division Bench maintained his conviction and sentence under Section 302/34, IPC but as regards his conviction under Section 27 of the Arms Act, 1959, it was altered to the offence under Section 25 of the Arms Act, 1959. He was sentenced to suffer rigorous imprisonment for three years and a fine in the sum of Rs. 2000/- with a default stipulation for that offence.



11. The present appeals are by A-2 and A-3. Mr. K.T.S. Tulsi, learned senior counsel for A-2 pointed out the discrepancy in the prosecution case about the telephonic message received in the Police Control Room. He referred to the evidence of PW-11 wherein he stated that he gave communication to the police from STD booth and the evidence of PW-3 who deposed that the telephonic message was received in the control room from Telephone No. 9210325051. Learned senior counsel argued that in the telephonic message, the names of the accused were not given. He vehemently contended that although the telephonic message was received at about 9.34 p.m., the FIR was registered after about two hours and this time was used by the prosecution to falsely implicate the accused because of their previous enmity. Mr. K.T.S. Tulsi argued that all the three eye-witnesses Rohit (PW-7), Sukhwinder @ Monty (PW-8) and PW-11 were declared hostile and, therefore, their evidence could not have formed the basis for the conviction of A-2. Even otherwise he submitted that evidence of PW-7, PW-8 and PW-11 was full of contradictions and material omissions and that their evidence was wholly unreliable. Learned senior counsel pointed out that PW-11 in his deposition stated that the deceased had gone without eating food but the postmortem report and the evidence of PW-5 indicated that deceased had taken meals about 1 ½ hours to 2 ½ hours before his death. Mr. K.T.S. Tulsi also submitted that PW-7, PW-8 and PW-11 were interested witnesses inasmuch as PW-7 and PW-8 were friends of the deceased and PW-11 was his younger brother and it is not safe to rely on their testimony. He, thus, submitted that the High Court erred in affirming the conviction of the accused under Section 302 read with Section 34 IPC.

12. Learned counsel for A-3 adopted the arguments of Mr. K.T.S. Tulsi and additionally submitted that PW-7 and PW-8 have not specifically identified A-3 and the evidence of PW-11 was not trustworthy. He submitted that the evidence let in by the prosecution was not sufficient to establish the guilt of A-

3 for the offence punishable under Section 302 read with Section 34 beyond any reasonable doubt.

13. Mr. A. Mariaputtam, learned senior counsel for the respondent supported the judgment of the High Court. He refuted the submission of Mr. K.T.S. Tulsi that the F.I.R. was lodged belatedly i.e. two hours after the occurrence of the incident and that the said time was used to falsely implicate the accused. He contended that evidence of PW-7, PW-8 and PW-11 – although they were cross examined by the public prosecutor – could be relied upon to the extent that supported the prosecution case. In this regard, he relied upon decision of this Court in the case of *Rajendra and Anr. vs. State of Uttar Pradesh*[1]. Learned senior counsel would contend that appreciation of the evidence by the High Court and the trial court was proper and the concurrent view of the two courts does not call for any interference by this Court.

14. It must be immediately stated that the evidence of PW-5 and the postmortem report leave no manner of doubt that the death of Murari was homicidal.

15. We see no merit in the submission of Mr. K.T.S. Tulsi, learned senior counsel for A-2 that the FIR was registered belatedly and this time was used to falsely implicate the accused because of their previous enmity. It transpires clearly from the evidence of PW-3 that the telephonic message was received in the control room at 9.34 p.m. on July 8, 2006. The said communication was noted down in exhibit PW-3/A and communicated to the Police Station, Sarai Rohilla. On receiving the communication DD No. 31/A, PW-24 and PW-19 immediately left for the place of incident and reached the spot within 15 minutes. On reaching the place of incident, PW-24 recorded the statement of PW-11 which took about 10 minutes. After recording the statement of PW-11, PW-24 and PW-19 left for Hindu Rao Hospital where the victim had been taken and

1. (2009) 13 SCC 480.



there PW-24 came to know that victim was brought dead. PW-24 then collected the MLC from the hospital, made endorsement on the statement (Exhibit PW-11/A) and sent PW-19 to the Police Station for registration of the FIR. The FIR was then registered on the basis of Exhibit PW-11/A at the Police Station Sarai Rohilla at 2350 hours. The sequence of facts narrated above does not lead to an inference that there was delay in the registration of FIR or it lacked spontaneity. As a matter of fact, in Exhibit PW-11/A, which was recorded within 20-25 minutes of the receipt of the communication of the incident, the details of the incident were narrated and the specific names of A-2 and A-3 figured with A-1 and A-4. It cannot, therefore, be said that the time of two hours was used to falsely implicate the accused due to their previous enmity.

16. PW-7 is one of the eye-witnesses. He deposed that on July 8, 2006 at about 9 - 9.30 p.m., he was returning back from Bharat Nagar Mandir and he saw Murari and PW-8 coming from the opposite direction. He stopped his bike and all the three started chatting. At that time, A-2 came on his bullet motorcycle with one person; entered into an argument with Murari and threatened Murari that he would kill him and went away. PW-7 then asked Murari as to what had happened and when Murari was about to tell him; PW-11 (younger brother of the deceased) came there and told Murari that their mother was calling him. A-2 then came back with 5-7 boys on 4-5 motor cycles. A-2 pointed towards Murari and claimed “yeh tha”. One of these boys got down from motorcycle and shot at Murari. Then he, PW-11 and PW-8 brought an auto rickshaw. PW-8 and he took Murari in that auto rickshaw and asked PW-11 to inform his parents regarding the incident. They took Murari to Parmarth Hospital where he was given first aid and then Murari was taken in a PCR van to Hindu Rao Hospital. The police reached Hindu Rao Hospital. Since complete facts were not deposed by him, the public prosecutor after obtaining the permission of the court put leading questions to him. The defence also cross-examined PW-7 at quite some length. As

regards the role of A-2 in the crime, the deposition of PW-7 is categorical and specific.

17. PW-8 in his deposition stated that on July 8, 2006 A-2 came on the motor-cycle at 9.20 p.m. with one person and threatened Murari. After about 5-10 minutes, A-2 came again with his associates and pointed towards Murari. One of the boys accompanying A-2 took out revolver and fired shot at Murari but he declined to identify the boy who fired the shot and the other boys who accompanied A-2. He was declared hostile by the prosecution and was cross-examined. He was also cross examined at quite some length by the defence.

18. PW-11 is the younger brother of the deceased. In his deposition, he stated that on July 8, 2006 at about 9.15 to 9.20 p.m., he along with his brother Murari, PW-7 and PW-8 was standing in front of Ahuja Clinic. A-2 along with one person came on motorcycle and threatened his brother, "Murari Mai Tujhe Zinda Nahi Chhodunga" and left. A-2 came again after 5-10 minutes with A-1, A-3, A-4 and A-5. A-2 then pointed towards his brother and told to A-4, "yeh hai Murari". A-1 and A-3 said, "Maar saale ko goli". A-4 then took out a Katta from the right pocket of his trouser and put that on the left side of the chest of his brother and fired. The accused then ran away from the spot. He further deposed that PW-7 and PW-8 took Murari to the hospital in a three wheeler; he informed the police that his brother had been shot at and he also received a phone call from PW-7 or PW-8 telling him that they had taken his brother to Parmarth Hospital first and then to Hindu Rao Hospital. Since complete facts were not deposed by PW-11, the court permitted the public prosecutor to put leading questions to him. The defence extensively cross-examined PW-11.

19. The evidence of PW-7, PW-8 and PW-11 was thoroughly examined and analysed by the trial court. As regards their deposition, the trial court observed thus:



"There is no reason to disbelieve the statement of PW-11 Raju, who is a truthful witness as discussed above I am of the opinion that even presence of PW-7 and PW-8 at the spot cannot be denied. They have testified about the incident in detail. They have only not deposed with respect to the identity of the accused persons namely Shesh Bahadur Pandey, Sunil @ Fundi and Ramesh @ Dudhiya, but have otherwise given the detailed factum of their having been present at the spot and having taken the injured to the hospital. These facts are not disputed on record. There is an explanation on record as to why witness Rohit (PW-7) did not identify the accused persons in the court. Though the witness had given their names (of accused) in the statement before the police u/Sec. 161 Cr.P.C., but had turned hostile in respect of their identity in the court as it has been shown on record that witness had been threatened not to dispose *(sic)* in this case against the accused persons. The said writ petitions filed by PW-7 Rohit and his father in the Hon'ble High Court of Delhi are Ex. PW-7/A and Ex. PW-7/B. Accused Himanshu has been identified by all the three witnesses i.e. PW-7, PW-8 and PW-11 in the Court. It is also seen that though PW-7 was partly hostile in respect to the identify *(sic)* of the accused persons, he had given his statement in detail with respect to the incident as it took place. It is seen that the prosecution had placed on record the certified copy of the writ petition filed by Rohit and his father before the Hon'ble High Court of Delhi, wherein he had alleged the threats of the members of the family of the accused persons to Rohit and his family, which seems a plausible reason for the witness to have not identified the accused persons in the Court though he had named them earlier. It is seen that in material particulars, the witness had supported the case of the prosecution and there was sufficient reasons for him for not identifying the accused persons now in the Court. Further that all the three eye witnesses had identified accused Himanshu and the role played by him. Further

PW-11 Raju had identified all the accused persons and had mentioned in detail the role played by each of them and there was no reason to disbelieve this witness merely because he was related to the deceased. Further the weapon of offence had been recovered from nala at the instance of accused Ramesh @ Dudhiya. The motive was also there for the accused persons to have committed this offence inasmuch as witness have stated that Murari had said that Chintoo used to tease his girl friend on which an altercation had taken place between them in the evening. It is seen that all these witnesses have corroborated this fact of Himanshu coming there first to say that he would not spare Murari now."

The trial court concluded its opinion as follows :

"I am, thus, of the opinion that despite lengthy cross-examination of the witness and various points put forth during arguments, Ld. Counsel for the accused has not been able to extract any material point or contradictions or bring home any point, which could be considered as fatal to the case of the prosecution. Accordingly, I hold that on 08.07.2006 at about 09.30 p.m. in front of Ahuja Clinic, Khurana Tent Wali Gali, A-Block, Shastri Nagar, Delhi that accused Ramesh @ Dudhiya, Himanshu, Sunil @ Fundi, and Shesh Bahadur Pandey have committed murder of Murari by firing gunshot in furtherance to their common intention and thus, committed an offence punishable u/Sec. 302/34 IPC."

20. The testimony of PW-7, PW-8 and PW-11 has also been examined by the Division Bench of the High Court at great length. The Division Bench was alive to the situation that PW-8 was declared hostile and PW-7 and PW-11 were subjected to leading questions by the public prosecutor. The Division Bench took into consideration the discrepancies, omissions and contradictions pointed out by the counsel for the accused and on careful consideration of their evidence held that the



presence of these three witnesses at the time and place of occurrence was not doubtful and the evidence of PW-11 was corroborated by PW-7 and PW-8 with regard to the manner in which the crime was committed. The Division Bench opined as follows :

"PW-7 and PW-8 have categorically deposed that before he was shot at, Himanshu had come to the spot on a motorcycle with another boy and had threatened Murari with death and that after 5-10 minutes, Himanshu returned with 5-7 boys on motorcycles and said "yeh hai murari". Even PW-11 has so deposed. There can be only two circumstances under which PW-11 could have testified to said fact. The first was that either PW-7 or PW-8 or both told him said facts or he saw the same himself. We find no suggestions have been given to PW-7 and PW-8 that they were the ones who told said facts to PW-11. No suggestion has been given to PW-11 that said facts were told to him by either PW-7 and PW-8. Thus, prima facie, said facts deposed to by PW-11 have to be accepted as his narratives which he saw with his eyes."

21. We are in agreement with the consideration of the prosecution evidence by the High Court. In the case of *Ram Babu* v. *State of Uttar Pradesh*[2], this Court speaking through one of us (R.M. Lodha, J.) reiterated the position consistently stated by this Court that ordinarily this Court does not enter into an elaborate examination of the evidence in a case where the High Court has concurred with the findings of fact recorded by the trial court. As a matter of fact, there is no justification for departure from that rule in the present case. However, we have carefully considered the prosecution evidence and, particularly, the testimony of PW-7, PW-8 and PW-11 who were presented as eye-witnesses. In our view, the conclusions recorded by the trial court and confirmed by the High Court concerning A-2 and A-3 cannot be said to suffer from any factual or legal error or

2. (2010) 5 SCC 63.

that such conclusions could not reasonably be arrived at by those courts. The presence of PW-11 at the scene of occurrence is not at all doubtful. The fact that his statement, PW-11/A was taken down by PW-24 at the place of occurrence within 20-25 minutes of the incident is clearly established. Although the defence has been able to point out certain discrepancies and omissions in his deposition, but, in our opinion, such discrepancies and omissions are only minor and not very material and in any case do not shake his trustworthiness. It is true that the public prosecutor also put leading questions to him but that does not obliterate his evidence from the record. His deposition that he informed the Police Control Room from STD booth whereas PW-3 stated that the information about the incident was received from the mobile phone No. 9210325051 hardly affects the material part of his evidence concerning the crime and the involvement of A-2 and A-3. Yet another discrepancy in the evidence of PW-11 pointed out by the learned senior counsel for A-2 that the deceased had not taken dinner whereas the evidence of PW-5 and the post-mortem report suggested that the deceased had taken some eatables about 1½ to 2½ hours prior to his death is no discrepancy at all. What PW-11 has deposed is that the meals were under preparation by his mother when the deceased had left home. This does not rule out the possibility of the deceased having taken something earlier. In our view, the evidence of PW-11 clearly nails A-2 and A-3 for the murder of Murari. He is a truthful witness and can be safely relied upon. His evidence is corroborated insofar as A-2 is concerned by the other eye-witnesses PW-7 and PW-8. His evidence also gets corroborated from the evidence of PW-5 and PW-24. The complicity of A-3 is also established by the evidence of PW-11 which is duly corroborated by medical and other evidence although PW-7 and PW-8 have not specifically named him. We agree with the concurrent finding of the High Court and the trial court that the prosecution evidence is sufficient to bring home the guilt of A-3 as well beyond any reasonable doubt.



22. In *Prithi* v. *State of Haryana*[3] decided recently, one of us (R.M. Lodha, J.) noticed the legal position with regard to a hostile witness in the light of Section 154 of the Evidence Act, 1872 and few decisions of this Court as under :-

"**25.** Section 154 of the Evidence Act, 1872 enables the court in its discretion to permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party. Some High Courts had earlier taken the view that when a witness is cross-examined by the party calling him, his evidence cannot be believed in part and disbelieved in part, but must be excluded altogether. However this view has not found acceptance in later decisions. As a matter of fact, the decisions of this Court are to the contrary. In *Khujji* @ Surendra Tiwari v. *State of M.P. [(1991) 3 SCC 627]*, a three-Judge Bench of this Court relying upon earlier decisions of this Court in *Bhagwan Singh* v. *State of Haryana [(1976) 1 SCC 389]*, Sri *Rabindra Kumar Dey* v. *State of Orissa [(1976 4 SCC 233]* and *Syad Akbar* v. *State of Karnataka [(1980) 1 SCC 30]* reiterated the legal position that: (*Khujji case*, SCC p. 635, para 6)

"*6*. … the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent their version is found to be dependable on careful scrutiny thereof."

**26.** In *Koli Lakhmanbhai Chanabhai* v. *State of Gujarat [(1999) 8 SCC 624],* this Court again reiterated that testimony of a hostile witness is useful to the extent to which it supports the prosecution case. It is worth noticing that in *Bhagwan Singh* this Court held that when a witness

3. (2010) 8 SCC 536.

is declared hostile and cross-examined with the permission of the court, his evidence remains admissible and there is no legal bar to have a conviction upon his testimony, if corroborated by other reliable evidence.

**27.** The submission of the learned Senior Counsel for the appellant that the testimony of PW 6 should be either accepted as it is or rejected in its entirety, thus, cannot be accepted in view of the settled legal position as noticed above."

23. The aforesaid legal position leaves no manner of doubt that the evidence of a hostile witness remains the admissible evidence and it is open to the court to rely upon the dependable part of that evidence which is found to be acceptable and duly corroborated by some other reliable evidence available on record. The High Court and the trial court, thus, cannot be said to have erred in acting on the evidence of PW-11 which was duly corroborated by the other reliable evidence on record. We find no flaw in the judgment of the High Court affirming the conviction of A-2 and A-3 under Section 302 read with Section 34 IPC.

24. Both the appeals are, accordingly, dismissed.

D.G. Appeals dismissed.



SECRETARY/GENERAL MANAGER CHENNAI CENTRAL COOPERATIVE BANK LTD. & ANR.

*v.*

S. KAMALAVENI SUNDARAM

(Civil Appeal No. 14 of 2011)

JANUARY 4, 2011

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

*Code of Civil Procedure, 1908:*

*s. 34 – Interest – Plaint re-presented five years and six months after its return – Interest on principal amount – HELD: Interest is awardable pendente lite taking into consideration the facts and circumstances of the case and not as a matter of course – Section 34 does not empower the court to award pre-suit interest which would ordinarily depend on the contract between the parties – Direction of the High Court to pay interest for the period from return of the plaint to its re-presentation set aside – Rent Control and Eviction.*

**The respondent landlady, after the eviction of appellant-2, the tenant, filed a suit on 9.9.1998 for recovery of arrears of rent and for 18% interest thereon. The plaint was returned on 20.1.2000 because of certain defects. It was re-presented after a gap of about 5 years and 6 months on 20.7.2005. The suit was decreed on 24.3.2008, with 6% interest from 9.9.1998 to 21.1.2000 and from 21.7.2005 to the date of payment. On appeal by the landlady, the High Court allowed 12% interest from the date of filing of the suit till the date of decree and 6% interest thereafter till realisation of principal amount of rent.**

**Partly allowing the appeal filed by the tenant, the Court**

**HELD: Interest is awardable *pendente lite* taking into consideration the facts and circumstances of the case and not as a matter of course. Section 34 CPC empowers the court to award interest for the period from the date of the suit to the date of the decree and from the date of the decree to the date of payment where the decree is for payment of money. It does not empower the court to award pre-suit interest, which would ordinarily depend on the contract (express or implied) between the parties or some statutory provisions or the mercantile usage. In the instant case, the plaint after its return on 20.1.2000, was not re-presented immediately nor within reasonable time. As a matter of fact, the matter remained dormant in the hands of the landlady and the plaint was re-presented after five years and six months on July 20,2005. Obviously, the landlady cannot derive any advantage of her inaction or lack of diligence in re-presenting the plaint. The direction of the High Court to the tenant to pay interest @ 12% per annum on the due rent for the period January 20, 2000 to July 20, 2005 is set aside. [para 10-12] [70-G-H; 71-A-D]**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 14 of 2011.

From the Judgment & Order dated 11.3.2010 of the High Court of Judicature at Madras in A.S. No. 990 of 2008.

K.V. Viswanathan, Mary Mitzy, G.S. Chauhan, Shiv Prakash Pandey for the Appellants.

S. Aravindh, V. Balachandran for the Respondent.

The Judgment of the Court was delivered by

**R.M. LODHA, J.** 1. Leave granted.

2. The short question for consideration in this appeal, by special leave, is whether the Single Judge of the Madras High



Court was justified in directing the 2nd appellant to pay interest @ 12% per annum on the arrears of rent from September 9, 1998 to the date of decree dated March 24, 2008.

3. Brief facts leading to the present controversy are these. The respondent—S. Kamalaveni Sundaram (hereinafter referred to as 'the landlady') let out ground floor of her property situate at MRC Nagar, South Beach Avenue, Chennai to the 2nd appellant (hereinafter referred to as 'the tenant') in the month of February, 1990 on a monthly rent of Rs. 5600/- payable according to the English calendar month. The tenancy was for non-residential purposes viz., for running the banking business. The landlady filed the suit for fixation of fair rent against the tenant in 1996. The Small Causes Court, Chennai vide its order dated March 27, 1998 fixed the fair rent at Rs. 32,356/- per month with effect from October 28, 1996. In September 1998, the tenant vacated the leased premises. However, the tenant was in arrears of rent at the time of vacation of premises. The landlady sent a notice through her lawyer and called upon the tenant to pay a sum of Rs. 5,71,832/- towards difference in rent upto May, 1998 and also rent for the months June, July and August, 1998 after giving adjustment of sum of Rs. 33,600/- paid by the tenant in advance. The tenant failed and neglected to comply with the notice sent by the landlady.

4. The landlady then filed a suit in the month of December, 1998 against the tenant for recovery of Rs. 6,83,346/- in the City Civil Court, Chennai. The landlady also claimed interest @ 18% per annum on Rs. 5,71,832/- (the principal amount of rent) due against the tenant.

5. The plaint filed by the landlady suffered from certain defects and the same was returned to her on January 20, 2000 for the rectification of defects. The landlady, however, re-presented the plaint after a gap of more than five years, to be precise on July 20, 2005. Initially an ex-parte decree was passed against the tenant in the suit but later on the tenant was

permitted to contest the suit after the ex-parte decree was set aside.

6. After contest, the III Additional Judge, City Civil Court, Chennai passed a decree on March 24, 2008 in favour of the landlady and directed the tenant to pay to her the arrears of rent amounting to Rs. 5,71,832/- with interest at the rate of 6% per annum from September 9, 1998 to January 21, 2000 and from July 21, 2005 to the date of payment. The tenant was given three months' time to pay the amount from the date of the decree.

7. The landlady challenged the judgment and decree dated March 24, 2008 before the High Court of Judicature at Madras. The Single Judge of the High Court after hearing the parties allowed the appeal preferred by the landlady in part and directed the tenant to pay interest @ 12% per annum from the date of the filing of the suit, i.e., from September 9, 1998 until March 24, 2008 and @ 6% per annum from March 25, 2008 till the date of realization of the principal amount of rent.

8. On July 26, 2010, while issuing notice in the petition for special leave to appeal, the following order was passed by us:

> "Counsel for the petitioners submits that there was no justification for the High Court to grant interest for the period January 20, 2000 to July 20, 2005, when the plaint had been returned to the plaintiff for removal of certain defects.
>
> Issue notice.
>
> The execution of the decree as per the High Court Judgment shall remain stayed, provided the petitioners deposit a sum of Rs. 7.5 lakhs before the Court below, within four weeks from today."

9. The landlady—sole respondent—has filed counter affidavit and justified the order of the High Court principally on



the ground that on the admitted facts and circumstances of the case, the High Court has struck the balance on equity as between the parties by granting lesser interest than what was claimed by her while granting interest for the entire period of pendency of the suit.

10. We heard the learned senior counsel for the tenant and the learned counsel for the landlady. Having regard to the facts and circumstances of the case, we are unable to sustain the order of the High Court to the extent the interest has been awarded to the landlady for the period from January 20, 2000 to July 20, 2005. As noticed above, the plaint was returned by the City Civil Court, Chennai to the landlady on January 20, 2000 for re-presenting the same after rectification of the defects. However, for the reasons best known to the landlady, the plaint was not re-presented immediately nor within reasonable time. As a matter of fact, the matter remained dormant in the hands of the landlady and the plaint was re-presented after five years and six months on July 20, 2005. Obviously, the landlady cannot derive advantage of her inaction or lack of diligence in re-presenting the plaint. Had the landlady re-presented the plaint within reasonable time, the matter would have been decided long back. As the facts reveal, the plaint was re-presented on July 20, 2005 and the suit was decreed by the trial court on March 24, 2008. In the circumstances, therefore, the award of interest for the period January 20, 2000 to July 20, 2005 does not seem to be justified. We are not persuaded by the submission that by not filing the plaint immediately after it was returned or for delay in re-presenting the plaint, the landlady did not gain anything and although she was entitled to interest @ 18% per annum on the arrears of rent, the High Court only awarded interest @ 12% and thereby struck a balance on equity. Whether the landlady gained anything or not by delay in re-presenting the plaint is not material but what is material is that interest is awardable *pendente lite* taking into consideration the facts and circumstances of the case and not as a matter of course.

11. Section 34 of the Code of Civil Procedure, 1908 (CPC) empowers the court to award interest for the period from the date of the suit to the date of the decree and from the date of the decree to the date of payment where the decree is for payment of money. Section 34 of the CPC does not empower the court to award pre-suit interest. The pre-suit interest would ordinarily depend on the contract (express or implied) between the parties or some statutory provisions or the mercantile usage. Be that as it may, we do not find that on equitable considerations the landlady is entitled to interest for the period January 20, 2000 to July 20, 2005.

12. As a result of the foregoing discussion, the appeal is allowed in part and the direction given by the High Court to the tenant to pay interest @ 12% per annum on the due rent for the period January 20, 2000 to July 20, 2005 is set aside. Except the above modification, the decree of the High Court stands. The parties shall bear their own costs.

R.P. Appeal partly allowed.



MANGESH

*v.*

STATE OF MAHARASHTRA

(Criminal Appeal No. 14 of 2011)

JANUARY 05, 2011

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

*Penal code, 1860: s.302 – Murder – Accused's sister had love affair with the victim-deceased which was not liked by the accused – On the fateful day at odd hours, when accused saw the deceased with his sister, he assaulted him with a knife – Deceased died after three days – Concurrent findings of courts below that accused stabbed the deceased with a knife which resulted in his death – Conviction u/s.302 and award of life sentence – On appeal, held: It was a clear cut case of loss of self control that the accused caused injuries to deceased – Blow was not with full force as was apparent from the medical evidence – Stabbing was twice on thigh and only once in chest which indicated that there was no intention to cause death – The act was not pre-meditated – The accused had not taken any undue advantage or acted in cruel or in unusual manner – In the facts and circumstances of the case, conviction of the accused altered from s.302 to s.304 Part-I IPC and in order to meet the ends of the justice, ten years rigorous imprisonment awarded to him.*

**The prosecution case was that PW-6, the sister of the appellant had a love affair with the victim (deceased) which continued for 2-3 years. The appellant did not like their relationship and had altercations with the deceased several times. On the fateful night, the appellant saw the deceased and his sister together at 9.15 p.m. He assaulted the deceased with a knife thrice and ran away from the spot. PW-6 called the police jeep which took the**

**deceased to the hospital. On the way, the deceased made a statement of sub-inspector (PW-7) which was treated as an FIR under Section 307 IPC. The deceased died later and the FIR was converted to one under Section 302 IPC. The deceased made two dying declarations, one to PW-7 and another to the magistrate to the effect that the appellant had caused knife injuries to him. The trial court convicted the appellant under Section 302 IPC. The High Court affirmed the same. The instant appeal was filed challenging the order of the High Court on the ground that the act of the appellant was not pre-meditated and it happened because of sudden provocation.**

**Disposing of the appeal, the Court**

**HELD: 1. It was not the case in any of the dying declarations that the appellant had pre-meditated or pre-planned his actions or was having any information prior to the incident that the deceased would be found with his sister at the place of occurrence. Their meeting might have been taken by the appellant as temerity. Therefore, it was a clear cut case of loss of self control and in the heat of passion, the appellant caused injuries to deceased. It was evident from the medical report that the appellant had not given the knife blow with full force, otherwise, the depth of the injury no.1 would have been more than just "cavity deep". Undoubtedly, injury No.1 had been caused on the vital part of the body of the deceased but when a person loses his sense he may act violently and that by itself may not be a ground to be considered against him while determining the nature of the offence. Each case is to be considered on its own facts. In such a case, the entire attending circumstances must be taken into consideration in order to find out the nature of the actual offence committed. The fact that the appellant stabbed the deceased twice in the thigh and only once in the chest was indicative of a lack of**



**intention to cause death. Had the appellant intended to kill the deceased, it is unlikely that he would flee from the scene without having inflicted more injuries on the deceased. On examining the weapon, the doctor, PW.1 opined that injury Nos. 1, 2 and 3 could be caused by handle of the knife. Death of deceased was not instantaneous rather he died on third day of the incident. The appellant had not taken any undue advantage or acted in cruel or in unusual manner. Thus, the facts and circumstances of the case require alteration of conviction of the appellant from Section 302 IPC to Section 304 Part-I IPC and ends of the justice would be met by awarding ten years rigorous imprisonment to the appellant. [Paras 12, 15, 16, 17] [79-B-C; 80-D-H; 81-A-B]**

*Pulicherla Nagaraju alias Nagaraja Reddy v. State of A.P.* **AIR 2006 SC 3010 – distinguished.**

*Kailash v. State of M.P.* **(2006 (11) SCC 420;** *Karuppusamy & Anr. v. State of Tamil Nadu* **(2006) 11 SCC 459 – relied on.**

*Sridhar Bhuyan v. State of Orissa* **AIR 2004 SC 4100;** *Gali Venkataiah v. State of Andhra Pradesh* **AIR 2008 SC 462 – referred to.**

**Case Law Reference:**

| | | |
|---|---|---|
| **AIR 2006 SC 3010** | **distinguished** | **Para 13** |
| **AIR 2004 SC 4100** | **referred to** | **Para 14** |
| **AIR 2008 SC 462** | **referred to** | **Para 14** |
| **(2006 (11) SCC 420** | **relied on** | **Para 16** |
| **(2006) 11 SCC 459** | **relied on** | **Para 16** |

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 14 of 2011.

From the Judgment & Order dated 25.8.2009 of the High Court of Bombay at Nagpur Bench, Nagpur in Criminal Appeal No. 242 of 2004.

Gaurav Agarwal for the Appellant.

Shabkar Chillarge, Sanjay V. Kharde and Asha Gopalan Nair for the Respondent.

The Judgment of the Court was delivered by

**DR. B.S. CHAUHAN, J.** 1. Leave granted.

2. This appeal has been preferred against the judgment and order dated 25.8.2009 passed in Criminal Appeal No.242/04 by the High Court of Judicature at Bombay, Nagpur Bench, affirming the judgment and order dated 16.3.2004 passed by 2nd Additional Sessions Judge, Nagpur, in Sessions Trial No.366/03 convicting the appellant under Section 302 of Indian Penal Code, 1860 (hereinafter called IPC) and awarding the sentence of life imprisonment and, in addition thereto a fine of Rs.1000/- had also been imposed and in default of payment to undergo further rigorous imprisonment for the period of one year.

3. Facts and circumstances giving rise to this appeal are that the appellant's sister Sandhya had a love affair with Prashant (deceased) which continued for 2-3 years. The appellant was fully aware of the said affair and expressed his displeasure, having had altercations with Prashant (deceased) several times. On 30.4.2003, the appellant saw Prashant (deceased) and his sister Sandhya chatting with each other at about 9.15 p.m. at a short distance from his house. He assaulted Prashant (deceased) with the knife thrice and ran away from the spot.

4. The appellant's sister Sandhya (PW.6) called the police jeep passing through the road. The police shifted Prashant,



injured, to hospital and while going to the hospital Prashant made a statement to PSI Bhaurao Meshram (PW.7) which was treated to be an FIR under Section 307 IPC. As subsequently, Prashant died, the FIR was converted to one under Section 302 IPC. Prashant made two dying declarations (Exh. 20 and 26), one to PSI Bhaurao Meshram (PW.7) on 30.4.2003 and another to Mr. Prakash, Special Judicial Magistrate (PW.3) on 1.5.2003 to the effect that the appellant had caused knife injuries to him.

5. After conclusion of the investigation, charge sheet was filed against the appellant under Section 302 IPC. In support of the case, the prosecution examined several witnesses, however, the eye-witnesses including Sandhya (PW.6) did not support the case of the prosecution and they were declared hostile. The trial Court after considering the evidence on record and the arguments made by learned counsel for prosecution as well as the defence, convicted the appellant under Section 302 IPC vide judgment and order dated 16.3.2004 awarding the life imprisonment and a fine of Rs.1000/- and in default of payment to undergo further rigorous imprisonment for the period of one year.

6. Being aggrieved, the appellant preferred Criminal Appeal No.242/04 which has been dismissed vide impugned judgment and order dated 25.8.2009. Hence, this appeal.

7. Shri Gaurav Agrawal, learned counsel appearing for the appellant has made large number of submissions regarding the veracity of the evidence on record; pointed out contradictions in two dying declarations; prosecution case was not supported by any of the eye-witnesses including Sandhya (PW.6) who had called the police jeep which had taken Prashant (deceased) to the hospital; and the panchnama witnesses of the recovery of knife also did not support the case of the prosecution. However, realising the fact that there have been concurrent findings of fact by the two courts below, wherein after considering the contentions of the defence in detail the courts

have recorded the finding that there was no material contradiction in both the dying declarations and the conviction could be based solely on the said dying declarations, he restricted his case only to the nature of offence. It has been submitted by Mr. Agrawal that as the act of the appellant had not been pre-meditated and it all happened because of sudden provocation, conviction could be only under Section 304, Part I IPC and not under Section 302 IPC.

8. Mr. Shabkar Chillarge, learned counsel appearing for the State has submitted that considering the gravity of injuries, no interference is required with the impugned judgment by this Court. The appellant has rightly been convicted under Section 302 IPC. The appeal lacks merit and is liable to be dismissed.

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

10. The admitted facts, in the case, have been that the love affair of Sandhya, sister of the appellant, continued with Prashant (deceased) for 2-3 years. The appellant did not like the relationship and had altercations with Prashant (deceased) several times. On seeing both of them together at an odd hour i.e. 9.15 P.M. on 30th April, 2003, he suddenly assaulted Prashant with knife and caused stab injuries. Later on, Prashant (deceased) succumbed to the said injuries and died on 2nd May, 2003. The following injuries were found on his body as per the postmortem report:

(i) Stitched wound over left side of chest 9th intercostal space in posterior auxiliary line of size 1 cm x 0.5 cm angles and margins clear cut cavity deep.

(ii) Continued abrasion left shoulder, anterior aspect 3 cm x 0.5 cm, reddish.

(iii) Grazed abrasion over left arm, anterior aspect 4 cm x 3 cm, reddish brown.



(iv) Contused abrasion over dorsum of left hand, 3 cm x 2 cm, reddish brown.

(v) Stab wound in the mid of right thigh medial aspect 1.5 cm x 0.5 cm x muscle deep, angles and margins clean.

(vi) Stab wound over right thigh, lateral aspect in its middle 4.5 cm x 1.5 cm, muscle deep, angles and margins clear cut.

Doctor Amit Kumar (PW.1) found the following internal injuries :

(i) Internal injuries to thorax cut injury to the parietal pleura corresponding to the injury no. 1.

(ii) Internal injury to diaphragm cut injury through and through corresponding to injury no. 1.

(iii) Peritoneum cut injury to peritoneum corresponding to injury no. 1.

(iv) Cut injury to left gastric artery, cut injury to outer layer of stomach cut injury to peritoneum corresponding to injury no. 1.

Cause of death was opined to be hemorrhagic shock due to stab injury.

In the opinion of the doctor, injury no.1 was of grave nature and proved to be fatal. Injury nos.2, 3, and 4 were simple injuries. Injury nos. 5 and 6 did not cause any internal damage.

11. In both dying declarations made by Prashant (deceased), the contradiction had been regarding place of injuries and nothing else which has been held by both the courts below to be immaterial. What is material in both the dying declarations that on seeing Prashant, deceased and Sandhya

together, appellant got annoyed and immediately took out the knife which he had with him and gave three blows on the body of deceased.

12. It is evident from the medical report that the appellant has not given the knife blow with full force. Otherwise, the depth of the injury No.1 would have been more than just "cavity deep". The fact that the appellant stabbed the deceased twice in the thigh and only once in the chest is indicative of a lack of intention to cause death. Had the appellant intended to kill the deceased, it is unlikely that he would flee from the scene without having inflicted more injuries on the deceased.

13. The judgment cited by the learned counsel for the State, *Pulicherla Nagaraju alias Nagaraja Reddy v. State of A.P.,* AIR 2006 SC 3010, is quite distinguishable from the present case as in that case the knife blow that caused death was given with full force and the single injury was found to be 12 c.m. deep. Even in that case the law has been laid down as under:

> "The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances: (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any premeditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a



> single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention".

14. This Court has re-iterated the same view in *Sridhar Bhuyan v. State of Orissa,* AIR 2004 SC 4100; and *Gali Venkataiah v. State of Andhra Pradesh,* AIR 2008 SC 462.

15. It is not the case even in any of the dying declarations that the appellant had premeditated or preplanned his actions or was having any information prior to the incident that the deceased would be found with his sister Sandhya at the place of occurrence. Their meeting might have been taken by the appellant as temerity. Therefore, it is a clear cut case of loss of self control and in the heat of passion, the appellant caused injuries to Prashant (deceased). By no means, can it be held to be a case of premeditation. The appellant did not cause all the injuries on the vital part of the body. Nor the appellant caused the fatal injury No.1 with full force, otherwise the said injury could have been very deep. On examining the weapon, Dr. Amit Kumar (PW.1) opined that injury Nos. 1, 2 and 3 could be caused by handle of the knife. Death of Parshant (deceased) was not instantaneous rather he died on third day of the incident. The appellant has not taken any undue advantage or acted in cruel or in unusual manner.

16. Undoubtedly, injury No.1 had been caused on the vital part of the body of the deceased but it must also be borne in mind that when a person loses his sense he may act violently and that by itself may not be a ground to be considered against him while determining the nature of the offence. Each case is to be considered on its own facts, however, taking a holistic view of the matter. In such a case, the entire attending circumstances must be taken into consideration in order to find out the nature of the actual offence committed. (See: *Kailash*

*v. State of M.P.,* (2006 (11) SCC 420; and *Karuppusamy & Anr. v. State of Tamil Nadu,* (2006) 11 SCC 459.)

17. Thus, the facts and circumstances of the case require alteration of conviction of the appellant from Section 302 IPC to Section 304 Part-I IPC and ends of the justice would be met by awarding ten years rigorous imprisonment to the appellant. Ordered accordingly. The appeal is disposed of.

D.G. Appeal disposed of.



INDUSTRIAL INVESTMENT BANK OF INDIA LTD.
*v.*
M/S JAIN CABLES PVT. LTD. & ORS.
(Civil Appeal No. 8123 of 2004)

JANUARY 05, 2011

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

*Industrial Reconstruction Bank of India Act, 1984 – s. 40 – Enforcement of claims by the Reconstruction Bank – Industrial concern defaulting in repayment of loan given by the Reconstruction Bank (IRBI) – Subsequent, transfer of undertakings of IRBI to Industrial Investment Bank of India Ltd. (IIBIL) in 1997 – Recalling of loan by IIBIL – Non-payment of loan by industrial concern – Application by IIBIL against industrial concern u/s. 40 of the 1984 Act before the High Court – Maintainability of – Held: Application is maintainable – Sub-section (4) of Section 4 read with Sub-Section (2)(b) of Section 13 of the 1997 Act makes it clear that any cause of action by IRBI in relation to its undertakings existing immediately before March 27, 1997 may be continued and enforced by IIBIL as it might have been enforced by IRBI if the 1997 Act had not been enacted – Provisions of Chapter VIII of the 1984 Act, that include s. 40 would continue to be applicable in respect of the arrangements entered into by IRBI with an industrial concern u/s. 18 of the 1984 Act and the IIBIL would be able to enforce the same as fully and effectually as if the 1997 Act had not been enacted – Industrial Reconstruction Bank (Transfer of Undertaking and Repeal) Act, 1997 – ss. 4(4), 13(2)(b).*

**The Industrial Reconstruction Bank of India (IRBI) sanctioned certain loan in favour of respondent No. 1 who defaulted in repayment of the loan amount. The IRBI told respondent No. 1 to make payment as per an amended**

**schedule but respondent No. 1 did not adhere to the same. Thereafter, the Industrial Reconstruction Bank (Transfer of Undertaking and Repeal) Act, 1997 came into force and the undertakings of the IRBI were transferred to and vested in the Industrial Investment Bank of India Ltd. (IIBIL). The IIBIL gave a notice to respondent No. 1 to make the payment but respondent No. 1 did not make the payment. The IIBIL then filed an application before the High Court under Section 40 of the Industrial Reconstruction Bank of India Act, 1984. The High Court held that the application was not maintainable as it was filed under the provision no longer in existence. Therefore, the appellant filed the instant appeal.**

**Allowing the appeal, the Court**

**HELD: 1.1 A plain reading of Sub-section (4) of Section 4 coupled with Sub-Section (2) (b) of Section 13 of the Industrial Reconstruction Bank (Transfer of Undertaking and Repeal) Act, 1997 would make it manifest and clear that any cause of action by the IRBI in relation to its undertakings existing immediately before March 27, 1997 may be continued and enforced by the IIBIL as it might have been enforced by the IRBI if the 1997 Act had not been enacted. The provisions of Chapter VIII of the Industrial Reconstruction Bank of India Act, 1984, that include Section 40, would continue to be applicable in respect of the arrangements entered into by the IRBI with an industrial concern under Section 18 of the 1984 Act and the IIBIL would be able to enforce the same as fully and effectually as if the 1997 Act had not been enacted. [Para 10] [92-G-H; 93-A-B]**

**1.2 The High Court in the impugned judgment referred to Section 13 of the 1997 Act, but failed to notice the true import of Sub-section 2(b) of Section 13 as also overlooked the provisions of Sub-Section (4) of Section**



**4 of the 1997 Act; and as a result arrived at a conclusion that is patently erroneous and cannot be sustained. On the basis of the provisions contained in Section 4 (4) and Section 13(2)(b) of the 1997 Act, there is no doubt that the application filed by the appellant under Section 40 of the 1984 Act for the enforcement of its claim against respondent No.1 was perfectly maintainable before the High Court. The order passed by the High Court is set aside. [Paras 11 and 12] [93-C-F]**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8123 of 2004.

From the Judgment and Order dated 01.11.2002 of the High Court of Judicature of Rajasthan at Jodhpur in S.B.C. Misc. Application No. 40 of 1999.

Sanjay Bhatt and Amit Wadhwa (for Shobha for the Appellant.

Dr. Manish Singhvi, AAG, Sahil S. Chauhan and P.V. Yogeswaran for the Respondents.

The Judgment of the Court was delivered by

**AFTAB ALAM, J.** 1. The appellant, Industrial Investment Bank of India Limited ("IIBIL" for short), is the successor of the Industrial Reconstruction Bank of India ("IRBI" for short) constituted under section 3(1) of the Industrial Reconstruction Bank of India Act, 1984, ("the 1984 Act" for short).

2. In the year 1985, the IRBI had sanctioned a loan of rupees twenty two lakhs (Rs.22,00,000/-) in favour of M/s Jain Cables Pvt. Ltd., respondent no.1. Out of the sanctioned amount a sum of rupees twenty lakhs (Rs.20,00,000/-) was actually disbursed in the year 1991 and the balance amount of the loan was cancelled. The repayment of the loan was secured by mortgage of the immovable properties of the borrower company and by creating the charge of hypothecation over its immovable

properties in favour of the IRBI. The borrower company defaulted in repayment of the loan and in 1994, on its request, the IRBI granted to it an amended schedule of payment under which the last installment of the loan amount was to be paid on February 15, 1996. The respondent no.1 did not adhere even to the rescheduled payment plan.

3. On March 27, 1997, the Industrial Reconstruction Bank (Transfer of Undertaking and Repeal) Act, 1997 ("the 1997 Act" for short) came into force and by virtue of notification, S.O. 242 (E), dated March 25, 1997 the undertakings of the IRBI were transferred to and vested in the IIBIL with effect from March 27, 1997.

4. On August 14, 1997, the IIBIL gave a notice to respondent no.1 under section 38 of the 1984 Act recalling the loan. The notice did not bring any payments from respondent no.1 and after about 2 years from the date of the notice, in the year 1999, the IIBIL filed an application before the Rajasthan High Court, under section 40 of the 1984 Act. The application filed by the IIBIL was registered in the High Court as S.B.C. Misc. Application No.40/99. The High Court issued notice on the application but after hearing the other side, rejected it by order dated November 1, 2002 holding that the application was not maintainable as it was filed under the provision of a repealed Act. The High Court in its brief order referred to section 40 of the 1984 Act and the repeal and saving provision as contained in section 13 of the 1997 Act and took the view that the provision of section 40 of the 1984 Act was purely procedural and it simply provided the IRBI with an additional forum besides those available under section 39 of the 1984 Act and section 69 of the Transfer of Property Act. On the other hand, the provision of repeal contained in section 13 of the 1997 Act was definite and categorical and the provision of section 40 of the 1984 Act was not saved by sub-section (2) of section 13 of the 1997 Act. In other words, according to the High Court, the application was filed under a provision that was



no longer in existence. In this connection, the High Court held and observed as follows:

> "Thus, to put it in other words, the rights and liabilities of the Company, as they existed on the appointed day, are saved, obviously substantive rights qua the other persons, and the liabilities. Section 40 does not confer any such substantive right, as it is only procedural provision providing an additional forum to be available to the Company for effecting recovery of its outstandings by praying for taking up & different course than the one available under Section 39 of that Act, or Section 69 of Transfer of Property Act.
>
> As such, the provisions of section 40 or more remain available to the petitioner. An overall reading of the repealing Act of 1997 also does show that it predominantly comprehends the rights and liabilities of Industrial Investment Bank of India, which are to devolve on Industrial Reconstruction Bank of India, as the Act is to provide for transfer and vesting of the Undertakings to the Company to be formed and registered as company under the Companies Act, and for matters concerned therewith, or incidental thereto, and also to repeal the 1984 Act."

5. For the sake of the record, it may also be noted that during the pendency of the proceeding before the High Court, the IIBIL also moved the Debt Recovery Tribunal. But its application to the Debt Recovery Tribunal was against the guarantor alone and no relief was claimed against respondent no.1, the borrower company. The application against the guarantor was decreed *ex parte* but the decree has so far not borne any fruits as it was a personal guarantee and there were no assets against which the decree may be executed.

6. The IIBIL has now brought this matter in appeal, by grant of special leave, against the order of the High Court dated November 1, 2002 rejecting its application filed against the

borrower company, respondent no.1, under section 40 of the 1984 Act.

7. At this stage, it will be useful to take a look at some of the provisions of the 1984 Act and the 1997 Act. Section 2(a) of the 1984 Act defined "assistance" to mean any direct or indirect financial, managerial or technical assistance granted by the Reconstruction Bank in pursuance of its business referred to in section 18. Section 2(c) defined "assisted industrial concern" to mean any industrial concern to which any assistance was given by the Reconstruction Bank. Chapter VIII of the Act contained sections 36 to 51 dealing with the "Special Powers of the Reconstruction Bank". Section 38, in that chapter, authorized the IRBI, under certain conditions enumerated in clauses (a) to (f), to ask, by notice in writing, any industrial concern to which it had granted any assistance to forthwith discharge in full its entire dues and also discharge its other liabilities to the Bank. The statutory provision expressly overrode anything contained in any agreement to the contrary. Section 39 dealt with the rights of the IRBI in case of default by any assisted industrial concern. Section 40 of the 1984 Act provided for the enforcement of claims by the IRBI and in so far as relevant for the present it is as under:

"40. **Enforcement of claims by the Reconstruction Bank**- (1) (a) Where an assisted industrial concern makes any default in the payment of any dues to, or in meeting its obligation in relation to any other assistance given by the Reconstruction Bank or otherwise fails to comply with the terms of agreement with that Bank, or

(b) where the Reconstruction Bank makes an order under section 38 requiring the assisted industrial concern to make immediate repayment of any assistance granted to it and the industrial concern fails to make such repayment,

then, without prejudice to the provisions of section 39 of



this Act and of section 69 of the Transfer of Property Act, 1882, any officer of the Reconstruction Bank generally or specially authorised by the Board in this behalf, may apply to the concerned High Court for one or more of the following reliefs, namely :—

(i) for an order for the sale or lease of the property assigned, charged, hypothecated, mortgaged or pledged to the Reconstruction Bank as security for the assistance granted to it, or for the sale or lease of any other property, of the industrial concern; or

(ii) **********

(iii) for an *ad interim* injunction restraining the industrial concern from transferring or removing its machinery, plant or equipment from the premises of the industrial concern without the previous permission of the Board, where such transfer or removal is apprehended; or

(iv) for an order for the appointment of a receiver where there is apprehension of the machinery, equipment or any other property of substantial value which has been assigned, charged, hypothecated, mortgaged or pledged to the Reconstruction Bank, being removed from the premises of the industrial concern or of being transferred without the previous permission of the Reconstruction Bank.

(2) **********

(3) Where an application is for any relief mentioned in sub-clause (i) of sub-section (1), the High Court may,—

(a) by an order, authorise the Reconstruction Bank to grant lease of such property to such person and on such terms and conditions as may be specified in the said order; or

(b) pass an order calling upon the person whose property has been assigned, charged, hypothecated, mortgaged or pledged to the Reconstruction Bank to show cause, on a date to be specified in the notice, as to why an order for the sale of such property or so much of such property, as would, on being sold, realise, in its estimation, an amount equivalent in value to the outstanding dues of the industrial concern to the Reconstruction Bank, together with costs of the proceedings taken under this section, shall not be made; or

(c) pass an *ad interim* order attaching any property of the industrial concern which has not been assigned, charged, hypothecated, mortgaged or pledged to the Reconstruction Bank, or so much of such property, as would on being sold, realise, in its estimation, an amount equivalent in value to the outstanding dues of the industrial concern to the Reconstruction Bank, together with costs of the proceedings taken under this section, and pass an order calling upon the industrial concern to show cause on a date to be specified in the notice as to why such order of *ad interim* attachment shall not be made absolute.

(4) **********

(5) Where an application is for the relief mentioned in sub-clause (iii) of sub-section (1), the High Court shall grant an *ad interim* injunction restraining the industrial concern from transferring or removing its machinery or other equipment and issue a notice calling upon the industrial concern to show cause, on a date to be specified in the notice, as to why such *ad interim* injunction shall not be made absolute.

(6) Where an application is for the relief mentioned in sub-clause (iv) of sub-section (1), the High Court shall pass an ad interim order appointing a receiver in respect of the property assigned, charged, hypothecated, mortgaged or pledged and shall issue a notice calling upon the industrial concern to show cause, on a date to be specified in the notice, as to why the *ad interim* order appointing the receiver shall not be made absolute.



(7) **********

(8) **********

(9) **********

(10) **********

(11) **********

(12) **********

(13) **********

8. Then comes, the 1997 Act. Section 2(a) of the 1997 Act defines "appointed day" which is March 27, 1997 vide notification dated March 25, 1997 issued by the Central Government and published in the Gazette of India, Extra., of that date. Section 2(b) defines "company" to mean the Industrial Development Bank of India Ltd to be formed and registered under the Companies Act. Section 2(c) defines "Reconstruction Bank" to mean the Industrial Reconstruction Bank of India established under sub-section (1) of section 3 of the 1984 Act. Section 3 of the 1997 Act provides that on the appointed date (March 27, 1997) the undertakings of the Reconstruction Bank shall be transferred to and vest in the Company. Section 4 of the 1997 Act deals with the effect of vesting of undertaking in the Company and provides as follows:

"4. **General effect of vesting of undertaking in Company**-(1) The Central Government, being the shareholder of the Reconstruction Bank immediately before the appointed day, shall be deemed to be registered, on and from the appointed day, as a shareholder of the Company.

(2) The undertakings of the Reconstruction Bank which are transferred to, and which vests in, Company under Section 3 shall be deemed to include all business, assets, rights, powers, authorities and privileges and all properties, movable and immovable, real and personal, corporeal and incorporeal, in possession or reservation, present or contingent of whatever nature and whatsoever situate including lands, buildings, vehicles, cash balances, deposits, foreign currencies, disclosed and undisclosed reserves, reserve fund, special reserve fund, benevolent reserve fund, any other fund, stocks, investments, shares, bonds, debentures, security, management of any industrial concern, loans, advances and guarantees given to the industrial concerns, tenancies, leases and book debts and all other rights and interests arising out of such property as were immediately before the appointed day in the ownership, possession or power of the Reconstruction Bank in relation to its undertakings, within or without India, all books of account, registers, records and documents relating thereto and shall also be deemed to include all borrowings, liabilities and obligations of whatever kind within or without India then subsisting of the Reconstruction Bank in relation to its undertakings.

(3) All contracts, deeds, bonds, guarantees, powers of attorney, other instruments and working arrangements subsisting immediately before the appointed day and affecting the Reconstruction Bank shall cease to have effect or to be enforceable against the Reconstruction Bank shall be of as full force and effect against or in favour of the Company in which the undertakings of the Reconstruction Bank have vested by virtue of this Act and enforceable as fully and effectually as if instead of the Reconstruction Bank, the Company had been therein or had been a party thereto.

(4) *Any* proceeding or *cause of action pending* or existing *immediately before the appointed day by* or against *the*



*Reconstruction Bank in relation to its undertakings may,* as from the appointed day, *be continued and enforced by or against the Company in which the undertakings of the Reconstruction Bank have vested by virtue of this Act as it might have been enforced by* or against the Reconstruction Bank *if this Act had not been enacted* and shall cease to be enforceable by or against the Reconstruction Bank."

(Emphasis added)

9. Section 13 of the 1997 Act containing the repeal and saving clause is as follows:

"13. **Repeal and saving of Act 62 of 1984**-(1) On the appointed day, the Industrial Reconstruction Bank of India Act, 1984 shall stand repealed.

(2) Notwithstanding the repeal of the Industrial Reconstruction Bank of India Act, 1984-

(a) the Company shall, so far as may be, comply with the provisions of Chapter VII of the Act so repealed for any of the purposes related to the annual accounts and audit of the Reconstruction Bank;

(b) *the provisions of Chapter VIII of the Act so repealed will continue to be applicable in respect of the arrangements entered into by the Reconstruction Bank with an industrial concern under section 18 thereof up to the appointed day and the Company will be entitled to act upon and enforce the same as fully and effectually as if this Act had not been enacted."*

10. A plain reading of sub-section (4) of section 4 coupled with sub-section (2) (b) of section 13 of the 1997 Act would make it manifest and clear that any cause of action by the IRBI in relation to its undertakings existing immediately before March

27, 1997 may be continued and enforced by the IIBIL as it might have been enforced by the IRBI if the 1997 Act had not been enacted. And further, that the provisions of Chapter VIII of the 1984 Act, that include section 40, would continue to be applicable in respect of the arrangements entered into by the IRBI with an industrial concern under section 18 of the 1984 Act and the IIBIL would be able to enforce the same as fully and effectually as if the 1997 Act had not been enacted.

11. The High Court in the impugned judgment referred to section 13 of the 1997 Act, but failed to notice the true import of sub-section 2(b) of section 13. Further, the High Court completely overlooked the provisions of sub-section (4) of section 4 of the 1997 Act and as a result arrived at a conclusion that is patently erroneous and cannot be sustained for a moment.

12. On the basis of the provisions contained in section 4 (4) and section 13(2)(b) of the 1997 Act, we do not have the slightest doubt that the application filed by the appellant under section 40 of the 1984 Act for the enforcement of its claim against respondent no.1 was perfectly maintainable before the High Court. We, accordingly, accept the appeal and set aside the order dated November 1, 2002 passed by the High Court. As a result, S.B.C. Misc. Application No.40/99 is restored to its file and the High Court shall now proceed to examine it on merits and dispose it of in accordance with law.

D.G. Appeal allowed.



KAILAS & OTHERS

*v.*

STATE OF MAHARASHTRA TR. TALUKA P.S.

(Criminal Appeal No. 11 of 2011)

JANUARY 05, 2011

**[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]**

*Penal Code, 1860 – ss. 459, 354, 323, 506 (2) rw s. 34 – Conviction under – Young woman, belonging to Scheduled Tribe beaten with fists and kicks, stripped naked and then paraded in naked condition on the road of the village by accused persons – Conviction u/ss. 452, 354, 323, 506 (2) rw s. 34 and sentenced to RI for six months with imposition of fine; sentenced to RI for one year with a fine for the offence punishable u/s. 354/34 and three months RI with a fine for the offence punishable u/s. 323/34 – Accused also convicted and sentenced u/s. 3 of the SC/ST Act – High Court acquitting the accused for the offence u/s. 3 of the SC/ST Act, however, upholding conviction under the provisions of the IPC – As regards imposition of fine, each accused directed to pay fine of Rs. 5000/- to the victim – On appeal held: There is no reason to disbelieve the statement of the victim though many witnesses turned hostile – Evidence of the victim corroborated by two prosecution witness – Medical certificate proved by doctor – Order passed by the High Court convicting the accused under various provisions of the IPC and fine imposed upheld, though sentence was too light considering the gravity of the offence – Instant case deserves total condemnation and harsh punishment – Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 – s. 3.*

**According to the prosecution, 'N' a young woman belonging to the Bhil tribe (Scheduled Tribe) in Maharashtra, had illicit relations with PW 9 who was from**

**a higher caste and had given birth to his daughter and was also pregnant through him for a second time. On the fateful day, the appellants-accused persons beat her with fists and kicks and stripped her naked after tearing her clothes, and then paraded her in naked condition on the road of a village while being beating and abusing her. The Court of Sessions convicted the accused under Sections 452, 354, 323, 506 (2) read with Section 34 IPC and sentenced them to RI for six months with imposition of fine. Rs.100/-; sentenced them to RI for one year with fine of Rs. 100/- for the offence punishable under Sections 354/34 IPC; sentenced under Section 323/34 IPC to three months RI with a fine of Rs. 100/-. The appellants were also convicted and sentenced under Section 3 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The High Court acquitted the appellants of the offence under Section 3 of the SC/ST Act, but upheld the conviction under the provisions of the IPC. However, as regards imposition of fine, each of the appellant was directed to pay a fine of Rs. 5000/- only to the victim. Therefore, the appellants filed the instant appeal.**

**Dismissing the appeal, the Court**

**HELD: 1.1 There is no reason to interfere with the judgment of the High Court convicting the appellants under various provisions of the Penal Code and imposing fine on them. In fact, the sentence was too light considering the gravity of the offence. [Para 11] [100-F]**

**1.2 There is the evidence of the victim 'N' PW4 herself and there is no reason to disbelieve the same. Although many of the witnesses have turned hostile, there is no reason to disbelieve the statement of PW 4. In fact, PW9 supported the prosecution case to some extent. He accepted his illicit relations with PW 4 and admitted that he had a daughter from her and she was pregnant for a**



**second time through him. Even though PW 9 did not support the actual incident, his evidence at least on the points admitted by him corroborates the evidence of PW 4. [Para 12] [100-G-H; 107-A]**

**1.3 PW 2 proved the spot. He stated that the panchanama was drawn in front of the house of PW 4. At the time of the panchanama, PW 4 was accompanied by the police and she had shown the entire area from her house to the place in front of the shop of PW3. The police seized the clothes in torn condition, produced by PW4. There were pieces of bangles lying in front of the house. Thus, there is no reason to disbelieve PW2. [Para 13] [101-B-C]**

**1.4 It appears that the accused are powerful persons in the village inasmuch as that all the eye-witnesses have turned hostile out of fear or some inducement. However, PW8-doctor proved the medical certificate and stated that there were two contusions on the person of the victim. [Para 14] [101-D]**

**1.5 The parade of a tribal woman on the village road in broad day light is shameful, shocking and outrageous. The dishonor of PW 4 called for harsher punishment, it is surprising that the State Government did not file any appeal for enhancement of the punishment awarded by the Additional Sessions Judge. [Paras 15] [101-E-F]**

**2. India has tremendous diversity and this is due to the large scale migrations and invasions into India over thousands of years. The various immigrants/invaders who came into India brought with them their different cultures, languages, religions, etc. which accounts for the tremendous diversity in India. Since India is a country of great diversity, it is absolutely essential if the country is united to have tolerance and equal respect for all communities and sects. The Constitution of India which**

**is secular in character, caters to the tremendous diversity in our country. Thus, it is the Constitution of India which is keeping us together despite all our tremendous diversity, because the Constitution gives equal respect to all communities, sects, lingual and ethnic groups, etc. in the country. The Constitution guarantees to all citizens freedom of speech (Article 19), freedom of religion (Article 25), equality (Articles 14 to 17), liberty (Article 21), etc. However, giving formal equality to all groups or communities in India would not result in genuine equality. The historically disadvantaged groups must be given special protection and help so that they can be uplifted from their poverty and low social status. It is for this reason that special provisions have been made in our Constitution in Articles 15(4), 15(5), 16(4), 16(4A), 46, etc. for the upliftment of these groups. Among these disadvantaged groups, the most disadvantaged and marginalized in India are the Adivasis (STs), who, are the descendants of the original inhabitants of India, and are the most marginalized and living in terrible poverty with high rates of illiteracy, disease, early mortality etc. Thus, it is the duty of all people who love the country to see that no harm is done to the Scheduled Tribes and that they are given all help to bring them up in their economic and social status, since they have been victimized for thousands of years by terrible oppression and atrocities. The mentality of the countrymen towards these tribals must change, and they must be given the respect they deserve as the original inhabitants of India. [Para 31, 34] [107-E-G; 108-A-C]**

**3. The injustice done to the tribal people of India is a shameful chapter in the country's history. Instances like the instant case deserves total condemnation and harsh punishment. [Paras 36 and 40] [108-G-H; 109-G]**

*Samatha vs. State of Andhra Pradesh and Ors.* **AIR 1997 SC 3297 – referred to.**



**Case Law Reference:**

**AIR 1997 SC 3297 Referred to Para 34**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 11 of 2011.

From the Judgment and Order dated 10.03.2010 of the High Court of Bombay Bench at Aurangabad in Criminal Appeal No. 62 of 1998.

Dilip A. Taur and Anil Kumar for the Appellants.

The following Judgment of the Court was delivered

JUDGMENT

1. Leave granted.

2. This appeal has been filed against the final judgment and order dated 10.03.2010 in Criminal Appeal No. 62 of 1998 passed by the Aurangabad Bench of Bombay High Court.

3. Heard learned counsel for the appellants.

4. This appeal furnishes a typical instance of how many of our people in India have been treating the tribal people (Scheduled Tribes or Adivasis), who are probably the descendants of the original inhabitants of India, but now constitute only about 8% of our total population, and as a group are one of the most marginalized and vulnerable communities in India characterized by high level of poverty, illiteracy, unemployment, disease, and landlessness.

5. The victim in the present case is a young woman Nandabai 25 years of age belonging to the Bhil tribe which is a Scheduled Tribe (ST) in Maharashtra, who was beaten with fists and kicks and stripped naked by the accused persons after tearing her blouse and brassieres and then got paraded

in naked condition on the road of a village while being beaten and abused by the accused herein.

6. The four accused were convicted by the Additional Sessions Judge, Ahmednagar on 05.02.1998 under Sections 452, 354, 323, 506(2) read with Section 34 IPC and sentenced to suffer RI for six months and to pay a fine of Rs. 100/-. They were also sentenced to suffer RI for one year and to pay a fine of Rs. 100/- for the offence punishable under Sections 354/34 IPC. They were also sentenced under Section 323/34 IPC and sentenced to three months RI and to pay a fine of Rs. 100/-. The appellants were further convicted under Section 3 of the Scheduled Cases and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and sentenced to suffer RI for one year and to pay a fine of Rs. 100/-.

6. In appeal before the High Court the appellants were acquitted of the offence under Section 3 of the SC/ST Act, but the conviction under the provisions of the IPC were confirmed. However, that part of the order regarding fine was set aside and each of the appellant was directed to pay a fine of Rs. 5000/- only to the victim Nandabai.

7. The prosecution case is that the victim Nandabai who belongs to the Bhil community was residing with her father, handicapped brother, and lunatic sister. She had illicit relations with PW9 Vikram and had given birth to his daughter and was also pregnant through him for a second time. Vikram belongs to a higher caste and his marriage was being arranged by his family with a woman of his own caste. On 13.5.1994 at about 5.00 P.M. when the victim Nandabai was at her house the four accused went to her house and asked why she had illicit relations with Vikram and started beating her with fists and kicks. At that time the accused Kailas and Balu held her hands while accused Subabai @ Subhadra removed her sari. The accused Subhash then removed her petticoat and accused Subabai tore the blouse and brassiere of the victim Nandabai.



Thereafter the accused Subabai and Balu paraded the victim Nandabai on the road of the village and at that time the four accused herein were beating and abusing the victim Nandabai.

8. At about 8.40 p.m. an FIR was lodged at Taluka Police Station and after investigation a charge-sheet was filed. After taking evidence the learned Additional Sessions Judge convicted the accused.

9. As already mentioned above, the conviction under the provisions of the IPC have been upheld but that under the Scheduled Cases and Scheduled Tribes (Prevention of Atrocities) Act, 1989 have been set aside.

10. We are surprised that the conviction of the accused under the Scheduled Cases and Scheduled Tribes (Prevention of Atrocities) Act, 1989 was set aside on hyper technical grounds that the Caste Certificate was not produced and investigation by a Police Officer of the rank of Deputy Superintendent of Police was not done. These appear to be only technicalities and hardly a ground for acquittal, but since no appeal has been filed against that part of the High Court judgment, we are now not going into it.

11. However, we see no reason to interfere with the judgment of the High court convicting the appellants under various provisions of the IPC and imposing fine on them. In fact, we feel that the sentence was too light considering the gravity of the offence.

12. There is the evidence of the victim Nandabai PW4 herself and we see no reason to disbelieve the same. Although many of the witnesses have turned hostile, we see no reason to disbelieve the statement of the victim Nandabai. In fact, PW9 Vikram supported the prosecution case to some extent. He has accepted his illicit relations with victim Nandabai and admitted that he had a daughter from her and she was pregnant for a second time through him. Even though he did not support the

actual incident, we are of the opinion that Vikram's evidence at least on the points admitted by him corroborates the evidence of victim Nandabai.

13. PW2 Narendra Kalamkar has proved the spot panchanama Exh. 12. He stated that the panchanama was drawn in front of the house of PW4, the victim Nandabai. At the time of the panchanama, Nandabai was accompanied by the police and she had shown the entire area from her house to the place in front of the shop of PW3 Shankar Pawar. The police seized the clothes in torn condition, produced by PW4 Nandabai. There were pieces of bangles lying in front of the house. Hence there is no reason to disbelieve PW2 Narendra Kalamkar.

14. It appears that the accused are powerful persons in the village inasmuch as that all the eye-witnesses have turned hostile out of fear or some inducement. However, PW8 Dr. Ashok Ingale proved the medical certificate Exh. 26 and stated that there were two contusions on the person of the victim.

15. The parade of a tribal woman on the village road in broad day light is shameful, shocking and outrageous. The dishonor of the victim Nandabai called for harsher punishment, and we are surprised that the State Government did not file any appeal for enhancement of the punishment awarded by the Additional Sessions Judge.

16. It is alleged by the appellants that the people belonging to the Bhil community live in torn clothes as they do not have proper clothes to wear. This itself shows the mentality of the accused who regard tribal people as inferior or sub-humans. This is totally unacceptable in modern India.

17. The Bhils are probably the descendants of some of the original inhabitants of India living in various parts of the country particularly southern Rajasthan, Maharashtra, Madhya Pradesh etc. They are mostly tribal people and have managed



to preserve many of their tribal customs despite many oppressions and atrocities from other communities.

18. It is stated in the Article 'World Directory of Minorities and Indigenous Peoples – India: Advasis', that in Maharashtra Bhils were mercilessly persecuted in the 17th century. If a criminal was caught and found to be a Bhil, he or she was often killed on the spot. Historical accounts tell us of entire Bhil communities being killed and wiped out. Hence, Bhils retreated to the strongholds of the hills and forests.

19. Thus Bhils are probably the descendants of some of the original inhabitants of India known as the 'aborigines' or Scheduled Tribes (Adivasis), who presently comprise of only about 8% of the population of India. The rest 92 % of the population of India consists of descendants of immigrants. *Thus India is broadly a country of immigrants like North America.* We may consider this in some detail.

**India is broadly a country of immigrants**

20. While North America (USA and Canada) is a country of new immigrants, who came mainly from Europe over the last four or five centuries, India is a country of old immigrants in which people have been coming in over the last ten thousand years or so. Probably about 92% people living in India today are descendants of immigrants, who came mainly from the North-West, and to a lesser extent from the North-East. Since this is a point of great importance for the understanding of our country, it is necessary to go into it in some detail.

21. People migrate from uncomfortable areas to comfortable areas. This is natural because everyone wants to live in comfort. Before the coming of modern industry there were agricultural societies everywhere, and India was a paradise for these because agriculture requires level land, fertile soil, plenty of water for irrigation etc. which was in abundance in India. Why should anybody living in India migrate to, say, Afghanistan which

has a harsh terrain, rocky and mountainous and covered with snow for several months in a year when one cannot grow any crop? Hence, almost all immigrations and invasions came from outside into India (except those Indians who were sent out during British rule as indentured labour, and the recent migration of a few million Indians to the developed countries for job opportunities). *There is perhaps not a single instance of an invasion from India to outside India.*

22. India was a veritable paradise for pastoral and agricultural societies because it has level & fertile land, hundreds of rivers, forests etc. and is rich in natural resources. Hence for thousands of years people kept pouring into India because they found a comfortable life here in a country which was gifted by nature.

23. As the great Urdu poet Firaq Gorakhpuri wrote:

"Sar Zamin-e—hind par aqwaam-e-alam ke firaq Kafile guzarte gae Hindustan banta gaya"

Which means –

"In the land of Hind, the Caravans of the peoples of The world kept coming in and India kept getting formed".

24. Who were the original inhabitants of India ? At one time it was believed that the Dravidians were the original inhabitants. However, this view has been considerably modified subsequently, and now the generally accepted belief is that *the original inhabitants of India were the pre-Dravidian aborigines* i.e. the ancestors of the present tribals or advasis (Scheduled Tribes). In this connection it is stated in The Cambridge History of India (Vol-I), Ancient India as follows:

"It must be remembered, however, that, when the term 'Dravidian' is thus used ethnographically, it is nothing more than a convenient label. It must not be assumed that the speakers of the Dravidian languages are aborigines. In



Southern India, as in the North, the same general distinction exists between the more primitive tribes of the hills and jungles and the civilized inhabitants of the fertile tracts; and some ethnologists hold that the difference is racial and not merely the result of culture. Mr. Thurston, for instance, says:

> *"It is the Pre-Dravidian aborigines, and not the later and more cultured Dravidians, who must be regarded as the primitive existing race*..... These Pre-Dravidians ..... are differentiated from the Dravidian classes by their short stature and broad (platyrhine) noses. There is strong ground for the belief that the Pre-Dravidians are ethnically related to the Veddas of Ceylon, the Talas of the Celebes, the Batin of Sumatra, and possibly the Australians. (*The Madras Presidency*, pp. 124-5.)"

*It would seem probable, then, that the original speakers of the Dravidian languages were outsiders,* and that the ethnographical Dravidians are a mixed race. In the more habitable regions the two elements have fused, while representatives of the aborigines are still in the fastnesses (in hills and forests) to which they retired before the encroachments of the newcomers. If this view be correct, we must suppose that these aborigines have, in the course of long ages, lost their ancient languages and adopted those of their conquerors. The process of linguistic transformation, which may still be observed in other parts of India, would seem to have been carried out more completely in the South than elsewhere.

The theory that the Dravidian element is the most ancient which we can discover in the population of Northern India, must also be modified by what we now know of the Munda languages, the Indian representatives of the Austric family of speech, and the mixed languages in which their influence has been traced (p.43). Here, according to the

evidence now available, *it would seem that the Austric element is the oldest*, and that it has been overlaid in different regions by successive waves of Dravidian and Indo-European on the one hand, and by Tibeto-Chinese on the other. Most ethnologists hold that there is no difference in physical type between the present speakers of Munda and Dravidian languages. This statement has been called in question; but, if it is true, it shows that racial conditions have become so complicated that it is no longer possible to analyse their constituents. Language alone has preserved a record which would otherwise have been lost.

At the same time, there can be little doubt that Dravidian languages were actually flourishing in the western regions of Northern India at the period when languages of the Indo-European type were introduced by the Aryan invasions from the north-west. Dravidian characteristics have been traced alike in Vedic and Classical Sanskrit, in the Prakrits, or early popular dialects, and in the modern vernaculars derived from them. The linguistic strata would thus appear to be arranged in the order-Austric, Dravidian, Indo-European.

There is good ground, then, for supposing that, before the coming of the Indo-Aryans speakers the Dravidian languages predominated both in Northern and in Southern India; but, as we have seen, older elements are discoverable in the populations of both regions, and therefore the assumption that the Dravidians are aboriginal is no longer tenable. Is there any evidence to show whence they came into India?

*No theory of their origin can be maintained which does not account for the existence of Brahui, the large island of Dravidian speech in the mountainous regions of distant Baluchistan* which lie near the western routes into India. Is Brahui a surviving trace of the immigration of Dravidian –speaking peoples into India from the west? Or



does it mark the limits of an overflow form India into Baluchistan? Both theories have been held; but as *all the great movements of peoples have been into India and not out of India,* and as a remote mountainous district may be expected to retain the survivals of ancient races while it is not likely to have been colonized, the former view would a *priori* seem to be by far the more probable."

(See 'Brahui' on Google).

25. In Google 'The original inhabitants of India', it is mentioned :

"A number of earlier anthropologists held the view that the Dravidian peoples together were a distinct race. However, comprehensive genetic studies have proven that this is not the case.

*The original inhabitants of India may be identified with the speakers of the Munda languages, which are unrelated to either Indo-Aryan or Dravidian languages"*

26. Thus the generally accepted view now is that the original inhabitants of India were not the Dravidians but the pre-Dravidians Munda aborigines whose descendants presently live in parts of Chotanagpur (Jharkhand), Chattisgarh, Orissa, West Bengal, etc., the Todas of the Nilgiris in Tamil Nadu, the tribals in the Andaman Islands, the Adivasis in various parts of India (especially in the forests and hills) e.g. Gonds, Santhals, Bhils, etc.

27. It is not necessary for us to go into further details into this issue, but the facts mentioned above certainly lends support to the view that *about 92% people living in India are descendants of immigrants* (though more research is required).

28. It is for this reason that there is such tremendous diversity in India. This diversity is a significant feature of our

country, and the only way to explain it is to accept that India is largely a country of immigrants.

29. There are a large number of religions, castes, languages, ethnic groups, cultures etc. in our country, which is due to the fact that India is a country of immigrants. Somebody is tall, somebody is short, some are dark, some are fair complexioned, with all kinds of shades in between, someone has Caucasian features, someone has Mongoloid features, someone has Negroid features, etc. There are differences in dress, food habits and various other matters.

30. We may compare India with China which is larger both in population and in land area than India. China has a population of about 1.3 billion whereas our population is roughly 1.1 billion. Also, China has more than twice our land area. However, all Chinese have Mongoloid features; they have a common written script (Mandarin Chinese) and 95% of them belong to one ethnic group, called the *Han Chinese*. Hence there is a broad (though not absolute) homogeneity in China.

31. On the other hand, as stated above, India has tremendous diversity and this is due to the large scale migrations and invasions into India over thousands of years. The various immigrants/invaders who came into India brought with them their different cultures, languages, religions, etc. which accounts for the tremendous diversity in India.

32. Since India is a country of great diversity, it is absolutely essential if we wish to keep our country united to have tolerance and equal respect for all communities and sects. It was due to the wisdom of our founding fathers that we have a Constitution which is secular in character, and which caters to the tremendous diversity in our country.

33. Thus it is the Constitution of India which is keeping us together despite all our tremendous diversity, because the Constitution gives equal respect to all communities, sects,



lingual and ethnic groups, etc. in the country. The Constitution guarantees to all citizens freedom of speech (Article 19), freedom of religion (Article 25), equality (Articles 14 to 17), liberty (Article 21), etc.

34. However, giving formal equality to all groups or communities in India would not result in genuine equality. The historically disadvantaged groups must be given special protection and help so that they can be uplifted from their poverty and low social status. It is for this reason that special provisions have been made in our Constitution in Articles 15(4), 15(5), 16(4), 16(4A), 46, etc. for the upliftment of these groups. Among these disadvantaged groups, the most disadvantaged and marginalized in India are the Adivasis (STs), who, as already mentioned, are the descendants of the original inhabitants of India, and are the most marginalized and living in terrible poverty with high rates of illiteracy, disease, early mortality etc. Their plight has been described by this Court in *Samatha vs. State of Andhra Pradesh and Ors.* AIR 1997 SC 3297 (vide paragraphs 12 to 15). Hence, it is the duty of all people who love our country to see that no harm is done to the Scheduled Tribes and that they are given all help to bring them up in their economic and social status, since they have been victimized for thousands of years by terrible oppression and atrocities. The mentality of our countrymen towards these tribals must change, and they must be given the respect they deserve as the original inhabitants of India.

35. The bravery of the Bhils was accepted by that great Indian warrior Rana Pratap, who held a high opinion of Bhils as part of his army.

36. The injustice done to the tribal people of India is a shameful chapter in our country's history. The tribals were called 'rakshas' (demons), 'asuras', and what not. They were slaughtered in large numbers, and the survivors and their descendants were degraded, humiliated, and all kinds of atrocities inflicted on them for centuries. They were deprived

of their lands, and pushed into forests and hills where they eke out a miserable existence of poverty, illiteracy, disease, etc. And now efforts are being made by some people to deprive them even of their forest and hill land where they are living, and the forest produce on which they survive.

37. The well known example of the injustice to the tribals is the story of Eklavya in the Adiparva of the Mahabharat. Eklavya wanted to learn archery, but Dronacharya refused to teach him, regarding him as low born. Eklavya then built a statue of Dronacharya and practiced archery before the statue. He would have perhaps become a better archer than Arjun, but since Arjun was Dronacharya's favourite pupil Dronacharya told Eklavya to cut off his right thumb and give it to him as 'guru dakshina' (gift to the teacher given traditionally by the student after his study is complete). In his simplicity Eklavya did what he was told.

38. This was a shameful act on the part of Dronacharya. He had not even taught Eklavya, so what right had he to demand 'guru dakshina', and that too of the right thumb of Eklavya so that the latter may not become a better archer than his favourite pupil Arjun?

39. Despite this horrible oppression on them, the tribals of India have generally (though not invariably) retained a higher level of ethics than the non-tribals in our country. They normally do not cheat, tell lies, and do other misdeeds which many non-tribals do. They are generally superior in character to the non-tribals. It is time now to undo the historical injustice to them.

40. Instances like the one with which we are concerned in this case deserve total condemnation and harsh punishment.

41. With these observations the appeal stands dismissed.

N.J. Appeal dismissed



NARWINDER SINGH

*v.*

STATE OF PUNJAB

(Criminal Appeal No. 590 of 2005)

JANUARY 5, 2011.

**[B.SUDERSHAN REDDY AND SURINDER SINGH NIJJAR, JJ.]**

*Penal Code, 1860:*

*s.306 – Suicidal death of a pregnant woman in her matrimonial home within 4 years of her marriage – Husband and in-laws convicted by trial court u/s 304-B – High Court converting the conviction of husband u/s 306 and acquitting the in-laws – HELD: There was no evidence of any demand for dowry soon before the death – High Court concluded that deceased had not committed suicide on account of demands for dowry but due to harassment caused by her husband and it had compounded the acute depression from which deceased was suffering after the murder of her father – High Court was fully justified in convicting the husband u/s 306 – Criminal Law – Framing of charges.*

*ss. 304-B and 306 – Dowry death and abetment of suicide – Explained.*

*Code of Criminal Procedure, 1973:*

*ss. 221(1) and (2) – Framing of charge – Conviction by trial court u/s 304-B IPC – High Court converting the conviction to one u/s 306 IPC – HELD: Nature of offence punishable u/ss 304-B and 306 IPC are not of distinct/different categories – High Court appropriately converted the conviction from s. 304-B to s. 306 IPC.*

**The wife of the appellant, who was pregnant, committed suicide in her matrimonial home within four years of her marriage with the appellant. The prosecution case was that the accused, namely, the appellant and his parents, harassed the deceased for dowry. The trial court held that the evidence on record indicated that demands for dowry had been made from the deceased time and again and that she had been harassed and compelled to commit suicide. It further held that ingredients of s.304-B IPC were satisfied on the presumptions raised u/s 114-B of the Evidence Act, 1872 and, accordingly, convicted the three accused u/s 304 IPC with a sentence of 7 years RI each. On appeal, the High Court held that the deceased had not committed suicide on account of demands for dowry, but due to harassment caused by the husband. It converted the conviction of the husband from s.304-B IPC to s.306 IPC with two years RI and acquitted his parents.**

**In the instant appeal filed by the husband-accused, it was contended for the appellant that because of the murder of the father of the deceased by extremists, she was under acute depression as a result of which she committed suicide and there was no distinction between his case and the case of his parents who were acquitted by the High Court; and that the High Court committed a grave error in convicting him u/s 306 IPC as the nature of offence punishable u/s 304 IPC was distinct and different from the offence punishable u/s 306 IPC and he was never charged with s.306 IPC.**

**Dismissing the appeal, the Court**

**HELD:**

**1. The High Court, on examination of the entire evidence, concluded that the deceased had not**



**committed suicide on account of demands for dowry but due to harassment caused by her husband, in particular, demanding that she should claim one of the two houses left behind by her father after his murder by extremists. The harassment by the appellant had compounded the acute depression from which the deceased was suffering after the murder of her father. There was no evidence of any demand for dowry soon before her death, and there was no demand whatsoever that the house in question should be transferred to either of the accused. Under s.304-B IPC, the cruelty or harassment by her husband or any relative of her husband "for, or in connection with, any demand for dowry" is a prelude to the suicidal death of the wife. Such suicidal death is defined as `dowry death'. The High Court has recorded a firm finding that the harassment was not for or in connection with any demands for dowry. But, at the same time, the High Court has concluded that the wife committed suicide due to the harassment of the appellant, in particular. The deceased had committed suicide by drinking Organo Phosphorus poison. In such circumstances, the High Court was, therefore, fully justified in convicting the appellant u/s 306 IPC. [para 9-10] [118-E-H; 119-A-D]**

**2.1. It cannot be said that the appellant could not have been convicted u/s 306 IPC in the absence of a charge being framed against him under the said section. Both the trial court and the High Court have held that the deceased had committed suicide. Therefore, the nature of the offence u/s 304-B and 306 IPC are not distinct and different categories. Mere omission or defect in framing charge would not disable the court from convicting the accused for the offence which has been found to be proved on the basis of the evidence on record. In such circumstances, the matter would fall within the purview of ss. 221 (1) and (2) Cr.P.C. The High Court upon meticulous scrutiny of the entire evidence on record**

**rightly concluded that there was no evidence to indicate the commission of the offence punishable u/s 304-B IPC. It was also observed that the deceased had committed suicide due to harassment meted out to her by the appellant but there was no evidence on record to suggest that such harassment or cruelty was made in connection to any dowry demands. Thus, cruelty or harassment sans any dowry demands which drives the wife to commit suicide attracts the offence of 'abetment of suicide' u/s 306 IPC and not s. 304-B IPC which defines the offence and punishment for 'dowry death'. [para 11-12] [119-E-F; 120-C-D; 122-D-H]**

**2.2. In the facts of the case, the High Court very appropriately converted the conviction from s. 304-B to s. 306 IPC. There has been no failure of justice in the conviction of the appellant u/s 306 IPC by the High Court, even though the specific charge had not been framed. [para 12-13]**

*Sangaraboina Sreenu Vs. State of A.P.* **1997 (3) SCR 957 = 1997 (5) SCC 348; and** *Shamnsaheb M. Multtani Vs. State of Karnataka* **2001 (1) SCR 514 = 2001 (2) SCC 577 - distinguished.**

**Case Law Reference:**

| | | |
|---|---|---|
| **1997 (3) SCR 957** | **distinguished** | **para 11** |
| **2001 (1) SCR 514** | **distinguished** | **para 11** |

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 590 of 2005.

From the Judgment and Order dated 6.10.2004 of the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 406-SB of 1992.



V.C. Mahajan, Sarwa Mitter (for M/s. Mitter & Mitter Co.) for the Appellant.

Kuldip Singh, R.K. Pandey, H.S. Sandhu and Ajay Pal for the Respondent.

The Judgment of the Court was delivered by

**SURINDER SINGH NIJJAR, J.** 1. This appeal has been filed against the judgment and order dated 6th October, 2004 of the Punjab and Haryana High Court at Chandigarh in Criminal Appeal No. 406-SB of 1992 wherein the appellant has been convicted under Section 306 Indian Penal Code ('IPC' for short) and sentenced to rigorous imprisonment for two years and to pay a fine of Rs.1,000/- and in default of payment thereof to undergo further rigorous imprisonment for one month.

2. We may briefly notice the facts.

Sukhjit Kaur, alias Rani was married to Narwinder Singh of Village Mehdipur on 30th September, 1984. A male child had first been born to the couple and at the time of the incident, the wife was pregnant a second time. According to the in-laws of the appellant, they had given sufficient dowry at the marriage of their daughter to the appellant. It appears that the appellant and his parents Daljit Singh and Joginder Kaur remained dissatisfied. About two months after the marriage, Sukhjit Kaur informed her mother Gursharan Kaur that her in-laws were asking her to bring valuable articles such as a scooter from her parents. It is also the case of the prosecution that an additional demand of Rs.5,000/- was made by Narwinder Singh, in the year 1986, which amount too was paid by his mother-in-law Gursharan Kaur. Unfortunately, on 25th May, 1987, Bhai Davinder Singh, father of Sukhjit Kaur was murdered by extremists. After the death of Bhai Davinder Singh, there was sea-change in the attitude of the appellant and her parents, and they started maltreating her. About six months prior to the fatal incident, there had been a quarrel between the husband and

wife, which was settled with the intervention of several relatives including Kulbir Singh and Onkar Singh, PW-5. About ten days prior to the incident, Sukhjit Kaur went to Onkar Singh's house in Village Nabipur and informed him that the accused were demanding Rs.50,000/-. They were saying that her late father had left enough money for the family and that she should get her share. Onkar Singh told her that he would inform Gursharan Kaur, who was then living in England about the demand and seek instructions from her. Unfortunately, on 30th May, 1988, Onkar Singh came to know about the death of his niece Sukhjit Kaur (hereinafter referred to as 'the deceased'). He alongwith Gurjit Kaur, sister of the deceased, Hanwant Singh, Darshan Singh and Mohan Singh went to village Mehdipur and saw the dead body of Sukhjit Kaur alias Rani lying in the house. Blood was oozing from her nose. Onkar Singh, thereafter, lodged a FIR naming the accused as having been responsible for her death. Initially, a case under Section 306 IPC was registered against the accused but, a charge under Section 304-B of the IPC was ultimately framed by the Court.

3. In support of its case, the prosecution relied inter-alia on the evidence of Kulbir Singh (PW-2) and Onkar Singh (PW-5), both uncles of the deceased, Gursharan Kaur (PW-6) the mother and Gurjit Kaur (PW-7). The sister of Sukhjit Kaur stated that the demands made by the accused had been satisfied off and on and that the behaviour of the accused had compelled Sukhjit Kaur to commit suicide. The prosecution also relied upon the evidence of Dr. H.S. Bajwa (PW-3), who on the basis of the report of the Forensic Science Laboratory opined that she had died of Organo Phosphorus poisoning. A large number of documents including some letters allegedly written by the deceased to her family members and by them to her were also produced in evidence.

4. The prosecution case was then put to the accused and their statements recorded under Section 313 of Cr.P.C. They denied the allegations levelled against them and pleaded that



as a matter of fact Sukhjit Kaur had fallen ill as she was pregnant and depressed after the murder of her father (to whom she had been deeply attached) and that she had been taken to Oberoi Hospital by her father-in-law on seeing her condition deteriorating, and that despite all efforts on the part of the accused to save her, she had died. The accused also produced three witnesses in defence, namely Hardev Singh (DW-1), Jarnail Singh (DW-2) and Pritam Singh (DW-3), as also certain letters written inter-se the parties.

5. The trial court held that from the evidence of Kulbir Singh, Onkar Singh, Gursharan Kaur and Gurjit Kaur (PWs) and the letter Ex.P.1, it appeared that demands for dowry had been made by the accused from Sukhjit Kaur time and again and that she had been harassed and thus compelled to commit suicide. It further held that the ingredients of Section 304-B IPC were satisfied on the presumptions raised under Section 113-B of the Evidence Act with regard to dowry deaths and that the letters Exs. PA, PB, PC, PD and PE did not in any way show that the relation between the parties had been cordial. The trial court accordingly convicted the accused for an offence punishable under Section 304-B IPC, and sentenced them to undergo rigorous imprisonment for seven years and to fine and in default of payment of fine to undergo further rigorous imprisonment for a specified period.

6. Aggrieved, against the aforesaid conviction and sentence, the appellant and his parents filed an appeal before the Punjab and Haryana High Court. Upon reconsideration of the entire evidence, the High Court concluded that the deceased had not committed suicide on account of demands for dowry but due to harassment caused by the husband, in particular. The appeal was, therefore, partly allowed. The High Court acquitted the parents of the appellant. However, the conviction of the appellant was converted from one under Section 304-B IPC to Section 306 IPC. He was sentenced to undergo rigorous imprisonment for two years and to pay a fine

of Rs.1,000/- and in default of payment, he has to undergo further rigorous imprisonment for one month. The aforesaid judgment is challenged in the present appeal.

7. Mr. Vikram Mahajan, learned senior counsel appearing for the appellant submitted that there is no distinction between the case of the appellant and that of his parents, who have been acquitted. The High Court having acquitted the parents, the appellant also could not have been convicted. He further submitted that this was a plain and simple case of suicide due to the mental state of the deceased. He submits that since the murder of her father by extremists, the deceased had been under acute depression and she, therefore, had suicidal tendencies. Learned senior counsel further submitted that there is no evidence on the record to show that the victim had died an unnatural death. Lastly, it is submitted that the High Court committed a grave error in convicting the appellant under Section 306 IPC. It is submitted by Mr. Mahajan that the nature of offence under Section 304-B IPC is distinct and different from the offence under Section 306 IPC. The basic constituent of an offence under Section 304-B IPC is homicidal death (dowry death) and those of Section 306 IPC is suicidal death and abetment thereof. Furthermore, according to the learned senior counsel, the nature of evidence required under both the categories of offences are totally different. The appellant was never charged under Section 306 IPC, nor is there any evidence on the record to sustain the conviction under Section 306 IPC.

8. Mr. Kuldip Singh, learned counsel, appearing for the State of Punjab submits that the appellant is in fact fortunate being convicted only under Section 306 IPC. There is overwhelming evidence to prove that the appellant and his parents had been harassing the deceased to bring more dowry. He submits that there is evidence that the wife had been subjected to harassment on account of dowry immediately after the marriage. The death occurred within seven years of marriage, therefore, by virtue of Section 113-B of the Evidence



Act, the trial court had rightly presumed that the appellant and his parents had committed the offence under Section 304-B IPC.

9. We have considered the submissions made by the learned counsel. The High Court, upon close scrutiny of the evidence, concluded that there was evidence of a quarrel between the husband and wife about six months prior to the occurrence, which had been settled with the intervention of the eldest. There were complaints that the deceased did not know how to do any household work. The in-laws had also complained that she was not well mannered. Their ill-treatment of the wife escalated after the murder of her father by extremists. It was at that stage the husband had started demanding that the deceased should claim one of the two houses left behind by her father in Village Nabipur. About ten months prior to her death, she was actually sent by the appellants to demand possession of the house. The appellant and his parents were suspecting that the sister of the deceased, Gurjit Kaur had taken everything after the death of the father of the deceased. The appellant and his parents were insisting that the house be legally conveyed in the name of the deceased. However, mother of the deceased left for England after the first death anniversary of her husband in May, 1988. The High Court, on examination of the entire evidence, concluded that the deceased had not committed suicide on account of demands for dowry but due to harassment caused by her husband, in particular. The deceased had committed suicide by drinking Organo Phosphorus poison. In view of the findings recorded, the High Court converted the conviction of the appellant from one under Section 304-B IPC to one under Section 306 IPC.

10. We do not find much substance in the submission of Mr. Mahajan that the High Court could not have convicted the appellant under Section 306 IPC as the charge had been framed under Section 304-B IPC. On scrutiny of the entire evidence, the High Court has come to the conclusion that the

deceased had not committed suicide on account of demands for dowry but due to harassment caused by her husband, in particular. The harassment by the appellant had compounded the acute depression from which the deceased was suffering after the murder of her father. There was no evidence of any demand for dowry soon before the death, and there was no demand whatsoever that the house in question should be transferred to either of the accused. Under Section 304-B IPC, the cruelty or harassment by her husband or any relative of her husband "for, or in connection with, any demand for dowry" is a prelude to the suicidal death of the wife. Such suicidal death is defined as 'dowry death'. The High Court has recorded a firm finding that the harassment was not for or in connection with any demands for dowry. But, at the same time, the High Court has concluded that the wife committed suicide due to the harassment of the appellant, in particular. In such circumstances, the High Court was, therefore, fully justified in convicting the appellant under Section 306 IPC.

11. We also do not find any substance in the submission of Mr. Mahajan that the appellant could not have been convicted under Section 306 IPC in the absence of a charge being framed against him under the aforesaid section. The learned counsel had relied upon the judgments of this court in the case of *Sangaraboina Sreenu Vs. State of A.P.*[1] and *Shamnsaheb M. Multtani Vs. State of Karnataka*[2]. We are of the opinion that the aforesaid judgments are of no assistance to the appellant, in the facts and circumstances of the present case. We may, however, notice the observations made therein. In the case of *Sangaraboina Sreenu* (supra), it was observed as follows:

> "This appeal must succeed for the simple reason that having acquitted the appellant of the charge under Section 302 IPC — which was the only charge framed against him — the High Court could not have convicted him of the

1. (1997) 5 SCC 348.
2. (2001) 2 SCC 577.



offence under Section 306 IPC. It is true that Section 222 CrPC entitles a court to convict a person of an offence which is minor in comparison to the one for which he is tried but Section 306 IPC cannot be said to be a minor offence in relation to an offence under Section 302 IPC within the meaning of Section 222 CrPC for the two offences are of distinct and different categories. While the basic constituent of an offence under Section 302 IPC is homicidal death, those of Section 306 IPC are suicidal death and abetment thereof."

In the present case, both the trial court and the High Court have held that the deceased had committed suicide. Therefore, the nature of the offence under Sections 304-B and 306 IPC are not distinct and different categories.

Again in the case of *Shamnsaheb M. Multtani* (supra), this court observed:

> "18**.** So when a person is charged with an offence under Sections 302 and 498-A IPC on the allegation that he caused the death of a bride after subjecting her to harassment with a demand for dowry, within a period of 7 years of marriage, a situation may arise, as in this case, that the offence of murder is not established as against the accused. Nonetheless, all other ingredients necessary for the offence under Section 304-B IPC would stand established. Can the accused be convicted in such a case for the offence under Section 304-B IPC without the said offence forming part of the charge?
>
> 19**.** A two-Judge Bench of this Court (K. Jayachandra Reddy and G.N. Ray, JJ.) has held in *Lakhjit Singh* v. *State of Punjab*[1] that if a prosecution failed to establish the offence under Section 302 IPC, which alone was included in the charge, but if the offence under Section 306 IPC was made out in the evidence it is permissible for the court to convict the accused of the latter offence.

20**.** But without reference to the above decision, another two-Judge Bench of this Court (M.K. Mukherjee and S.P. Kurdukar, JJ.) has held in *Sangaraboina Sreenu* v. *State of A.P.* that it is impermissible to do so. The rationale advanced by the Bench for the above position is this:(SCC p.348, para 2)

> "It is true that Section 222 CrPC entitles a court to convict a person of an offence which is minor in comparison to the one for which he is tried but Section 306 IPC cannot be said to be a minor offence in relation to an offence under Section 302 IPC within the meaning of Section 222 CrPC for the two offences are of distinct and different categories. While the basic constituent of an offence under Section 302 IPC is homicidal death, those of Section 306 IPC are suicidal death and abetment thereof."

21**.** The crux of the matter is this: Would there be occasion for a failure of justice by adopting such a course as to convict an accused of the offence under Section 304-B IPC when all the ingredients necessary for the said offence have come out in evidence, although he was not charged with the said offence? In this context a reference to Section 464(1) of the Code is apposite:

> "464. (1) No finding, sentence or order by a court of competent jurisdiction shall be deemed invalid merely on the ground *that no charge was framed* or on the ground of any error, *omission* or irregularity in the charge including any misjoinder of charges, *unless,* in the opinion of the court of appeal, confirmation or revision, *a failure of justice* has in fact been occasioned thereby". (emphasis supplied)

22**.** In other words, a conviction would be valid even if there



is any omission or irregularity in the charge, provided it did not occasion a failure of justice.

23**.** We often hear about "failure of justice" and quite often the submission in a criminal court is accentuated with the said expression. Perhaps it is too pliable or facile an expression which could be fitted in any situation of a case. The expression "failure of justice" would appear, sometimes, as an etymological chameleon (the simile is borrowed from Lord Diplock in *Town Investments Ltd.* v. *Deptt. of the Environment*). The criminal court, particularly the superior court should make a close examination to ascertain whether there was really a failure of justice or whether it is only a camouflage."

We are of the considered opinion that the aforesaid observations do not apply to the facts of the present case. The High Court upon meticulous scrutiny of the entire evidence on record rightly concluded that there was no evidence to indicate the commission of offence under Section 304-B IPC. It was also observed that the deceased had committed suicide due to harassment meted out to her by the appellant but there was no evidence on record to suggest that such harassment or cruelty was made in connection to any dowry demands. Thus, cruelty or harassment sans any dowry demands which drives the wife to commit suicide attracts the offence of 'abetment of suicide' under Section 306 IPC and not Section 304-B IPC which defines the offence and punishment for 'dowry death'.

12. It is a settled proposition of law that mere omission or defect in framing charge would not disable the Court from convicting the accused for the offence which has been found to be proved on the basis of the evidence on record. In such circumstances, the matter would fall within the purview of Section 221 (1) and (2) of the Cr.P.C. In the facts of the present case, the High Court very appropriately converted the conviction under Section 304-B to one under Section 306 IPC.

13. In our opinion, there has been no failure of justice in the conviction of the appellant under Section 306 IPC by the High Court, even though the specific charge had not been framed.

14. Therefore, we see no reason to interfere with the judgment of the High Court. The appeal is accordingly dismissed.

R.P. Appeal dismissed.



LAXMICHAND @ BALBUTYA
*v.*
STATE OF MAHARASHTRA
(Criminal Appeal No. 1643 of 2005)

JANUARY 06, 2011

**[HARJIT SINGH BEDI, P. SATHASIVAM AND CHADRAMAULI KR. PRASAD, JJ.]**

*Penal Code, 1860 – s.304 Part II and s.302 – Quarrel between parties – Victim, under the influence of liquor, refused to leave the house of the accused – Accused dragged the victim out of his house and also inflicted blow on his head with a spade, resulting in his death seven days later – Conviction u/s.302 by High Court setting aside the order of acquittal by trial court – On appeal, held: Accused had no intention to kill the victim – However, blow was given on a vital part – Accused convicted u/s. 304 Part II with five years of rigorous imprisonment – Evidence – Extra-judicial confession – Witnesses – Sentence/Sentencing.*

**According to the prosecution, quarrel arose between the parties. The victim, under the influence of liquor, refused to leave the house of the appellant. The appellant then dragged the victim out of his house and also inflicted blow on his head with a spade. The victim became unconscious and succumbed to his injuries seven days later in the hospital. PW-3 and 4 witnessed the incident. The appellant made an extra-judicial confession to PW-2, who later lodged a report. He also made the confessional statement to PW-7 and PW 8. Thereafter, the appellant surrendered himself at the police station. PW-12, P.S.I. arrested the appellant and seized the spade. The appellant was charged for the offence under Section 302 IPC. The Court of Sessions acquitted the accused. The High Court, however, convicted the**

**appellant under Section 302 IPC. Therefore, the appellant filed the instant appeal.**

**Partly allowing the appeal, the Court**

**HELD: 1.1. From the evidence of the eyewitnesses, PWs 3 and 4, the prosecution established that the quarrel was going on between the accused-appellant and the deceased, and the deceased was under the influence of liquor and he was adamant and refused to leave the house of the accused which forced the accused to drag him outside his house and also inflicted injuries with the spade. There is no reason to disbelieve the version of PWs 3 and 4, in this regard. On perusal of their evidence, no material omission or contradiction is found to disbelieve their version. [Para 5] [130-C-E]**

**1.2. The prosecution examined PW-2 who made a complaint to the police. The accused made an extra-judicial confession to PW-2. The perusal of the report strengthened the evidence of PW-2 about the statement said to have been made to him by the accused. It is also seen from the evidence of PW-12, P.S.I. that when he was scribing the report, the accused arrived at the police station with a spade and PW-12 arrested him and seized the spade. The statement of PW-2 if considered along with other materials, need not be rejected. The accused also made a confessional statement to PW 7. PW 8 also apprised the court about the admission of guilt by the accused. Though there was no need to attach importance to the statements of PWs 7 and 8, if all the materials are considered together, it proves the case of the prosecution that it was the accused who was responsible for the death of the deceased.[Paras 6 and 7] [130-F-H; 131-A-B]**

**1.3. An attempt was made to record the statement of the deceased by the Special Executive Magistrate but**



**that could not be done. The evidence of PW-1, the Medical Officer supports the version of the prosecution. He issued a certificate that the injured person was not able to give any statement. When PW-1 was shown spade at the time of examination in court, he opined that it would be possible that such injury could be caused with spade. The High Court held that the medical report, evidence of doctor and the statement of eye-witnesses support the case of the prosecution. PW-9 who conducted the post-mortem on the dead body of the deceased also found that the cause of death was head injury, laceration of the brain matter, resulting into neurogenic shock and peripheral circulatory failure. All the said materials including oral and documentary evidence clearly prove the case of the prosecution and the conclusion arrived at by the High Court is concurred with. [Para 8] [131-C-G]**

**1.4. It is clear from the evidence of PWs 3 and 4 that prior to the incident, there was a quarrel between the accused and the deceased inside the house of the accused, and the deceased consumed liquor and was adamant to leave the house of the accused which necessitated the accused to drag him out of his house and inasmuch as the deceased still refused to accede to the request of the accused, he inflicted blow on the head with the spade. The appellant pointed out that he had no pre-plan or intention to kill the deceased and his main worry was to get the deceased out of his house, who consumed excessive liquor. Considering all these aspects, particularly, the conduct of the deceased in not leaving the house of the accused, he dragged him out of his house, put him on the road and assaulted him with a spade, the accused has no intention to kill the deceased. It is true that blow given by the accused on the deceased was at the vital part because of which he was unconscious for seven days and ultimately succumbed**

**to his injuries. However, the accused had no intention to commit the offence. [Para 9] [132-A-E]**

**1.6. Considering all the materials and reasons, the commission of offence attributed to the accused-appellant would come under Section 304 Part II IPC. The incident had occurred in the year 1986 and the accused had no intention to kill the deceased but due to the reasons and circumstances stated, the ends of justice would be met by awarding sentence of rigorous imprisonment for five years. The accused is entitled to have the benefit of deduction of the period already undergone. [Para 10] [132-F-G]**

CRIMINAL APPELLATE JURISDCTION : Criminal Appeal No. 1643 of 2005.

From the Judgment & Order dated 15.10.2004 of the High Court of Judicature at Bombay, Nagpur Bench in Criminal Appeal No. 48 of 1990.

Sushil Karanjakar for the Appellant.

Shankar Chillarge, Sanjay V. Kharde, and Asha G. Nair for the Respondent.

The Judgment of the Court was delivered by

**P. SATHASIVAM, J.** 1. This appeal is filed by the appellant-accused, who is in Jail, through Superintendent, Nagpur Central Prison, Nagpur under Section 2 of the Supreme Court Enlargement of Criminal Appellate Jurisdiction Act against the final order and judgment dated 15.10.2004 passed by the High Court of Bombay, Nagpur Bench, Nagpur in Criminal Appeal No. 48 of 1990 whereby the High Court allowed the appeal filed by the State and set aside the order of acquittal passed by the Additional Sessions Judge, Gondia.

2. The prosecution case is as follows:



(a) On 10.08.1986, at about 3.00 p.m., there was a quarrel between Laxmichand @ Balbutya - the accused and Gyaniram Mahajan – the deceased, who was in drunken state, at the house of the accused. The appellant-accused asked Gyaniram to go home but he was not acceding to his request. The accused brought Gyaniram from his house on the road by lifting him but he fell down. The accused struck him with a spade on his head. As a result, Gyaniram sustained injury on his head and had become unconscious. The accused proceeded towards the house of one Police Patel. While going there, he made disclosure to some persons that he had killed Gyaniram Mahajan. One Ghanshyam, who was in the employment of Fulchand and who had heard the utterances of the accused to the above effect, informed Tejram (PW-2) who was sitting in the house of Fulchand that the appellant-accused was telling that he had killed Gyaniram. Tejram went towards the Gram Panchayat. The accused was coming from the side of the house of Police Patel. He again made similar utterances and informed Tejram that he had killed Gyaniram and further asked him to scribe a report. Tejram advised him to go to the police station.

(b) Tejram went to the police station and lodged an oral report that he was informed by the accused that he had killed Gyaniram. The oral report was reduced into writing by P.S.I. Narkhede (PW-12) under Section 302 of the Indian Penal Code. By the time, the accused reached there alongwith spade, P.S.I. Narkhede (PW-12) arrested him and seized the spade. Thereafter, he went to the spot and noticed that Gyaniram was lying unconsciously. Spot panchnama was prepared and the samples of blood stained earth and plain earth were collected.

(c) Gyaniram was sent to the hospital in the cart of Primary Health Centre, Tirora. The doctor examined him at 9.45 p.m. and found a lacerated wound on his fore head with underlying bony fractures into pieces. As Gyaniram was

unconsciousness, P.S.I. could not take his statement. On 17.08.1986, A.S.I. Sahare received a message from Dr. Jaiswal of K.T.S. Hospital, Gondia that Gyaniram had expired. On the same day itself the post mortem was conducted.

(d) After the investigation, the charge sheet was sent to the Court of J.M.F.C. Gondia. The J.M.F.C. committed the case under Section 209(a) of the Code of Criminal Procedure to the Court of Sessions for trial of the accused. The charge for the offence under Section 302 I.P.C. was framed against the accused. The Sessions Judge, Gondia, vide his judgment dated 29.07.1989, acquitted the accused of the charges framed against him.

(e) Against the said judgment of acquittal, the State filed an appeal before the High Court of Bombay, Nagpur Bench. The High Court, vide its judgment dated 15.10.2004, set aside the order of acquittal and convicted the appellant-accused for offence punishable under Section 302 I.P.C.

(f) Aggrieved by the judgment of the High Court, the appellant-accused has filed this appeal from Jail through the Superintendent, Nagpur Central Prison, Nagpur before this Court.

3. Heard Mr. Sushil Karanjakar, learned *amicus curiae* for the appellant and Mr. Shankar Chillarge, learned counsel for the State.

4. As far as the incident and the involvement of the appellant-accused is concerned, the prosecution has mainly relied on the evidence of Fattu Madavi (PW-3) and Mahadeo (PW-4) who are the two eye-witnesses. Apart from these two eye-witnesses, the prosecution has also relied on extra-judicial confession said to have been made by the accused to some of the witnesses.



5. It is seen from the evidence of Fattu (PW-3) that the accused gave a call to him and said that Gyaniram – the deceased was under the influence of liquor and he was not willing to leave his house. There was a quarrel between the accused and the deceased at the house of the accused. At the time of quarrel, Mahadeo (PW-4), who was present in the nearby house of Bhaurao Neware was witnessing the same. It is also seen from the evidence of Fattu (PW-3) and Mahadeo (PW-4) that in the course of quarrel, the accused dragged Gyaniram outside of his house and gave a stroke of spade on his head. From the evidence of PWs 3 & 4, the prosecution has established that the quarrel was going on between the accused and the deceased and the deceased was under the influence of liquor and he was adamant and refused to leave the house of the accused which forced the accused to drag him outside his house and also inflicted injuries with the spade. As rightly observed by the High Court, there is no reason to disbelieve the version of eye-witnesses, PWs 3 & 4, in this regard. On perusal of their evidence, we found no material omission or contradiction to disbelieve their version. On the other hand, we agree with the conclusion arrived at by the High Court as regard to the reliability of two eye-witnesses.

6. Apart from two eye-witnesses, the prosecution has examined one Tejram as PW-2 who made a complaint to the police. The accused has made an extra-judicial confession to him. Tejram (PW-2) is the person who lodged the report (Ex.21). The perusal of the above report strengthened the evidence of Tejram (PW-2) about the statement said to have been made to him by the accused.

7. It is also seen from the evidence of Narkhede, P.S.I. (PW-12) that when he was scribing the report, the accused arrived at the police station with a spade and immediately he arrested him and seized the spade. Though no much importance needs to be given to the statement of Tejram (PW-2) but if we consider the same along with other materials, there is no reason to reject his version. Another person before whom

the accused has made a confessional statement is Govardhan (PW-7). The accused had gone to his place and informed him about the incident. In the same way, one Udelal, who was examined as PW-8, also apprised the Court about the admission of guilt by the accused. Though their is no need to attach importance to the statements of PWs 7 & 8, as observed earlier, if we consider all the materials together, it prove the case of the prosecution that it was the accused who was responsible for the death of Gyaniram-the deceased.

8. It was submitted that though the injured was alive for seven days but no attempt was made to record his statement about the incident. It is seen from the evidence of Narkhede, PSI (PW-12) that he was not allowed to record his statement by the Doctors as the victim was not in a position to give the statement. It is relevant to note that an attempt was made to record his statement by the Special Executive Magistrate, that also could not be done. The evidence of Dr. Arvind Manwatkar (PW-1), Medical Officer attached to Primary Health Centre, Tirora also supports the version of the prosecution. He also issued a certificate (Ex.19) that the injured person was not able to give any statement. When Dr. Arvind Manwatkar (PW-1) was shown spade at the time of examination in Court, he opined that it would be possible that such injury could be caused with spade. As observed by the High Court, the medical report, evidence of Doctor and the statement of eye-witnesses support the case of the prosecution. Dr. Pradip Kumar Gujar (PW-9) who conducted the post-mortem on the dead body of Gyaniram also found that the cause of death was head injury, laceration of the brain matter, resulting into neurogenic shock and peripheral circulatory failure. All the above materials including oral and documentary evidence clearly prove the case of the prosecution and we agree with the conclusion arrived at by the High Court.

9. Coming to the argument that instead of convicting the accused for culpable homicide amounting to murder, his case would fall in the category of culpable homicide not amounting



to murder as even according to the prosecution one blow alone was caused by the accused that too in a quarrel, we have already pointed out and it is clear from the evidence of PWs 3 & 4 – eye-witnesses that prior to the incident, there was a quarrel between the accused and the deceased inside the house of the accused and the deceased consumed liquor and adamant not to leave the house of the accused which necessitated the accused to drag him out of his house and inasmuch as the deceased still refused to accede to the request of the accused, he inflicted blow on the head with the spade. As pointed out by the appellant-accused, he had no pre-plan or intention to kill the deceased and his main worry was to get the deceased out of his house, who consumed excessive liquor. Considering all these aspects, particularly, the conduct of the deceased in not leaving the house of the accused, he dragged him out of his house, put him on the road and assaulted him with a spade, we are of the view that the accused has no intention to kill the deceased. It is true that blow given by the accused on the deceased was at the vital part because of which he was unconscious for seven days and ultimately succumbed to his injuries. However, as discussed earlier, the accused had no intention to commit the offence.

10. Considering all the materials and reasons, we feel that the commission of offence attributed to the accused-appellant would come under Section 304 Part II Indian Penal Code. Taking note of the fact that the incident had occurred in the year 1986 and the accused had no intention to kill the deceased but due to the reasons and circumstances stated above, we feel that the ends of justice would be met by awarding sentence of rigorous imprisonment for five years. The accused is entitled to have the benefit of deduction of the period already undergone.

11. With the above modification, the appeal is allowed in part.

N.J. Appeal partly allowed.

SURENDERA MISHRA
*v.*
STATE OF JHARKHAND
(Criminal Appeal No.177 of 2006)

JANUARY 6, 2011

**[HARJIT SINGH BEDI, P. SATHASIVAM AND CHANDRAMAULI KR. PRASAD, JJ.]**

*Penal Code, 1860: s.84 – Applicability of – An act will not be an offence, if done by a person who, at the time of doing the same by reason of unsoundness of mind, is incapable of knowing the nature of the act – Burden to prove unsoundness of mind u/s.105 of Evidence Act is on the accused – In order to ascertain that, it is imperative to take into consideration the circumstances and the behaviour preceding, attending and following the crime – Even if the accused establishes unsoundness of mind, s.84 will not come to its rescue, in case it is found that the accused knew that what he was doing was wrong or that it was contrary to law – In the instant case, the case of the accused did not come within the exception contemplated u/s.84 – The prosecution had proved that immediately after the accused shot dead the deceased, he threatened his driver of dire consequences – Not only that, he ran away from the place of occurrence and threw the weapon of crime in the well in order to conceal himself from the crime – The said conduct of the accused subsequent to the commission of the offence clearly suggest that he knew that whatever he had done was wrong and illegal – Moreover, the fact that the accused was running a medical shop showed that he was mentally fit for same – The accused though suffered from certain mental instability even before and after the incident but from that one cannot infer on a balance of preponderance of probabilities that he at the time of the commission of the offence did not know the nature of his act*



*that it was either wrong or contrary to law – Evidence Act, 1872 – s.105.*

*Words and phrases: Expression 'unsoundness of mind' – Meaning of.*

**The prosecution case was that on 11.8.2000, the deceased was going in a car driven by PW-1. He stopped the car near a shop and called PW-2. While the deceased was talking to PW-2, the accused-appellant came there with a pistol and pushed PW-2 and fired at point blank range at the deceased. The accused threatened the driver who then fled away from the place of occurrence and informed the family members of the deceased about the incident. Thereafter, the deceased was rushed to hospital where he was declared dead. During trial, the only plea of appellant was that by virtue of unsoundness of mind, the act done by him would come within general exception under Section 84, IPC and, therefore, he cannot be held guilty for the act done by him. The trial court did not accept the said plea and convicted the appellant under Section 302 and Section 27 of Arms Act. The High Court upheld the conviction. The instant appeal was filed challenging the order of the High Court.**

**Dismissing the appeal, the Court**

**HELD: 1.1. A plain reading of Section 84, IPC shows that an act will not be an offence, if done by a person who, at the time of doing the same by reason of unsoundness of mind, is incapable of knowing the nature of the act, or what he is doing is either wrong or contrary to law. An accused who seeks exoneration from liability of an act under Section 84, IPC is to prove legal insanity and not medical insanity. Expression "unsoundness of mind" has not been defined in the IPC and it has mainly been**

**treated as equivalent to insanity. But the term insanity carries different meaning in different contexts and describes varying degrees of mental disorder. Every person who is suffering from mental disease is not *ipso facto* exempted from criminal liability. The mere fact that the accused is conceited, odd, irascible and his brain is not quite all right, or that the physical and mental ailments from which he suffered had rendered his intellect weak and affected his emotions or indulges in certain unusual acts, or had fits of insanity at short intervals or that he was subject to epileptic fits and there was abnormal behaviour or the behaviour is queer are not sufficient to attract the application of Section 84, IPC. [Paras 7, 9] [141-C-D; 142-C-D]**

*Bapu alias Gujraj Singh v. State of Rajasthan* **(2007) 8 SCC 66** *Hari Singh Gond v. State of Madhya Pradesh* **(2008) 16 SCC 109 – relied on.**

*State of Punjab v. Mohinder Singh* **(1983) 2 SCC 274** *Shrikant Anandrao Bhosale v. State of Maharashtra* **(2002) 7 SCC 748 – distinguished.**

**1.2. In law, the presumption is that every person is sane to the extent that he knows the natural consequences of his act. The burden of proof in the face of Section 105 of the Evidence Act is on the accused. Though the burden is on the accused but he is not required to prove the same beyond all reasonable doubt, but merely satisfy the preponderance of probabilities. The onus has to be discharged by producing evidence as to the conduct of the accused prior to the offence, his conduct at the time or immediately after the offence with reference to his medical condition by production of medical evidence and other relevant factors. Even if the accused establishes unsoundness of mind, Section 84, IPC will not come to its rescue, in case it is found that the accused knew that what he was doing was wrong or that**



**it was contrary to law. In order to ascertain that, it is imperative to take into consideration the circumstances and the behaviour preceding, attending and following the crime. Behaviour of an accused pertaining to a desire for concealment of the weapon of offence and conduct to avoid detection of crime go a long way to ascertain as to whether, he knew the consequences of the act done by him. [Para 10] [142-G-H; 143-A-D]**

*T.N. Lakshmaiah v. State of Karnataka* **(2002) 1 SCC 219 – relied on.**

**1.3. The first evidence in regard to the unsoundness of mind as brought by the appellant was the medical prescription dated 18th October, 1987 (Ext. A-1) in which symptom of the appellant was noted as psychiatric with paranoid features and medicine was advised for sleep. Other prescriptions were dated 9th January, 1988 (Ext. A) and 5th of September 1998 in which only medicines had been prescribed. Other prescriptions (Exts. A-5 to A-7) also did not spell out the disease the appellant was suffering but gave the names of the medicines, he was advised to take. The occurrence took place on 11th of August 2000. From these prescriptions, the only inference that could be drawn is that the appellant had paranoid feeling but that too was not proximate to the date of occurrence. To establish that acts done are not offence and come within general exception, it is required to be proved that at the time of commission of the act, accused by reason of unsoundness of mind was incapable of knowing that his acts were wrong or contrary to law. In the instant case, the prosecution had proved beyond all reasonable doubt that immediately after the appellant had shot- dead the deceased, threatened his driver PW.1, of dire consequences. Not only that, he ran away from the place of occurrence and threw the country-made pistol, the weapon of crime, in**

**the well in order to conceal himself from the crime, which was recovered later on. The said conduct of the appellant subsequent to the commission of the offence clearly suggest that he knew that whatever he had done was wrong and illegal. Further, he was running a medical shop and came to the place of occurrence and shot dead the deceased. Had the appellant been a person of unsound mind, it may not have been possible for him to run a medical shop. The appellant though suffered from certain mental instability even before and after the incident but from that one cannot infer on a balance of preponderance of probabilities that the appellant at the time of the commission of the offence did not know the nature of his act; that it was either wrong or contrary to law. The plea of the appellant did not come within the exception contemplated under Section 84, IPC. [Para 11] [144-D-H; 145-A-D]**

**Case Law Reference:**

| | | |
|---|---|---|
| **(1983) 2 SCC 274** | **distinguished** | **Paras 4, 12** |
| **(2002) 7 SCC 748** | **distinguished** | **Para 5, 12** |
| **(2007) 8 SCC 66** | **relied on** | **Para 7** |
| **(2008) 16 SCC 109** | **relied on** | **Para 8** |
| **(2002) 1 SCC 219** | **relied on** | **Para 10** |

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 177 of 2006.

From the Judgment & Order dated 29.6.2005 of the High Court of Jhrakhand at Ranchi in Criminal Appeal No. (DB) 446 of 2004.

Tanmaya Agarwal and Dr. Kailash Chand for the Appellant.

D.N. Goburdhan for the Respondent.

The Judgment of the Court was delivered by



**CHANDRAMAULI KR. PRASAD, J.** 1. Sole appellant was put on trial for commission of the offence under Section 302 of the Indian Penal Code as also Section 27 of the Arms Act. The trial court held him guilty on both the counts and sentenced him to undergo imprisonment for life under Section 302 of the Indian Penal Code but no separate sentence was awarded under Section 27 of the Arms Act. His conviction and sentence has been upheld by the High Court in appeal and hence the appellant is before us with the leave of the Court.

2. According to the prosecution, on 11th of August, 2000 the deceased Chandrashekhar Choubey was going in a car driven by PW.1, Vidyut Kumar Modi and when reached Chas Nala crossing, he asked the driver to stop the car and call Shasdhar Mukherjee (PW.2), the owner of Sulekha Auto Parts. As directed, the driver called said Shasdhar Mukherjee and the deceased started talking to him from inside the car. According to the prosecution all of a sudden the appellant, the owner of the Medical Hall came there with a country-made pistol, pushed Shasdhar Mukherjee aside and fired at point-blank range at the deceased. The driver fled away from the place of occurrence and informed the family members of the deceased, leaving the deceased in the car itself. PW.4, Vinod Kumar Choubey along with the driver came back and rushed the deceased to the Chas Nala Colliery Hospital, where he was declared dead. On the basis of the aforesaid report a case under Section 302 of the Indian Penal Code and Section 27 of the Arms Act was registered against the appellant. After usual investigation police submitted the charge-sheet and ultimately the appellant was put on trial for commission of the offence under Section 302 of the Indian Penal Code and Section 27 of the Arms Act.

3. In order to bring home the charge the prosecution altogether examined nine witnesses besides a large number of documents were exhibited. Only plea of the appellant during the trial was that by virtue of unsoundness of mind, the act done by him comes within general exception under Section 84 of the Indian Penal Code and, therefore, he cannot be held guilty for

the act done by him. The aforesaid plea did not find favour with the trial court as also by the High Court, in appeal. In this connection the High Court has observed as follows:

> "On the basis of the evidence, adduced on behalf of both the parties regarding mental status of accused Surendra Mishra, learned court below came to a safe conclusion that accused was not suffering from mental instability even prior to the incident or at the time of incident. I also find no ground to differ with such finding.
>
> I have noticed the observations of the learned court below that although some evidence were placed by the defence in support of the mental trouble of the accused, in absence of specific finding by the doctor or degree and nature of mental trouble, it can not be relied upon to declare the accused Surendra Mishra mentally unfit or that he was insane at the time of occurrence."

4. Mr. Tanmaya Agarwal, learned Counsel appearing on behalf of the appellant submits that the appellant being a person of unsound mind at the time of the commission of the offence, his act comes within general exception as provided under Section 84 of the Indian Penal Code and hence the appellant deserves to be acquitted. In support of the submission he has placed reliance on a judgment of this Court in the case of *State of Punjab v. Mohinder Singh,* (1983) 2 SCC 274, in which it has been held as follows:

> "The doctor had examined accused a little before as also a little after the occurrence and he was found insane. The detailed reasons given by both Dr. Harbans Lal and Dr. Ramkumar have been corroborated by each other. From the evidence also it is clear that he was talking in a very unusual manner saying things to the effect that he had seen Lord Shiva in front of him and the alike. It cannot be said that the finding of the High Court was wrong. In view of these circumstances we are not in a position to take a different



> view particularly when the appellant was suffering from schizophrenia."

5. Another decision of this Court on which reliance has been placed is in the case of *Shrikant Anandrao Bhosale v. State of Maharashtra,* (2002) 7 SCC 748, and our attention has been drawn to the following passage from paragraph 20 of the judgment:

> "In the present case, however, it is not only the aforesaid facts but it is the totality of the circumstances seen in the light of the evidence on record to prove that the appellant was suffering from paranoid schizophrenia. The unsoundness of mind before and after the incident is a relevant fact. From the circumstances of the case clearly an inference can be reasonably drawn that the appellant was under a delusion at the relevant time. He was under an attack of the ailment. The anger theory on which reliance has been placed is not ruled out under schizophrenia attack. Having regard to the nature of burden on the appellant, we are of the view that the appellant has proved the existence of circumstances as required by Section 105 of the Evidence Act so as to get the benefit of Section 84 IPC. We are unable to hold that the crime was committed as a result of an extreme fit of anger. There is a reasonable doubt that at the time of commission of the crime, the appellant was incapable of knowing the nature of the act by reason of unsoundness of mind and, thus, he is entitled to the benefit of Section 84 IPC. Hence, the conviction and sentence of the appellant cannot be sustained."

6. Nobody had appeared on behalf of the respondent. However, we have perused the records and bestowed our consideration to the submission advanced by Mr. Agarwal and we do not find any substance in the same. In view of the plea raised it is desirable to consider the meaning of the expression "unsoundness of mind" in the context of Section 84 of the Indian

Penal Code and for its appreciation, we deem it expedient to reproduce the same. It reads as follows:

> *"84. Act of a person of unsound mind*.—Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."

Section 84 of the Indian Penal Code is found in its Chapter IV, which deals with general exceptions.

7. From a plain reading of the aforesaid provision it is evident that an act will not be an offence, if done by a person who, at the time of doing the same by reason of unsoundness of mind, is incapable of knowing the nature of the act, or what he is doing is either wrong or contrary to law. But what is unsoundness of mind? This Court had the occasion to consider this question in the case of *Bapu alias Gujraj Singh v. State of Rajasthan,* (2007) 8 SCC 66, in which it has been held as follows:

> "The standard to be applied is whether according to the ordinary standard, adopted by reasonable men, the act was right or wrong. The mere fact that an accused is conceited, odd, irascible and his brain is not quite all right, or that the physical and mental ailments from which he suffered had rendered his intellect weak and had affected his emotions and will, or that he had committed certain unusual acts in the past, or that he was liable to recurring fits of insanity at short intervals, or that he was subject to getting epileptic fits but there was nothing abnormal in his behaviour, or that his behaviour was queer, cannot be sufficient to attract the application of this section."

8. The scope and ambit of the Section 84 of the Indian Penal Code also came up for consideration before this Court in the case of *Hari Singh Gond v. State of Madhya Pradesh,* (2008) 16 SCC 109 = AIR 2009 SC 31 in which it has been



held as follows:

> "Section 84 lays down the legal test of responsibility in cases of alleged unsoundness of mind. There is no definition of 'unsoundness of mind' in IPC. The courts have, however, mainly treated this expression as equivalent to insanity. But the term 'insanity' itself has no precise definition. It is a term used to describe varying degrees of mental disorder. So, every person, who is mentally diseased, is not ipso facto exempted from criminal responsibility. A distinction is to be made between legal insanity and medical insanity. A court is concerned with legal insanity, and not with medical insanity."

9. In our opinion, an accused who seeks exoneration from liability of an act under Section 84 of the Indian Penal Code is to prove legal insanity and not medical insanity. Expression "unsoundness of mind" has not been defined in the Indian Penal Code and it has mainly been treated as equivalent to insanity. But the term insanity carries different meaning in different contexts and describes varying degrees of mental disorder. Every person who is suffering from mental disease is not *ipso facto* exempted from criminal liability. The mere fact that the accused is conceited, odd, irascible and his brain is not quite all right, or that the physical and mental ailments from which he suffered had rendered his intellect weak and affected his emotions or indulges in certain unusual acts, or had fits of insanity at short intervals or that he was subject to epileptic fits and there was abnormal behaviour or the behaviour is queer are not sufficient to attract the application of Section 84 of the Indian Penal Code.

10. Next question which needs consideration is as to on whom the onus lies to prove unsoundness of mind. In law, the presumption is that every person is sane to the extent that he knows the natural consequences of his act. The burden of proof in the face of Section 105 of the Evidence Act is on the accused. Though the burden is on the accused but he is not

required to prove the same beyond all reasonable doubt, but merely satisfy the preponderance of probabilities. The onus has to be discharged by producing evidence as to the conduct of the accused prior to the offence, his conduct at the time or immediately after the offence with reference to his medical condition by production of medical evidence and other relevant factors. Even if the accused establishes unsoundness of mind, Section 84 of the Indian Penal Code will not come to its rescue, in case it is found that the accused knew that what he was doing was wrong or that it was contrary to law. In order to ascertain that, it is imperative to take into consideration the circumstances and the behaviour preceding, attending and following the crime. Behaviour of an accused pertaining to a desire for concealment of the weapon of offence and conduct to avoid detection of crime go a long way to ascertain as to whether, he knew the consequences of the act done by him. Reference in this connection can be made to a decision of this Court in the case of *T.N. Lakshmaiah v. State of Karnataka,* (2002) 1 SCC 219, in which it has been held as follows:

> **"9.** Under the Evidence Act, the onus of proving any of the exceptions mentioned in the Chapter lies on the accused though the requisite standard of proof is not the same as expected from the prosecution. It is sufficient if an accused is able to bring his case within the ambit of any of the general exceptions by the standard of preponderance of probabilities, as a result of which he may succeed not because that he proves his case to the hilt but because the version given by him casts a doubt on the prosecution case.
>
> **10.** In *State of M.P.* v. *Ahmadull,AIR 1961 SC 998,* this Court held that the burden of proof that the mental condition of the accused was, at the crucial point of time, such as is described by the section, lies on the accused who claims the benefit of this exemption vide Section 105 of the Evidence Act [Illustration (*a*)]. The settled position of law is that every man is presumed to be sane and to



> possess a sufficient degree of reason to be responsible for his acts unless the contrary is proved. Mere ipse dixit of the accused is not enough for availing of the benefit of the exceptions under Chapter IV.
>
> **11.** In a case where the exception under Section 84 of the Indian Penal Code is claimed, the court has to consider whether, at the time of commission of the offence, the accused, by reason of unsoundness of mind, was incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law. The entire conduct of the accused, from the time of the commission of the offence up to the time the sessions proceedings commenced, is relevant for the purpose of ascertaining as to whether plea raised was genuine, bona fide or an afterthought."

11. In the background of what we have observed above, we proceed to consider the facts of the present case. The first evidence in regard to the unsoundness of mind as brought by the appellant is the medical prescription dated 18th October, 1987 (Ext. A-1) in which symptom of the appellant has been noted as psychiatric with paranoid features and medicine was advised for sleep. Other prescriptions are dated 9th January, 1988 (Ext. A) and 5th of September 1998 in which only medicines have been prescribed. Other prescriptions (Exts. A-5 to A-7) also do not spell out the disease the appellant was suffering but give the names of the medicines, he was advised to take. The occurrence had taken place on 11th of August 2000. From these prescriptions, the only inference one can draw is that the appellant had paranoid feeling but that too was not proximate to the date of occurrence. It has to be borne in mind that to establish that acts done are not offence and come within general exception it is required to be proved that at the time of commission of the act, accused by reason of unsoundness of mind was incapable of knowing that his acts were wrong or contrary to law. In the present case the prosecution has proved beyond all reasonable doubt that

immediately after the appellant had shot- dead the deceased, threatened his driver PW.1, Vidyut Kumar Modi of dire consequences. Not only that, he ran away from the place of occurrence and threw the country-made pistol, the weapon of crime, in the well in order to conceal himself from the crime. However, it was recovered later on. The aforesaid conduct of the appellant subsequent to the commission of the offence clearly goes to suggest that he knew that whatever he had done was wrong and illegal. Further, he was running a medical shop and came to the place of occurrence and shot dead the deceased. Had the appellant been a person of unsound mind, it may not have been possible for him to run a medical shop. We are of the opinion that the appellant though suffered from certain mental instability even before and after the incident but from that one cannot infer on a balance of preponderance of probabilities that the appellant at the time of the commission of the offence did not know the nature of his act; that it was either wrong or contrary to law. In our opinion, the plea of the appellant does not come within the exception contemplated under Section 84 of the Indian Penal Code.

12. As regards the decisions of this Court in the cases of *Mohinder Singh* (supra) and *Shrikant Anandrao Bhosale* (supra), relied on by the appellant same are clearly distinguishable. In those decisions, this Court on fact found that the accused at the time of commission of crime was suffering from Schizophrenia and in that background held that accused is entitled to the protection under Section 84 of the Indian Penal Code. Here on fact, we have found that the appellant was not suffering from unsoundness of mind at the time of commission of the crime and therefore the decisions relied on in no way advance the case of the appellant.

13. We do not find any merit in the appeal and it is dismissed accordingly.

D.G. Appeal dismissed.



JT. C. I. T., MUMBAI

*v.*

M/S ROLTA INDIA LTD.

(Civil Appeal No. 135 of 2011 etc.)

JANUARY 7, 2011

**[S.H. KAPADIA,CJI, K.S. PANICKER RADHAKRISHNAN AND SWATANTER KUMAR, JJ.]**

*Income TAX ACT, 1961:*

*ss. 115JA/115JB and 234B/234C – MAT Companies – Interest on tax calculated on book profits – HELD: Interest u/ss 234B and 234C shall be payable on failure to pay advance tax in respect of tax payable u/ss 115JA/115JB – Circular No. 13/2001 dated 9.11.2001 issued by CBDT.*

**The assessee in C.A. No. 135 of 2011 furnished a return of income on 28.11.1997 declaring total income as Nil. On 28.3.2000, an order u/s 143(3) of the Income Tax Act, 1961 was passed determining the total income as nil after set off of unabsorbed business loss and depreciation. The tax was levied on book profits determined as per the provisions of s.115JA. The interest u/s 234B was charged on tax on book profits as worked out in the order of assessment. The assessee's appeal was dismissed by the CIT (A) as also by the Income Tax Appellate Tribunal. The High Court following the judgment of Karnataka High Court in the case of** *Kwality Biscuits Ltd*.[1] **held in favour of the assessee that interest u/s 234B could not be charged on the tax calculated on book profits.**

**In the instant appeals, the question for consideration before the Court was: whether interest u/s 234B can be**

1. Kwality Biscuits Ltd. Vs. CIT (2000) 243 ITR 519..

**charged on the tax calculated on book profits u/s 115JA?**

**Allowing the appeals of Revenue and dismissing those of the assesses, the Court**

**HELD:**

**1.1 Sections 115J/115JA of the Income Tax Act, 1961 are special provisions, which provide that where in the case of an assessee, the total income as computed under the Act in respect of any previous year relevant to the assessment year is less than 30% of the book profit, the total income of the assessee shall be deemed to be an amount equal to 30% of such book profit. The object is to tax zero-tax companies. [para 7] [156-E-F]**

**1.2 The pre-requisite condition for applicability of s. 234B is that the assessee is liable to pay tax u/s 208 and the expression "assessed tax" is defined to mean the tax on the total income determined u/s143(1) or u/s 143(3) as reduced by the amount of tax deducted or collected at source. Thus, there is no exclusion of ss.115J/115JA in the levy of interest u/s 234B. The expression "assessed tax" is defined to mean the tax assessed on regular assessment which means the tax determined on the application of s. 115J/115JA in the regular assessment. [para 8] [157-B-D]**

**1.3 The view of the Karnataka High Court in *Kwality Biscuits Ltd*. that interest u/s 234-B could not be charged on the tax calculated on book profits, was not shared by the Gauhati High Court in *Assam Bengal Carriers* Ltd* and Madhya Pradesh High Court in *Itarsi Oil and Flours (P.) Limited* as also by the Bombay High Court in the case of *Kotak Mahindra Finance Ltd*. which decided the issue in favour of Revenue and against the assessee. It appears that none of the assessees challenged the decisions of the Gauhati High Court, Madhya Pradesh**



**High Court as well as Bombay High Court in the Supreme Court. The judgment of the Karnataka High Court in *Kwality Biscuits Ltd.,* which was confined to s.115J of the Act, was challenged by Revenue and its special leave petition was dismissed by the Supreme Court *in limine*. [(2006) 284 ITR 434]. However, the Karnataka High Court has thereafter in the case of *Jindal Thermal Power Company Ltd.* distinguished its own decision in case of *Kwality Biscuits Ltd*. and held that s. 115JB is a self-contained code pertaining to MAT, which imposed liability for payment of advance tax on MAT companies and, therefore, where such companies defaulted in payment of advance tax in respect of tax payable u/s 115JB, it was liable to pay interest u/ss 234B and 234C of the Act. [para 9] [158-B-H; 159-A-G]**

**1.4 Thus, it can be concluded that interest u/ss 234B and 234C shall be payable on failure to pay advance tax in respect of tax payable u/ss 115JA/115JB. Therefore, Circular No. 13/2001 dated 9.11.2001 issued by CBDT reported in 252 ITR (St.)50 has no application. Moreover, in any event, para 2 of that Circular itself indicates that a large number of companies liable to be taxed under MAT provisions of s.115JB were not making advance tax payments. In the said circular, it has been clarified that s.115JB is a self-contained code and thus, all companies were liable for payment of advance tax u/s 115JB and, consequently, provisions of ss.234B and 234C imposing interest on default in payment of advance tax were also applicable. [para 9] [158-G-H; 159-A-B]**

*Kwality Biscuits Ltd. Vs. CIT* **(2000) 243 ITR 519 – distinguished.**

*Assam Bengal Carriers Ltd. v. CIT* **(1999) 239 ITR 862; and** *Madhya Pradesh High Court in Itarsi Oil and Flours (P.) Limited v. CIT* **(2001) 250 ITR 686;** *CIT v. Kotak Mahindra Finance Ltd.* **(2003) 130 TAXMAN 730;** *Jindal Thermal Power*

*Company Ltd. v. Dy. CIT* **(2006) 154 TAXMAN 547 – approved.**

**Case Law Reference:**

| | | |
|---|---|---|
| **(2000) 243 ITR 519** | **distinguished** | **para 9** |
| **(1999) 239 ITR 862** | **approved** | **para 9** |
| **(2001) 250 ITR 686** | **approved** | **para 9** |
| **(2003) 130 TAXMAN 730** | **approved** | **para 9** |
| **(2006) 154 TAXMAN 547** | **approved** | **para 9** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 135 of 2011.

From the Judgment & Order dated 06.02.2009 of the High Court of Bombay in ITA No. 1267 of 2008.

WITH

C.A. No. 136 of 2011, 459 of 2006 & 7429 of 2008.

Bishwajit Bhattacharya, ASG, R.P. Bhatt, S. Ganesh, P.H. Parekh, H.R. Rao, T.M. Singh, Laxmi lyengar, Vikas Malhotra, Taj Singh, B.V. Balaram Das, Pratap Venugopal, Surekha Raman, Asha G. Nair, Namrata Sood (for K.J. John & Co.), Vishal Prasad, Shashank Kunwar, Soumi Guha Thakurta (for Parekh & Co.), Salil Kapoor, Sanat Kapoor, Ankit Gupta, Kamal Mohan Gupta for the appearing parties.

The Judgment of the Court was delivered by

**S.H. KAPADIA, CJI** 1. Leave granted.

2. A short question which arises for determination in this batch of cases is – whether interest under Section 234B can be charged on the tax calculated on book profits under Section 115JA? In other words, whether advance tax was at all payable



on book profits under Section 115JA?

3. The lead matter in this batch of cases is Joint *CIT v. Rolta India Ltd.* (Civil Appeal arising out of S.L.P. (C) No. 25746/09).

4. Assessee furnished a return of income on 28.11.1997 declaring total income of Rs. Nil. On 28.3.2000, an order under Section 143(3) was passed determining the total income at nil after set off of unabsorbed business loss and depreciation. The tax was levied on the book profit worked out at Rs. 1,52,61,834/- determined as per the provisions of Section 115JA. The interest under Section 234B of Rs. 39,73,167/- was charged on the tax on the book profit as worked out in the order of assessment. Aggrieved by the said order, the assessee went in appeal before CIT (A). The appeal on the question in hand was dismissed. On charging of interest under Section 234B the appeal was dismissed by the Tribunal on the ground that the case fell under Section 115JA and not under Section 115J, hence, judgment of the Karnataka High Court in the case of M/s Kwality Biscuits Ltd. was not applicable. At one stage the Bombay High Court decided the matter in favour of the Department but later on by way of review it took the view following the judgment of Karnataka High Court in the case of Kwality Biscuits Ltd. that interest under Section 234B cannot be charged on tax calculated on book profits, hence, the CIT has come to this Court by way of Civil Appeal(s).

5. We quote hereinbelow Sections 234B and 234C of the Income Tax Act, 1961 (in short "the Act"):

**"Interest for defaults in payment of advance tax.**

**234B.** (1) Subject to the other provisions of this section, where, in any financial year, an assessee who is liable to pay advance tax under section 208 has failed to pay such tax or, where the advance tax paid by such assessee under the provisions of section 210 is less than ninety per

cent of the assessed tax, the assessee shall be liable to pay simple interest at the rate of one and one-half per cent for every month or part of a month comprised in the period from the 1st day of April next following such financial year to the date of determination of total income under sub-section (1) of section 143 and where a regular assessment is made, to the date of such regular assessment, on an amount equal to the assessed tax or, as the case may be, on the amount by which the advance tax paid as aforesaid falls short of the assessed tax.

*Explanation 1.*—In this section, "assessed tax" means,—

(*a*) for the purposes of computing the interest payable under section 140A, the tax on the total income as declared in the return referred to in that section;

(*b*) in any other case, the tax on the total income determined under sub-section (1) of section 143 or on regular assessment,

as reduced by the amount of tax deducted or collected at source in accordance with the provisions of Chapter XVII on any income which is subject to such deduction or collection and which is taken into account in computing such total income.

*Explanation 2.*—Where, in relation to an assessment year, an assessment is made for the first time under section 147, the assessment so made shall be regarded as a regular assessment for the purposes of this section.

*Explanation 3.*—In *Explanation 1* and in sub-section (3) "tax on the total income determined under sub-section (1) of section 143" shall not include the additional income-tax, if any, payable under section 143.

(2) Where, before the date of determination of total income under sub-section (1) of section 143 or completion of a



regular assessment, tax is paid by the assessee under section 140A or otherwise,—

(*i*) interest shall be calculated in accordance with the foregoing provisions of this section up to the date on which the tax is so paid, and reduced by the interest, if any, paid under section 140A towards the interest chargeable under this section;

(*ii*) thereafter, interest shall be calculated at the rate aforesaid on the amount by which the tax so paid together with the advance tax paid falls short of the assessed tax.

(3) Where, as a result of an order of re-assessment or re-computation under section 147, the amount on which interest was payable under sub-section (1) is increased, the assessee shall be liable to pay simple interest at the rate of one and one-half per cent for every month or part of a month comprised in the period commencing on the day following the date of determination of total income under sub-section (1) of section 143 and where a regular assessment is made as is referred to in sub-section (1) following the date of such regular assessment and ending on the date of the re-assessment or re-computation under section 147, on the amount by which the tax on the total income determined on the basis of the re-assessment or re-computation exceeds the tax on the total income determined under sub-section (1) of section 143 or on the basis of the regular assessment aforesaid.

(4) Where, as a result of an order under section 154 or section 155 or section 250 or section 254 or section 260 or section 262 or section 263 or section 264 or an order of the Settlement Commission under sub-section (4) of section 245D, the amount on which interest was payable under sub-section (1) or sub-section (3) has been increased or reduced, as the case may be, the interest shall be increased or reduced accordingly, and—

(*i*) in a case where the interest is increased, the Assessing Officer shall serve on the assessee a notice of demand in the prescribed form specifying the sum payable and such notice of demand shall be deemed to be a notice under section 156 and the provisions of this Act shall apply accordingly;

(*ii*) in a case where the interest is reduced, the excess interest paid, if any, shall be refunded.

(5) The provisions of this section shall apply in respect of assessments for the assessment year commencing on the 1st day of April, 1989 and subsequent assessment years.

**Interest for deferment of advance tax.**

**234C.** (1) Where in any financial year,—

(*a*) the company which is liable to pay advance tax under section 208 has failed to pay such tax or—

(*i*) the advance tax paid by the company on its current income on or before the 15th day of June is less than fifteen per cent of the tax due on the returned income or the amount of such advance tax paid on or before the 15th day of September is less than forty-five per cent of the tax due on the returned income or the amount of such advance tax paid on or before the 15th day of December is less than seventy-five per cent of the tax due on the returned income, then, the company shall be liable to pay simple interest at the rate of one and one-half per cent per month for a period of three months on the amount of the shortfall from fifteen per cent or forty-five per cent or seventy-five per cent, as the case may be, of the tax due on the returned income;

(*ii*) the advance tax paid by the company on its current income on or before the 15th day of March is less than the tax due on the returned income, then, the company shall be liable to pay simple interest at the rate of one and one-



half per cent on the amount of the shortfall from the tax due on the returned income:

**Provided** that if the advance tax paid by the company on its current income on or before the 15th day of June or the 15th day of September, is not less than twelve per cent or, as the case may be, thirty-six per cent of the tax due on the returned income, then, it shall not be liable to pay any interest on the amount of the shortfall on those dates;

(*b*) the assessee, other than a company, who is liable to pay advance tax under section 208 has failed to pay such tax or,—

(*i*) the advance tax paid by the assessee on his current income on or before the 15th day of September is less than thirty per cent of the tax due on the returned income or the amount of such advance tax paid on or before the 15th day of December is less than sixty per cent of the tax due on the returned income, then, the assessee shall be liable to pay simple interest at the rate of one and one-half per cent per month for a period of three months on the amount of the shortfall from thirty per cent or, as the case may be, sixty per cent of the tax due on the returned income;

(*ii*) the advance tax paid by the assessee on his current income on or before the 15th day of March is less than the tax due on the returned income, then, the assessee shall be liable to pay simple interest at the rate of one and one-half per cent on the amount of the shortfall from the tax due on the returned income:

**Provided** that nothing contained in this sub-section shall apply to any shortfall in the payment of the tax due on the returned income where such shortfall is on account of under-estimate or failure to estimate—

(*a*) the amount of capital gains; or

(*b*) income of the nature referred to in sub-clause (*ix*) of clause (*24*) of section 2,

and the assessee has paid the whole of the amount of tax payable in respect of income referred to in clause (*a*) or clause (*b*), as the case may be, had such income been a part of the total income, as part of the remaining instalments of advance tax which are due or where no such instalments are due, by the 31st day of March of the financial year:

*Explanation.*—In this section, "tax due on the returned income" means the tax chargeable on the total income declared in the return of income furnished by the assessee for the assessment year commencing on the 1st day of April immediately following the financial year in which the advance tax is paid or payable, as reduced by the amount of tax deductible or collectible at source in accordance with the provisions of Chapter XVII on any income which is subject to such deduction or collection and which is taken into account in computing such total income.

(2) The provisions of this section shall apply in respect of assessments for the assessment year commencing on the 1st day of April, 1989 and subsequent assessment years."

6. At the outset, it may be stated that Sections 234B and 234C do not make any reference to Section 115J/115JA. Section 234B lays down that where advance tax is required to be paid under Section 208 and there is a failure on that if the amount of advance tax paid under Section 210 is less than 90% of the assessed tax, then, in that case the assessee is liable to pay interest. Section 234C refers to interest for deferment of advance tax. It says that if the assessee has to pay advance tax on its current income on or before 15th of June and the tax paid is less than 15% of the tax due on the returned income or the amount of the advance tax paid on or before 15th of September is less than 45% of the tax due on the returned



income or the amount of such advance tax paid on or before 15th of December is less than 75% of the tax due on the returned income, then the assessee shall be liable to pay interest at the specified rate on the amount of the shortfall from 15% or 45% or 75%, as the case may be, of the tax due on the returned income.

7. In our view, Section 115J/115JA are special provisions. Section 207 envisages that tax shall be payable in advance during any financial year on current income in accordance with the scheme provided in Sections 208 to 219 (both inclusive) in respect of the total income of the assessee that would be chargeable to tax for the assessment year immediately following that financial year. Section 215(5) of the Act defined what is "assessed tax", i.e., tax determined on the basis of regular assessment so far as such tax relates to income subject to advance tax. The evaluation of the current income and the determination of the assessed income had to be made in terms of the statutory scheme comprising Section 115J/115JA of the Act. Hence, levying of interest was inescapable. The assessee was bound to pay advance tax under the said scheme of the Act. Section 115J/115JA of the Act were special provisions which provided that where in the case of an assessee, the total income as computed under the Act in respect of any previous year relevant to the assessment year is less than 30% of the book profit, the total income of the assessee shall be deemed to be an amount equal to 30% of such book profit. The object is to tax zero-tax companies.

8. Section 115J was inserted by Finance Act, 1987 w.e.f. 1.4.1988. This section was in force from 1.4.1988 to 31.3.1991. After 1.4.1991, Section 115JA was inserted by Finance Act of 1996 w.e.f. 1.4.1997. After insertion of Section 115JA, Section 115JB was inserted by Finance Act, 2000 w.e.f. 1.4.2001. It is clear from reading Sections 115JA and 115JB that the question whether a company which is liable to pay tax under either provision does not assume importance because specific

provision(s) is made in the section saying that all other provisions of the Act shall apply to the MAT Company (Section 115JA(4) and Section 115JB(5)). Similarly, amendments have been made in the relevant Finance Acts providing for payment of advance tax under Sections 115JA and 115JB. So far as interest leviable under Section 234B is concerned, the section is clear that it applies to all companies. The pre-requisite condition for applicability of Section 234B is that assessee is liable to pay tax under Section 208 and the expression "assessed tax" is defined to mean the tax on the total income determined under Section 143(1) or under Section 143(3) as reduced by the amount of tax deducted or collected at source. Thus, there is no exclusion of Section 115J/115JA in the levy of interest under Section 234B. The expression "assessed tax" is defined to mean the tax assessed on regular assessment which means the tax determined on the application of Section 115J/115JA in the regular assessment.

9. The question which remains to be considered is whether the assessee, which is a MAT Company, was not in a position to estimate its profits of the current year prior to the end of the financial year on 31st March. In this connection the assessee placed reliance on the judgment of the Karnataka High Court in the case of Kwality Biscuits Ltd. v. CIT reported in (2000) 243 ITR 519 and, according to the Karnataka High Court, the profit as computed under the Income Tax Act, 1961 had to be prepared and thereafter the book profit as contemplated under Section 115J of the Act had to be determined and then, the liability of the assessee to pay tax under Section 115J of the Act arose, only if the total income as computed under the provisions of the Act was less than 30% of the book profit. According to the Karnataka High Court, this entire exercise of computing income or the book profits of the company could be done only at the end of the financial year and hence the provisions of Sections 207, 208, 209 and 210 (predecessors of Sections 234B and 234C) were not applicable until and unless the accounts stood audited and the



balance sheet stood prepared, because till then even the assessee may not know whether the provisions of Section 115J would be applied or not. The Court, therefore, held that the liability would arise only after the profit is determined in accordance with the provisions of the Companies Act, 1956 and, therefore, interest under Sections 234B and 234C is not leviable in cases where Section 115J applied. This view of the Karnataka High Court in Kwality Biscuits Ltd. was not shared by the Gauhati High Court in Assam Bengal Carriers Ltd. v. CIT reported in (1999) 239 ITR 862 and Madhya Pradesh High Court in Itarsi Oil and Flours (P.) Limited v. CIT reported in (2001) 250 ITR 686 as also by the Bombay High Court in the case of CIT v. Kotak Mahindra Finance Ltd. reported in (2003) 130 TAXMAN 730 which decided the issue in favour of the Department and against the assessee. It appears that none of the assessees challenged the decisions of the Gauhati High Court, Madhya Pradesh High Court as well as Bombay High Court in the Supreme Court. However, it may be noted that the judgment of the Karnataka High Court in Kwality Biscuits Ltd. was confined to Section 115J of the Act. The Order of the Supreme Court dismissing the Special Leave Petition in limine filed by the Department against Kwality Biscuits Ltd. is reported in (2006) 284 ITR 434. Thus, the judgment of Karnataka High Court in Kwality Biscuits stood affirmed. However, the Karnataka High Court has thereafter in the case of Jindal Thermal Power Company Ltd. v. Dy. CIT reported in (2006) 154 TAXMAN 547 distinguished its own decision in case of Kwality Biscuits Ltd. (supra) and held that Section 115JB, with which we are concerned, is a self-contained code pertaining to MAT, which imposed liability for payment of advance tax on MAT companies and, therefore, where such companies defaulted in payment of advance tax in respect of tax payable under Section 115JB, it was liable to pay interest under Sections 234B and 234C of the Act. Thus, it can be concluded that interest under Sections 234B and 234C shall be payable on failure to pay advance tax in respect of tax payable under Section 115JA/115JB. For the aforestated reasons, Circular No. 13/2001

dated 9.11.2001 issued by CBDT reported in 252 ITR(St.)50 has no application. Moreover, in any event, para 2 of that Circular itself indicates that a large number of companies liable to be taxed under MAT provisions of Section 115JB were not making advance tax payments. In the said circular, it has been clarified that Section 115JB is a self-contained code and thus, all companies were liable for payment of advance tax under Section 115JB and consequently provisions of Sections 234B and 234C imposing interest on default in payment of advance tax were also applicable.

10. For the aforestated reasons CIT succeeds in the civil appeal arising out of S.L.P. (C) No. 25746 of 2009 (Jt. *CIT v. Rolta India Ltd.*) as also in the civil appeal arising out of S.L.P. (C) No. 18367 of 2010 (CIT-3 v. Export Credit Guarantee Corporation of India Ltd.). Consequently, Civil Appeal No. 459 of 2006 (*Nahar Exports v. CIT*) and Civil Appeal No. 7429 of 2008 (*Lakshmi Precision Screws Ltd. v. CIT*) stand dismissed with no order as to costs.

R.P. Appeals disposed of.



NEW INDIA ASSURANCE COMPANY LTD.
*v.*
YADU SAMBHAJI MORE & ORS.
(Civil Appeal No. 3744 of 2005)

JANUARY 07, 2011

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

*Motor Vehicles Act, 1939 – ss. 110A and 92A – Claim for no-fault compensation u/s 92A – Allowed by the Supreme Court holding that the fire and explosion of the petrol tanker resulting in the death of victim was due to accident arising out of the use of the motor vehicle, the petrol tanker – Applications u/s. 110A – Dismissed by Claims Tribunal, however allowed by the High Court holding that the order of the Supreme Court u/s 92A was conclusive on the issue – On appeal held: On the basis of the evidences led by the opposite party, no new points were raised before the Claims Tribunal that can be said to have not been raised before the Supreme Court u/s 92A – Decision rendered by the Supreme Court on an application u/s 92A was completely binding on the Claims Tribunal – Claims Tribunal could not come to any finding inconsistent with the decision of the Supreme Court.*

**There was a collision involving the petrol tanker and the other truck resulting in leakage from the tanker. Few hours later, there was a fire and explosion resulting in the death of 46 persons, who had assembled at the accident site. The heirs and legal representatives of the victims filed claim petitions for compensation under Section 110A of the Motor Vehicles Act, 1939 against the owner of the petrol tanker and the appellant, the insurer; and for no-fault compensation under Section 92A of the Act. The Claims Tribunal dismissed all the claim petitions filed under Section 92A of the Act on the ground that the fire and the explosion could not be said to be accident**

**arising out of the use of the petrol tanker and there was a time gap of about four hours. The appeals were filed before the High Court. One 'VU' whose son died in the accident also filed an appeal. The Single Judge of the High Court set aside the order passed by the Claims Tribunal. The Division Bench of the High Court upheld the order passed by the Single Judge. Aggrieved, the owner of the tanker and the insurance company filed SLP and the same was dismissed. The judgment was reported as ****Shivaji Dayanu Patil & Anr.* **vs.** *Vatschala Uttam More* **where it was held that the fire and explosion of the petrol tanker in which son of 'VU' lost his life could be said to have resulted from an accident arising out of the use of the motor vehicle, petrol tanker, thus, allowed the claim of no-fault compensation by and/or on behalf of the victims. As regards the applications filed under Section 110A of the Act, the Claims Tribunal dismissed all applications. The High Court allowed the appeal holding that the ****Shivaji Dayanu Patil***'s case was conclusive on the issue that the death of the victim, caused by the fire and explosion of the petrol tanker, had resulted from an accident arising out of the use of the motor vehicle, namely the petrol tanker. However, the High Court on a prayer made by the appellant, granted them certificate to appeal to this Court. Therefore, the appellant filed the instant appeal.**

**Dismissing the appeal, the Court**

**HELD: 1.1 On the basis of the evidences later on adduced before the Tribunal in the main proceeding under Section 110A of the Motor Vehicles Act, 1939, it might be possible for the Claims Tribunal to arrive at a finding at variance with the finding recorded by a superior court on the same issue on an application under Section 92A of the Act. But the variant finding by the Tribunal must be based on some material facts coming to light**



**from the evidences led before it that were not available before the superior court while dealing with the proceeding under Section 92A of the Act. However, in the instant case, as correctly noted by the High Court, the position is entirely different. [Para 13] [168-G-H; 169-A-B]**

**1.2 The evidences of the OWs adduced before the Claims Tribunal, in particular the depositions of the owner of the petrol tanker, who was examined himself as OW1 and the driver of the ill-fated petrol tanker who was examined as OW2 are examined and the judgment of the Tribunal is perused. In the evidences of the OWs, there was no new material fact that wasn't already before this Court in ****Shivaji Dayanu Patil,* **and on the basis of the evidences led by the opposite party, no new points were raised before the Claims Tribunal that can be said to have not been raised before this Court in ****Shivaji Dayanu Patil***. [Para 15] [171-B-C]**

**1.3 In the facts and circumstances of the instant case, the decision rendered in ****Shivaji Dayanu Patil* **was completely binding on the Claims Tribunal and it was not open to the Claims Tribunal to come to any finding inconsistent with the said decision of this Court. [Para 16] [172-A-B]**

**Shivaji Dayanu Patil and Anr. vs. Vatschala Uttam More* **(1991) 3 SCC 530 – Relied on.**

**Case Law Reference:**

| | | |
|---|---|---|
| **(1991) 3 SCC 530** | **Relied on** | **Para 4** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3744 of 2005.

From the Judgment and Order dated 28.04.2005 of the High Court of Judicature at Bombay in Civil Application No. 1583 of 2005 in First Appeal No. 149 of 1999.

Atul Nanda, (AC) , Ramesh Chandra Mishra, Ashok Kumar Singh, Sapam Biswajit Mietei, Surender Dutt Sharma, Punam Kumari and Dr. Meera Agarwal for the appearing parties.

The Judgment of the Court was delivered by

**AFTAB ALAM, J.** 1. This is an appeal under Article 133 of the Constitution of India read with Order XV Rule 1 of the Supreme Court Rules,1966 on a certificate granted by the Bombay High Court under Article 134A(b) of the Constitution. The appellant is the insurance company and it seeks to assail the judgment and order passed by the High Court in an appeal from a motor accident claim case. In order to properly appreciate the issue in regard to which the High Court has granted the certificate to appeal, it would be useful to take note of some basic facts of the case.

2. In the early hours of October 29, 1987 a petrol tanker bearing registration no.MXL7461, was proceeding on National Highway 4, coming from the Pune side and going towards Bangalore. As it reached near village Kavathe, in the district of Satara, Maharashtra, a truck, bearing registration no.MEH4197, laden with onions, was coming from the opposite direction. At the point where the two vehicles crossed each other, there was a pile of rubble on the left side of the road. As the two vehicles crossed each other, the rear right side of the petrol tanker was hit by the rear left side of the truck. As a result of the impact, the petrol tanker was thrown off the road and it came to rest on its left side/ cleaner's side on the kutcha ground, about 5 feet below the road. As a result of the collision and the falling down of the petrol tanker on its side, petrol started leaking from the tanker. The tanker driver was unable to stop the leak even though he tried to tighten the lid. The accident took place at around 3:15am. Shortly after the accident, another tanker, coming from the Bombay side passed by. In that tanker, apart from the driver, there was also an officer of the Indian Oil Company. Both of them assured the driver of



the fallen down tanker that they would report the accident at the police station and asked him to wait near the place of the accident. Later on, yet another tanker from Sangli arrived at the spot and then the cleaner of the ill-fated tanker and the owner of the Sangli tanker together went to village Kavathe in search of a telephone to inform the tanker owner about the accident. After they came back from the village all of them, the driver and the cleaner of the tanker that had met with accident and the owner, the driver and the cleaner of the tanker coming from Sangli waited near the accident site. At daybreak, the local people started collecting near the fallen down tanker and some of them brought cans and tried to collect the petrol leaking out from the tanker. The driver of the tanker tried to stop them from collecting petrol or even going near the tanker, explaining to them that doing so would be risky and dangerous. No one, however, listened to him and he was even manhandled. In the melee, the petrol caught fire and there was a big explosion in which 46 persons lost their lives.

3. The heirs and legal representatives of those people who died at the accident site filed claim petitions for compensation under section 110A of the Motor Vehicles Act, 1939 before the MACT, Satara, against the owner of the petrol tanker and its insurer, the present appellant. In all the cases, claims were also made for payment of Rs.15,000/- as no fault compensation under section 92A of the Act. The owner of the tanker and the insurer (the respondents before the Tribunal) contested the claim petitions filed by the applicants under section 92A of the Act and questioned the jurisdiction of the Claims Tribunal to entertain such petitions on the ground that the fire and the explosion causing the death of those who had assembled at the accident site could not be said to be an accident arising out of the use of a motor vehicle. The Claims Tribunal upheld the objection raised by the insurer and the owner of the petrol tanker, and by a common order dated December 2, 1989, dismissed all the claim petitions filed under section 92A of the Act on the ground that the fire and the explosion could not be

said to be accident arising out of the use of the petrol tanker and hence, the provisions of section 92A of the Act were not attracted. The Claims Tribunal pointed out that there was a time gap of about 4 hours between the tanker meeting with the road accident and the fire and explosion of the tanker and there was absolutely no connection between the road accident and the fire accident that took place about 4 hours later. The Claims Ttribunal also observed that the local people were trying to steal petrol from the petrol tanker and the fire and the explosion were the result of their attempt to steal the petrol leaking out from the tanker. In other words, it was the people who had assembled at the accident site and some of whom eventually died as a result of it who were responsible for causing the fire and explosion accident and the later accident had no causal connection with the earlier road accident of the tanker. The fire and the explosion could not be said to be an accident arising out of the use of the tanker. Against the order of the Claims Tribunal passed on December 2, 1989, appeals were filed before the High Court. One such appeal was filed by Vatschala Uttam More, whose son Deepak Uttam More was one of the persons who died as a result of injuries caused by the fire and explosion of the petrol tanker. A learned single judge of the High Court allowed the appeal and by judgment dated February 5, 1990, reversed the order passed by the Claims Tribunal. Against the decision of the single judge, the owner of the petrol tanker and the insurance company filed a Letters Patent Appeal which was dismissed by a division bench of the High Court by judgment dated August 16, 1990.

4. The owner of the petrol tanker and the insurance company then brought the matter to this court in SLP no.14822 of 1990 challenging the judgment and order of the High Court passed on August 16, 1990. The SLP was dismissed by this court by judgment and order passed on July 17, 1991. In this judgment, reported as *Shivaji Dayanu Patil & Anr.* vs. *Vatschala Uttam More*, (1991) 3 SCC 530 the Court considered at length, the questions whether the fire and



explosion of the petrol tanker in which Deepak Uttam More lost his life could be said to have resulted from an accident arising out of the use of a motor vehicle, namely the petrol tanker. The court answered the question in the affirmative, that is to say, in favor of the claimant and against the insurer.

5. The judgment of this Court, thus, put an end to the objections raised by the owner and the insurer of the petrol tanker against the claim of no fault compensation by and/or on behalf of the victims of the fire and explosion accident.

6. But next came the turn of the main applications filed under section 110A of the Act. There were altogether 44 claim applications in which, case no.168 of 1988 was treated as the lead case. In the main claim cases too, the owner and the insurer of the tanker *inter alia* raised the same objections as taken earlier against the claim of no fault compensation. In view of the pleadings of the parties, the Claims Tribunal framed five issues in which issue no.3, being relevant for the present, was as follows:

> "3. Whether sustaining of injuries was (*sic*) arising out of use of the petrol tanker and was the result of negligence on the part of the petrol tanker driver?"

7. On the basis of the evidences led before it, the Claims Tribunal answered the issue in the negative and as a consequence dismissed all the claim cases by its judgment and order dated July 31, 1997.

8. Against the judgment and order passed by the Claims Tribunal, the applicant of MACP no.168 of 1988, preferred an appeal before the High Court (being First Appeal no.149 of 1999). (The other claimants whose claims were similarly dismissed by the Claims Tribunal are also said to have preferred their respective appeals before the High Court which are pending awaiting the result of the present appeal before this Court).

9. Before the High Court it was contended on behalf of the claimants that the question whether the death of the victims resulted from an accident arising out of the use of the petrol tanker was concluded by the decision of this Court in *Shivaji Dayanu Patil* and any finding recorded by the Claims Tribunal contrary to the decision of this Court was completely illegal and untenable. On the other hand, on behalf of the insurer and the owner of the petrol tanker, it was argued that the decision of this Court in *Shivaji Dayanu Patil* was rendered on a claim for no-fault compensation under section 92A of the Act. It was, thus, a judgment against an interlocutory order, before any evidences were recorded in the proceeding and, therefore, the decision in *Shivaji Dayanu Patil* cannot be taken as binding and it was open to the Claims Tribunal or the High Court to come to a different finding on the basis of the evidences adduced in course of the main proceeding. It was further argued, on behalf of the insurer and the owner of the petrol tanker that an order under section 92A is, in nature, an interim order that is passed without following the formal procedure of recording evidence. The decision of this Court in *Shivaji Dayanu Patil* had not decided the issue finally and conclusively and, hence, the claimants could not draw any benefit from it in the main proceeding under section 110A of the Act based on the principle of fault or negligence of the driver of the vehicle. The High Court did not accept the arguments advanced on behalf of the owner and the insurer of the petrol tanker, but agreed with the claimants that the decision of this Court in *Shivaji Dayanu Patil* was conclusive on the issue that the death of the victim, caused by the fire and explosion of the petrol tanker, had resulted from an accident arising out of the use of the motor vehicle, namely, the petrol tanker and it was not open to the Claims Tribunal to take a contrary view. It, accordingly, allowed the appeal and by judgment and order dated March 24, 2005, set aside the judgment of the Claims Tribunal and allowed the claim petition with costs.

10. Though, having held against the insurer, the High Court,



on a prayer made before it, granted certificate to appeal to this Court by order dated April 28, 2005, in the following terms:

> "1. Heard advocates for the appellant and respondents. The issue involved that is for the purpose of this leave to go to the Supreme Court is, whether the order of the Supreme Court under section 92A was for all purposes an interim order or it concluded and decided the question as to whether the vehicle i.e. the tanker was in use when exploded. Though, I have held against the respondents, looking to the question involved, certificate as prayed, is granted. No stay to the order of payment. Certified copy expedited."

11. Mr. Ramesh Chandra Mishra appearing on behalf of the appellant advanced the same arguments before us as were advanced before the High Court in support of the judgment passed by the Claims Tribunal. Learned counsel submitted that the decision of this Court in *Shivaji Dayanu Patil* was rendered on an application under section 92A of the Act and, therefore, any finding recorded in that decision would not be binding on the Claims Tribunal in the main proceeding under section 110A of the Act that was to be decided on the basis of the evidences adduced before the Tribunal.

12. On hearing Mr. Atul Nanda, the *amicus curiae* and Mr. Ashok Kumar Singh, counsel appearing on behalf of the respondent, we are unable to accept the submissions made by Mr. Ramesh Chandra Mishra and we are in complete agreement with the view taken by the High Court.

13. In a given case, on the basis of the evidences later on adduced before it in the main proceeding under section 110A of the Act, it may be possible for the Claims Tribunal to arrive at a finding at variance with the finding recorded by a superior court on the same issue on an application under section 92A of the Act. But the variant finding by the tribunal must be based on some material facts coming to light from the evidences led

before it that were not available before the superior court while dealing with the proceeding under section 92A of the Act. In this case, however, as correctly noted by the High Court, the position is entirely different. It is true that the case *Shivaji Dayanu Patil* arose from the claim for no-fault compensation under section 92A but all the material facts were already before the court and all the contentions being raised now were considered at length by this Court in that case. In *Shivaji Dayanu Patil* the Court took note of the relevant facts in paragraphs 2 and 3 of the judgment. In paragraph 4 of the judgment, the Court noted the three limbs of argument advanced by Mr. G.L. Sanghi, learned counsel appearing for the owner of the petrol tanker in support of the plea that the explosion and fire in the petrol tanker could not be said to be an accident arising out of the use of a motor vehicle. Paragraph 4 of the judgment reads as under:

> "4. Shri G.L. Sanghi, the learned Counsel appearing for the petitioners, has urged that in the instant case, it cannot be said that the explosion and fire in the petrol tanker which occurred at about 7.15 A.M., i.e., nearly four and half hours after the collision involving the petrol tanker and the other truck, was an accident arising out of the use of a motor vehicle and therefore, the claim petition filed by the respondent could not be entertained under Section 92-A of the Act. Shri Sanghi has made a three-fold submission in this regard. In the first place, he has submitted that the petrol tanker was not a motor vehicle as defined in Section 2(18) of the Act at the time when the explosion and fire took place because at that time the petrol tanker was lying turtle and was not capable of movement on the road. The second submission of Shri Sanghi is that since before the explosion and fire the petrol tanker was lying immobile it could not be said that the petrol tanker, even if it be assumed that it was a motor vehicle, was in use as a motor vehicle at the time of the explosion and fire. Thirdly, it has been submitted by Shri Sanghi that even if it is found



> that the petrol tanker was in use as a motor vehicle at the time of the explosion and fire, there was no causal relationship between the collision which took place between the petrol tanker and the truck at about 3 A.M. and the explosion and fire in the petrol tanker which took place about four and half hours later and it cannot, therefore, be said that explosion and fire in the petrol tanker was an accident arising out of the use of a motor vehicle."

14. After having considered each of the 3 limbs of Mr. Sanghi's arguments and having rejected all of them, the Court, in paragraph 37 of the judgment, held and observed as follows:

> "37. Was the accident involving explosion and fire in the petrol tanker connected with the use of tanker as a motor vehicle? In our view, in the facts and circumstances of the present case, this question must be answered in the affirmative. The High Court has found that the tanker in question was carrying petrol which is a highly combustible and volatile material and after the collision with the other motor vehicle the tanker had fallen on one of its sides on the sloping ground resulting in escape of highly inflammable petrol and that there was grave risk of explosion and fire from the petrol coming out of the tanker. In the light of the aforesaid circumstances the learned Judges of the High Court have rightly concluded that the collision between the tanker and the other vehicle which had occurred earlier and the escape of petrol from the tanker which ultimately resulted in the explosion and fire were not unconnected but related events and merely because there was interval of about four to four and half hours between the said collision and the explosion and fire in the tanker, it cannot be necessarily inferred that there was no causal relation between explosion and fire. In the circumstances, it must be held that the explosion and fire resulting in the injuries which led to the death of Deepak Uttam More was due to

an accident arising out of the use of the motor vehicle viz. the petrol tanker No. MKL 7461."

15. We have examined the evidences of the OWs adduced before the Claims Tribunal, in particular the depositions of Shivaji Patil, the owner of the petrol tanker, who examined himself as OW1 and Dhondirama Mali, the driver of the ill-fated petrol tanker who was examined as OW2. We have also gone through the judgment of the Tribunal. In the evidences of the OWs, there was no new material fact that wasn't already before this Court in *Shivaji Dayanu Patil.* And on the basis of the evidences led by the opposite party, no new points were raised before the Claims Tribunal, that can be said to have not been raised before this Court in *Shivaji Dayanu Patil*. The High Court was, therefore, perfectly justified in observing in paragraph 26 of the judgment coming under appeal as follows:

"… But whether the vehicle was in use or not was a question before the Supreme Court and even after evidence that aspect has not changed. Time at which the accident occurred, viz. catching the fire by the petrol has remained the same. The circumstances preceding this particular point have also remained the same. The manner in which the petrol tanker came near the spot and how it was hit by a vehicle or truck coming from opposite direction also remained the same even after evidence and therefore when facts which were before the Supreme Court have not at all changed inspite of the full trial and evidence, the judgment of the Supreme Court has to be accepted and taken as a concluded judgment so far as the issue as to whether the vehicle was "in use" or "arising out of the use of the motor vehicle", fully and concluding. Secondly, questions before the Supreme Court was about the interpretation of the words "arising out of use of motor vehicle". The situation namely occurring explosion to the petrol tanker has not changed so far as this particular aspect is concerned…."



16. In light of the discussions made above, it must be held that in the facts and circumstances of the present case, the decision rendered in *Shivaji Dayanu Patil* was completely binding on the Claims Tribunal and it was not open to the Claims Tribunal to come to any finding inconsistent with the aforesaid decision of this Court. The issue framed by the High Court is answered accordingly. There is no merit in the appeal and it is, accordingly, dismissed with costs.

N.J. Appeal dismissed.

DAYA NAND
*v.*
STATE OF HARYANA
(Criminal Appeal No. 30 of 2011)

JANUARY 7, 2011

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

*Juvenile Justice (Care and Protection of Children) Act, 2000: s.2(k), 2(1), 7-A, 20 and 49 – Determination of juvenility – Held: All persons below the age of 18 years on the date of commission of offence would be treated as juveniles, even if the claim of juvenility is raised after they have attained the age of 18 years on or before the date of commencement of the 2000 Act and were undergoing sentence upon being convicted – Accordingly, a juvenile who has not completed 18 years on the date of commission of the offence is entitled to the benefits of the 2000 Act, as if the provisions of s.2(k) had always been in existence even during the operation of the 1986 Act – In the instant case, appellant was convicted u/s.376 r/w s.511, IPC – His age at the time of commission of offence was about 16 years, therefore, he is held to be a juvenile, within the meaning of s.2(l) of the amended 2000 Act – He cannot be kept in prison to undergo the sentence – The sentence imposed is set aside and he is directed to be released from prison – He is further directed to be produced before the Juvenile Justice Board, for passing appropriate orders in accordance with the provisions of 2000 Act – Juvenile Justice Act, 1986 – s.2(h) – Juvenile Justice (Care and Protection of Children) Rules 2007 – rr.12 and 98 – Penal Code, 1860 – s.376 r/w s.511.*

**The appellant was convicted under Section 376 r.w. Section 511, IPC, however, his plea of juvenility was accepted by the trial court. The Session Court reversed the findings as regards the juvenility of the appellant. The**





**High court upheld the order of the Session Court. In the instant appeal, the appellant again raised the plea of juvenility.**

**Disposing of the appeal, the Court**

**HELD: 1.1. On the date of occurrence i.e. 2.2.1998, the age of the appellant was 16 years 5 months and 19 days. In the Juvenile Justice Act, 1986, a 'juvenile' was defined under section 2(h) to mean a boy who has not attained the age of *16 years* or a girl who has not attained the age of 18 years. On the basis of the finding of the Session Court that on the date of occurrence, the appellant was over 16 years of age, he did not come within the definition of 'juvenile' under the 1986 Act. The Juvenile Justice Act, 1986 was replaced by the Juvenile Justice (Care and Protection of Children) Act, 2000 that came into force on April 1, 2001. The 2000 Act defined 'juvenile or child' in section 2(k) to mean a person who has not completed eighteenth years of age. Section 69 of the 2000 Act, repealed the Juvenile Justice Act, 1986. Section 20 of 2000 Act also contained a provision in regard to cases that were pending when it came into force and in which the accused at the time of commission of offence was below 18 years of age but above sixteen years of age (and hence, not a juvenile under the 1986 Act) and consequently who was being tried not before a juvenile court but a regular court. [Paras 9, 10 and 11] [179-E-H; 180-A-B]**

**1.2. A Constitution Bench of this Court held in *_Pratap Singh case_ that section 20 of the 2000 Act would apply only to cases in which the accused was below 18 years of age on April 1, 2001, the date on which the 2000 Act came into force but it would have no application in case the accused had crossed the age of 18 years on the date of coming into force of the 2000 Act. Applying the ratio of *_Pratap Singh case_, the appellant would not be entitled**

**to the protections and benefits of the provisions of the 2000 Act, since he was over 18 years of age on April 1, 2001, when the 2000 Act came into force. But the matter did not stop at that stage. After this Court's decision in *Pratap Singh* (and presumably as a result of that decision) a number of amendments of a very basic nature were introduced in the 2000 Act w.e.f. August 22, 2006 by Act 33 of 2006. The effect of the amendments in the 2000 Act were considered by this Court in *****Hari Ram case*** **wherein it was held that the Constitution Bench decision in ****Pratap Singh's*** **case was no longer relevant since it was rendered under the unamended Act. It was held in *****Hari Ram case*** **that a conjoint reading of Sections 2(k), 2(1), 7-A, 20 and 49 of 2000 Act read with Rules 12 and 98, places beyond all doubt that all persons who were below the age of 18 years on the date of commission of the offence even prior to April 1, 2001, would be treated as juveniles, even if the claim of juvenility was raised after they had attained the age of 18 years on or before the date of commencement of the Act and were undergoing sentence upon being convicted. Section 7A of 2000 Act made provision for the claim of juvenility to be raised before any court at any stage and such claim was required to be determined in terms of the provisions contained in the 2000 Act and the Rules framed thereunder, even if the juvenile had ceased to be so on or before the date of commencement of the Act. Accordingly, a juvenile who had not completed eighteen years on the date of commission of the offence was also entitled to the benefits of the Juvenile Justice Act, 2000, as if the provisions of Section 2(k) had always been in existence even during the operation of the 1986 Act. The said position was re-emphasised by virtue of the amendments introduced in Section 20 of the 2000 Act, whereby the proviso and Explanation were added to Section 20, which made it even more explicit that in all pending cases, including trial, revision, appeal and any**



**other criminal proceedings in respect of a juvenile in conflict with law, the determination of juvenility of such a juvenile would be in terms of Clause (l) of Section 2 of the 2000 Act, and the provisions of the Act would apply as if the said provisions had been in force when the alleged offence was committed. [Paras 12 to 14] [180-E-H; 183-F-H; 184-A-F]**

***Hari Ram* v. *State of Rajasthan and Anr.* **(2009) 13 SCC 211 – Followed.**

*Dharambir* v. *State (NCT of Delhi) and Anr.* **(2010) 5 SCC 344;** *Mohan Mali and Anr. v. State of M.P.* **AIR 2010 SC 1790 – relied on.**

**Pratap Singh vs. State of Jharkhand and Anr.* **(2005) 3 SCC 551 – referred to.**

**1.3. In view of the Juvenile Justice Act as it stood after the amendments introduced into it and following the decision in *****Hari Ram*** **and the later decisions the appellant cannot be kept in prison to undergo the sentence imposed by the Session Court and affirmed by the High Court. The sentence imposed against the appellant is set aside and he is directed to be released from prison. He is further directed to be produced before the Juvenile Justice Board, for passing appropriate orders in accordance with the provisions of the Juvenile Justice Act. [Para 16] [185-C-D]**

**Case Law Reference:**

| | | |
|---|---|---|
| **(2005) 3 SCC 551** | **Referred to** | **Para 12, 13** |
| **(2009) 13 SCC 211** | **Followed** | **Para 14, 15, 16** |
| **(2010) 5 SCC 344** | **Relied on** | **Para 15** |
| **AIR 2010 SC 1790** | **Relied on** | **Para 15** |

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 30 of 2011.

From the Judgment and Order dated 15.10.2009 of the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 174-SB of 1999.

D.S. Bali, Shalu Sharma and Rajesh Sharma for the Appellant.

Alok Sangwan (for Devashish Bharuka) for the Respondent.

The Judgment of the Court was delivered by

**AFTAB ALAM, J.** 1. Leave granted.

2. The appellant stands convicted under section 376 read with section 511 of the Penal Code and sentenced to rigorous imprisonment for five years and a fine of Rs.2000/- with the direction that in default of payment of fine he would undergo rigorous imprisonment for a further period of two months.

3. According to the prosecution case, on February 2, 1998, at about 10.00 A.M., the prosecutrix had gone out to the fields for relieving herself. There she was accosted by the appellant. Seeing him take off his pants, the prosecutrix tried to run away but the appellant caught hold of her and pulled her down to the ground. The prosecutrix freed herself by biting on the appellant's hand and ran towards her house. The appellant chased her and again caught hold of her. He pulled her down and grabbed her breasts and attempted to commit rape on her. She resisted him and in their struggle some mustard crops grown in the field were also damaged. On alarm raised by the prosecutrix, her mother and uncle came to the spot and on seeing them, the appellant ran away threatening the prosecutrix that he would kill her in case she went to the police.

4. In support of its case, the prosecution examined the mother of the prosecutrix as PW.1, the prosecutrix herself as



PW.2 and two policemen connected with the investigation and a photographer who had taken pictures of the place of occurrence.

5. The Additional Sessions Judge, Narnaul, trying the offence, on a consideration of the evidence adduced before him, found and held that the charge against the appellant was fully proved and by judgment and order dated February 13/15, 1999, passed in Sessions Case No.39 of 6.10.1998, Sessions Trial No.1 of 1.2.1999 convicted and sentenced him, as noted above. Against the judgment and order passed by the trial court, the appellant preferred an appeal (Criminal Appeal No.174-SB of 1999) before the High Court of Punjab and Haryana at Chandigarh. The High Court dismissed the appeal by judgment and order dated October 15, 2009, maintaining the conviction and sentence awarded to the appellant.

6. So far as the question of the appellant's guilt is concerned, that seems to be amply established by the evidence adduced by the prosecution and there is no need to go into any further detail in that regard. What needs to be considered in this appeal is the appellant's plea based on juvenility.

7. From the judgment of the High Court coming under appeal, it appears that the plea of the appellant's juvenility was raised at an early stage of the proceedings and the Principal Magistrate, Juvenile Justice Court, Narnaul, by his order dated March 20, 1998 had found that the appellant was a juvenile. Against the order of the Principal Magistrate, the State went in appeal and the learned Sessions Judge, Narnaul, reversed the findings of the Principal Magistrate, Juvenile Justice Court, observing that the date of birth of the appellant as recorded in the Deaths and Births Register maintained by the Registrar was August 14, 1981 and reckoned on that basis, he was not a juvenile on February 2, 1998, the date of the occurrence. As a consequence, the appellant was tried not before a Juvenile Court, but before the Additional Sessions Judge, Narnaul.

8. The plea of juvenility was again raised in appeal, but

the High Court rejected it referring to the finding of the Sessions Judge on the matter and observing as follows:-

> "Learned counsel for the appellant argued that the appellant was a juvenile at the time of occurrence and should have been tried by the Principal Magistrate, Juvenile Justice Court, Narnaul. However, after going through the records of the case, I do not find any merit in this argument. In his order dated 20.3.1998, the Principal Magistrate, Juvenile Justice Court, Narnaul, had held that the appellant was a juvenile. Against the order dated 20.3.1998, the State had gone in appeal and the learned Sessions Judge Narnaul, reversed the findings of the Principal Magistrate, Juvenile Justice Court, Narnaul by observing that the date of birth of the appellant was 14.8.1981 as mentioned in the Deaths and Births Register so maintained by the Registrar. Thus, on 2.2.1998, i.e. the date of occurrence, the appellant was not a juvenile."

9. From the above it is evident that on the date of occurrence the age of the appellant was 16 years 5 months and 19 days.

10. In the Juvenile Justice Act, 1986, a 'juvenile' was defined under section 2(h) to mean a boy who has not attained the age of *16 years* or a girl who has not attained the age of 18 years. On the basis of the finding of the Sessions Judge that on the date of occurrence, the appellant was over 16 years of age, he did not come within the definition of 'juvenile' under the 1986 Act.

11. The Juvenile Justice Act, 1986 was replaced by the Juvenile Justice (Care and Protection of Children) Act, 2000 that came into force on April 1, 2001. The 2000 Act defined 'juvenile or child' in section 2(k) to mean a person who has not completed eighteenth years of age. Section 69 of the 2000 Act, repealed the Juvenile Justice Act, 1986. The 2000 Act, in section 20 also contained a provision in regard to cases that



were pending when it came into force and in which the accused at the time of commission of offence was below 18 years of age but above sixteen years of age (and hence, not a juvenile under the 1986 Act) and consequently who was being tried not before a juvenile court but a regular court. Section 20 (prior to its amendment in 2006) provided as follows:

> "20. Special provision in respect of pending cases. – Notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which this Act comes into force in that area, shall be continued in that court as if this Act had not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of this Act as if it had been satisfied on inquiry under this Act that a juvenile has committed the offence."

12. The above quoted provision came up for consideration before a Constitution Bench of this Court in *Pratap Singh vs. State of Jharkhand and Anr.,* (2005) 3 SCC 551. In Pratap Singh, this Court held that section 20 of the 2000 Act would apply only to cases in which the accused was below 18 years of age on April 1, 2001, the date on which the 2000 Act came into force but it would have no application in case the accused had crossed the age of 18 years on the date of coming into force of the 2000 Act.

13. Applying the ratio of the Constitution Bench decision, the appellant would not be entitled to the protections and benefits of the provisions of the 2000 Act, since he was over 18 years of age on April 1, 2001, when the 2000 Act came into force. But the matter did not stop at that stage. After this Court's decision in *Pratap Singh* (and presumably as a result of that decision) a number of amendments of a very basic nature were introduced in the 2000 Act w.e.f. August 22, 2006 by Act 33 of

2006. Some of the provisions incorporated in the 2000 Act by the 2006 amendment insofar as relevant for the present are reproduced below:

"1(4) Notwithstanding anything contained in any other law for the time being in force, the provisions of this Act shall apply to all cases involving detention, prosecution, penalty or sentence of imprisonment of juveniles in conflict with law under any such law.

2(1) "juvenile in conflict with law" means a juvenile who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence;

7(A) Procedure to be followed when claim of juvenility is raised before any court – (1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:

Provided that a claim of juvenility may be raised before any court and it shall be recognized at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate orders and the sentence, if any, passed by a Court shall be deemed to have no effect.



20. Special provision in respect of pending cases. – Notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which this Act comes into force in that area, shall be continued in that court as if this Act had not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of this Act as if it had been satisfied on inquiry under this Act that a juvenile has committed the offence:

[Provided that the Board may, for any adequate and special reason to be mentioned in the order, review the case and pass appropriate order in the interest of such juvenile.

*Explanation*. – In all pending cases including trial, revision, appeal or any other criminal proceedings in respect of a juvenile in conflict with law, in any court, the determination of juvenility of such a juvenile shall be in terms of clause (1) of section 2, even if the juvenile ceases to be so on or before the date of commencement of this Act and the provisions of this Act shall apply as if the said provisions had been in force, for all purposes and at all material times when the alleged offence was committed.]

64. Juvenile in conflict with law undergoing sentence at commencement of this Act. - In any area in which this Act is brought into force, the State Government shall direct that a juvenile in conflict with law who is undergoing any sentence of imprisonment at the commencement of this Act, shall, in lieu of undergoing such sentence, be sent to a special home or be kept in fit institution in such manner as the State Government thinks fit for the remainder of the period of the sentence; and the provisions of this Act shall apply to the juvenile as if he had been ordered by the

Board to be sent to such special home or institution or, as the case may be, ordered to be kept under protective care under sub-section (2)of section 16 of this Act:

Provided that the State Government or as the case may be the Board, may, for any adequate and special reason to be recorded in writing, review the case of a juvenile in conflict with law undergoing sentence of imprisonment, who has ceased to be so on or before the commencement of this Act, and pass appropriate order in the interest of such juvenile.

*Explanation*. – In all cases where a juvenile in conflict with law is undergoing a sentence of imprisonment at any stage on the date of commencement of this Act, his case including the issue of juvenility, shall be deemed to be decided in terms of clause (1) of Section 2 and other provisions contained in this Act and the rules made thereunder, irrespective of the fact that he ceases to be a juvenile on or before such date and accordingly he shall be sent to the special home or a fit institution, as the case may be, for the remainder of the period of the sentence but such sentence shall not in any case exceed the maximum period provided in section 15 of this Act."

14. The effect of the amendments in the 2000 Act were considered by this Court in *Hari Ram* v. *State of Rajasthan and Another* reported in (2009) 13 SCC 211. In *Hari Ram* this Court held that the Constitution Bench decision in *Pratap Singh's* case was no longer relevant since it was rendered under the unamended Act. In *Hari Ram* this Court held and observed as follows:

"59. The law as now crystallised on a conjoint reading of Sections 2(k), 2(1), 7-A, 20 and 49 read with Rules 12 and 98, places beyond all doubt that all persons who were below the age of 18 years on the date of commission of the offence even prior to 1-4-2001, would be treated as



juveniles, even if the claim of juvenility was raised after they had attained the age of 18 years on or before the date of commencement of the Act and were undergoing sentence upon being convicted.

xxx xxxx xxx xxxx

67. Section 7A of the Juvenile Justice Act, 2000, made provision for the claim of juvenility to be raised before any Court at any stage, as has been done in this case, and such claim was required to be determined in terms of the provisions contained in the 2000 Act and the Rules framed thereunder, even if the juvenile had ceased to be so on or before the date of commencement of the Act.

68. Accordingly, a juvenile who had not completed eighteen years on the date of commission of the offence was also entitled to the benefits of the Juvenile Justice Act, 2000, as if the provisions of Section 2(k) had always been in existence even during the operation of the 1986 Act.

69. The said position was re-emphasised by virtue of the amendments introduced in Section 20 of the 2000 Act, whereby the Proviso and Explanation were added to Section 20, which made it even more explicit that in all pending cases, including trial, revision, appeal and any other criminal proceedings in respect of a juvenile in conflict with law, the determination of juvenility of such a juvenile would be in terms of Clause (l) of Section 2 of the 2000 Act, and the provisions of the Act would apply as if the said provisions had been in force when the alleged offence was committed.

70. In the instant case, there is no controversy that the appellant was about sixteen years of age on the date of commission of the alleged offence and had not completed eighteen years of age. In view of Sections 2(k), 2(l) and 7A read with Section 20 of the said Act, the provisions

thereof would apply to the appellant's case and on the date of the alleged incident it has to be held that he was a juvenile."

15. Later on, the decision in *Hari Ram* (supra) was followed by this Court in *Dharambir* v. *State (NCT of Delhi) and Another*, (2010) 5 SCC 344 and also in *Mohan Mali & Another* v. *State of M.P.*, AIR 2010 SC 1790.

16. In view of the Juvenile Justice Act as it stands after the amendments introduced into it and following the decision in *Hari Ram* and the later decisions the appellant can not be kept in prison to undergo the sentence imposed by the Additional Sessions Judge and affirmed by the High Court. The sentence imposed against the appellant is set aside and he is directed to be released from prison. He is further directed to be produced before the Juvenile Justice Board, Narnaul, for passing appropriate orders in accordance with the provisions of the Juvenile Justice Act.

17. The appeal is, thus, disposed of with the aforesaid observations and directions.

D.G. Appeal disposed of.



M/S. UNITED RICELAND LTD.
*v.*
STATE OF HARYANA AND ANR.
(Civil Appeal No. 3463 of 2003)

JANUARY 7, 2011

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

*Haryana General Sales Tax Act, 1973: s.9(1)(b) – Exemption under – Assessment year 1990-91 – Held: The benefit of the exemption contained in s.9(1)(b) is available to the dealer only upto 15th October, 1990 i.e. the date when Ordinance no.2 of 1990, deleting s.9 was promulgated – The dealer would not be liable to pay purchase tax on the purchase of paddy made by them upto 15th October, 1990 – Haryana General Sales Tax (Second Amendment) Ordinance no.2 of 1990.*

*Constitution of India, 1950: Articles 367(2) and 213(2) – Held: An ordinance promulgated by the President or the Governor has the same force and effect as an Act of Parliament or Act of State Legislature, as the case may be – Articles 367(2) and 213(2) make it abundantly clear that an ordinance operates in the field it occupies with the same rigour as an Act – Haryana General Sales Tax (Second Amendment) Ordinance no.2 of 1990.*

**The appellant was engaged in the business of purchase and dehusking of paddy to produce rice, in the State of Haryana. The turnover of the paddy purchased by the dealer during the assessment year 1990-91 was subjected to purchase tax under Sections 6 and 15-A of the Central Sales Tax Act, 1956 by assessment orders dated 14th January, 1997 and 9th July, 1999. The appellant filed a writ petition before the High Court challenging the assessment orders. The High Court**

**dismissed the writ petition on the ground of delay and laches.**

**In the instant appeal, it was contended for the appellant that the date of commencement of an Act which is preceded by an ordinance, is the date of promulgation of the ordinance; and that the benefit of exemption contained in Section 9(1)(b) of the Act would be available to the dealer till 15th October, 1990 i.e. the date when Ordinance No. 2 of 1990, deleting Section 9 of the Act, was promulgated.**

**Partly allowing the appeal, the Court**

**HELD: 1. It is trite that an ordinance promulgated by the President or the Governor has the same force and effect as an Act of Parliament or Act of State Legislature, as the case may be. Articles 367(2) and 213(2) of the Constitution make it abundantly clear that an ordinance operates in the field it occupies with the same rigour as an Act. [Para 14] [196--F-G]**

*R.K. Garg v. Union of India & Ors.* **(1981) 4 SCC 675;** *A.K. Roy v. Union of India & Ors.* **(1982) 1 SCC 271;** *Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.* **(2001) 6 SCC 356;** *T. Venkata Reddy & Ors. v. State of Andhra Pradesh* **(1985) 3 SCC 198;** *Satnam Overseas (Export) & Ors. v. State of Haryana & Anr.* **(2003) 1 SCC 561 – relied on.**

**2. Ordinance no.2 of 1990 was succeeded by the Haryana General Sales Tax (Amendment) Act no.4 of 1991 (Act no.4 of 1991) which came into effect from 15th April, 1991. Section 9 ceased to exist in the statute book from the date of promulgation of the ordinance i.e. 15th October, 1990. There was nothing in the Act No. 4 of 1991 rendering the provisions of the ordinance otiose during the period from 15th October, 1990 to 15th April, 1991,**



**therefore, the benefit of the exemption contained in Section 9(1)(b) of the Act was available to the dealer only upto 15th October, 1990; and not till 1st April, 1991. The dealer will not be liable to pay purchase tax on the purchase of paddy made by them upto 15th October, 1990, i.e. till the date of promulgation of Ordinance No.2 of 1990. [Paras 15, 16] [197-B-E]**

*United Riceland Limited & Anr. v. State of Haryana & Ors.* **104 STC 362 (Full Bench);** *Bishambhar Nath Kohli & Ors. v. State of Uttar Pradesh & Ors.* **AIR 1966 SC 573;** *M/s. Titagarh Paper Mills Ltd. v. Orissa State Electricity Board & Anr.* **(1975) 2 SCC 436;** *Murli Manohar and Co. & Anr. v. State of Haryana & Anr.* **(1991) 1 SCC 377;** *Hotel Balaji & Ors. v. State of A.P. & Ors.* **1993 Supp (4) SCC 536;** *K.B. Handicrafts Emporium & Ors. v. State of Haryana & Ors.* **1993 Supp (4) SCC 589 – referred to.**

**Case Law Reference:**

| | | |
|---|---|---|
| **104 STC 362 (FB)** | **referred to** | **Para 4** |
| **(2003) 1 SCC 561** | **referred to** | **Paras 6, 7, 9,12, 13, 15** |
| **AIR 1966 SC 573** | **referred to** | **Para 6** |
| **(1981) 4 SCC 675** | **relied on** | **Para 6** |
| **(1982) 1 SCC 271** | **relied on** | **Para 6, 14** |
| **(2001) 6 SCC 356** | **relied on** | **Para 6, 7** |
| **(1975) 2 SCC 436** | **referred to** | **Para 7** |
| **(1991) 1 SCC 377** | **referred to** | **Para 9** |
| **1993 Supp (4) SCC 536** | **referred to** | **Para 9** |
| **1993 Supp (4) SCC 589** | **referred to** | **Para 9** |
| **(1985) 3 SCC 198** | **relied on** | **Para 14** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3463 of 2003.

From the Judgment & Order dated 03.08.2000 of the High Court of Punjab & Haryana at Chandigarh in C.W.P. No. 10110 of 2000.

Ramesh Singh, Ankur Saigal, Bina Gupta for the Appellant.

Gaurav Teotia (for Kamal Mohan Gupta) for the Respondents.

The Judgment of the Court was delivered by

**D.K. JAIN, J.:** 1. This appeal, by special leave, is directed against the judgment dated 3rd August, 2000 delivered by the High Court of Punjab and Haryana, whereby the writ petition filed by the appellant herein, questioning the Constitutional validity of Haryana General Sales Tax (Amendment) Act 9 of 1993 (for short "Act 9 of 1993"), substituting Section 15-A in the Haryana General Sales Tax Act, 1973 (for short "the Act") retrospectively w.e.f. 27th May, 1971, has been dismissed.

2. The appellant (hereinafter referred to as "the dealer"), a registered dealer under the Act, was engaged in the business of purchase and dehusking of paddy to produce rice, in the State of Haryana. Rice so produced was exported outside the country within the meaning of Section 5 of the Central Sales Tax Act, 1956 (for short "the CST Act"). The present appeal relates to the assessment year 1990-91. The turnover of the paddy purchased by the dealer during the relevant year was subjected to purchase tax under Sections 6 and 15-A of the Act vide assessment orders dated 14th January, 1997 and 9th July, 1999.

3. Aggrieved by the said levy, the dealer preferred a writ petition before the High Court, challenging, *inter alia,* the



substitution of Section 15-A in the Act vide Act 9 of 1993, with retrospective effect.

4. Before the High Court, it was conceded by the counsel for the dealer that the question of the constitutional validity of substituted Section 15-A was concluded against the dealer by virtue of the decision of a Full Bench of the High Court in *United Riceland Limited & Anr. Vs. State of Haryana & Ors.*[1], and therefore, the said issue did not survive for consideration. In so far as the merits of the assessments were concerned, the High Court was of the opinion that since an efficacious statutory remedy by way of appeal was available to the dealer and that the writ petition also suffered from delay and laches, it could not be entertained. Accordingly, as noted above, by the impugned judgment, the writ petition has been dismissed primarily on the ground of laches.

5. Hence, the present appeal.

6. Mr. Ramesh Singh, learned counsel appearing on behalf of the dealer contended that in *Satnam Overseas (Export) & Ors. Vs. State of Haryana & Anr.*[2], this Court did not consider the effect of the Haryana General Sales Tax (Second Amendment) Ordinance No. 2 of 1990 (for short "Ordinance No. 2 of 1990") which had deleted Section 9 of the Act with effect from 15th October, 1990. Learned counsel argued that in light of the decisions of this Court in *Bishambhar Nath Kohli & Ors. Vs. State of Uttar Pradesh & Ors.*[3]; *R.K. Garg Vs. Union of India & Ors.*[4]; *A.K. Roy Vs. Union of India & Ors.*[5] and *Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd.*[6], it is settled that the date of commencement of an Act which is preceded by an

1. 104 STC 362 (Full Bench).
2. (2003) 1 SCC 561.
3. AIR 1966 SC 573.
4. (1981) 4 SCC 675.
5. (1992) 1 SCC 271.
6. (2001) 6 SCC 356.

ordinance, is the date of promulgation of the ordinance. Learned counsel argued that in any case the benefit of exemption contained in Section 9(1)(b) of the Act would be available to the dealer till 15th October, 1990 i.e. the date when Ordinance No. 2 of 1990, deleting Section 9 of the Act, was promulgated.

7. *Per contra,* learned counsel for the respondents submitted that since the provisions of Ordinance No. 2 of 1990 were incorporated in the Haryana General Sales Tax (Amendment) Act No.4 of 1991 (for short "Act No. 4 of 1991"), in light of the judgment of this Court in *Fuerst Day Lawson Ltd.* (supra), the amendment was effective from the date of the ordinance i.e 15th October, 1990. It was urged that if at all the dealer was eligible for the benefit of the exemptions under Section 9(1)(b) of the Act, it would only be for a part of the year and not for the whole of the assessment year, as initially claimed. While supporting the impugned judgment, learned counsel contended that the High Court had rightly dismissed the dealer's writ petition as barred by laches, and had correctly relegated them to the statutory remedy under the Act in light of the decision of this Court in *M/s. Titagarh Paper Mills Ltd. Vs. Orissa State Electricity Board & Anr.*[7]. It was asserted that dealer's challenge to the levy of purchase tax cannot survive after this Court had upheld the validity of Section 15-A of the Act in *Satnam Overseas (Export)* (supra).

8. In order to appreciate the rival submissions, it would be expedient to examine relevant provisions of the Act. Section 9, as it stood prior to its deletion by Ordinance No.2 of 1990, provided that:

"9. (1) Where a dealer liable to pay tax under this Act,

(*a*) * * *

7. (1975) 2 SCC 436.



(*b*) purchases goods, other than those specified in Schedule B, from any source in the State and uses them in the State in the manufacture of any other goods and either disposes of the manufactured goods in any manner otherwise than by way of sale in the State or dispatches the manufactured goods to the place outside the State in any manner otherwise than by way of sale in the course of inter-State trade or commerce or in the course of export outside the territory of India within the meaning of Section 5 of the Central Sales Tax Act, 1956; or

(*c*) * * *

in the circumstances in which no tax is payable under any other provision of this Act, there shall be levied, subject to the provisions of Section 17, a tax on the purchase of such goods at such rate as may be notified under Section 15."

9. The scope and ambit of Section 9(1)(b) of the Act, was succinctly explained by this Court in *Satnam Overseas (Export)* (supra). It was observed that the Section postulates the existence of circumstances in which no tax is payable, under any provisions of the Act by a dealer who: (i) is liable to pay tax under the Act; (ii) purchases goods (referred to as "raw material") (other than those specified in Schedule B) from any source in the State; (iii) uses them in the State in the manufacture of any other goods (referred to as "manufactured goods"); (iv) disposes of the manufactured goods in any manner otherwise, than by way of sale or (v) dispatches the manufactured goods to a place outside the State in any manner and provides that in such a case there shall be levied, a tax, subject to the provisions of Section 17, on the purchase of raw material at such rate as may be notified under Section 15 of the Act. It was explained that the levy of purchase tax on the raw material would have no application when the manufactured goods are: (a) disposed of by way of sale in the State; (b) dispatched to a place outside the State: (i) in the course of inter-State trade or commerce, or (ii) in the course of export outside

the territory of India, within the meaning of Section 5 of the CST Act. It was emphasised that the exemptions contained in Section 9(1)(b) of the Act were confined to cases of impost levied thereunder and not otherwise. Endorsing the view expressed by this Court in the cases of *Murli Manohar and Co. & Anr. Vs. State of Haryana & Anr.*[8], *Hotel Balaji & Ors. Vs. State of A.P. & Ors.*[9] and *K.B. Handicrafts Emporium & Ors. Vs. State of Haryana & Ors.*[10], it was held as under:

> "…we conclude that specific charging provision of Section 9(1)(b) will be attracted as the assessee purchased paddy (which is not one of the goods specified in Schedule B), procured rice (manufactured goods) from the said paddy and exported rice outside the territory of India, on which no purchase tax was payable under the general charging provision of Section 6 which is, inter alia, subject to the provisions of Section 9. We have already held above that the assessees will not be liable to pay tax on the purchase of such paddy in view of the provisions of clause (b) of sub-section (1) of Section 9 in the assessment years in question, or, for that matter, any assessment year ending before 1-4-1991."

10. Ordinance No.2 of 1990 was succeeded by Act No.4 of 1991 which came into effect from 15th April, 1991. Section 15 of Act No.4 of 1991 provided that:

> "The Haryana General Sales Tax (Second Amendment) Ordinance, 1990 (Haryana Ordinance No.2 of 1990), is hereby repealed."

11. Section 15-A was initially inserted in the Act on 25th January, 1990 and was given retrospective effect from 27th May, 1971. Presently, we are concerned with Section 15-A as

8. (1991) 1 SCC 377.

9. 1993 Supp (4) SCC 536.

10. 1993 Supp (4) SCC 589.



substituted by Act No. 9 of 1993 retrospectively from 27th May, 1971. It provides:

> "15-A. *Adjustment or refund of tax in certain cases*.— Subject to the provisions of clause (*iii*) of proviso to sub-section (1) of Section 15 and subject to the conditions and restrictions, as may be prescribed—
>
> (*i*) the tax leviable under this Act or the Central Sales Tax Act, 1956, on the sale of goods by a dealer, manufactured by him, shall be reduced by the amount of tax paid in the State on the sale or purchase of goods, other than the tax paid on the last purchase of paddy, cotton and oilseeds, used in their manufacture; and
>
> (*ii*) when no tax is leviable on the sale of manufactured goods except those specified in Schedule B, subject to the conditions and exceptions specified therein, or when the tax leviable on the sale of manufactured goods is less than the tax paid in the State on the sale or purchase of goods, other than the tax paid on the 1st purchase of paddy, cotton and oilseeds, used in their manufacture, the full amount of tax paid or the excess amount of tax paid over the tax leviable on sale, as the case may be, shall be refundable if the manufactured goods are sold in the State or in the course of inter-State trade or commerce or in the course of export out of the territory of India.
>
> Provided that in case the manufactured goods have been sold before the 1st day of January, 1988 the tax paid on goods, leviable to tax at the first stage of sale under Section 18, used in their manufacture, shall not be refunded."

12. The question relating to the constitutional validity of the retrospective substitution of Section 15-A in the Act w.e.f. 27th May, 1971 is no more *res integra*, in light of the decision of this Court in *Satnam Overseas (Export)* (supra), wherein this

Court, while upholding the constitutionality of Act 9 of 1993, observed thus:

> "It is true that Section 15-A does not permit refund of purchase tax paid on paddy, cotton and oilseeds by an assessee though such a relief is available in regard to other goods. In the light of the above discussion, the challenge to Section 15-A on the ground of violation of Section 15(*c*) of the CST Act or Article 286(1)(*b*) of the Constitution cannot be sustained because the only relief that is granted by Section 15(*c*) is reduction of tax leviable on the sale of rice procured from out of paddy, where tax has been levied on sale or purchase of such paddy inside the State. This relief is incorporated by the Haryana Act in clause (*iii*) of the proviso to sub-section (1) of Section 15. Even clause (*b*) of sub-article (1) of Article 286 does not provide for exemption of tax on the purchase of paddy. There is no other provision either in Article 286 or in the CST Act which bars a State from levying tax on the sale or purchase of paddy which is not exported out of the territory of India. Section 15-A proceeds on the premise that purchase tax is payable, inter alia, on paddy. From the above discussion, it is clear that before the omission of Section 9 from the Haryana Act, no purchase tax was payable on paddy under Section 6 of the Act, therefore, during the aforesaid period, the assessee cannot complain of the denial of the benefit of adjustment and refund of purchase tax on the basis of Section 15-A of the Haryana Act. The position would, however, be different after 1-4-1991, when Section 9 was omitted from the Act."

The Court finally summed up its conclusions as follows:

> "(*1*) In the specified circumstances in which charge of purchase tax on the raw material is imposed, clause (*b*) of sub-section (1) of Section 9 of the Haryana Act and the exemptions provided therein would apply; the law declared



> by this Court in *Murli Manohar & Co.*, *Hotel Balaji* and *K.B. Handicrafts* holds the field;
>
> (*2*) while Section 9 remained on the statute-book till 1-4-1991, retrospective amendments of Sections 2(*p*), 6, 15 and 15-A of the Haryana Act would make no difference in regard to levy of purchase tax on paddy;
>
> (*3*) adjustment of purchase tax paid on paddy (raw material) is permissible under Section 15-A of the Haryana Act during the relevant period;
>
> (*4*) by virtue of Section 15-A of the Haryana Act, denial of refund of purchase tax, if any, paid by a dealer is not illegal much less unconstitutional."

13. The Court held that the exemptions mentioned in Section 9(1)(b) of the Act would be available to the dealer for assessment years ending before 1st April, 1991, and the substituted Section 15-A, which provides that purchase tax payable on paddy used as raw material can neither be refunded nor adjusted, will not have any effect between 27th May, 1971 and 1st April, 1991 as Section 9(1)(b) still existed in the statute book during that period. It is evident that in *Satnam Overseas (Export)* (supra), this Court did not examine the effect of Ordinance No.2 of 1990, as Section 9 was first deleted vide the said Ordinance w.e.f. 15th October, 1990.

14. It is trite that an ordinance promulgated by the President or the Governor has the same force and effect as an Act of Parliament or Act of State Legislature, as the case may be. Articles 367(2) and 213(2) of the Constitution make it abundantly clear that an ordinance operates in the field it occupies with the same rigour as an Act. In *A.K. Roy* (supra); a Constitution Bench of this Court had observed that "an ordinance issued by the President or the Governor is as much a law as an Act passed by the Parliament and is, fortunately and unquestionably, subject to the same inhibitions. In those

inhibitions lie the safety of the people." This view has been approved and reiterated in other Constitution Bench decisions. (See: *R.K. Garg* (supra); *T. Venkata Reddy & Ors. Vs. State of Andhra Pradesh*[11] and *Fuerst Day Lawson Ltd.* (supra).)

15. Examined on the touch-stone of the afore-noted legal principles, it is manifest that Section 9 ceased to exist in the statute book from the date of promulgation of the ordinance i.e. 15th October, 1990; particularly, when there was nothing in the Act No. 4 of 1991 rendering the provisions of the ordinance otiose during the period from 15th October, 1990 to 15th April, 1991. Therefore, it follows that the benefit of the exemption contained in Section 9(1)(b) of the Act was available to the dealer only upto 15th October, 1990; and not till 1st April, 1991, as elucidated in *Satnam Overseas (Exports)* (supra).

16. In light of the foregoing discussion, the appeal is partly allowed to the extent that the dealer will not be liable to pay purchase tax on the purchase of paddy made by them upto 15th October, 1990, i.e. till the date of promulgation of Ordinance No.2 of 1990.

17. In the facts and circumstances of the case, we make no order as to costs.

D.G. Appeal partly allowed.

11. (1985) 3 SCC 198.



AUTOMOTIVE TYRE MANUFACTURERS ASSOCIATION
*v.*
THE DESIGNATED AUTHORITY & ORS.
(CIVIL APPEAL NO. 949 OF 2006 ETC.)

JANUARY 7, 2011

**[D.K. JAIN AND H.L. DATTU, JJ.]**

*Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995:*

*Rules 4, 5, 6, 10 11 and 17 r/w s. 9 of Tariff Act – Investigation and findings by Designated Authority as to existence, degree and extent of alleged dumping, determination of normal value, export price and margin of dumping and determination of injury –HELD : DA performs quasi-judicial functions under the Tariff Act read with Rules and is bound to act judicially –While determining the existence, degree and effect of the alleged dumping the DA determines a 'lis' between the persons supporting the levy of duty and those opposing the said levy –Customs Tariff Act, 1975 –s.9-C.*

*Rules 4,5,6, 10, 11 and 17 – Investigation as to existence, degree and extent of alleged dumping and final finding thereon – Opportunity of oral hearing – HELD: In view of the elaborate procedure prescribed in r.6 which the DA is obliged to adhere to, while conducting the investigation, duty to follow the principles of natural justice is implicit in the existence of power conferred on him under the Rules – The procedure prescribed in the Rules imposes a duty on DA to afford to all the parties, who have filed objection and adduced evidence, a personal hearing before taking a final decision in the matter – Even written arguments are no substitute for an oral hearing – In the instant case, the entire matter had*

*been collected by the predecessor of the DA, but the final findings in the form of an order were recorded by the successor DA who had no occasion to hear the appellants – The final order of the new DA offends the basic principle of natural justice and, as such, is quashed – Consequently, the decision of the Tribunal is set aside and the notification dated 27.4.2006 is quashed – Administrative Law – Principles of natural justice – Oral hearing – Doctrines – Audi alteram partem.*

*Customs Tariff Act, 1975:*

*s.9-A – Anti dumping duty – Refund of – HELD: In view of the fact that importers and its constituent members have passed on the burden of levy on third persons, they cannot claim refund of the anti-dumping duty levied – Doctrine of unjust enrichment is attracted – Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995.*

*Words and Phrases:*

*"Natural justice" – Connotation of.*

**The domestic tyre manufacturing units, represented by the appellant (ATMA), imported Nylon Tyre Cord Fabric (NTCF) from various countries, including China, as one of their raw materials for manufacture of tyres. In 2003, respondent no. 3, the Association of Synthetic Fibre Industry (ASFI), filed an application under the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 before the Designated Authority (DA), inter alia, praying for imposition of anti-dumping duty u/s 9A of the Customs Tariff Act, on imports of NTCF from China. The DA issued the notification in terms of Rules 5 and 6 of the 1995 Rules indicating the period of investigation from 1.4.2002 to 30.6.2003. After conducting**



**investigation, the DA recorded preliminary findings and issued a public notice by Notification dated 30.6.2004, recommending imposition of provisional anti-dumping duty on NTCF originating in and exported from China. Accordingly, the Central Government, by Notification dated 26.7.2004 imposed the provisional anti-dumping duty. The DA granted a public hearing to all the parties on 1.9.2004. However, on 1.11.2004 the said DA was transferred and a new officer took over as the DA, who sent the disclosure statement to all the parties concerned on 12.1.2005. The DA then issued final findings by Notification dated 9.3.2005, recommending the imposition of anti-dumping duty on NTCF originating from China. The Central Government accepted the final findings of the DA and issued Notification dated 27.4.2005 levying anti-dumping duty at different rates. Writ petitions were filed before the Kerala High Court, which by its order dated 12.7.2005, disposing of the writ petitions, directed the incumbent DA to grant hearing on the issues raised in the writ petitions and issue orders modifying the final findings to the extent required. The order of the High Court was challenged before the Supreme Court, which, suspending the operation of the judgment of the High Court, directed the parties to pursue the remedy before the Customs, Excise and Service Tax Appellate Tribunal u/s 9 of the Act. The Tribunal, ultimately, dismissed the appeals and confirmed the levy of anti-dumping duty in terms of Notification dated 27.4.2005, holding that the imposition of anti-dumping duty being legislative in character, the principles of natural justice were not applicable to the proceedings before the DA and, therefore, the persons affected had no right to be heard before imposition of the duty.**

**In the instant appeals, during the course of hearing, it was conceded that the function of DA was not legislative in nature and, thus, the contentions of the**

**parties boiled down to the questions: (1) "whether the function of the DA is administrative or quasi-judicial in character"; and (2) "whether or not the decision of the DA dated 9th March, 2005, returning the final findings in terms of Rule 17 of the 1995 Rules is in breach of the principles of natural justice, resulting in vitiating the subject notification under Rule 18 of the said Rules."**

**Partly allowing the appeals, the Court**

**HELD:**

**1.1 For determining whether a power is an administrative power or a quasi-judicial power, regard must be had to: (i) the nature of the power conferred; (ii) the person or persons on whom it is conferred; (iii) the framework of the law conferring that power; (iv) the consequences ensuing from the exercise of that power; and (v) the manner in which that power is expected to be exercised. [para 49] [255-B-C]**

*Province of Bombay vs. Khushaldas S. Advani & Ors.* **1950 SCR 621 = 1950 AIR 222;** *Jaswant Sugar Mills Ltd., Meerut Vs. Lakshmi Chand & Ors.* **1963 Supp (1) SCR 242 - relied on.**

*A.K. Kraipak & Ors. Vs. Union of India & Ors.* **1970 (1) SCR 457 = 1969 (2) SCC 262 – referred to**

**1.2 Keeping in view the scheme of the Tariff Act read with the 1995 Rules and the principles, particularly, the first principle enunciated in *Khusaldas S. Advani's case*, this is an obvious case where the DA exercises quasi-judicial functions and is bound to act judicially. A cursory look at the relevant Rules would show that the DA determines the rights and obligations of the 'interested parties' and by applying objective standards based on the material/information/evidence presented by the**



**exporters, foreign producers and other 'interested parties' by applying the procedure and principles laid down in the 1995 Rules. Rule 5 of the 1995 Rules provides that the DA shall initiate an investigation so as to determine the existence, degree and effect of any alleged dumping upon the receipt of a written application by or on behalf of the domestic industry. When the DA has decided to initiate an investigation, Rule 6 requires that a public notice shall be issued to all the interested parties as mentioned in Rule 2(c), as also to industrial users of the product and to the representatives of the consumer organisations in cases when the product is commonly sold at the retail level. It is manifest that while determining the existence, degree and effect of the alleged dumping, the DA determines a *'lis'* between persons supporting the levy of duty and those opposing the said levy. [para 52] [257-E-H; 258-A-B]**

**1.3 Further, it is also clear from the scheme of the Tariff Act and the 1995 Rules that the determination of existence, effect and degree of alleged dumping is on the basis of criteria mentioned in the Tariff Act and 1995 Rules, and an anti-dumping duty cannot be levied unless, on the basis of the investigation, it is established that there is: (i) existence of dumped imports; (ii) material injury to the domestic industry and, (iii) a causal link between the dumped imports and the injury. Rule 10 of the Rules lays down the criteria for the determination of the normal value, export price and margin of dumping, while Rule 11 deals with the determination of injury, which according to Annexure II to the 1995 Rules, is based on positive evidence and involves an objective examination of both: (a) the volume and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products. It is evident that the determination of injury is premised on an**

**objective examination of the material submitted by the parties. [para 53] [258-C-G]**

*S&S Enterprise Vs. Designated Authority & Ors.* **2005 (2 ) SCR 255 = 2005 (3 ) SCC 337 – relied on**

**1.4 Moreover, under Rule 6(7) of the 1995 Rules, the DA is required to make available the evidence presented to it by one party to other interested parties, participating in the investigation. It is also pertinent to note that Rule 12 of the 1995 Rules which deals with the preliminary findings, explicitly provides that such findings shall "contain sufficiently detailed information for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected." A similar stipulation is found in relation to the final findings recorded by the DA under Rule 17(2) of the 1995 Rules. [para 53] [258-F-H; 259-A]**

**1.5 Above all, Section 9C of the Tariff Act provides for an appeal to the Tribunal against the order of determination or review thereof regarding the existence, degree and effect of dumping in relation to imports of any article, which order, obviously has to be based on the determination and findings of the DA. The cumulative effect of all these factors leads to an irresistible conclusion that the DA performs quasi-judicial functions under the Tariff Act read with the 1995 Rules and is bound to act judicially. [para 53] [259-A-C]**

**2.1 It is trite that rules of "natural justice" are not embodied rules. The phrase "natural justice" is also not capable of a precise definition. The underlying principle of natural justice, evolved under the common law, is to check arbitrary exercise of power by the State or its functionaries. Therefore, the principle implies a duty to**



**act fairly i.e. fair play in action. [para 55] [259-E]**

*A.K. Kraipak & Ors. Vs. Union of India & Ors.* **1970 (1) SCR 457 = 1969 (2) SCC 262; and** *Mohinder Singh Gill & Anr. Vs. The Chief Election Commissioner, New Delhi & Ors.* **1978 (2) SCR 272 = 1978 (1) SCC 405; and** *Swadeshi Cotton Mills Vs. Union of India* **1981 (2) SCR 533 = 1981 (1) SCC 664 – relied on.**

**2.2 It is well settled that unless a statutory provision, either specifically or by necessary implication excludes the application of principles of natural justice, because in that event the Court would not ignore the legislative mandate, the requirement of giving reasonable opportunity of being heard before an order is made, is generally read into the provisions of a statute, particularly, when the order has adverse civil consequences which obviously cover infraction of property, personal rights and material deprivations for the party affected. The principle holds good irrespective of whether the power conferred on a statutory body or Tribunal is administrative or quasi-judicial. It is equally trite that the concept of natural justice can neither be put in a strait-jacket nor is it a general rule of universal application. Undoubtedly, there can be exceptions to the said doctrine. The question whether the principle has to be applied or not is to be considered bearing in mind the express language and the basic scheme of the provision conferring the power; the nature of the power conferred and the purpose for which the power is conferred and the final effect of the exercise of that power. It is only upon a consideration of these matters that the question of application of the said principle can be properly determined. [Para 58] [261-F-H; 262-A-C]**

*Union of India Vs. Col. J.N. Sinha & Anr.* **(1970) 2 SCC 458 – relied on**

**2.3 In light of the legal position and the elaborate procedure prescribed in Rule 6 of 1995 Rules, which the DA is obliged to adhere to while conducting investigations, duty to follow the principles of natural justice is implicit in the exercise of power conferred on him under the said Rules. In so far as the instant case is concerned, though it was sought to be pleaded on behalf of the respondents that the incumbent DA had issued a common notice to the Advocates for ATMA and Ningbo Nylon, for oral hearing on 9.3.2005, however, there is no document on record indicating that pursuant to ATMA's letter dated 24.1.2005, notice for oral hearing was issued to them by the incumbent DA. Moreover, the alleged opportunity of oral hearing on 9.3.2005, being in relation to the price undertaking offer by Ningbo Nylon, cannot be likened to a public hearing contemplated under Rule 6(6) of the 1995 Rules. [para 59] [262-D-G]**

**2.4 The procedure prescribed in the 1995 Rules imposes a duty on the DA to afford to all the parties, who have filed objections and adduced evidence, a personal hearing before taking a final decision in the matter. Even written arguments are no substitute for an oral hearing. A personal hearing enables the authority concerned to watch the demeanour of the witnesses etc. and also clear up his doubts during the course of the arguments. However, as held in *Gullapalli,* if one person hears and other decides, then personal hearing becomes an empty formality. In the instant case, admittedly, the entire material had been collected by the predecessor of the DA; he had allowed the interested parties and/or their representatives to present the relevant information before him in terms of Rule 6(6), but the final findings in the form of an order were recorded by the successor DA, who had no occasion to hear the appellants. The final order passed by the new DA offends the basic principle of natural justice. Thus, the impugned notification having**



**been issued on the basis of the final findings of the DA, who failed to follow the principles of natural justice, cannot be sustained. Since the recommendation of the DA stands vitiated on account of non-compliance with the basic principle of *audi alteram partem,* the decision of the Tribunal is set aside and the Notification No.36/2005-Cus., dated 27.4. 2005, is quashed. [para 59, 61 and 64] [262-F-H; 263-A-C-E; 265-B-C]**

*Gullapalli Nageswara Rao & Ors. Vs. Andhra Pradesh State Road Transport Corporation & Anr.* **AIR 1958 SC 308 – relied on.**

**3.1 As regards the refund of the duty already paid and collected, it is trite law that in the case of indirect taxes like central excise duties and customs duties, the tax collected by the State without the authority of law, shall not be refunded to the petitioner unless he alleges and establishes that he has himself borne the burden of the said duty and that he has not passed on the burden of duty to a third party. In such a situation, the doctrine of unjust enrichment comes into play. [para 61] [263-E-H]**

*Mafatlal Industries Ltd. & Ors. Vs. Union of India & Ors.* **1996 (10) Suppl. SCR 585 = 1997 (5) SCC 536 – followed.**

**3.2 In the instant case, the DA, during the sunset review (Notification No.14/20/2008-DGAD dated 31.3.2009) had recorded a clear finding to the effect that the Chinese exporters had been underselling below the non-injurious price to the tune of 25-20% during the period of investigation. It is, therefore, manifest that the burden of anti-dumping duty had been absorbed by the exporters. The said finding of fact attained finality in as much as it had not been assailed by any of the interested parties. In the light of the fact that the importers, viz. ATMA and its constituent members have passed on the burden of the levy to third person(s), it follows that members of**

**ATMA cannot claim refund of the anti-dumping duty levied in terms of the Notification No.36/2005-Cus. ATMA and its constituent members have neither pleaded nor adduced any evidence to show that they had not passed on the burden of the duty to any other person. In any case, the appellants cannot claim refund of duty already levied in as much as they have not specifically challenged the findings of the sunset review and, therefore, the findings in relation to the existence of dumped imports, material injury to domestic industry and causal link between dumped imports and material injury to domestic industry remain unchallenged. In that view of the matter, particularly, when the existence of dumping has not been put in issue, refund of the duty to any of the appellants would be inconsistent with the object and scheme of the Tariff Act and the 1995 Rules. [para 62, 63] [264-D-H; 265-A-B]**

*Shri Radheshyam Khare & Anr. Vs. The State of Madhya Pradesh & Ors.* **AIR 1959 SC 1440;** *Shivji Nathubhai Vs. Union of India & Ors.* **1960 SCR 775 = 1960 AIR SC 606;** *Shankarlal Aggarwala & Ors. Vs. Shankarlal Poddar & Ors.* **AIR 1965 SC 507;** *S.K. Bhargava Vs. Collector, Chandigarh & Ors.* **1998 (2) SCR 1158 =1998 (5) SCC 170;** *Sahara India (Firm), Lucknow Vs. Commissioner of Income Tax, Central-I & Anr.* **2008 (6) SCR 427 = 2008 (14) SCC 151;** *PTC India Limited Vs. Central Electricity Regulatory Commission* **2010 (3) SCR 609 = (2010) 4 SCC 603;** *Designated Authority (Anti-Dumping Directorate), Ministry of Commerce Vs. Haldor Topsoe A/S* **(2000) 6 SCC 626;** *Reliance Industries Ltd. Vs. Designated Authority & Ors.* **2006 (6) Suppl. SCR 1=2006 (10) SCC 368 and** *J.K. Industries Vs. Union of India* **SLP (C) No.11061 of 2005,** *Tata Chemicals Limited (2) Vs. Union of India & Ors.* **2008 (5) SCR 320 = 2008 (17) SCC 180;** *Tata Chemicals Limited Vs. Union of India & Ors.* **(2007) 15 SCC 596;** *State of T.N. Vs. K. Sabanayagam & Anr.* **1997 (5) Suppl. SCR 345 =1998 (1) SCC 318; and** *Godawat Pan*



*Masala Products I.P. Ltd. & Anr. Vs. Union of India & Ors.* **2004 (3) Suppl. SCR 239 = 2004 (7) SCC 68;** *Maneka Gandhi vs. Union of India & Anr.* **1978 (2) SCR 621 = 1978 (1) SCC 248;** *SBP & Co. Vs. Patel Engineering Ltd. & Anr.* **2005 (4) Suppl. SCR 688 =2005 (8) SCC 618; and** *C.B. Gautam Vs. Union of India & Ors.* **1992 (3) Suppl. SCR 12 = 1993 (1) SCC 78;** *The Cannanore Spinning and Weaving Mills Ltd. Vs. Collector of Customs and Central Excise, Cochin & Ors.* **(1969) 3 SCC 221;** *Hukam Chand Etc. Vs. Union of India & Ors.* **1973 (1) SCR 896 = 1972 (2) SCC 601;** *Orissa State Electricity Board & Anr. Vs. Indian Aluminum Co. Ltd.* **(1975) 2 SCC 431;** *Regional Transport Officer, Chittoor & Ors. Vs. Associated Transport Madras (P) Ltd. & Ors.* **1981 (1) SCR 627 = 1980 (4) SCC 597;** *Mahabir Vegetable Oils (P) Ltd. & Anr. Vs. State of Haryana & Ors.* **2006 (2) SCR 1172 = 2006 (3) SCC 620; and** *Bakul Cashew Co. & Ors. Vs. Sales Tax Officer, Quilon & Anr.* **1986 (1) SCR 610 =1986 (2) SCC 365;** *State of Madhya Pradesh & Anr. Vs. Dadabhoy's New Chiri Miri Ponri Hill Colliery Co. Pvt. Ltd.* **1972 (2) SCR 609 = 1972 (1) SCC 278;** *Yudhishter Vs. Ashok Kumar* **1987 (1) SCR 516 = 1987 (1) SCC 204;** *Bhavnagar University Vs. Palitana Sugar Mill (P) Ltd. & Ors.* **2002 (4) Suppl. SCR 517 = 2003 (2) SCC 111;** *Shenyang Matsushita S. Battery Co. Ltd. Vs. Exide Industries Ltd. & Ors.* **2005 (2) SCR 332 =2005 (3) SCC 39;** *Reserve Bank of India Vs. Peerless General Finance and Investment Co. Ltd. & Ors.* **1987 (2) SCR 1 = 1987 (1) SCC 424;** *Shri Sitaram Sugar Company Ltd. & Anr. Vs. Union of India & Ors.* **1990 (1) SCR 909 = 1990 (3) SCC 223;** *Dalmia Cement (Bharat) Ltd. & Anr. Vs. Union of India & Ors.* **1996 (1) Suppl. SCR 825 = 1996 (10) SCC 104,** *Ramesh Chandra Kachardas Porwal & Ors. Vs. State of Maharashtra & Ors.* **1981 (2) SCR 866 = 1981 (2) SCC 722;** *Saraswati Industrial Syndicate Ltd. & Ors. Vs. Union of India* **1975 (1) SCR 956 = 1974 (2) SCC 630 and** *P.M. Ashwathanarayana Setty & Ors. Vs. State of Karnataka & Ors.* **1988 (3) Suppl. SCR 155 = 1989 (1) Suppl. SCC 696;** *The State of Gujarat*

*& Anr. Vs. Shri Ambica Mills Ltd., Ahmedabad & Anr.* **(1974) 4 SCC 656;** *Jardine Henderson Limited Vs. Workmen & Anr.* **(1962) Supp 3 SCR 582;** *M/s. Krishnamurthi & Co. Etc. Vs. State of Madras & Anr.* **1973 SCR 54= (1973) 1 SCC 75;** *Empire Industries Ltd. & Ors. Vs. Union of India & Ors.* **1985 (1) Suppl. SCR 292 = 1985 (3) SCC 314;** *The New Prakash Transport Co. Ltd. Vs. The New Suwarna Transport Co. Ltd.* **1957 AIR 232 = 1957 SCR 98;** *Haryana Financial Corporation & Anr. Vs. Kailash Chandra Ahuja* **2008 (10) SCR 222 = 2008 (9) SCC 31;** *State Bank of Patiala & Ors. Vs. S.K. Sharma* **1996 (3) SCR 972 = 1996 (3) SCC 364;** Ossein *and Gelatine Manufacturers' Association of India Vs. Modi Alkalies and Chemicals Limited & Anr.* **1989 (3) SCR 815 = 1989 (4) SCC 264;** *General Manager, Eastern Railway & Anr. Vs. Jawala Prosad Singh* **1970 (3) SCR 271 = 1970 (1) SCC 103;** *Madhya Pradesh Industries Ltd. Vs. Union of India & Ors.* **(1966) 1 SCR 466;** *J.A. Naiksatam Vs. Prothonotary & Senior Master, High Court of Bombay & Ors.* **2004 (5) Suppl. SCR 287= 2004 (8) SCC 653;** *R Vs. Immigration Appeal Tribunal & Anr.* **[1988] 2 All ER 65;** *Selvarajan Vs. Race Relations Board* **[1976] 1 All ER 12;** *Gramophone Company of India Ltd. Vs. Birendra Bahadur Pandey & Ors.* **1984 (2) SCR 664 =1984 (2) SCC 534;** *M/s. Tractoroexport, Moscow Vs. M/s Tarapore & Company & Anr..* **1970 (3) SCR 53 = 1969 (3) SCC 562;** *Jolly George Varghese & Anr. Vs. The Bank of Cochin* **1980 (2) SCR 913 = 1980 (2) SCC 360;** *Union of India Vs. Mohan Lal Capoor* **(1973) 2 SCC 836;** *P. Sambamurthy & Ors. Vs. State of Andhra Pradesh & Anr.* **(1987) 1 SCC 362;** *Union of India Vs. K.M. Shankarappa* **2000 (5) Suppl. SCR 117 = 2001 (1) SCC 582; and** *B.B. Rajwanshi Vs. State of U.P. & Ors.* **1988 (3) SCR 469 =1988 (2) SCC 415;** *Jayantilal Amrit Lal Shodhan Vs. F.N. Rana & Ors* **1964 (5) SCR 294;** *Managing Director, ECIL, Hyderabad & Ors. Vs. B. Karunakar & Ors.* **1993 (2) Suppl. SCR 576 = 1993 (4) SCC 727;** *Union of India & Anr. Vs. Cynamide India & Anr.* **1987 (2) SCR 841 =**



**1987 (2) SCC 720;** *Shri Sita Ram Sugar Company Limited & Anr. Vs. Union of India & Ors.* **1990 (1) SCR 909 = 1990 (3) SCC 223; and** *Viveka Nand Sethi Vs. Chairman, J&K Bank Ltd. & Ors.* **2005 (3) SCR 1095 = 2005 (5) SCC 337 – cited.**

**Case Law Reference:**

| | | |
|---|---|---|
| **1950 SCR 621** | **relied on** | **para 19 and 50** |
| **1959 SC 1440** | **cited** | **para 19** |
| **1960 SCR 775** | **cited** | **para 19** |
| **AIR 1965 SC 507** | **cited** | **para 19** |
| **1998 (2) SCR 1158** | **cited** | **para 19** |
| **[1963] Supp. 1 S.C.R. 242** | **relied on** | **para 19 and 51** |
| **2008 (6) SCR 427** | **cited** | **para 19** |
| **2010 (3) SCR 609** | **cited** | **para 19** |
| **(2000) 6 SCC 626** | **cited** | **para 19** |
| **2006 (6) Suppl. SCR 1** | **cited** | **para 20** |
| **SLP (C) No.11061 of 2005** | **cited** | **para 20** |
| **2008 (5) SCR 320** | **cited** | **para 20** |
| **(2007) 15 SCC 596** | **cited** | **para 20** |
| **1997 (5) Suppl. SCR 345** | **cited** | **para 20** |
| **2004 (3) Suppl. SCR 239** | **cited** | **para 20** |
| **1978 (2) SCR 272** | **cited** | **para 21** |
| **1978 (2) SCR 621** | **cited** | **para 22** |
| **2005 (4) Suppl. SCR 688** | **cited** | **para 22** |
| **1992 (3) Suppl. SCR 12** | **cited** | **para 22** |

| | | |
|---|---|---|
| AIR 1958 SC 308 | relied on | para 23 |
| (1969) 3 SCC 221 | cited | para 24 |
| 1973 (1) SCR 896 | cited | para 24 |
| (1975) 2 SCC 431 | cited | para 24 |
| 1981 (1) SCR 627 | cited | para 24 |
| 2006 (2) SCR 1172 | cited | para 24 |
| 1986 (1) SCR 610 | cited | para 24 |
| 2005 (2 ) SCR 255 | relied on | para 26 and 53 |
| 1972 (2) SCR 609 | cited | para 27 |
| 1987 (1) SCR 516 | cited | para 27 |
| 2002 (4) Suppl. SCR 517 | cited | para 28 |
| 2005 (2 ) SCR 332 | cited | para 30 |
| 1987 ( 2 ) SCR 1 | cited | para 32 |
| 1990 (1) SCR 909 | cited | para 33 |
| 1996 (1) Suppl. SCR 825 | cited | para 33 |
| 1981 (2) SCR 866 | cited | para 33 |
| 975 ( 1) SCR 956 | cited | para 33 |
| 1988 ( 3 ) Suppl. SCR 155 | cited | para 33 |
| (1974) 4 SCC 656 | cited | para 33 |
| (1962) Supp 3 SCR 582 | cited | para 33 |
| 1973 SCR 54 | cited | para 33 |
| 1985 ( 1 ) Suppl. SCR 292 | cited | para 33 |
| 1957 SCR 98 | cited | para 34 |
| 2008 (10 ) SCR 222 | cited | para 34 |



| | | |
|---|---|---|
| 1996 ( 3 ) SCR 972 | cited | para 34 |
| 1989 ( 3 ) SCR 815 | cited | para 34 |
| 1970 ( 3 ) SCR 271 | cited | para 35 |
| (1966) 1 SCR 466 | cited | para 35 |
| 2004 (5 ) Suppl. SCR 287 | cited | para 35 |
| [1988] 2 All ER 65 | cited | para 35 |
| [1976] 1 All ER 12 | cited | para 35 |
| 1984 ( 2 ) SCR 664 | cited | para 35 |
| 1970 ( 3 ) SCR 53 | cited | para 35 |
| 1980 ( 2 ) SCR 913 | cited | para 35 |
| (1973) 2 SCC 836 | cited | para 37 |
| (1987) 1 SCC 362 | cited | para 38 |
| 2000 (5) Suppl. SCR 117 | cited | para 38 |
| 1988 ( 3 ) SCR 469 | cited | para 38 |
| [1964] 5 SCR 294 | cited | para 38 |
| 1993 (2) Suppl. SCR 576 | cited | para 40 |
| 1987 (2) SCR 841 | cited | para 43 |
| 1990 (1) SCR 909 | cited | para 43 |
| 2005 (3 ) SCR 1095 | cited | para 43 |
| 1970 (1) SCR 457 | referred to | para 49 |
| 1981 ( 2 ) SCR 533 | relied on | para 57 |
| (1970) 2 SCC 458 | relied on | para 58 |
| 1996 (10) Suppl. SCR 585 | followed | para 61 |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 949 of 2006.

From the Judgment & Order dated 9.9.2005 of the Customs, Excise and Service Tax Appellate Tribunal, New Delhi in Appeal No. C/601/05-AD and final Order No. 19/05-AD.

WITH

C.A. No. 8012 of 2010.

C.A. No. 2007 of 2006.

C.A. No. 2115 of 2006.

H.P. Raval, Ld. ASG, S.K. Bagaria, V. Shekhar and Harish Chandra, Meenakshi Arora, Sharad Bhansali, Jitendra Singh, Saurabh S. Sinha, Poli Kataki, Nitya Bagaria, P.K. Manohar, Shalinder Saini, Shweta Verma, Anriudh Sharma, A.K. Sharma, Anil Katiyar, G. Umapathy, Rajesh Sharma, Rakesh K. Sharma, Rashmi Malhotra, Sunita Rani Singh and B.K. Prasad for the Respondents.

The Judgment of the Court was delivered by

**D.K. JAIN, J.** 1. This batch of civil appeals under Section 130E of the Customs Act, 1962 (for short "the Act") arises out of a common judgment and order, dated 9th September 2005, passed by the Customs, Excise and Service Tax Appellate Tribunal (for short "the Tribunal) whereby the appeals filed by the appellants herein, have been dismissed and the levy of anti-dumping duty, imposed under Section 9A of the Customs Tariff Act, 1975 (for short "the Tariff Act") vide Notification 36/2005-Cus dated 27th April 2005 has been affirmed.

2. As common questions of law are involved in all the appeals and even the background facts are identical, these are being disposed of by this common judgment. However, to appreciate the controversy and the rival stands thereon, we



shall refer to the facts in Civil Appeal No. 949 of 2006 as illustrative:

The appellant in this appeal viz. Automotive Tyre Manufacturers Association (for short "ATMA"), is an association representing domestic tyre manufacturing units, who import Nylon Tyre Cord Fabric (for short "NTCF") from various countries, including China, as one of their basic raw materials for manufacture of tyres.

Sometime in 2003, the Association of Synthetic Fibre Industry (for short "ASFI"), respondent No. 3 herein, filed an application under the Customs Tariff (Identification, Assessment & Collection of Anti-Dumping Duty on Dumped Articles & for Determination of Injury) Rules, 1995 (for short "the 1995 Rules") before the Designated Authority (hereinafter referred to as "the DA") *inter-alia,* praying for imposition of anti-dumping duty under Section 9A of the Act, on imports of NTCF from China. In their application, ASFI had specifically contended that China being a non-market economy country, normal value of the export price from that country had to be determined as per the principle contemplated in para 7 of Annexure I to the 1995 Rules.

3. Taking cognizance of the application, on 29th October 2003, the DA initiated investigation by issuing notification in terms of Rules 5 and 6 of the 1995 Rules, indicating the period of investigation from 1st April 2002 to 30th June 2003. After conducting investigations, the DA recorded preliminary findings and issued public notice in that behalf on 30th June 2004, vide Notification No. 14/20/2003-DGAD, recommending imposition of provisional anti-dumping duty at the rate of US $ 0.69 per Kg on NTCF originating in and exported from China. The recommendations made in the preliminary findings were accepted by the Central Government, and provisional anti-dumping duty was, accordingly, imposed vide Notification No. 72/2004-Cus, published on 26th July 2004. It would be of some

significance to note here that the 2nd proviso to Rule 13 of the 1995 Rules postulates that the levy of provisional duty, in the first instance, can be for a period of six months, which may be extended by a further period of three months on the request of exporters representing a significant percentage of the trade involved.

4. Being aggrieved, one of the constituent members of ATMA viz. Apollo Tyres Ltd. filed Writ Petition No. SCA/8747/2004 before the Gujarat High Court, challenging the preliminary findings mainly on the ground that the investigation proceedings were in violation of the principles of natural justice and the procedure prescribed by the 1995 Rules. The said writ petition was dismissed by the High Court on 20th July 2004, observing thus:

> "we do not think it fit to entertain this petition at this stage, when the interested parties including exporters and importers are provided an opportunity to submit their views and are also assured of oral hearing."

5. The DA granted a public hearing to all the parties on 1st September 2004. However, on 1st November 2004, the officer functioning as the DA, who had conducted the investigations in the instant case was transferred, and a new officer took over as the DA. On 6th January 2005, the appellants herein, in particular ATMA and Ningbo Nylon, a Chinese exporter, requested the newly appointed DA to grant a fresh public hearing, before finalizing his report/recommendations.

6. On 12th January 2005, the DA sent the disclosure statement to all the parties concerned. On 17th January 2005, the appellants wrote a letter of protest to the DA, *inter alia,* contending that their submissions were not examined; the newly appointed DA had failed to grant them a public hearing and some of the new submissions made by the domestic industry formed part of the record.



7. One of the constituent members of ATMA viz. J.K. Industries Ltd. filed a Civil Writ Petition (No.548 of 2005) before the High Court of Rajasthan at Jodhpur challenging the investigation proceedings, preliminary findings and the disclosure statement. On 25th January 2005, the High Court admitted the said writ petition and granted ad-interim stay restraining the DA from issuing final findings in terms of the disclosure statement.

8. Thereafter, on 16th February 2005, the High Court modified the earlier interim stay order dated 25th January 2005 to the extent that the DA was allowed to proceed to record the final findings but the same had to be placed in a sealed cover.

9. On 9th March 2005, the DA issued final findings, vide notification No. 14/20/2003-DGAD, recommending the imposition of anti-dumping duty on NTCF originating from China at the rate of US $ 0.54 per Kg to US $ 0.81 per Kg.

10. AFSI, respondent no. 3 herein, filed SLP (C) No. 6878-6879 of 2005 challenging the orders of the High Court of Rajasthan dated 25th January 2005 and 16th February 2005. This Court granted leave in the said SLP, and set aside the said interim orders.

11. Ultimately, on 21st April, 2005, the High Court of Rajasthan dismissed the writ petition filed by JK Industries Ltd. observing that:

> "such findings are not reached by the Designated Authority in exercise of any legislative power vested in it for the purpose of deciding any litigatious contentions between the various interests or to adjudicate or to decide upon rights of any party to lis."

Aggrieved by the said order, JK Industries preferred SLP (C) 11061 of 2005 before this Court. The said SLP was dismissed on 13th May 2005 in view of the alternative remedy

available to the appellant. The Court, *inter alia*, observed that:

> "However, we clarify that the following observations made in the impugned judgment by the Division Bench of the High Court- "investigation by the Designated Authority is in aid of legislative function"-shall not come in the way of the hearing by the Appellate Authority of any judicial review sought for thereafter by either party."

12. The Central Government accepted the final findings of the DA, and issued Notification No. 36/2005-Cus dated 27th April 2005 levying anti-dumping duty at different rates varying from US $ 0.54 per Kg to US $ 0.81 per Kg on NTCF w.e.f. 26th July 2004.

13. M/s. Apollo Tyres filed W.P. No. 19896 of 2005 before the High Court of Kerala for quashing the final findings of the DA. The High Court observed that since the petitioners had been represented by ATMA before the DA, ATMA should approach the High Court. Thereafter, ATMA filed W.P. No.20587 of 2005 before the High Court.

14. By a common order dated 12th July 2005, the High Court of Kerala disposed of both the writ petitions, directing the incumbent DA to grant hearing on the issues raised in the writ petition, and issue orders modifying the final findings to the extent required.

15. ASFI filed S.L.P. (C) No. 15704-15705 of 2005 before this Court challenging the said order of the High Court of Kerala. This Court disposed of the SLP vide order dated 12th August 2005, suspending the operation of the judgment of the High Court of Kerala, and directing the parties to pursue the remedy before the Tribunal under Section 9C of the Act.

16. As afore-mentioned, the Tribunal has dismissed the appeals, preferred by ATMA, Apollo Tyres, J.K. Tyres, ASFI and Ningbo Nylon and confirmed the levy of anti-dumping duty in



terms of Notification No. 36/2005-Cus. Dealing with the main grievance of the appellants viz. denial of an opportunity of hearing and thus, violation of the principles of natural justice, the Tribunal has held that:- (i) an anti-dumping duty has all the characteristics of a tax as it is imposed under statutory power without the tax-payers consent, and its payment is enforced by law, therefore, issuance of the notification by the Central Government in the Official Gazette under Rule 18 of the 1995 Rules read with Section 9A(1) of the Tariff Act imposing anti-dumping duty upon importation of the subject article in India is purely a legislative function; (ii) the process of imposing anti-dumping duty which is legislative in nature does not decide any existing dispute or '*lis*' inter-parties; it only determines whether imposition of anti-dumping duty is called for in relation to dumped imports and if so, at what rate, on the basis of the information collected from the exporters-importers and a large number of other interested parties; (iii) there can never be a '*lis*' between the State and its citizens in the matter of exercise of legislative power to impose tax as there is no "right-duty" relationship between the Central Government imposing anti-dumping duty under the Tariff Act and the 1995 Rules, and the exporters or importers who are given an opportunity to give information under the Rules and that the principles of natural justice are not applicable to a legislative process for enactment of law and the persons affected have no right to an opportunity to be heard before the enactment; (iv) if, however, the Parliament, in its wisdom, for an impost like the anti-dumping duty, which arises due to and has nexus with the interest of domestic industry, provides a mechanism for taking into consideration the views of those who will be affected and the other interested parties, that will not amount to vesting in them a right to be heard personally, arising as a consequence of the principles of natural justice, against taking legislative action of imposing anti-dumping duty and fixing its rate for the subject article and (v) in cases where investigative procedure leading to determination of the rates of taxes is undertaken by the Parliament, through its agencies, as per its rules of business,

there will be absolutely no scope for any judicial tribunal to examine whether any procedural irregularity was committed by not consulting any particular section of the public likely to be adversely affected by such law. This is precisely why legislative enactments are not generally made subject to the principles of natural justice, as doing so may lead to a finding of irregularity of procedure which is prohibited by the constitutional scheme of law making. It is settled law that there is no right to be heard before the making of legislation, whether primary or delegated, unless specifically provided by the Statute.

17. Thus, the Tribunal held that the imposition of anti-dumping duty being legislative in character, the principles of natural justice were not applicable to the proceedings before the DA and, therefore, persons affected had no right to be heard before the imposition of duty.

18. Hence the present appeals.

**Submissions made on behalf of the appellants:**

19. Mr. S.K. Bagaria, learned senior counsel appearing on behalf of ATMA, piloting the arguments on behalf of the appellants, referring to various provisions of the Tariff Act and 1995 Rules strenuously urged that the functions discharged by the DA are quasi-judicial in nature. Relying on the decisions of this Court in *Province of Bombay Vs. Khushaldas S. Advani & Ors.*[1]*; Shri Radheshyam Khare & Anr. Vs. The State of Madhya Pradesh & Ors.*[2]*; Shivji Nathubhai Vs. Union of India & Ors.*[3]*; Shankarlal Aggarwala & Ors. Vs. Shankarlal Poddar & Ors*[4]*. S.K. Bhargava Vs. Collector, Chandigarh & Ors.*[5]*, Jaswant Sugar Mills Ltd., Meerut Vs. Lakshmi Chand & Ors.*[6]*;*

1. AIR 1950 SC 222.
2. AIR 1959 SCR 1440.
3. AIR 1960 SC 606.
4. AIR 1965 SC 507.
5. AIR (1998) 5 SCC 170.
6. [1963] Supp. 1 S.C.R. 242.



*Sahara India (Firm), Lucknow Vs. Commissioner of Income Tax, Central-I & Anr.*[7]*,* learned counsel contended that if a statute empowers an authority, not being a Court in the ordinary sense, to decide disputes arising out of a claim made by one party and disputed by another, on the basis of some objective standards, and is required by the terms of the statute to act judicially, then such authority discharges quasi-judicial functions. Learned counsel submitted that such attributes are in-built in the scheme of the Tariff Act and the 1995 Rules, in as much as:-(i) there are interested parties, some opposing the levy and some supporting the levy; (ii) there is a lis between these interested parties; (iii) Rule 6(1) of the 1995 Rules mandates that the DA has to issue a public notice to all interested parties, and their responses to the same are elicited; (iv) evidence and information is collected, and the evidence presented by one interested party is made available to the other interested parties in terms of Rule 6; (v) a public hearing is conducted, and all the information presented orally has to be subsequently reduced into writing as per Rule 6(6); (vi) Rule 12 and 17 provide that the DA is required to determine all matters of facts and law by adjudicating on the material placed before the said authority and record reasons leading to the final determination on the existence, degree and effect of dumping and (vii) Section 9C of the Tariff Act contemplates an appeal to the Tribunal on all aspects of the determination by the DA viz. the existence, degree and effect of dumping. Learned counsel then urged that since the said Section provides for a remedy of appeal on all the facets of determination, the Tribunal has no option but to examine all aspects viz. existence, degree and effect of dumping on the basis of the material placed before the DA, in order to confirm, modify or annul the orders appealed against. Commending us to the decision of a Constitution Bench of this Court in *PTC India Limited Vs. Central Electricity Regulatory Commission*[8]*,* learned counsel contended that

7. (2008) 14 SCC 151.
8. (2010) 4 SCC 603.

whenever a particular statute provides for an appeal against the decision of an authority, then orders/decisions of that authority are quasi-judicial in nature. In order to buttress the argument, learned counsel also commended us to two publications of the Government of India viz. "Anti-Dumping and Anti-Subsidy Measures" and "Anti-Dumping, A Guide" wherein the Government has accepted that the functions of the DA are quasi-judicial in nature. Learned counsel argued that even the procedure adopted by the DA leads to the inescapable conclusion that it discharges quasi-judicial functions in as much as the DA grants all interested persons an opportunity to make oral submissions. Relying on the decision of this Court in *Designated Authority (Anti-Dumping Directorate), Ministry of Commerce Vs. Haldor Topsoe A/S*[9], learned counsel contended that it is a settled practice that if during the course of investigations, the DA conducting the public hearings is transferred, the new DA grants a fresh hearing before making the final order.

20. Learned counsel urged that in light of the observations made by this Court in *Reliance Industries Ltd. Vs. Designated Authority & Ors*[10]*.* and *J.K. Industries Vs. Union of India* (SLP (C) No.11061 of 2005)*,* it is fallacious to contend that the functions discharged by the DA are legislative in nature. Learned counsel submitted that in *Tata Chemicals Limited (2) Vs. Union of India & Ors*[11]*.* and *Tata Chemicals Limited Vs. Union of India & Ors.*[12], this Court has also held that an appeal before the Tribunal is maintainable against the determination by the DA together with the Customs Notification. Learned counsel contended that even if the DA's functions are held to be in exercise of conditional legislation, it would be of the nature as mentioned in the third category of cases highlighted

9. (2000) 6 SCC 626.

10. (2006) 10 SCC 368.

11. (2008) 17 SCC 180.

12. (2007) 15 SCC 596.



in *State of T.N. Vs. K. Sabanayagam & Anr*[13]*.* and *Godawat Pan Masala Products I.P. Ltd. & Anr. Vs. Union of India & Ors.*[14], in as much as the levy of duty would depend on the satisfaction of the DA on objective facts placed by one party seeking benefits, and even in such a situation principles of natural justice are required to be complied with.

21. Learned counsel urged that at this stage the respondents cannot be allowed to contend that no prejudice was caused to the appellants due to non-grant of hearing, as the DA did not take this stand either in the disclosure statement or in the final findings. Further, the respondents have not submitted any counter-affidavit in this behalf. Commending us to the decision of this Court in *Mohinder Singh Gill & Anr. Vs. The Chief Election Commissioner, New Delhi & Ors.*[15], learned counsel contended that the validity of an order has to be judged by the reasons mentioned therein, and cannot be supplemented by fresh reasons in the form of affidavits or otherwise. Learned counsel contended that despite several requests, the incumbent DA did not grant hearing to ATMA. Learned counsel complained that after the issuance of disclosure statement, a specific request for personal hearing was made vide letter dated 24th January, 2005 but the DA did not even make a reference to the said request in his final order. According to the learned counsel, non-consideration of the request for hearing by itself has caused grave and serious prejudice to the appellants.

22. Learned counsel asserted that even if it is held that the functions of the DA are administrative in nature, the principles of natural justice would still have to be complied with as the decision of the DA entails far-reaching civil consequences. In support, reliance was placed on the decisions of this Court in *Mohinder Singh Gill* (supra); *Maneka Gandhi Vs. Union of*

13. (1998) 1 SCC 318.

14. (2004) 7 SCC 68.

15. (1978) 1 SCC 405.

*India & Anr.*[16]; *Sahara India* (supra); *SBP & Co. Vs. Patel Engineering Ltd. & Anr*[17]*.* and *C.B. Gautam Vs. Union of India & Ors.*[18].

23. Relying heavily on the decision of a Constitution Bench of this Court in *Gullapalli Nageswara Rao & Ors. Vs. Andhra Pradesh State Road Transport Corporation & Anr.*[19], learned counsel contended that the final determination by the new DA without granting a hearing to the appellants is bad in law in as much as it is well settled that the principles of natural justice mandate that the authority who hears, must also decide. Learned counsel urged that the hearing granted by the new DA to the Advocates of Ningbo Nylon, the Chinese Exporter, is of no consequence in so far as the Indian Tyre Manufacturers were concerned, particularly when the hearing granted to Ningbo Nylon was confined to their offer of price undertaking, which otherwise is a confidential hearing not akin to the public hearing, which was requested by ATMA.

24. In relation to the levy of anti-dumping duty during the interregnum period between 26th January, 2005 to 26th April, 2005, Mr. Bagaria contended that the provisions of the Tariff Act or the Rules made thereunder do not contemplate the power to levy duty retrospectively, save and except as provided in Section 9A(3) of the Tariff Act. Relying on the decisions of this Court in *The Cannanore Spinning and Weaving Mills Ltd. Vs. Collector of Customs and Central Excise, Cochin & Ors.*[20]*; Hukam Chand Etc. Vs. Union of India & Ors.*[21]*; Orissa State Electricity Board & Anr. Vs. Indian Aluminum Co. Ltd.*[22]*; Regional Transport Officer, Chittoor & Ors. Vs. Associated*

16. (1978) 1 SCC 248.
17. (2005) 8 SCC 618.
18. (1993) 1 SCC 78.
19. AIR 1958 SC 308.
20. (1969) 3 SCC 221.
21. (1972) 2 SCC 601.
22. (1975) 2 SCC 431.



*Transport Madras (P) Ltd. & Ors.*[23]*; Mahabir Vegetable Oils (P) Ltd. & Anr. Vs. State of Haryana & Ors.*[24] and *Bakul Cashew Co. & Ors. Vs. Sales Tax Officer, Quilon & Anr.*[25], learned counsel contended that if no power has been conferred upon the delegatee by the parent Act to levy tax or duty retrospectively, the delegatee cannot confer upon itself any such power by making any such Rule nor can it exercise any such power or levy duty or tax retrospectively. Section 9A(3) of the Tariff Act only provides for the levy of duty retrospectively prior to the date of issuance of notification levying provisional duty and the instant case, is therefore, not covered under Section 9A(3). Learned counsel urged that Section 9A (3) makes it manifest that wherever the legislature intended to confer the power to levy duty retrospectively, it has specifically provided for the same.

25. Learned counsel then contended that the submission of the respondents that the levy of anti-dumping duty is in continuation for the period of five years commencing from the levy of provisional duty is contrary to the scheme and provisions of the Tariff Act. It was submitted that it is manifest from the plain language of Section 9A, the charging provision, that the levy of anti-dumping duty is not automatic. Therefore, the continuity of the levy, in terms of the Section itself, is only for the period of notification and nothing more and there could be continuity only when the final notification is issued before the expiry of the provisional duty covered under the provisional notification. However, if the Government allows the period of levy of the provisional duty to expire, and issues the final notification thereafter, there can be no levy during the interregnum period.

26. Emphasising that provisional anti-dumping duty being a short-term measure, which in terms of Rule 13 of the 1995 Rules can remain in force only for a period not exceeding six

23. (1980) 4 SCC 597.
24. (2006) 3 SCC 620.
25. (1986) 2 SCC 365.

months, extendable by a further period of three months under the circumstances mentioned in the said Rule, learned counsel pointed out that since in the instant case, there was no such extension, the period for levy of provisional duty expired on 25th January, 2005. Furthermore, in *S&S Enterprise Vs. Designated Authority & Ors.*[26], this Court had observed that the imposition of anti-dumping duty under Section 9A of the Tariff Act, is the result of the General Agreement on Tariff and Trade and, therefore, the levy of provisional duty should be in accordance with Rule 13 of the 1995 Rules and Article 7.4 of the agreement on Tariffs and Trade, 1994 (for short "the WTO Agreement"), which contemplates that the provisional duty shall be limited to as short a period as possible, and, in fact, provides for the outer limit for the imposition of provisional duty.

27. Learned counsel contended that in the instant case, the provisional levy was finalized and validated by paragraph 2 of the final anti-dumping duty notification dated 27th April, 2005, and by virtue of the said paragraph the provisional duty was merely replaced by the final duty. Rule 20(2)(a) of the 1995 Rules uses the expression "where a provisional duty has been levied" and "in absence of provisional duty", thereby making it clear that the final measure merely validates the provisional duty already levied. The use of the said expression also establishes that Rule 20(2)(a) applies only when the provisional duty had in fact been levied, and therefore the said Rule has no application to the interregnum period. This position is also clarified by Rule 21 of the 1995 Rules which provides that if final duty is higher than the provisional duty already imposed and collected, the differential shall not be collected from the importer, and if it is lower, the differential shall be refunded to the importer, argued the learned counsel. Learned counsel asserted that the scheme of Rules 20 and 21 also makes it clear that no additional liability can be fastened for the periods prior to the date of final levy over and above the provisional duty for the period during which such provisional levy was in force.

26. (2005) 3 SCC 337.



Learned counsel thus, argued that if Rule 20(2)(a) is construed as conferring any power on the Central Government to levy duty retrospectively, the Rule itself would become *ultra vires* the Act, and such construction which maintains the validity of the provision should be preferred. Commending us to the decisions of this Court in *State of Madhya Pradesh & Anr. Vs. Dadabhoy's New Chiri Miri Ponri Hill Colliery Co. Pvt. Ltd.*[27] and *Yudhishter Vs. Ashok Kumar*[28], learned counsel submitted that reading down of a legislation to maintain its validity is an accepted principle of law.

28. Learned counsel then submitted that even if it is assumed that the Government has the power to levy anti-dumping duty retrospectively, even then the conditions precedent for making such retrospective levy as mentioned in Rule 17(1)(a) and Rule 20(2)(a), which respectively require the DA, to record: (i) a finding as to whether retrospective levy is called for and if so, the reasons thereof and the date of commencement of such levy and (ii) a specific finding to the effect that the dumped imports would have, in the absence of the provisional duty, led to injury, were not satisfied. Relying on the decision of this Court in *Bhavnagar University Vs. Palitana Sugar Mill (P) Ltd. & Ors.*[29], Mr. Bagaria submitted that when a statutory authority is required to discharge its functions in a particular manner, such functions must be discharged in that manner alone or not at all. Learned counsel urged that Section 9A which is the charging Section must be construed strictly, and when the said Section itself makes the levy of duty contingent upon the existence of notification, there can be no scope for invoking any concept of continuity in the absence of a notification.

29. Learned counsel urged that Section 9A(5) of the Tariff Act does not have any application in the instant case as the

27. (1972) 1 SCC 298.

28. (1987) 1 SCC 204.

29. (2003) 2 SCC 111.

anti-dumping duty referred to in that Section is the final duty, and not the provisional duty. The position is also clarified by the first and second proviso to the said sub-Section, in as much as the first proviso refers to the extension of "such imposition" by five years, and such extension can only be in relation to the final levy, while second proviso relates to the extension of final levy for a further period of one year when the review is initiated before the expiry of five years. Learned counsel urged that the fact that the outer time limit of five years is only contemplated in relation to the final duty and not the provisional duty is also evident from Article 11.3 of the WTO Agreement. Learned counsel contended that the outer limit for the levy of provisional duty cannot be set at naught by an alleged theory of continuity.

30. Learned counsel contended that in light of the decision of this Court in *Shenyang Matsushita S. Battery Co. Ltd. Vs. Exide Industries Ltd. & Ors.*[30], the DA is required to construct normal value after sequentially applying the different methods mentioned in paragraph 7 of Annexure I of the 1995 Rules, and only if construction by the first two methods is not possible, reliance can be placed on the third method. Learned counsel contended that in the instant case, the domestic industry had premised their application on the assumption that normal value can be constructed on the basis of any of the methods, and therefore, it resorted to the last method viz. the price paid or payable in India. This erroneous approach was adopted by the DA in the Initiation Notification dated 29th October, 2003. The appellants objected to the same in their submissions before the DA, and the same was ignored by the DA in its preliminary findings, and thereafter, in the disclosure statement. Learned counsel contended that the method followed by the DA is clearly in violation of the requirements of paragraph 7 of the Annexure I of the 1995 Rules in as much as it did not undertake any selection process for selecting market economy third country, it did not invite any comments and it did not give any opportunity to the parties in that regard.

30. (2005) 3 SCC.



31. Ms. Meenakshi Arora, learned counsel appearing on behalf of Ningbo Nylon adopting the same line of arguments, submitted that the second hearing granted to Ningbo Nylon by the new DA on 9th March 2005, was only for the purpose of Ningbo Nylon's price undertaking, and the same cannot be equated with the public hearing envisaged under Rule 6(6) of the 1995 Rules, in as much as: (i) Section 9B(1)(c)(iii) makes it clear that the price undertaking is in the nature of an agreement between a specific exporter and the Central Government wherein the exporter agrees to revise its price in a manner that the injurious effect of dumping is eliminated; (ii) confidential information has to be considered to ascertain the injurious effect of dumping and (iii) in terms of Rule 7, the hearing relating to price undertaking is confidential, and the same does not relate to all the aspects of investigation or to all the parties before the DA. Learned counsel thus, urged that even if it is assumed that the second hearing granted to counsel for Ningbo Nylon was in the nature of a public hearing in terms of Rule 6(6), the same cannot be considered as an effective opportunity as it is inconceivable for any counsel to participate in any meaningful discussion unless accompanied by the representative of the concerned exporter. Furthermore, the notice for hearing on 9th March 2005, given on 7th March, 2005 could not be considered as an adequate opportunity keeping in view the time difference between India and China.

**Submissions made on behalf of the Respondents:**

32. Mr. Harin P. Raval, learned Additional Solicitor General, appearing on behalf of the DA, defending the decision of the Tribunal, contended that since the 1995 Rules were in the nature of a "super special legislation", having economic policy overtones, this Court should adopt a policy of judicial deference. Commending us to the decision of this Court in *Reserve Bank of India Vs. Peerless General Finance and Investment Co. Ltd. & Ors.*[31], learned counsel urged that while

31. (1987) 1 SCC 424.

interpreting a legislation, the Courts should have regard to both the text and context of the legislation, and in light of the fact that the 1995 Rules contemplate adjustment of India's international trade policy measures, allowing a great deal of leeway in terms of policy operation, any judicial interpretation of the 1995 Rules must accord with this object of these Rules.

33. To start with, learned counsel strenuously urged that the levy of anti-dumping duty as per the procedure laid down in 1995 Rules constitutes a legislative act. Drawing support from the decisions of this Court in *Shri Sitaram Sugar Company Ltd. & Anr. Vs. Union of India & Ors.*[32] and *Dalmia Cement (Bharat) Ltd. & Anr. Vs. Union of India & Ors.*[33], learned counsel stressed that it is a settled principle that price fixation is a legislative function, and the legislature is competent to delegate its power to its agent and authorize it to adjudicate and arrive at findings of fact, which would be conclusive. Learned counsel pleaded that it is again a settled principle of law that principles of natural justice do not apply in case of legislative acts. In support, reliance was placed on the decisions of this Court in *Ramesh Chandra Kachardas Porwal & Ors. Vs. State of Maharashtra & Ors.*[34]*; Saraswati Industrial Syndicate Ltd. & Ors. Vs. Union of India*[35] and *P.M. Ashwathanarayana Setty & Ors. Vs. State of Karnataka & Ors.*[36]. Moreover, in relation to the cases involving economic regulation, the Courts have usually adopted a policy of deference as was held by this Court in the *The State of Gujarat & Anr. Vs. Shri Ambica Mills Ltd., Ahmedabad & Anr.*[37], asserted the learned counsel. In relation to taxing statutes in particular, larger discretion is accorded in light of their inherent complexity as was held in *Jardine*

32. (1990) 3 SCC 223.

33. (1996) 10 SCC 104.

34. (1981) 2 SCC 630.

35. (1989) Supp (1) SCC 696.

36. (1989) Supp (1) SCC 696.

37. (1974) 4 SCC 656.



*Henderson Limited Vs. Workmen & Anr*[38]*.* Learned counsel further contended that competence to legislate encompasses the competence to legislate both prospectively and retrospectively as was held in *M/s. Krishnamurthi & Co. Etc. Vs. State of Madras & Anr.*[39] and *Empire Industries Ltd. & Ors. Vs. Union of India & Ors.*[40]. Commending us to the decision of this Court in *Haridas Exports* (supra), learned counsel urged that since in an anti-dumping proceeding, no interest group other than the domestic producers have full legal standing, it is evident that the said proceedings are not adversarial, judicial or quasi-judicial in nature. However, at a later stage of his arguments, the learned counsel candidly conceded that at best the proceedings before the DA could be considered as administrative in nature.

34. Learned counsel urged that it is also well settled that the principles of natural justice will take their color from the context of the statutory provisions under which the issue is to be adjudicated as has been observed in *The New Prakash Transport Co. Ltd. Vs. The New Suwarna Transport Co. Ltd.*[41] and *Haryana Financial Corporation & Anr. Vs. Kailash Chandra Ahuja*[42]*.* Learned counsel submitted that the alleged breach of natural justice principles has to be judged in light of the prejudice caused to the party, and public interest, and not merely on technicalities. Learned counsel asserted that in any event in the instant case, the new DA had afforded an opportunity of hearing to the appellants on 7th March, 2005, which they failed to avail of. Learned counsel submitted that at the most the present case may be considered as one in which only a "partial hearing" was granted, and, therefore, in such a situation, the appellants were obliged to establish that some

38. (1962) Supp (3 SCR 582).

39. (1973) 1 SCC 75.

40. (1985) 3 SCC 314.

41. AIR 1957 SC 232.

42. (2008) 9 SCC 31.

prejudice had been caused to them because of lack of proper oral hearing. In support of the argument, reliance was placed on the decision of this Court in *State Bank of Patiala & Ors. Vs. S.K. Sharma*[43]. Controverting the stand of the appellants that the recommendation of the DA was vitiated because the incumbent DA had not heard the appellants, learned counsel placed heavy reliance on the decision in *Ossein and Gelatine Manufacturers' Association of India Vs. Modi Alkalies and Chemicals Limited & Anr.*[44], wherein despite the fact that hearing was conducted by one authority, and the decision was rendered by another, this Court did not set aside the said decision. Learned counsel emphasised that since in the instant case the appellants have neither established prejudice, nor have they challenged the findings of the DA on injury or in the sunset review, there is no merit in these appeals. Relying on *P.M. Aswathanarayana Setty* (supra), learned counsel pleaded that having regard to the object of the legislation, this Court should prefer an interpretation that would save the proceedings of the DA. Distinguishing the decision in *PTC India Ltd.* (supra), learned counsel submitted that reliance on the said decision by the appellants was misplaced in as much as in the said judgment, the Court itself clarified that its findings shall not be construed as a general principle of law applicable to other enactments and Tribunals. Moreover, the proceedings under Section 62 of the Electricity Act, 2003 are adversarial in nature, and therefore they cannot be likened to an anti-dumping investigation in which the only consideration is fairness in trade. Learned counsel asserted that while the proceedings under the Electricity Act relate to regulation of electricity within the territory of India, anti-dumping investigations, by their very nature, have an international perspective; the decision of the Commission under Electricity Act is binding whereas the findings of the DA are merely recommendatory; while the interests of various groups have to be examined in proceedings under the

43. (1996) 3 SCC 364.

44. (1989) 4 SCC 264.



Electricity Act, no interest group other than the domestic industry has full legal standing in an anti-dumping investigation and that proceedings under the Electricity Act are held by a court of law, but anti-dumping investigation is conducted by governmental agencies through administrative procedures.

35. Mr. Krishnan Venugopal, learned senior counsel appearing on behalf of the ASFI contended that the exact scope and ambit of the principles of natural justice, including the nature of hearing to be accorded must be decided keeping in view the nature and object of the Tariff Act and the 1995 Rules, and therefore, the question as to whether the hearing contemplated under the 1995 Rules is oral or by written representation will have an important bearing on the issue as to whether the new DA was required to conduct a fresh public hearing. According to the learned counsel even if the functions of the DA are held to be quasi-judicial in nature, the new DA is not required to hold a fresh public hearing as under Rule 6(6) of the 1995 Rules while interested parties are allowed to present information orally, but the DA can take into consideration only that information which is subsequently reproduced in writing and, therefore, the principles enunciated in *Gullapalli* (supra) are not applicable in the instant case. In that case, the oral hearing was preceded by written objections and representations, while under the Tariff Act and Rules, the sequence is reversed in as much as in proceedings before the DA, parties present oral information followed by reproduction of that information in writing, argued the learned counsel. Commending us to the decisions in *General Manager, Eastern Railway & Anr. Vs. Jawala Prosad Singh*[45]*; Madhya Pradesh Industries Ltd. Vs. Union of India & Ors.*[46]*; J.A. Naiksatam Vs. Prothonotary & Senior Master, High Court of Bombay & Ors.*[47]*; R Vs. Immigration Appeal Tribunal & Anr*[48]*.* and

45. (1970) 1 SCC 103.

46. (1966) 1 SCR 466.

47. (2004) 8 SCC 653.

48. [1988] 2 All ER 65.

*Selvarajan Vs. Race Relations Board*[49], learned counsel contended that as per the prescribed procedure an opportunity to place the relevant information on record in writing is sufficient compliance with the principles of *audi alteram partem.* To buttress his stand, reliance was placed on the decisions of this Court in *Gramophone Company of India Ltd. Vs. Birendra Bahadur Pandey & Ors.*[50]*; M/s. Tractoroexport, Moscow Vs. M/s Tarapore & Company & Anr.*[51]*.* and *Jolly George Varghese & Anr. Vs. The Bank of Cochin.*[52]. It was also contended that since Sections 9A to 9C were introduced in the Tariff Act in order to comply with India's WTO obligations, the interpretation of these provisions should be consistent with the provisions of the treaty. It was urged that having submitted written submissions on 10th September, 2004 pursuant to the public hearing on 1st September, 2004, as also the rejoinder, the appellants cannot complain of violation of the principles of natural justice, more so when the DA had also afforded opportunities to counsel of the appellants on two occasions i.e. 25th January, 2005 and 7th March, 2005, to appear before him but the appellants failed to appear on both the occasions. It was asserted that in any event the principles enunciated in *Gullapalli* (supra) are not applicable to the instant case, in as much as the role of the DA is merely recommendatory.

36. It was argued that the decision of a two judge Bench in *Reliance Industries* (supra), relied upon on behalf of the appellants, is *per incuriam* in light of the decision of the three judge Bench decision in *Haridas Exports* (supra), which was not even noticed in *Reliance Industries* (supra).

37. As regards the decision in *PTC India* (supra), *inter-alia,* holding that whenever an appeal is provided against an order, the determination becomes quasi-judicial, it was

49. [1976] 1 All ER 12.

50. (1984) 2 SCC 534.

51. (1969) 3 SCC 562.

52. (1980) 2 SCC 360.



submitted that as the said observations were made in the context of the Electricity Act, which is entirely different in purport and scope from the Tariff Act read with the 1995 Rules, the ratio of the said decision has no bearing on the facts of the present case. Learned counsel stressed that one of the attributes of a quasi-judicial authority is that it must render a binding decision, and if its decision is merely advisory, deliberative, investigatory or conciliatory in character, which has to be confirmed by another authority before it becomes binding, then such a body is administrative in character, as was observed by this Court in *Union of India Vs. Mohan Lal Capoor.*[53], which is the case here, as the role of the DA is merely recommendatory. In support, reliance was placed on the decision of this Court in *Tata Chemicals (2)* (supra).

38. Relying on the decisions of this Court in *P. Sambamurthy & Ors. Vs. State of Andhra Pradesh & Anr.*[54]*; Union of India Vs. K.M. Shankarappa*[55] and *B.B. Rajwanshi Vs. State of U.P. & Ors.*[56], learned counsel urged that it is a settled principle of law that the executive cannot sit in judgment over the decision of a quasi-judicial body, and since the Central Government has the power to alter or annul the recommendations of the DA, even logically the DA cannot be held to be a quasi-judicial authority. Learned counsel pleaded that a rigid application of the principles of natural justice in such a situation would defeat the purpose of the administrative enquiry conducted by the DA which is conducted with a view to elicit information from a broad spectrum of interested persons, as was held in *Jayantilal Amrit Lal Shodhan Vs. F.N. Rana & Ors*[57]*.*

39. Learned counsel contended that there are certain

53. (1973) 2 SCC 836.

54. (1987) 1 SCC 362.

55. (2001) 1 SCC 582.

56. (1988) 2 SCC 415.

57. [1964] 5 SCR 294.

peculiar features of the investigation conducted by the DA which make it manifest that the DA is not a quasi-judicial authority. Firstly, in light of the fact that there are numerous interested parties and many competing economic interests are involved in an anti-dumping investigation, it is fallacious to assume that the proceedings are in the nature of a simple *lis* between two parties. Secondly, the *suo motu* power invested in the DA to conduct investigations is in furtherance of his policy-making role in the nation's international trade regime. Thirdly, under Rule 7, the DA is required to keep certain information confidential, and this procedure whereby the parties do not know what information is being taken into account by the DA while making the determination is alien to quasi-judicial proceedings. Fourthly, the information collected by the DA is not required to be sworn on affidavit or otherwise and the witnesses do not testify on oath. Moreover, Rule 6(8) of the 1995 Rules empowers the DA to take into account unverified information, which procedure is inconsistent with the DA being classified as a quasi-judicial authority. Fifthly, the procedure of "sampling" contemplated under Rule 17(3) allows the DA to limit its findings to a reasonable number of interested parties or to articles using a statistically valid sample, and based on this, the DA can fix a country-wise margin of dumping which will apply to all exporters, a procedure unknown to quasi-judicial proceedings.

40. Learned counsel contended that even if it is assumed that the DA discharges quasi-judicial functions and the principles of natural are held to be applicable to the proceedings before it, still it is not sufficient to merely allege breach of natural justice, and actual prejudice must be demonstrated, as was held in *Haryana Financial Corporation* (supra) and *Managing Director, ECIL, Hyderabad & Ors. Vs. B. Karunakar & Ors.*[58]. It was asserted that in the present case, the appellants have failed to demonstrate any prejudice to them with reference to any material placed by them before the DA.

58. (1993) 4 SCC 727.



41. In response to the challenge against the retrospective levy of anti-dumping duty during the interregnum period between 26th January, 2005 to 27th April, 2005, Mr. Venugopal submitted that in absence of the stay granted by the Rajasthan High Court on 25th January, 2005, the Central Government could have, under the second proviso to Rule 13, extended the provisional duty for a further period of nine months from 25th January, 2005. Learned counsel further urged that under Rule 20(2)(a), the DA after recording a finding of actual injury, was empowered to recommend imposition of anti-dumping duty from the date of the imposition of the provisional duty. Learned counsel submitted that the appellant's contention that Rule 20(2)(b) is *ultra vires* the Tariff Act as the power to levy anti-dumping duty retrospectively is found in sub-section (3) of Section 9A of the Tariff Act is misconceived as an anti-dumping investigation always relates to a past period known as the "period of investigation", and therefore, there is no question of retrospectivity.

42. Mr. Venugopal also pleaded that the present appeals had in fact been rendered infructuous as the original final findings by the DA are no longer in existence in view of the fact that a sunset review has been conducted by the DA, pursuant to which the Central Government has revised the levy of duty vide its notification dated 31st March, 2009, which has not been put in issue by the appellants.

43. Mr.C.S. Vaidyanathan, learned senior counsel appearing on behalf of ASFI, urged that the 1995 Rules are a complete code in themselves; Rule 6 provides the framework within which the DA has to operate, and therefore, the applicability of principles of natural justice is limited to those areas that are provided under the 1995 Rules. Learned counsel contended that anti-dumping investigation conducted by the DA is administrative in nature, whereas the imposition of anti-dumping duty is legislative in character. Relying on the decisions of this Court in *Keshav Mills* (supra); *Ramesh*

*Chandra Kachardas Porwal* (supra)*; Union of India & Anr. Vs. Cynamide India & Anr.*[59]*; Shri Sita Ram Sugar Company Limited & Anr. Vs. Union of India & Ors.*[60]*; State Bank of Patiala* (supra) and *Viveka Nand Sethi Vs. Chairman, J&K Bank Ltd. & Ors*.[61], learned counsel submitted that there is no straight jacket formula to apply the principles of natural justice, and the effect of the alleged breach of natural justice has to be considered while determining the remedial action. It was asserted that there was no prejudice caused to the appellants due to the alleged breach of natural justice, and therefore, there was no merit in the appellants' claim. It was urged that if this Court were to conclude that there has been a violation of the principles of natural justice, it would be appropriate to remand the matter back to the DA for *de novo* adjudication from the stage the procedural irregularity had intervened.

44. Commending us to the definition of the term "determination" as contained in the Webster's Dictionary and the Oxford Dictionary, learned counsel submitted that the use of the said term in Section 9C of the Tariff Act, when understood in the context of the 1995 Rules, leads to the incontrovertible conclusion that it is the determination by the DA that is made appealable, and not the notification levying anti-dumping duty. Therefore, it is manifest that the imposition of duty is legislative in nature.

**Discussion:**

45. Before addressing the contentions advanced on behalf of the parties, it will be necessary and expedient to survey the relevant statutory provisions under which the levy, questioned in these appeals, has been imposed. Section 9A of the Tariff Act contemplates levy of anti-dumping duty on dumped articles. It reads as follows:

59. (1987) 32 SCC 720.

60. (1990) 3 SCC 223.

61. (2005) 5 SCC 337.



*9A. Anti-dumping duty on dumped articles.*- (1) Where any article is exported from any country or territory (hereinafter in this section referred to as the exporting country or territory) to India at less than its normal value, then, upon the importation of such article into India, the Central Government may, by notification in the Official Gazette, impose an anti-dumping duty not exceeding the margin of dumping in relation to such article.

*Explanation.*- For the purposes of this section,-

(a) "margin of dumping", in relation to an article, means the difference between its export price and its normal value;

(b) "export price", in relation to an article, means the price of the article exported from the exporting country or territory and in cases where there is no export price or where the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported articles are first resold to an independent buyer or if the article is not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as may be determined in accordance with the rules made under sub-section (6);

(c) "normal value", in relation to an article, means –

(i) the comparable price, in the ordinary course of trade, for the like article when meant for consumption in the exporting country or territory as determined in accordance with the rules made under sub-section (6); or

(ii) when there are no sales of the like article in the ordinary course of trade in the domestic market of the exporting country or territory, or when because of the particular market situation or low volume of the sales in the domestic

market of the exporting country or territory, such sales do not permit a proper comparison, the normal value shall be either-

(a) comparable representative price of the like article when exported from the exporting country or territory to an appropriate third country as determined in accordance with the rules made under sub-section (6); or

(b) the cost of production of the said article in the country of origin along with reasonable addition for administrative, selling and general costs, and for profits, as determined in accordance with the rules made under sub-section (6):

*Provided* that in the case of import of the article from a country other than the country of origin and where the article has been merely transshipped through the country of export or such article is not produced in the country of export or there is no comparable price in the country of export, the normal value shall be determined with reference to its price in the country of origin.

(2) The Central Government may, pending the determination in accordance with the provisions of this section and the rules made thereunder of the normal value and the margin of dumping in relation to any article, impose on the importation of such article into India an anti-dump ing duty on the basis of a provisional estimate of such value and margin and if such anti-dumping duty exceeds the margin as so determined:-

(a) the Central Government shall, having regard to such determination and as soon as may be after such determination, reduce such anti-dumping duty; and

(b) refund shall be made of so much of the anti-dumping



duty which has been collected as is in excess of the anti-dumping duty as so reduced.

(2A) Notwithstanding anything contained in sub-section (1) and sub-section (2), a notification issued under sub-section (1) or any anti-dumping duty imposed under sub-section (2), unless specifically made applicable in such notification or such imposition, as the case may be, shall not apply to articles imported by a hundred per cent. Export-oriented undertaking or a unit in a free trade zone or in a special economic zone.

*Explanation.*—For the purposes of this sub-section, the expression "hundred per cent export-oriented undertaking", "free trade zone" and "special economic zone" shall have the meanings assigned to them in *Explanation* 2 to sub-section (1) of section 3 of the Central Excise Act, 1944.

(3) If the Central Government, in respect of the dumped article under inquiry, is of the opinion that –

(i) there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practices dumping and that such dumping would cause injury; and

(ii) the injury is caused by massive dumping of an article imported in a relatively short time which in the light of the timing and the volume of imported article dumped and other circumstances is likely to seriously undermine the remedial effect of the anti-dumping duty liable to be levied,

the Central Government may, by notification in the Official Gazette, levy anti-dumping duty retrospectively from a date prior to the date of imposition of anti-dumping duty under sub-section (2) but not beyond ninety days from the date of notification under that sub-section, and notwithstanding anything contained in any law for the time being in force,

such duty shall be payable at such rate and from such date as may be specified in the notification.

(4) The anti-dumping duty chargeable under this section shall be in addition to any other duty imposed under this Act or any other law for the time being in force.

(5) The anti-dumping duty imposed under this section shall, unless revoked earlier, cease to have effect on the expiry of five years from the date of such imposition:

Provided that if the Central Government, in a review, is of the opinion that the cessation of such duty is likely to lead to continuation or recurrence of dumping and injury, it may, from time to time, extend the period of such imposition for a further period of five years and such further period shall commence from the date of order of such extension:

Provided further that where a review initiated before the expiry of the aforesaid period of five years has not come to a conclusion before such expiry, the anti-dumping duty may continue to remain in force pending the outcome of such a review for a further period not exceeding one year.

(6) The margin of dumping as referred to in sub-section (1) or sub-section (2) shall, from time to time, be ascertained and determined by the Central Government, after such inquiry as it may consider necessary and the Central Government may, by notification in the Official Gazette, make rules for the purposes of this section, and without prejudice to the generality of the foregoing, such rules may provide for the manner in which articles liable for any anti-dumping duty under this section may be identified, and for the manner in which the export price and the normal value of, and the margin of dumping in relation to, such articles may be determined and for the assessment and collection of such anti-dumping duty.



(7) Every notification issued under this section shall, as soon as may be after it is issued, be laid before each House of Parliament.

(8) The provisions of the Customs Act, 1962 (52 of 1962) and the rules and regulations made thereunder, *relating to the date for determination of rate of duty, non-levy, short levy, refunds, interest, appeals, offences, and penalties* shall, as far as may be, apply to the duty chargeable under this section as they apply in relation to duties leviable under that Act."

46. Section 9C of the Tariff Act provides for an appeal against the order passed under Section 9A thereof and reads thus:

*"9C. Appeal.*-(1) An appeal against the order of determination or review thereof regarding the existence, degree and effect of any subsidy or dumping in relation to import of any article shall lie to the Customs, Excise and Gold (Control) Appellate Tribunal constituted under section 129 of the Customs Act, 1962 (52 of 1962) (hereinafter referred to as the Appellate Tribunal).

(1A) An appeal under sub-section (1) shall be accompanied by a fee of fifteen thousand rupees

(1B) Every application made before the Appellate Tribunal-

(a) in an appeal under sub-section (1), for grant of stay or for rectification of mistake or for any other purpose; or

(b) for restoration of an appeal or an application, shall be accompanied by a fee of five hundred rupees.

(2) Every appeal under this section shall be filed within ninety days of the date of order under appeal:

Provided that the Appellate Tribunal may entertain any

appeal after the expiry of the said period of ninety days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

(3) The Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or annulling the order appealed against.

(4) The provisions of sub-sections (1), (2), (5) and (6) of section 129C of the Customs Act, 1962 (52 of 1962) shall apply to the Appellate Tribunal in the such Bench shall consist of the President and not less than two members and shall include one judicial member and one technical member.

47. The 1995 Rules lay down a comprehensive procedure for identification, assessment and collection of anti-dumping duty on dumped articles. The Rules, relevant for these appeals, read as under:

4. *Duties of the designated authority.*-(1) It shall be the duty of the designated authority in accordance with these rules-

(a) to investigate as to the existence, degree and effect of any alleged dumping in relation to import of any article;

(b) to identify the article liable for anti-dumping duty;

(c) to submit its findings, provisional or otherwise to Central Government as to-

(i) normal value, export price and the margin of dumping in relation to the article under investigation, and

(ii) the injury or threat of injury to an industry established in India or material retardation to



the establishment of an industry in India consequent upon the import of such article from the specified countries.

(d) to recommend the amount of anti-dumping duty equal to the margin of dumping or less, which if levied, would remove the injury to the domestic industry, and the date of commencement of such duty; and

(e) to review the need for continuance of anti-dumping duty.

5. *Initiation of investigation.*- (1) Except as provided in sub-rule (4), the designated authority shall initiate an investigation to determine the existence, degree and effect of any alleged dumping only upon receipt of a written application by or on behalf of the domestic industry.

(2) An application under sub-rule (1) shall be in the form as may be specified by the designated authority and the application shall be supported by evidence of –

(a) dumping

(b) injury, where applicable, and

(c) where applicable, a causal link between such dumped imports and alleged injury.

(3) The designated authority shall not initiate an investigation pursuant to an application made under sub-rule (1) unless –

(a) it determines, on the basis of an examination of the degree of support for, or opposition to the application expressed by domestic producers of the like product, that the application has been made by

or on behalf of the domestic industry:

Provided that no investigation shall be initiated if domestic producers expressly supporting the application account for less than twenty five per cent of the total production of the like article by the domestic industry, and

(b) it examines the accuracy and adequacy of the evidence provided in the application and satisfies itself that there is sufficient evidence regarding -

(i) dumping,

(ii) injury, where applicable; and

(iii) where applicable, a causal link between such dumped imports and the alleged injury, to justify the initiation of an investigation.

*Explanation.* – For the purpose of this rule the application shall be deemed to have been made by or on behalf of the domestic industry, if it is supported by those domestic producers whose collective output constitute more than fifty per cent of the total production of the like article produced by that portion of the domestic industry expressing either support for or opposition, as the case may be, to the application.

(4) Notwithstanding anything contained in sub-rule (1) the designated authority may initiate an investigation suo motu if it is satisfied from the information received from the Commissioner of Customs appointed under the Customs Act, 1962 (52 of 1962) or from any other source that sufficient evidence exists as to the existence of the circumstances referred to in clause (b) of sub-rule (3).

(5) The designated authority shall notify the government



of the exporting country before proceeding to initiate an investigation.

*6. Principles governing investigations.-* (1) The designated authority shall, after it has decided to initiate investigation to determine the existence, degree and effect of any alleged dumping of any article, issue a public notice notifying its decision and such public notice shall, inter alia, contain adequate information on the following:-

(i) the name of the exporting country or countries and the article involved;

(ii) the date of initiation of the investigation;

(iii) the basis on which dumping is alleged in the application;

(iv) a summary of the factors on which the allegation of injury is based;

(v) the address to which representations by interested parties should be directed; and

(vi) the time-limits allowed to interested parties for making their views known.

(2) A copy of the public notice shall be forwarded by the designated authority to the known exporters of the article alleged to have been dumped, the Governments of the exporting countries concerned and other interested parties.

(3) The designated authority shall also provide a copy of the application referred to in sub-rule (1) of Rule 5 to –

(i) the known exporters or to the concerned trade association where the number of exporters is large,

and

(ii) the governments of the exporting countries:

Provided that the designated authority shall also make available a copy of the application to any other interested party who makes a request therefor in writing.

(4) The designated authority may issue a notice calling for any information, in such form as may be specified by it, from the exporters, foreign producers and other interested parties and such information shall be furnished by such persons in writing within thirty days from the date of receipt of the notice or within such extended period as the designated authority may allow on sufficient cause being shown.

*Explanation:* For the purpose of this sub-rule, the notice calling for information and other documents shall be deemed to have been received one week from the date on which it was sent by the designated authority or transmitted to the appropriate diplomatic representative of the exporting country.

(5) The designated authority shall also provide opportunity to the industrial users of the article under investigation, and to representative consumer organizations in cases where the article is commonly sold at the retail level, to furnish information which is relevant to the investigation regarding dumping, injury where applicable, and causality.

(6) The designated authority may allow an interested party or its representative to present information relevant to the investigation orally but such oral information shall be taken into consideration by the designated authority only when it is subsequently reproduced in writing.

(7) The designated authority shall make available the evidence presented to it by one interested party to the



other interested parties, participating in the investigation.

(8) In a case where an interested party refuses access to, or otherwise does not provide necessary information within a reasonable period, or significantly impedes the investigation, the designated authority may record its findings on the basis of the facts available to it and make such recommendations to the Central Government as it deems fit under such circumstances.

*7. Confidential information*- (1) Notwithstanding anything contained in sub-rules (2), (3)and (7) of rule 6, sub-rule (2) of rule 12, sub-rule (4) of rule 15 and sub-rule (4) of rule 17,the copies of applications received under sub-rule (1) of rule 5, or any other information provided to the designated authority on a confidential basis by any party in the course of investigation, shall, upon the designated authority being satisfied as to its confidentiality, be treated as such by it and no such information shall be disclosed to any other party without specific authorization of the party providing such information.

(2) The designated authority may require the parties providing information on confidential basis to furnish non-confidential summary thereof and if, in the opinion of a party providing such information, such information is not susceptible of summary, such party may submit to the designated authority a statement of reasons why summarisation is not possible.

(3) Notwithstanding anything contained in sub-rule (2), if the designated authority is satisfied that the request for confidentiality is not warranted or the supplier of the information is either unwilling to make the information public or to authorize its disclosure in a generalized or summary form, it may disregard such information.

*10. Determination of normal value, export price and*

*margin of dumping.* - An article shall be considered as being dumped if it is exported from a country or territory to India at a price less than its normal value and in such circumstances the designated authority shall determine the normal value, export price and the margin of dumping taking into account, inter alia, the principles laid down in Annexure I to these rules.

*11. Determination of injury*. - (1) In the case of imports from specified countries, the designated authority shall record a further finding that import of such article into India causes or threatens material injury to any established industry in India or materially retards the establishment of any industry in India.

(2) The designated authority shall determine the injury to domestic industry, threat of injury to domestic industry, material retardation to establishment of domestic industry and a causal link between dumped imports and injury, taking into account all relevant facts, including the volume of dumped imports, their effect on price in the domestic market for like articles and the consequent effect of such imports on domestic producers of such articles and in accordance with the principles set out in Annexure II to these rules.

(3) The designated authority may, in exceptional cases, give a finding as to the existence of injury even where a substantial portion of the domestic industry is not injured, if-

(i) there is a concentration of dumped imports into an isolated market, and

(ii) the dumped articles are causing injury to the producers of all or almost all of the production within such market.



*12. Preliminary findings.* - (1) The designated authority shall proceed expeditiously with the conduct of the investigation and shall, in appropriate cases, record a preliminary finding regarding export price, normal value and margin of dumping, and in respect of imports from specified countries, it shall also record a further finding regarding injury to the domestic industry and such finding shall contain sufficiently detailed information for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. It will also contain:-

(i) the names of the suppliers, or when this is impracticable, the supplying countries involved;

(ii) a description of the article which is sufficient for customs purposes;

(iii) the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value;

(iv) considerations relevant to the injury determination; and

(v) the main reasons leading to the determination.

2. The designated authority shall issue a public notice recording its preliminary findings.

*16. Disclosure of information.* - The designated authority shall, before giving its final findings, inform all interested parties of the essential facts under consideration which form the basis for its decision.

*17. Final findings.* - (1) The designated authority shall, within one year from the date of initiation of an investigation, determine as to whether or not the article

under investigation is being dumped in India and submit to the Central Government its final finding –

(a) as to, -

(i) the export price, normal value and the margin of dumping of the said article;

(ii) whether import of the said article into India, in the case of imports from specified countries, causes or threatens material injury to any industry established in India or materially retards the establishment of any industry in India;

(iii) a casual link, where applicable, between the dumped imports and injury;

(iv) whether a retrospective levy is called for and if so, the reasons therefor and date of commencement of such retrospective levy:

Provided that the Central Government may, in its discretion in special circumstances extend further the aforesaid period of one year by six months:

Provided further that in those cases where the designated authority has suspended the investigation on the acceptance of a price undertaking as provided in rule 15 and subsequently resumes the same on violation of the terms of the said undertaking, the period for which investigation was kept under suspension shall not be taken into account while calculating the period of said one year,

(b) *recommending the amount of duty which, if levied, would remove the injury where applicable, to the domestic industry.*

(2) The final finding, if affirmative, shall contain all information on the matter of facts and law and



reasons which have led to the conclusion and shall also contain information regarding-

(i) the names of the suppliers, or when this is impracticable, the supplying countries involved;

(ii) a description of the product which is sufficient for customs purposes;

(iii) the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value;

(iv) Considerations relevant to the injury determination; and

(v) the main reasons leading to the determination.

(3) The designated authority shall determine an individual margin of dumping for each known exporter or producer concerned of the article under investigation:

Provided that in cases where the number of exporters, producers, importers or types of articles involved are so large as to make such determination impracticable, it may limit its findings either to a reasonable number of interested parties or articles by using statistically valid samples based on information available at the time of selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated, and any selection, of exporters, producers, or types of articles, made under this proviso shall preferably be made in consultation with and with the consent of the exporters, producers or importers concerned :

Provided further that the designated authority shall,

determine an individual margin of dumping for any exporter or producer, though not selected initially, who submit necessary information in time, except where the number of exporters or producers are so large that individual examination would be unduly burdensome and prevent the timely completion of the investigation.

(4) The designated authority shall issue a public notice recording its final findings.

*20. Commencement of duty.* - (1) The anti-dumping duty levied under rule 13 and rule 18 shall take effect from the date of its publication in the Official Gazette.

(2) Notwithstanding anything contained in sub-rule (1)-

(a) where a provisional duty has been levied and where the designated authority has recorded a final finding of injury or where the designated authority has recorded a final finding of threat of injury and a further finding that the effect of dumped imports in the absence of provisional duty would have led to injury, the anti-dumping duty may be levied from the date of imposition of provisional duty;

(b) in the circumstances referred to in sub-section (3) of section 9A of the Act, the anti-dumping duty may be levied retrospectively from the date commencing ninety days prior to the imposition of such provisional duty:

Provided that no duty shall be levied retrospectively on imports entered for home consumption before initiation of the investigation:

Provided further that in the cases of violation of price undertaking referred to in sub-rule (6) of rule 15, no duty shall be levied retrospectively on the imports which have entered for home consumption before the violation of the terms of such undertaking.



Provided also that notwithstanding anything contained in the foregoing proviso, in case of violation of such undertaking, the provisional duty shall be deemed to have been levied from the date of violation of the undertaking or such date as the Central Government may specify in each case.

*21. Refund of duty.* - (1) If the anti-dumping duty imposed by the Central Government on the basis of the final findings of the investigation conducted by the designated authority is higher than the provisional duty already imposed and collected, the differential shall not be collected from the importer.

(2) If, the anti-dumping duty fixed after the conclusion of the investigation is lower than the provisional duty already imposed and collected, the differential shall be refunded to the importer.

(3) If the provisional duty imposed by the Central Government is withdrawn in accordance with the provisions of sub-rule (4) of rule 18, the provisional duty already imposed and collected, if any, shall be refunded to the importer."

48. Thus, the first and foremost question for adjudication is the nature of proceedings before the DA appointed by the Central Government under Rule 3 of the 1995 Rules for conducting investigations for the purpose of levy of anti-dumping duty in terms of Section 9A of the Act. To put it differently, the question is whether the decision of the DA is legislative, administrative or quasi-judicial in character? However, for the purpose of the present case, we shall confine our discussion only to the question as to whether the function of the DA is administrative or quasi-judicial in character as Mr. Rawal, learned counsel appearing for the DA had finally conceded before us that it is not legislative in nature.

49. More often than not, it is not easy to draw a line demarcating an administrative decision from a quasi-judicial decision. Nevertheless, the aim of both a quasi-judicial function as well as an administrative function is to arrive at a just decision. In *A.K. Kraipak & Ors. Vs. Union of India & Ors.*[62], this Court had observed that the dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated. For determining whether a power is an administrative power or a quasi-judicial power, regard must be had to: (i) the nature of the power conferred; (ii) the person or persons on whom it is conferred; (iii) the framework of the law conferring that power; (iv) the consequences ensuing from the exercise of that power and (v) the manner in which that power is expected to be exercised.

50. The first leading case decided by this Court on the point was *Khushaldas S. Advani* (supra). In that case, while dealing with the question whether the governmental function of requisitioning property under Section 3 of the Bombay Land Requisition Ordinance, 1947 was an administrative or quasi-judicial function, Das J. (as His Lordship then was), while concurring with the majority, in his separate judgment, upon reference to a long line of cases expressing divergent views, deduced the following principles, which could be applied for determining the question posed in para 48 supra:

> "(i) that if a statute empowers an authority, not being a Court in the ordinary sense, to decide disputes arising out of a claim made by one party under the statute which claim is opposed by another party and to determine the respective rights of the contesting parties who are opposed to each other, there is a lis and prima facie, and in the absence of anything in the statute to the contrary it is the duty of the authority to act judicially and the decision of the authority is a quasi-judicial act; and

62. (1969) 2 SCC 262.



> (ii) that if a statutory authority has power to do any act which will prejudicially affect the subject, then, although there are not two parties apart from the authority and the contest is between the authority proposing to do the act and the subject opposing it, the final determination of the authority will yet be a quasi-judicial act provided the authority is required by the statute to act judicially."

51. In *Jaswant Sugar Mills Ltd., Meerut Vs. Lakshmi Chand & Ors.*[63], a Constitution Bench of this Court had observed that:

> "Often the line of distinction between decisions judicial and administrative is thin: but the principles for ascertaining the true character of the decisions are well-settled. A judicial decision is not always the act of a judge or a tribunal invested with power to determine questions of law or fact: it must however be the act of a body or authority invested by law with authority to determine questions or disputes affecting the rights of citizens and under a duty to act judicially. A judicial decision always postulates the existence of a duty laid upon the authority to act judicially. Administrative authorities are often invested with authority or power to determine questions, which affect the rights of citizens. The authority may have to invite objections to the course of action proposed by him, he may be under a duty to hear the objectors, and his decision may seriously affect the rights of citizens but unless in arriving at his decision he is required to act judicially, his decision will be executive or administrative. Legal authority to determine questions affecting the rights of citizens, does not make the determination judicial: *it is the duty to act judicially which invests it with that character*……
> ……To

63. 1963 Supp (1) SCR 242.

make a decision or an act judicial, the following criteria must be satisfied:

(*1*) it is in substance a determination upon investigation of a question by the application of objective standards to facts found in the light of pre-existing legal rule;

(*2*) it declares rights or imposes upon parties obligations affecting their civil rights; and

(*3*) that the investigation is subject to certain procedural attributes contemplating an opportunity of presenting its case to a party, ascertainment of facts by means of evidence if a dispute be on questions of fact, and if the dispute be on question of law on the presentation of legal argument, and a decision resulting in the disposal of the matter on findings based upon those questions of law and fact."

52. Having examined the scheme of the Tariff Act read with the 1995 Rules on the touchstone of the aforenoted principles, particularly the first principle enunciated in *Khushaldas S. Advani* (supra), we have no hesitation in coming to the conclusion that this is an obvious case where the DA exercises quasi-judicial functions and is bound to act judicially. A cursory look at the relevant Rules would show that the DA determines the rights and obligations of the 'interested parties' by applying objective standards based on the material/information/evidence presented by the exporters, foreign producers and other 'interested parties' by applying the procedure and principles laid down in the 1995 Rules. Rule 5 of the 1995 Rules provides that the DA shall initiate an investigation so as to determine the existence, degree and effect of any alleged dumping upon the receipt of a written application by or on behalf of the domestic industry; sub-rule (4) thereof empowers the DA to initiate an investigation *suo motu* on the basis of information received from the Commissioner of Customs or from any other source. When the DA has decided to initiate an investigation,



Rule 6 requires that a public notice shall be issued to all the interested parties as mentioned in Rule 2(c) of the 1995 Rules, as also to industrial users of the product, and to the representatives of the consumer organizations in cases when the product is commonly sold at the retail level. It is manifest that while determining the existence, degree and effect of the alleged dumping, the DA determines a '*lis*' between persons supporting the levy of duty and those opposing the said levy.

53. Further, it is also clear from the scheme of the Tariff Act and the 1995 Rules that the determination of existence, effect and degree of alleged dumping is on the basis of criteria mentioned in the Tariff Act and 1995 Rules, and an anti-dumping duty cannot be levied unless, on the basis of the investigation, it is established that there is: (i) existence of dumped imports; (ii) material injury to the domestic industry and, (iii) a causal link between the dumped imports and the injury. Rule 10 of the said Rules lays down the criteria for the determination of the normal value, export price and margin of dumping, while Rule 11 deals with the determination of injury which according to Annexure II to the 1995 Rules is based on positive evidence and involves an objective examination of both: (a) the volume and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products. (See: *S&S Enterprise Vs. Designated Authority & Ors.*[64]*).* It is evident that the determination of injury is premised on an objective examination of the material submitted by the parties. Moreover, under Rule 6(7) of the 1995 Rules, the DA is required to make available the evidence presented to it by one party to other interested parties, participating in the investigation. It is also pertinent to note that Rule 12 of the 1995 Rules which deals with the preliminary findings, explicitly provides that such findings shall "contain sufficiently detailed information for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have

64. (2005) 3 SCC 337.

led to arguments being accepted or rejected." A similar stipulation is found in relation to the final findings recorded by the DA under Rule 17(2) of the 1995 Rules. Above all, Section 9C of the Tariff Act provides for an appeal to the Tribunal against the order of determination or review thereof regarding the existence, degree and effect of dumping in relation to imports of any article, which order, obviously has to be based on the determination and findings of the DA. The cumulative effect of all these factors leads us to an irresistible conclusion that the DA performs quasi-judicial functions under the Tariff Act read with the 1995 Rules.

54. Having come to the conclusion that the DA is entrusted with a quasi-judicial function, the next question for consideration is whether or not the decision of the DA dated 9th March 2005, returning the final findings in terms of Rule 17 of the 1995 Rules is in breach of the principles of natural justice, resulting in vitiating the subject notification under Rule 18 of the said Rules?

55. It is trite that rules of "natural justice" are not embodied rules. The phrase "natural justice" is also not capable of a precise definition. The underlying principle of natural justice, evolved under the common law, is to check arbitrary exercise of power by the State or its functionaries. Therefore, the principle implies a duty to act fairly i.e. fair play in action. In *A.K. Kraipak* (supra), it was observed that the aim of rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice.

56. In *Mohinder Singh Gill* (supra), upon consideration of several cases, Krishna Iyer, J. in his inimitable style observed thus:

> "48. Once we understand the soul of the rule as fairplay in action — and it is so — we must hold that it extends to both the fields. After all, administrative power in a democratic set-up is not allergic to fairness in action and discretionary executive justice cannot degenerate into



> unilateral injustice. Nor is there ground to be frightened of delay, inconvenience and expense, if natural justice gains access. For fairness itself is a flexible, pragmatic and relative concept, not a rigid, ritualistic or sophisticated abstraction. It is not a bull in a china shop, nor a bee in one's bonnet. Its essence is good conscience in a given situation: nothing more — but nothing less. The 'exceptions' to the rules of natural justice are a misnomer or rather are but a shorthand form of expressing the idea that in those exclusionary cases nothing unfair can be inferred by not affording an opportunity to present or meet a case. Text-book excerpts and ratios from rulings can be heaped, but they all converge to the same point that *audi alteram partem* is the justice of the law, without, of course, making law lifeless, absurd, stultifying, self-defeating or plainly contrary to the common sense of the situation."

57. In *Swadeshi Cotton Mills Vs. Union of India*[65], R.S. Sarkaria, J., speaking for the majority in a three-Judge Bench, lucidly explained the meaning and scope of the concept of "natural justice". Referring to several decisions, His Lordship observed thus:

> "Rules of natural justice are not embodied rules. Being means to an end and not an end in themselves, it is not possible to make an exhaustive catalogue of such rules. But there are two fundamental maxims of natural justice viz. *(i) audi alteram partem* and *(ii) nemo judex in re sua.* The audi alteram partem rule has many facets, two of them being *(a)* notice of the case to be met; and *(b)* opportunity to explain. This rule cannot be sacrificed at the altar of administrative convenience or celerity. The general principle—as distinguished from an absolute rule of uniform application—seems to be that where a statute does not, in terms, exclude this rule of prior hearing but contemplates a post-decisional hearing amounting to a full

65. (1981) 1 SCC 664.

review of the original order on merits, then such a statute would be construed as excluding the *audi alteram partem* rule at the pre-decisional stage. Conversely if the statute conferring the power is silent with regard to the giving of a pre-decisional hearing to the person affected and the administrative decision taken by the authority involves civil consequences of a grave nature, and no full review or appeal on merits against that decision is provided, courts will be extremely reluctant to construe such a statute as excluding the duty of affording even a minimal hearing, shorn of all its formal trappings and dilatory features at the pre-decisional stage, unless, viewed pragmatically, it would paralyse the administrative process or frustrate the need for utmost promptitude. In short, this rule of fair play must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands. The court must make every effort to salvage this cardinal rule to the maximum extent possible, with situational modifications. *But, the core of it must, however, remain, namely, that the person affected must have reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise."*

(Emphasis supplied by us)

58. It is thus, well settled that unless a statutory provision, either specifically or by necessary implication excludes the application of principles of natural justice, because in that event the Court would not ignore the legislative mandate, the requirement of giving reasonable opportunity of being heard before an order is made, is generally read into the provisions of a statute, particularly when the order has adverse civil consequences which obviously cover infraction of property, personal rights and material deprivations for the party affected. The principle holds good irrespective of whether the power conferred on a statutory body or Tribunal is administrative or



quasi-judicial. It is equally trite that the concept of natural justice can neither be put in a strait-jacket nor is it a general rule of universal application. Undoubtedly, there can be exceptions to the said doctrine. As stated above, the question whether the principle has to be applied or not is to be considered bearing in mind the express language and the basic scheme of the provision conferring the power; the nature of the power conferred and the purpose for which the power is conferred and the final effect of the exercise of that power. It is only upon a consideration of these matters that the question of application of the said principle can be properly determined. (See: *Union of India Vs. Col. J.N. Sinha & Anr.*[66].)

59. In light of the aforenoted legal position and the elaborate procedure prescribed in Rule 6 of 1995 Rules, which the DA is obliged to adhere to while conducting investigations, we are convinced that duty to follow the principles of natural justice is implicit in the exercise of power conferred on him under the said Rules. In so far as the instant case is concerned, though it was sought to be pleaded on behalf of the respondents that the incumbent DA had issued a common notice to the Advocates for ATMA and Ningbo Nylon, for oral hearing on 9th March 2005, however, there is no document on record indicating that pursuant to ATMA's letter dated 24th January 2005, notice for oral hearing was issued to them by the incumbent DA. Moreover, the alleged opportunity of oral hearing on 9th March, 2005, being in relation to the price undertaking offer by Ningbo Nylon, cannot be likened to a public hearing contemplated under Rule 6(6) of the 1995 Rules. The procedure prescribed in the 1995 Rules imposes a duty on the DA to afford to all the parties, who have filed objections and adduced evidence, a personal hearing before taking a final decision in the matter. Even written arguments are no substitute for an oral hearing. A personal hearing enables the authority concerned to watch the demeanour of the witnesses etc. and

66. (1970) 2 SCC 458.

also clear up his doubts during the course of the arguments. Moreover, it was also observed in *Gullapalli* (supra), if one person hears and other decides, then personal hearing becomes an empty formality. In the present case, admittedly, the entire material had been collected by the predecessor of the DA; he had allowed the interested parties and/or their representatives to present the relevant information before him in terms of Rule 6(6) but the final findings in the form of an order were recorded by the successor DA, who had no occasion to hear the appellants herein. In our opinion, the final order passed by the new DA offends the basic principle of natural justice. Thus, the impugned notification having been issued on the basis of the final findings of the DA, who failed to follow the principles of natural justice, cannot be sustained. It is quashed accordingly.

60. For the view we have taken above, we deem it unnecessary to deal with the other contentions urged on behalf of the parties on the merits of the levy.

61. This brings us to the question of relief. In view of our finding that the recommendation of the DA stands vitiated on account of non-compliance with the basic principle of *audi alteram partem,* the appeals must succeed. However, the question for consideration is whether the appellants will be entitled to the refund of the duty already paid and collected. It is trite law that in the case of indirect taxes like central excise duties and customs duties, the tax collected by the State without the authority of law, shall not be refunded to the petitioner unless he alleges and establishes that he has himself borne the burden of the said duty and that he has not passed on the burden of duty to a third party. In such a situation, the doctrine of unjust enrichment comes into play. On the doctrine of unjust enrichment, in *Mafatlal Industries Ltd. & Ors. Vs. Union of India & Ors.*[67], a decision by a bench comprising of nine learned

67. (1997) 5 SCC 536.



Judges of this Court, B.P. Jeevan Reddy, J., speaking for the majority, had observed thus:

> "The doctrine of unjust enrichment is a just and salutary doctrine. No person can seek to collect the duty from both ends. In other words, he cannot collect the duty from his purchaser at one end and also collect the same duty from the State on the ground that it has been collected from him contrary to law. The power of the court is not meant to be exercised for unjustly enriching a person. The doctrine of unjust enrichment is, however, inapplicable to the State. State represents the people of the country. No one can speak of the people being unjustly enriched."

62. In the instant case, the DA, during the Sunset Review (Notification No.14/20/2008-DGAD dated 31st March, 2009) had recorded a clear finding to the effect that the Chinese exporters had been underselling below the non-injurious price to the tune of 25-20% during the period of investigation. It is, therefore, manifest that the burden of anti-dumping duty had been absorbed by the exporters. The said finding of fact attained finality in as much as it had not been assailed by any of the interested parties. In light of the fact that the importers viz. ATMA and its constituent members have passed on the burden of the levy to third person(s), it follows that members of ATMA cannot claim refund of the anti-dumping duty levied in terms of the Notification No.36/2005-Cus. In any event, ATMA and its constituent members have neither pleaded nor adduced any evidence to show that they had not passed on the burden of the duty to any other person.

63. In any case, we are of the opinion that the appellants cannot claim refund of duty already levied in as much as they have not specifically challenged the findings of the sunset review, and therefore, the findings in relation to the existence of dumped imports, material injury to domestic industry and causal link between dumped imports and material injury to

domestic industry remain unchallenged. In that view of the matter, particularly when the existence of dumping has not been put in issue, we are of the opinion that refund of the duty to any of the appellants would be inconsistent with the object and scheme of the Tariff Act and the 1995 Rules.

64. In the result, the appeals are allowed to the extent mentioned above; the decision of the Tribunal is set aside and Notification No.36/2005-Cus., dated 27th April 2005, is quashed. However, considering the facts and circumstances of the case, the parties are left to bear their own costs.

R.P. Appeals partly allowed.



STATE OF U.P. & ORS.

*v.*

MADHAV PRASAD SHARMA

(Civil Appeal No. 242 of 2011)

JANUARY 10, 2011

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

*Allahabad High Court Rules, 1952:*

*Chapter 8, Rule 5 – Special appeal – Writ petition challenging the order of appellate authority passed in exercise of appellate jurisdiction in terms of Service Rules of 1991 – Allowed by Single Judge of High Court – Special appeal before Division Bench of High Court – HELD: Has been rightly held by Division Bench of the High Court as not maintainable.*

*Service Law:*

*Termination of service – Police Constable – Departmental proceedings for unauthorized absence from duty – Delinquent sanctioned leave without pay – Subsequently services terminated – Plea of double punishment – HELD: Single Judge of High Court erred in quashing the order of termination holding that the delinquent was inflicted with two punishments – Rule 4 of the Service Rules of 1991, defining the penalties in clear terms, makes it clear that sanction of leave without pay cannot be treated as a penalty – There is no question of awarding two punishments in respect of one charge – Doctrine of double jeopardy has no application in the case – Judgment of Single Judge set aside – Matter remitted to Single Judge of High Court for disposal afresh – Uttar Pradesh Subordinate Police Officers/ Employees (Punishment and Appeal) Rules, 1991*

*– Rules 4,7 and 8 – Constitution of India, 1950 – Article 20(2).*

**The respondent was appointed as Police Constable on 1.2.1978. He remained on unauthorized leave for 101 days from 19.10.2001 to 28.01.2002. Departmental proceedings were initiated against him which culminated in termination of his services by order dated 23.11.2002 passed by the Senior Superintendent of Police. The departmental appeal filed by him before the Deputy Inspector General of Police was rejected. However, the writ petition filed by the respondent was allowed by the Single Judge of the High Court holding that the respondent was sanctioned leave without pay and subsequently, his services were terminated on the same ground and, as such, two punishments were inflicted for one charge which was not permissible in law. The special appeal filed by the State Government was dismissed by the Division Bench of the High Court on the ground of maintainability.**

**In the instant appeal filed the State Government the questions for consideration before the Court were: (i) whether the special appeal preferred by the State before the Division Bench of the High Court against the order of the Single Judge allowing the writ petition filed by the petitioner therein was maintainable? and (ii) whether the order of the Single Judge quashing the order of termination of the petitioner therein was sustainable.**

**Partly allowing the appeal, the Court**

**HELD:**

**1. It is fairly admitted that in view of the fact that against the order of termination the delinquent availed departmental appeal to the DIG, against the order of the Single Judge of the High Court no further appeal by way**



**of special appeal before the Division Bench would lie. The order of the SSP was considered and disposed of by the Appellate Authority, i.e., DIG and the order impugned in the writ petition was passed in exercise of appellate jurisdiction in terms of the Uttar Pradesh Subordinate Police Officers/Employees (Punishment and Appeal) Rules, 1991. Therefore, in view of Rule 5 of Chapter VIII of the Allahabad High Court Rules, 1952, the Division Bench of the High Court rightly arrived at the conclusion that the special appeal filed by the State Government was no maintainable. [para 8] [274-A-D]**

**2.1 The Single Judge of the High Court, without going into the merits of the claim made by both the parties with reference to the charge levelled against the delinquent, enquiry proceedings, order of the SSP and DIG, erred in quashing the order of termination holding that the delinquent was inflicted with two punishments. Rule 4 of the Uttar Pradesh Subordinate Police Officers/ Employees (Punishment and Appeal) Rules, 1991, makes it clear that sanction of leave without pay is not one of the punishments, prescribed. Disciplinary authority is competent to impose appropriate penalty from those provided in Rule 4 of the Rules which deals with major penalties and minor penalties. Denial of salary on the ground of 'no work no pay' cannot be treated as a penalty in view of statutory provisions contained in Rule 4 defining the penalties in clear terms. Rule 8 provides for punishment of dismissal and removal. Thus, the punishment of dismissal from the service is the punishment which has been awarded to the respondent in accordance with Rules 4 and 8 of the Rules. There is no question of awarding two punishments in respect of one charge. [para 8-9] [274-E-F; 276-E-G]**

**2.2 Doctrine of double jeopardy enshrined in Article 20(2) of the Constitution of India has no application in the**

**event of there being only one punishment awarded to the respondent under the Rules on charges being proved during the course of disciplinary enquiry. [para 10] [276-H; 277-A]**

*Union of India* vs. *Datta Linga Toshatwad* **(2005) 13 SCC 709; and** *Maan Singh* vs. *Union of India*, **2003 (2) SCR 129 = (2003) 3 SCC 464, relied on**

**2.3 The decision in the case of *Bakshish Singh**, was considered by this Court in *Mann Singh's case* wherein after following the judgment in *Hari Har Gopal's case,* this Court clarified that in *Bakshish Singh* the Court dealt with only the issue of remand by the High Court as well as by the first appellate court to the punishing authority for imposing the fresh punishment and held that "Bakshish Singh's case is not an authority for the proposition that the order terminating the employment cannot be sustained inasmuch as in the later part of the same order the Disciplinary Authority also regularized unauthorized absence from duty by granting an employee leave without pay." [para 11] [277-D-G]**

**State of Punjab & Ors*. Vs. *Bakshish Singh,* **1998 (1) Suppl. SCR 478 = AIR 1999 SC 2626 = (1998) 8 SCC 222 - distinguished.**

*State of M.P. v. Hari Har Gopal & Ors.,* **(1969) 3 SLR 274 (SC) – relied on**

**2.4. In the circumstances, the conclusion of the Single Judge that the delinquent had suffered two punishments cannot be sustained. Inasmuch as the Single Judge quashed the order of termination only on the ground that it is impermissible to impose two punishments, the order of the Single Judge is set aside and the matter remitted to the Single Judge for disposal expeditiously. [para 12] [278-B-D]**



**Case Law Reference:**

| | | |
|---|---|---|
| **(2005) 13 SCC 709** | **relied on** | **para 10** |
| **2003 (2) SCR 129** | **relied on** | **para 10** |
| **1998 (1) Suppl. SCR 478** | **distinguished** | **para 11** |
| **(1969) 3 SLR 274 (SC)** | **relied on** | **Para 11** |

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 242 of 2011.

From the Judgment & Order dated 29.06.2009 of the High Court of Judicature at Allahabad in Special Appeal No. 614 of 2009.

Shail Kr. Dwivedi, AAG, Abhishek K. Chaudhary, Manoj Kumar, Gunnam Venkateswara Rao for the Appellants.

V. Shekhar, K. Krishna Kumar, M.A. Chinnasamy for the Respondent.

The Judgment of the Court was delivered by

**P. SATHASIVAM, J.** 1. Leave granted.

2. his appeal is directed against the final judgment and order dated 29.06.2009 passed by the High Court of Judicature at Allahabad in Special Appeal No. 614 of 2009 whereby the Division Bench of the High Court dismissed the special appeal preferred by the appellants herein.

3. Brief facts:

(a) The respondent was appointed as Police Constable at Police Lines, Aligarh vide order dated 01.02.1978. On 19.10.2001, the respondent had gone for some official work and left the Police Station, Sikandarpur Vaishya and thereafter came back on his duty on 28.01.2002 after 101 days. After

initiation of departmental proceedings, the Disciplinary Authority issued notices to the respondent on various dates for seeking explanation for his unauthorized absence from duty. On 23.03.2002, the Deputy Superintendent of Police (in short "the DSP") issued charge sheet against the respondent by leveling charges and directed him to submit the reply by 01.04.2002. As the respondent did not reply to the notice, the DSP issued another notice to the respondent on 04.04.2002. After giving several opportunities to the respondent, the Disciplinary Authority fixed the date as 01.07.2002 for recording of evidence but the respondent did not appear before the Presiding Officer. Finally, the respondent appeared before the Presiding Officer on 16.09.2002 and informed that he has no defence witness. After completion of the enquiry, the Presiding Officer, vide his order dated 09.10.2002, submitted his report to the Disciplinary Authority. Agreeing with the enquiry report, the Disciplinary Authority issued show cause notice dated 25.10.2002 to the respondent along with the copy of the enquiry report for his comments/reply on the findings recorded therein. On 06.11.2002, the respondent submitted his reply stating that he had accepted the findings on the charge of unauthorized absence from duty on the ground of illness.

(b) The Sr. Superintendent of Police (in short "the SSP"), Etah, vide order dated 23.11.2002, terminated the service of the respondent. Feeling aggrieved by the said order, the respondent preferred Departmental Appeal before the Deputy Inspector General of Police (in short "the DIG"), Agra Zone, Agra. Vide order dated 27.02.2003, the DIG rejected the appeal filed by the respondent herein.

(c) Aggrieved by the said order, the respondent preferred writ petition being C.M.W.P. No. 53909 of 2003 before the High Court which was allowed by the learned single Judge vide his order dated 17.09.2008. Against the said order, the appellants herein preferred special appeal being S.A. No. 614 of 2009 before the High Court. The Division Bench of the High Court,



vide its order 29.06.2009, dismissed the special appeal on the ground of maintainability. Aggrieved by the said order, the appellants have preferred this appeal by way of special leave before this Court.

4. Heard Mr. Shail Kr. Dwivedi, learned Additional Advocate General for the State of U.P. and Mr. V. Shekhar, learned senior counsel for the respondent.

5. Without going into the merits of the charges leveled against the respondent, let us consider the following two questions:-

(i) Whether the Special Appeal No. 614 of 2009 preferred by the State before a Division Bench against the order of the learned single Judge allowing the writ petition filed by the petitioner therein is maintainable?

(ii) Even if we answer the first question in the negative, whether the order of the learned single Judge quashing the order of termination dated 23.11.2002 of the petitioner therein is sustainable.

6. In view of the limited issues, there is no need to traverse all the factual details. However, it is relevant to refer the charge leveled against the respondent herein which reads as under:-

> "You left Police Station Sikandarpur Vaishya on 19.10.2001 for the Office of Circle Officer in connection with some departmental work and thereafter you came back on 28.01.2002 and thus remained unauthorizedly absent for 101 days from your service without any sanctioned leave/permission in this regard."

Pursuant to the Charge Memo, the delinquent was asked to show cause and ultimately enquiry was conducted and the Enquiry Officer submitted his report. The Disciplinary Authority, namely, the SSP, by order dated 23.11.2002 terminated the service of the respondent with immediate effect. By order dated

27.02.2003, the Appellate Authority, i.e., the DIG, Agra also dismissed the appeal filed by the respondent herein. Against the said order, the respondent filed Writ Petition No. 53909 of 2003 before the High Court. By order dated 17.09.2008, the learned single Judge, after finding that the respondent herein had been sanctioned leave without pay and subsequently his service was terminated on the same ground and as such two punishments were inflicted for one charge which is not permissible in law, quashed the order of termination dated 23.11.2002. We will consider the merits of the order of the learned single Judge while considering the second issue.

**About the First Issue:-**

7. Against the order of the learned single Judge, the State Government filed Special Appeal No. 614 of 2009 before the Division Bench of the High Court. Rule 5 of Chapter VIII of Allahabad High Court Rules, 1952 speaks about Special Appeal which reads as under:-

> **"Special Appeal.**—An appeal shall lie to the Court from a judgment not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made by a Court subject to the Superintendence of the Court and not being an order made in the exercise of revisional jurisdiction or in the exercise of its power of Superintendence or in the exercise of criminal jurisdiction or in the exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution in respect of any judgment, order or award (a) of a tribunal Court or statutory arbitrator made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution, or (b) of the Government or any Officer or authority, made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction



> under any such Act of one Judge."

8. It is fairly admitted that in view of the fact that against the order of termination the delinquent availed departmental appeal to the DIG, after the order of the learned single Judge no further appeal by way of special appeal before the Division Bench would lie. The materials placed and in view of the fact that the order of the SSP was considered and disposed of by the Appellate Authority, i.e., DIG and also of the fact that the order impugned in the writ petition was passed in exercise of appellate jurisdiction in terms of The Uttar Pradesh Subordinate Police Officers/Employees (Punishment and Appeal) Rules, 1991 (hereinafter referred to as "the Rules"), we concur with the conclusion arrived at by the Division Bench of the High Court in the impugned order. However, in view of the fact that this Court issued notice in the special leave petition as early as on 20.11.2009, after hearing the arguments of either side, we intend to consider the merits of the order of the learned single Judge dated 17.09.2008.

**About the Second Issue:-**

The learned single Judge, without going into the merits of the claim made by both the parties with reference to the charge leveled against the delinquent, enquiry proceedings, order of the SSP and DIG, quashed the order of termination on the simple ground that the delinquent was inflicted with two punishments which is not permissible in law. In the second paragraph, the learned single Judge after pointing out that due to illness of the delinquent the Department has sanctioned his leave without pay and thereafter his service has been terminated for his absence which amounts to two punishments for one charge and quashed the order of termination. On going through the relevant rules, we are of the view that the learned single Judge committed an error in arriving at such a conclusion.

9. Rule 4 of the Rules prescribes the mode of punishment which reads as under:

"4. Punishment.—(a) The following punishments may, for good and sufficient reasons and as hereinafter provided, be imposed upon a Police Officer, namely:—

(a) Major Penalties:—

(i) Dismissal from service

(ii) Removal from service

(iii) Reduction in rank including reduction to a lower-scale or to a lower stage in a time-scale.

(b) Minor Penalties:—

(i) With-holding of promotion

(ii) Fine not exceeding one month's pay

(iii) With-holding of increment, including stoppage at an efficiency bar.

(iv) Censure

(2) In addition to the punishments mentioned in sub-rule (1) Head Constables and Constables may also be inflicted with the following punishments:—

(i) Confinement to quarters (this term includes confinement to Quarter Guard for a term not exceeding fifteen days extra guard or other duty).

(ii) Punishment Drill not exceeding fifteen days.

(iii) Extra guard duty not exceeding seven days.

(iv) Deprivation of good conduct pay.



(3) In addition to the punishments mentioned in sub-rules (1) and (2) Constables may also be punished with Fatique duty, which shall be restricted to the following tasks:-

(i) Tent pitching;

(ii) Drain digging;

(iii) Cutting grass, cleaning jungle and picking stones from parade grounds;

(iv) Repairing huts and butts and similar work in the lines;

(v) Cleaning Arms."

We are not concerned about other rules. The perusal of major and minor penalties prescribed in the above Rule makes it clear that "sanctioning leave without pay" is not one of the punishments prescribed, though, and under what circumstances leave has been sanctioned without pay is a different aspect with which we are not concerned for the present. However, Rule 4 makes it clear that sanction of leave without pay is not one of the punishment prescribed. Disciplinary authority is competent to impose appropriate penalty from those provided in Rule 4 of the Rules which deals with the major penalties and minor penalties. Denial of salary on the ground of 'no work no pay' cannot be treated as a penalty in view of statutory provisions contained in Rule 4 defining the penalties in clear terms. Rule 7 empowers the Government or any Officer of the Police to award the punishment mentioned in Rule 4. Rule 8 provides for punishment of dismissal and removal. Thus the punishment of dismissal from the service is the punishment which has been awarded to the Respondent in accordance with Rules 4 and 8 of the Rules. There is no question of awarding two punishments in respect of one charge.

10. Doctrine of double jeopardy enshrined in Article 20(2) of the Constitution of India has no application in the event of

there being only one punishment awarded to the respondent under the Rules on charges being proved during the course of disciplinary enquiry. The law laid down by this Court in the case of *Union of India* vs. *Datta Linga Toshatwad* (2005) 13 SCC 709 and *Maan Singh* vs. *Union of India*, (2003) 3 SCC 464 fully apply in the facts and circumstances of the present case.

11. In *State of Punjab & Ors*. v. *Bakshish Singh,* AIR 1999 SC 2626 = (1998) 8 SCC 222, this Court has dealt with a case wherein the Trial Court as well as the First Appellate Court and the High Court had taken the view that in case unauthorized absence from duty had been regularized by treating the period of absence as leave without pay, the charge of misconduct did not survive. However, without examining the correctness of the said legal proposition, this court allowed the appeal on other issues. As the said judgment gave an impression that this Court had laid down the law that once unauthorized absence has been regularized, the misconduct would not survive. The matter was referred to the larger bench in *Mann Singh's case* (supra) wherein this Court clarified that the earlier judgment in *Bakshish Singh* (supra) did not affirm the said legal proposition and after following the judgment of this court in *State of M.P. v. Hari Har Gopal & Ors.,* (1969) 3 SLR 274 (SC) disposed of the case clarifying that this court in *Bakshish Singh* (supra) dealt with only on the issue of remand by the High Court as well as by the Ist Appellate Court to the punishing authority for imposing the fresh punishment. This Court held as under:

> "Bakshish Singh's case is not an authority for the proposition that the order terminating the employment cannot be sustained inasmuch as in the later part of the same order the Disciplinary Authority also regularized unauthorized absence from duty by granting an employee leave without pay."

This Court further held that the law laid down by this court in *Hari Har Gopal* (supra) wherein it had been held that in absence of regularization of unauthorized absence it may not be possible



for the employer to continue with the disciplinary proceedings as there would be break in service and thus, regularization of such absence even without pay is justified. It is so necessary to continue with the disciplinary proceedings.

12. In such circumstances, the conclusion of the learned single Judge that the delinquent had suffered two punishments cannot be sustained. At present, we are not inclined to go into the validity or otherwise of the order of termination in this proceeding. Inasmuch as learned single Judge quashed the order of termination only on the ground that it is impermissible to impose two punishments, we set aside the order of the learned single Judge dated 17.09.2008 and remit the matter to the learned single Judge for fresh disposal. Both parties are permitted to put forth their claim with regard to the outcome of the charge, order of the original and appellate authority for which we express no opinion and it is for the learned single Judge to consider and dispose of the same as expeditiously as possible, preferably within a period of six months from the date of receipt of the copy of this judgment. Civil Appeal is allowed to this extent with no order as to costs.

R.P. Appeal Partly allowed.

VIKAS KUMAR ROORKEWAL
*v.*
STATE OF UTTARAKHAND AND ORS.
(Transfer Petition (Crl.) No. 29 of 2008)

JANUARY 11, 2011

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

*Code of Criminal Procedure, 1908:*

*s.406 – Transfer petition – Petitioner's father brutally murdered in broad daylight – Accused belonging to powerful gang operating in the State – Records showed threat administered to the petitioner and family by accomplices of the accused – No action taken by police or State Government to afford protection to petitioner/his family or to thwart threats made by accused – Four accused already enlarged on bail but police or State Agency not taken steps for cancellation of their bail order – Sincerity/effectiveness of prosecuting agency apparent from such conduct – The reluctance of the witnesses to go to the court at Haridwar in spite of receipt of repeated summons bound to hamper the course of justice – Petitioner able to make out a case that there would be failure of justice and resultant acquittal of the accused only on account of threats to the witnesses – On the facts and circumstances of the case and in the interest of justice, the transfer of the case from Haridwar to Delhi ordered.*

*s.311 – Power of court to summon and examine witnesses – Role of Presiding Judge – Held: The Judge has to take participatory role in the trial – He is not to act like a mere tape-recorder to record whatever is stated by the witnesses – s.311 and s.165 of the Evidence Act confers vast and wide powers on court to elicit all necessary materials by playing an active role in the evidence collecting process – Evidence Act – s.165.*





**The petitioner's case was that his father was the Superintending Engineer and in-charge of a project involving huge amount. He was brutally murdered in broad day light by three persons at his residence at Roorkee (Uttarakhand). He filed the instant transfer petition seeking transfer of criminal case against the accused (involved in his father's murder) from court at Uttarakhand to Delhi. The transfer of case was sought on the ground of coercion and threat to the witnesses as well as doubtful sincerity of the investigating agency and prosecuting agency. The petitioner stated in the petition that the driver of his father who was an eye witness had turned hostile and the other witnesses who were regularly receiving summons for appearing in Court to give testimony were unable to appear and depose due to regular threats administered to them. Further, it was also mentioned in the petition that the petitioner, his wife and mother had already left Roorkee on account of fear and threats and have started staying in Delhi and were thus unable to depose before the court at Haridwar.**

**Disposing of the transfer petition, the Court**

**HELD: 1.1. The record of the case showed that several letters were written and/or applications were made by the petitioner making grievances about the threats administered to him and his family by the accomplices of the accused, however, no action was taken either by the SSP, Haridwar or by Government of Uttarakhand either to afford protection to the petitioner and his family or to thwart such threats made by the accused and/or their accomplices. It was not disputed that the driver of the deceased had turned hostile. The fact that in spite of receipt of several summons neither the petitioner nor his wife nor his family members nor other witnesses have been able to go to Haridwar to depose before the Court was not denied by the State Government. There is no**

**manner of doubt that because of chasing of the petitioner and his relatives by the accomplices of the accused, they have not been able to attend the Court and tender evidence. If this situation continues then the prosecution would not be able to lead any evidence in such a brutal murder case and the accused will have to be acquitted. The record indicates that four accused have been already enlarged on bail but neither the police nor the State agency has taken any steps for the purpose of getting their bail order cancelled. [Para 13] [288-B-G]**

*Himanshu Singh Sabharwal v. State of M.P. and others* **(2008) 4 SCR 783 – relied on.**

*Abdul Nazar Madani v. State of Tamil Nadu* **AIR 2000 SC 2293– referred to.**

**1.2. Ineffective cross-examination by public prosecutor of the driver who resiled from the statement made during investigation speaks volumes about the sincerity/ effectiveness of the prosecuting agency. The necessity of fair trial hardly needs emphasis. The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases. The Judge has failed to take participatory role in the trial. He was not expected to act like a mere tape-recorder to record whatever has been stated by the witnesses. Section 311, Cr.P.C. and Section 165 of the Evidence Act confers vast and wide powers on Court to elicit all necessary materials by playing an active role in the evidence collecting process. However, the record did not indicate that the Judge presiding the trial had exercised powers under Section 165 of the Evidence Act which is in a way complimentary to his other powers. It is true that there must be reasonable apprehension on the part of the party to a case that justice may not be done and mere allegation that there is apprehension that justice will not be done cannot be the basis for transfer. However, there is no**



**manner of doubt that the reasonable apprehension that there would be failure of justice and acquittal of the accused only because the witnesses are threatened is made out by the petitioner. [Para 15] [291-A-F]**

*Gurcharan Dass Chadha v. State of Rajasthan* **AIR 1966 SC 1418;** *Maneka Sanjay Gandhi v. Rani Jethmalani* **(1979) 4 SCC 167;** *K. Anbazhagan v. Superintendent of Police* **(2004) 3 SCC 767;** *Abdul Nazar Madani* vs. *State of Tamil Nadu* **(2000) 6 SCC 204 – relied on.**

**1.3. It is evident from the averments made in the petition that the accused belong to powerful gang operating in U.P. from which State of Uttarakhand is carved out. The petitioner has been able to show the circumstances from which it can be reasonably inferred that it has become difficult for the witnesses to safely depose truth because of fear of being haunted by those against whom they have to depose. The reluctance of the witnesses to go to the court at Haridwar in spite of receipt of repeated summons is bound to hamper the course of justice. If such a situation is permitted to continue, it will pave way for anarchy, oppression, etc., resulting in breakdown of criminal justice system. In order to see that the incapacitation of the eye-witnesses is removed and justice triumphs, it has become necessary to grant the relief claimed in the instant petition. On the facts and in the circumstances of the case and in the interest of justice, the transfer of the case from Haridwar to Delhi is ordered. [Para 17] [294-B-E]**

**Case Law Reference:**

| | | |
|---|---|---|
| **(2008) 4 SCR 783** | **relied on** | **Para 14** |
| **AIR 2000 SC 2293** | **referred to** | **Para 11** |
| **AIR 1966 SC 1418** | **relied on** | **Para 16** |

| | | |
|---|---|---|
| **(1979) 4 SCC 167** | **relied on** | **Para 16** |
| **(2004) 3 SCC 767** | **relied on** | **Para 16** |
| **(2000) 6 SCC 204** | **relied on** | **Para 16** |

CRIMINAL ORIGINAL JURIDICTION : Transfer Petition (Crl.) No. 29 of 2008.

D.R. Nigam, Rajesh Kumar, Krishna Kumar R.S., R.K. Shrivastav for the Petitioner.

Soumyajit Pani, Ansar Ahmad Chaudhary, S.S. Shamshery, Jatinder Kumar Bhatia, Dr. Laxmi Shastri, R.K. Shastri, Dr. Vipin Gupta for the Respondents.

The Judgment of the Court was delivered by

**J.M. PANCHAL, J.** 1. By filing this petition under Section 406 of the Code of Criminal Procedure 1973 ("The Code", for short), the petitioner, who is son of late Radhey Shyam and who is also the first informant in the case relating to the murder of his father, has prayed that the case titled as *State* Vs. *Aakash Tyagi and others* being S.T. No. 6 of 2007 pending in the Court of learned Additional District Judge, Fast Track Court, Haridwar (Uttrakhand) arising out of crime No. 182 of 2006 and FIR No.169 of 2006 be transferred to the Court of competent jurisdiction at Delhi.

2. The background facts as projected by the petitioner in the instant petition are as follows:-

Late Radhey Shyam was initially appointed Executive Engineer in Irrigation Department of Uttar Pradesh. In January, 2004 he was posted to look after a project known as Upper Ganga Link Canal Project, under which two rivers, namely, Ganga and Yamuna were to be linked. It is claimed that because of his excellent track record, efficiency and honesty, he was promoted to the post of Superintending Engineer in November, 2005 and was placed in charge of the said project,



the total cost of which was Rs.240 crores. The project was intended to solve the long standing irrigation and drinking water problems of western U.P. and also to provide a solution to control floods. He was brutally murdered in cold blood in broad day light in the afternoon of June 18, 2006 by three persons at his residence located in his Camp 0ffice at Roorkee (Uttarakhand). The petitioner, who claims to be an eye-witness, has stated that he had chased the accused but they had escaped and, therefore, he had called the police and reported the matter to the police immediately. The police on arrival at the place of the incident had taken the deceased to the Government Hospital where he was declared brought dead. On the basis of the information given by the petitioner, the police had registered an FIR No. 169/2006 on 18.6.2006. On the same day post mortem on the dead body of the deceased was conducted by the medical officers, on the intervention of the District Magistrate (Uttarakhand). The murder of Radhey Shyam, Superintending Engineer of U.P. had sent shock waves throughout Uttarakhand and U.P and in the engineering and bureaucratic community and the incident was widely reported in the newspapers.

3. Because of the high profile of the accused involved in the murder of the deceased engineer, the Uttarakhand police was found to be incapable/reluctant to investigate the crime. Therefore, the State of Uttar Pradesh had directed the Special Task Force along with Special Operation Group to investigate the murder and to arrest the accused. It may be mentioned that the Special Task Force along with Special Operation Group appointed to investigate the matter and to arrest the accused had conducted large number of raids. All the arrests were made by Special Task Force, Uttar Pradesh except one which was effected by the Uttarakhand police on the information of Special Task Force, Uttar Pradesh.

4. It is mentioned by the petitioner that large scale corruption is prevailing in the Irrigation Department and earlier

two Junior Engineers were also murdered brutally. It was reported that disputes concerning the contracts which were entrusted and to be entrusted under the project had emerged as the main reason for the murders of these engineers including that of late Radhey Shyam. The record shows that after investigation, charge-sheet was filed and charges have been framed against accused persons, who are respondent Nos. 2 to 9 in the Transfer Petition, under Section 302 read with Section 120B of the Indian Penal Code and Section 3(2)(V) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The trial has commenced in the Court of learned Additional District Judge, Fast Track Court, Haridwar (Uttarakhand) and by this time, one witness is already examined.

5. Grievance of the petitioner is that continuously threats are being administered to his family including him and other witnesses that they would meet the same fate as that of the deceased, if they dare to depose before the Court. The petitioner has mentioned that the first eye witness examined in the court, who was the driver of the deceased, has turned hostile because of the threats given to him and the learned Judge presiding over the trial could not do anything except being a passive spectator. The petitioner claims that he along with his wife was chased by the gang when they were enroute to Haridwar to appear before the court on May 25, 2007, and due to fear, they have not been able to appear before the court on several dates.

6. The petitioner has mentioned that the other witnesses who are yet to be examined are regularly receiving/getting summons calling upon them to remain present before the court to tender testimony, but they are unable to appear and depose before the Trial Court at Haridwar due to regular threats being administered to them. It is also mentioned by the petitioner that his mother on account of fear and threats has already left Roorkee and is staying with brother of the petitioner in Delhi



and is thus unable to depose before the court at Haridwar. What is claimed by the petitioner is that due to the threats received by him, he and his wife who are material witnesses have also started residing at Delhi.

7. The petitioner has mentioned that he has written several letters/made applications and prayed the competent authorities to take immediate action and to provide security to him and other witnesses, but no action has been taken.

8. What is mentioned in the petition is that in the Dainik Jagran newspaper published on June 8, 2007 it was reported that Sunil Rathi, responsible for murdering the deceased is running his gang in Uttar Pradesh and Uttarakhand from Dehradun Jail and has created wide spread terror which would not permit fair trial commenced in case of the murder of the deceased. The petitioner has mentioned that the investigation by the police is not impartial and has been influenced by powerful people involved in the murder of the deceased. It is also highlighted that the trial court also did not make a serious effort to see that justice is done. Thus, by filing the instant petition, the petitioner has prayed to transfer the case pending in the court of learned District Judge, Fast Track Court, Haridwar to competent court of jurisdiction at Delhi.

9. The petition was placed for preliminary hearing before the Court on May 1, 2008 and after hearing the learned counsel for the petitioner, this Court had ordered notices to be issued to the respondents. On service of notice, the State of Uttarakhand has filed counter affidavit controverting the averments made in the petition. It is mentioned in the reply that the accused were arrested on different dates and proper investigation was made in the case. And mobile phone used in the incident, one pistol of 315 bore from Akash Tyagi, cartridges, motorcycle having blue colour etc., were ceased. In the reply it is mentioned that on interrogation of Akash Tyagi and his co-accused other accused namely Vineet Sharma @ Chinu Pandit was arrested and that the accused are being tried

for alleged commission of serious offences. According to the reply affidavit Uttarakhand police was capable to investigate the case and was not reluctant to investigate but in view of allegations levelled against local police investigating the case, the investigation was handed over to special agency. By filing reply, it is claimed by State of Uttarakhand that the petition has no substance and the same should be dismissed.

10. The petitioner has filed rejoinder to the affidavit in reply filed on behalf of the State Government.

11. The respondent No. 2, i.e., Kumar Gaurav has also filed affidavit in reply mentioning inter alia that the Transfer Petition is wholly misconceived and the allegations leveled therein are baseless, vague and incorrect and, therefore, the petition should be dismissed. In the reply the respondent No. 2 has referred to a decision of this Court in *Abdul Nazar Madani Vs. State of Tamil Nadu* AIR 2000 SC 2293, wherein it is held that not only the convenience of the complainant alone but convenience of the accused should also be taken into consideration before ordering transfer of criminal case from one State to another. The reply proceeds to mention that the investigation is not yet complete and, therefore, if the trial is transferred from Haridwar to any other State, the same shall have adverse effect on the trial and that there is every possibility that injustice and prejudice would be caused to the accused. What is stated is that the witnesses proposed to be examined on behalf of accused would not be willing to travel to any other place for tendering defence evidence and, therefore, transfer of case would result into injustice to the accused. According to the reply, the present case is a classic example of trial by media and the petitioner who is influential and had widely publicized the incident has succeeded in falsely implicating the respondent No. 2 in the case. The reply states that no ground is made out by the petitioner to transfer the case from Court of Haridwar to competent Court of jurisdiction at Delhi and therefore the petition should be dismissed.



12. This Court has heard the learned counsel for the parties at length and in great detail. This Court has also considered the documents forming part of the instant petition.

13. From the record of the case it is evident that several letters have been written and/or applications have been made by the petitioner making grievances about the threats administered to him and his family by the accomplices of the accused. However, it is an admitted position that no action, worth the name, is taken either by the SSP, Haridwar or by Government of Uttarakhand either to afford protection to the petitioner and his family or to thwart such threats made by the accused and/or their accomplices. It is relevant to notice that it was claimed by the prosecution that the driver of the deceased was an eye-witness and it is the case of the petitioner that due to threats, he turned hostile. The fact that the driver had turned hostile is not in dispute. The fact that in spite of the receipt of several summons neither the petitioner nor his wife nor his family members nor other witnesses have been able to go to Haridwar to depose before the Court is not denied by the State Government. Therefore, this Court is inclined to accept the case of the petitioner that he and other witnesses have not been able to respond the summons only because of fear to their lives due to the threats administered by the accomplices of the accused. There is no manner of doubt that because of chasing of the petitioner and his relatives by the accomplices of the accused, they have not been able to attend the Court and tender evidence. If this situation continues then the prosecution would not be able to lead any evidence in such a brutal murder case and the accused will have to be acquitted. The record indicates that four accused have been already enlarged on bail but neither the police nor the State agency has taken any steps for the purpose of getting their bail order cancelled.

14. The learned counsel for the petitioner has placed reliance on a decision of this Court in *Himanshu Singh Sabharwal* vs. *State of M.P. and others* (2008) 4 SCR 783,

where this Court in paragraphs 14 and 15 has observed as under: -

> "14. "Witnesses" as Benthem said: are the eyes and ears of justice. Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors like the witness being not in a position for reasons beyond control to speak the truth in the Court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by Courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingenuously adopted to smoother and stifle truth and realities coming out to surface rendering truth and justice, to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State represented by their prosecuting agencies do not suffer even in slow process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution. There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the Court and justice triumphs and the trial is not reduced to mockery. The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases involving those in



> power, who has political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. As a protector of its citizens it has to ensure that during a trial in Court the witness could safely depose truth without any fear of being haunted by those against whom he has deposed. Some legislative enactments like the Terrorist and Disruptive Activities (Prevention) Act, 1987 (in short the 'TADA Act') have taken note of the reluctance shown by witnesses to depose against dangerous criminals-terrorists. In a milder form also the reluctance and the hesitation of witnesses to depose against people with muscle power, money power or political power has become the order of the day. If ultimately truth is to be arrived at, the eyes and ears of justice have to be protected so that the interests of justice do not get incapacitated in the sense of making the proceedings before Courts mere mock trials as are usually seen in movies.
>
> 15. Legislative measures to emphasise prohibition against tampering with witness, victim or informant have become the imminent and inevitable need of the day. Conducts which illegitimately affect the presentation of evidence in proceedings before the Courts have to be seriously and sternly dealt with. There should not be any undue anxiety to only protect the interest of the accused. That would be unfair as noted above to the needs of the society. On the contrary, the efforts should be to ensure fair trial where the accused and the prosecution both get a fair deal. Public interest in the proper administration of justice must be given as much importance if not more, as the interests of the individual accused. In this courts have a vital role to play.

15. Above judgment clearly enunciates the importance of witness in criminal trial. This is a case of murder of a Superintending Engineer. There is no manner of doubt that brutal assault was mounted on him which resulted into his death.

The son of the deceased is seeking transfer of proceedings on ground of coercion and threat to the witnesses as well as doubtful sincerity of the investigating agency and prosecuting agency. In effective cross-examination by public prosecutor of the driver who resiled from the statement made during investigation speaks volumes about the sincerity/ effectiveness of the prosecuting agency. The necessity of fair trial hardly needs emphasis. The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases. The learned Judge has failed to take participatory role in the trial. He was not expected to act like a mere tape recorder to record whatever has been stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confers vast and wide powers on Court to elicit all necessary materials by playing an active role in the evidence collecting process. However, the record does not indicate that the learned Judge presiding the trial had exercised powers under Section 165 of the Evidence Act which is in a way complimentary to his other powers. It is true that there must be reasonable apprehension on the part of the party to a case that justice may not be done and mere allegation that there is apprehension that justice will not be done cannot be the basis for transfer. However, there is no manner of doubt that the reasonable apprehension that there would be failure of justice and acquittal of the accused only because the witnesses are threatened is made out by the petitioner.

16. This Court, on various occasions, had opportunity to discuss the importance of fair trial in Criminal Justice System and various circumstances in which a trial can be transferred to dispense fair and impartial justice. It would be advantageous to notice a few decisions of this Court with regard to the scope of Section 406 of Code of Criminal Procedure. In *Gurcharan Dass Chadha* vs. *State of Rajasthan* AIR 1966 SC 1418, this Court held as under: -

"A case is transferred if there is a reasonable



apprehension on the part of a party to a case that justice will not be done. A petitioner is not required to demonstrate that justice will inevitably fail. He is entitled to a transfer if he shows circumstances from which it can be inferred that he entertains an apprehension and that it is reasonable in the circumstances alleged. It is one of the principles of the administration of justice that justice should not only be done but it should be seen to be done. However, a mere allegation that there is apprehension that justice will not be done in a given case does not suffice. The Court has further to see whether apprehension is reasonable or not. To judge the reasonableness of the apprehension the state of the mind of the person who entertains the apprehension is no doubt relevant but that is not all. The apprehension must not only be entertained, but must appear to the court to be a reasonable apprehension."

In *Maneka Sanjay Gandhi* vs. *Rani Jethmalani* (1979) 4 SCC 167, this Court has observed as under: -

"Assurance of a fair trial is the first imperative of the dispensation of justice and the central criterion for the court to consider when a motion for transfer is made is not the hypersensitivity or relative convenience of a party or easy availability of legal services or like mini-grievances. Something more substantial, more compelling, more imperilling, from the point of view of public justice and its attendant environment, is necessitous if the Court is to exercise its power of transfer. This is the cardinal principle although the circumstances may be myriad and vary from case to case. We have to test the petitioner's grounds on this touchstone bearing in mind the rule that normally the complainant has the right to choose any court having jurisdiction and the accused cannot dictate where the case against him should be tried. Even so, the process of justice should not harass the parties and from that angle the court may weigh the circumstances."

In *K. Anbazhagan* vs. *Superintendent of Police* (2004) 3 SCC 767, this Court held as under: -

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

In *Abdul Nazar Madani* vs. *State of Tamil Nadu* (2000) 6 SCC 204, this Court observed as under: -

> "The purpose of criminal trial is to dispense fair and impartial justice uninfluenced by extraneous considerations. When it is shown that public confidence in the fairness of a trial would be seriously undermined, any party can seek the transfer of a case within the State under Section 407 and anywhere in the country under Section 406 Cr.P.C. The apprehension of not getting a fair and impartial inquiry or trial is required to be reasonable and not imaginary, based upon conjectures and surmises. If it appears that the dispensation of criminal justice is not possible impartially and objectively and without any bias before any court or even at any place, the appropriate court may transfer the case to another court where it feels that holding of fair and proper trial is conducive. No universal or hard-and-fast rules can be prescribed for deciding a transfer petition which has always to be decided on the basis of the facts of each case. Convenience of the parties including the witness to be produced at the trial is also a relevant consideration for deciding the transfer petition. The convenience of the parties does not necessarily mean the convenience of the petitioners alone who approached the court on misconceived notions of apprehension. Convenience for the purposes of transfer means the convenience of the prosecution, other accused, the witnesses and the larger interest of the society."



17. From the averments made in the petition it is evident that the accused belong to powerful gang operating in U.P. from which State of Uttarakhand is carved out. The petitioner has been able to show the circumstances from which it can be reasonably inferred that it has become difficult for the witnesses to safely depose truth because of fear of being haunted by those against whom they have to depose. The reluctance of the witnesses to go to the court at Haridwar in spite of receipt of repeated summons is bound to hamper the course of justice. If such a situation is permitted to continue, it will pave way for anarchy, oppression, etc., resulting in breakdown of criminal justice system. In order to see that the incapacitation of the eye-witnesses is removed and justice triumphs, it has become necessary to grant the relief claimed in the instant petition. On the facts and in the circumstances of the case this Court is of the opinion that interest of justice would be served if transfer of the case from Haridwar to Delhi is ordered.

18. For the foregoing reasons the petition succeeds. The case titled as *State Vs. Akash Tyagi & Others* bearing ST No. 6 of 2007 pending in the Court of learned First Fast Track Court / A.D.J., Haridwar, Uttarakhand arising out of Crime No. 182/ 2006 and FIR No.169 of 2006 is hereby transferred to competent Court of jurisdiction at Delhi. The investigating agency, the prosecution agency, the State of Delhi as well as State of Uttarakhand and the learned Judge to whom the trial of the case may be made over, are directed to take appropriate steps for protecting the witnesses and to ensure that the trial concludes as early as possible and without any avoidable delay. The Transfer Petition accordingly stands disposed of.

D.G. Transfer Petition disposed of.