RANBIR SINGH
v.
THE EXECUTIVE ENGINEER
(Civil Appeal No. 5 of 2011)

JANUARY 3, 2011

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

Labour Law:

Back wages – Award of Labour Court directing reinstatement of workman with 50% back wages – State Government filing writ petition challenging the part of the award granting back wages – Single Judge of the High Court setting aside the award in toto and directing compensation to be paid to workman – Order affirmed by Division Bench of High Court – HELD: The order of the Single Judge as well as of the Division Bench was well beyond the scope of the prayers in the writ petition – If the State felt aggrieved by the Award of the Labour Court in toto, there was no impediment in its way to challenge it in its entirety – A party must be held to be bound by its pleadings – A prayer clause cannot be construed or dubbed as a technicality – The orders of the Single Judge as well as the Division Bench of the High Court are set aside and that of the Labour Court is restored to the extent of reinstatement – Since services of the workmen had again been terminated in December, 2009, the back wages would be payable to him only from January, 2010 onwards till his reinstatement as a consequence of the instant order – Pleadings – Relief.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5 of 2011.

From the Judgment & Order dated 21.10.2010 of the High

Court of Punjab & Haryana at Chandigarh in LPA No. 420 of 2009 in WP No. 269 of 2009.

M.K. Bhardwaj, Priyanka Bhardwaj, R.C. Kaushik for the Appellant.

Manjit Singh, AAG. Tarjit Singh, Kamal Mohan Gupta, Gaurav Teotia, Sanjeev Kumar for the Respondent.

The following order of the Court was delivered

O R D E R

1. Leave granted.

2. The appellant herein, a workman, was engaged on daily wages in the year 1992. His services were terminated in the year 1999 on the ground that he had been involved in a criminal case. It is the conceded position that the criminal case has ended in his acquittal. The appellant also raised an industrial dispute alleging violation of Section 25(f) of the Industrial Disputes Act, 1947. The matter was referred to the Labour Court which held in favour of the appellant directing his reinstatement with fifty per cent back wages. The State of Haryana challenged the order of the Labour Court exclusively on the plea that the award of back wages was not justified. The learned Single Judge, however, allowed the writ petition filed by the State in toto and set side the Award of the Labour Court and instead awarded a compensation of Rs. 60,000/- to the appellant. The matter was thereafter taken before the Letters Patent Bench and it was argued that the challenge in the writ petition had been limited to the award of back wages and the judgment of the Single Bench setting aside the Award in toto was beyond the prayer. The Division Bench noticed this argument but nevertheless went on to hold that as the issue with regard to the status of a daily wage employee was covered against the appellant by a string of judgments of this Court, the technicality with regard to the prayer in the writ petition would

not stand in the way of the High Court making an order setting aside the Award of the Labour Court. The Division Bench, accordingly, affirmed the order of the learned Single Judge. The appellant-workman is here before us in appeal.

3. Before us today, the learned counsel for the appellant has argued that in the writ petition filed by the respondent-State challenging the Award of the Labour Court, the only plea was against the grant of back wages and nothing more. In support of this submission, the learned counsel has drawn our attention to the writ petition which has been appended with the paper book. We find that the assertion of the learned counsel is correct. We are, therefore, of the opinion that the order of the Single Judge as well as of the Division Bench was well beyond the scope of the prayers in the writ petition . If the State felt aggrieved by the Award of the Labour Court in toto there was no impediment in its way to challenge it in its entirety. We feel that a party must be held to be bound by its pleadings; a prayer clause cannot be construed or dubbed as a technicality. We are, therefore, of the opinion that the appeal deserves to succeed. We, accordingly, allow the appeal and set aside the orders of the Single Judge as well as the Division Bench and restore the order of the Labour Court to the extent of reinstatement. We are also told by the learned counsel for the appellant that the appellant had in fact been reinstated but after the order of the Division Bench his services had again been terminated in December, 2009. We, accordingly, direct that the back wages envisaged would be payable only from January 2010 onwards till his reinstatement as a consequence of this order.

4. The appellant will also have his costs which are assessed at Rs. 5,000/-.

R.P. Appeal allowed.

STATE OF KERALA
v.
RANEEF
(Criminal Appeal No. 3 of 2011)

JANUARY 3, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Bail – Grant of – Criminal assault on College Professor – His right palm chopped of – Alleged motive for attacking the Professor was that he incorporated a question for B.Com. paper criticizing Prophet Mohammed and Islam – Prosecution case that respondent, a dental surgeon, stitched the back of an injured assailant in pursuance of a previous plan – Further allegation that respondent was member of PFI, a Muslim organization –– High Court granted bail to respondent – Challenge to – Held: There was no allegation that respondent was one of the assailants – Even there was no prima facie proof that respondent was involved in the crime – Hence, proviso to s.43D(5) of the Unlawful Activities (Prevention) Act was not violated – Even a dentist can apply stitches in an emergency – Prima facie the only offence that can be leveled against the respondent is under s.202 IPC, of omitting to give information of the crime to the police, and this offence also has to be proved beyond reasonable doubt – S.202 is a bailable offence – In absence of any evidence to prove that PFI is a terrorist organization, the respondent cannot be penalized merely for belonging to the PFI – No reason for denial of bail to respondent – Penal Code, 1860 – s.202 – Unlawful Activities (Prevention) Act, 1967 – s.43D(5), proviso.

According to the prosecution, seven assailants came in a Maruti Van and assaulted a College Professor and chopped off his right palm when he was returning home. The alleged motive for attacking the Professor was that

he incorporated a question for the internal examination of B.Com. paper criticizing Prophet Mohammed and Islam.

Respondent is a dental surgeon. The prosecution case is that the respondent gave medical aid to one of the wounded accused in pursuance of a previous plan that if and when any of the assailants got injured in the attack on the Professor then immediate medical treatment would be given by the respondent to the injured; and that the respondent stitched the back of an assailant, which is not the job of a dentist. It was further alleged that the respondent was a member of the Popular Front of India (PFI), a Muslim organization, and was head of its medical committee. The prosecution placed reliance on the proviso to Section 43D(5) of the Unlawful Activities (Prevention) Act, 1967 which states that the accused shall not be released on bail if the Court, on perusal of the case diary or the report under Section 173 Cr.P.C. is of the opinion that there are reasonable grounds for believing that the accusation against such person is *prima facie* true.

The instant appeal is filed against the order of High Court granting bail to the respondent.

Dismissing the appeal, the Court

HELD:1. In the instant case, this Court is only considering the bail matter and not deciding whether the respondent is guilty or not. Evidence has yet to be led and the trial yet to commence. Hence the prosecution is yet to establish by proof beyond reasonable doubt that the respondent was part of a conspiracy which led to the attack on the Professor. [Para 12] [596-E]

2. The case against the respondent is very different from that against the alleged assailants. There is no

allegation that the respondent was one of the assailants. There is no *prima facie* proof that the respondent was involved in the crime. Hence the proviso to Section 43D(5) of the Unlawful Activities (Prevention) Act, 1967 has not been violated. The respondent, being a doctor, was under the Hippocratic oath to attempt to heal a patient. Just as it is the duty of a lawyer to defend an accused, so also it is the duty of a doctor to heal. Even a dentist can apply stitches in an emergency. *Prima facie* the only offence that can be leveled against the respondent is that under Section 202 I.P.C., that is, of omitting to give information of the crime to the police, and this offence has also to be proved beyond reasonable doubt. Section 202 is a bailable offence. [Para 12] [596-F-H; 597-A-B]

3. As regards the allegation that the respondent belongs to the PFI, there is no evidence as yet to prove that the P.F.I. is a terrorist organization, and hence the respondent cannot be penalized merely for belonging to the P.F.I. Moreover, even assuming that the P.F.I. is an illegal organization, this Court is yet to consider whether all members of the organization can be automatically held to be guilty. [Para 12] [597-B-C-E-F]

Redaul Husain Khan v. National Investigation Agency **2010 (1) SCC 521;** *State of Maharashtra v. Dhanendra Shriram Bhurle* **2009 (11) SCC 541 – distinguished.**

Scales v. United States **367 U.S. 203;** *Elfbrandt v. Russell* **384 US 17-19 (1966);** *Joint Anti-Fascist Refugee Committee v. McGrath* **341 US 123 – referred to.**

4. In deciding bail applications an important factor which should certainly be taken into consideration by the Court is the delay in concluding the trial. Often the trial takes several years, and if the accused is denied bail but is ultimately acquitted, Article 21 of the Constitution,

which is the most basic of all the fundamental rights in our Constitution, would be violated. Of course this is not the only factor, but it is certainly one of the important factors in deciding whether to grant bail. In the present case the respondent has already spent 66 days in custody, and there is no reason why he should be denied bail. [Paras 12, 13] [598-H; 599-A-C]

Case Law Reference:

2010 (1) SCC 521	**distinguished**	**Para 12**
2009 (11) SCC 541	**distinguished**	**Para 12**
367 U.S. 203	**referred to**	**Para 12**
384 US 17-19 (1966)	**referred to**	**Para 12**
341 US 123	**referred to**	**Para 12**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 3 of 2011.

From the Judgment & Order dated 17.10.2010 of the High Court of Kerala at Ernakulam in Bail Application No. 5360 of 2010.

L. Nageswar Rao, G. Prakash, Beena Prakash for the Appellant.

U.U. Lalit, E.M.S. Anam, K.P. Mohamad Shareef for the Respondent.

The Judgment of the Court was delivered by

MARKANDEY KATJU, J. 1. Leave granted.

2. Heard learned counsel for the parties.

3. The appellant has filed this appeal challenging the impugned order of the Kerala High Court dated 17.9.2010

granting bail to the respondent, Dr. Raneef, who is a medical practitioner (dentist) in Ernakulam district in Kerala, and is accused in crime no.704 of 2010 of P.S. Muvattupuzha for offences under various provisions of the I.P.C., the Explosive Substances Act, and the Unlawful Activities (Prevention) Act.

4. The facts of the case are that on 4.7.2010 soon after 8 a.m. seven assailants came in a Maruti Van and assaulted Prof. T.J. Jacob of Newman College, Thodupuzha and chopped off his right palm from the vicinity of his house when he was returning home after Sunday mass. The role attributed to the respondent is that he treated one of the injured assailants (who was injured when Prof. Jacob's son tried to protect his father) by suturing (stitching) his wound on the back after applying local anesthesia at a place 45 kms. away from the place of the incident.

5. The alleged motive for attacking Prof. Jacob was that he incorporated a question for the internal examination of B.Com. paper criticizing Prophet Mohammed and Islam.

6. The prosecution case is that the respondent gave medical aid to one of the wounded accused in pursuance of a previous plan that if and when any of the assailants got injured in the attack on Prof. Jacob then immediate medical treatment would be given by the respondent to the injured. The respondent stitched the back of an assailant, which is not the job of a dentist. The respondent, along with the other accused is a member of the Popular Front of India, a Muslim organization, and was head of its medical committee. Certain documents, C.D.s, mobile phone, books, etc. including a book called 'Jihad' were allegedly seized from his house and car.

7. The prosecution has placed reliance on the proviso to Section 43D(5) of the Unlawful Activities (Prevention) Act, 1967 which states that the accused shall not be released on bail if the Court, on perusal of the case diary or the report under Section 173 Cr.P.C. is of the opinion that there are reasonable

grounds for believing that the accusation against such person is prima facie true.

8. On the other hand, the case of the respondent as disclosed in the counter affidavit filed before us is that even according to the prosecution case the respondent was not one of the assailants, and he is not named in the FIR. In para 13 of the counter affidavit the respondent has stated that the attack on Prof. Jacob is a crime which is to be condemned. However, as a pretext to the investigation the police had lashed out a rein of terror on innocent people of the minority community, people who are totally innocent or even had no knowledge of the crime have been falsely implicated. 54 persons have been made accused in the crime. Many residential houses, mosques and offices were raided and searched, and even minor children and women were cruelly tortured both physically and mentally. Holy books and other religious books were thrown out, seized and taken away and bundled in police stations. War like atmosphere was created in mosques, daily prayers were disrupted and men illegally detained, and physically tortured in custody and false cases booked against innocents.

9. It is further alleged in the counter affidavit that the Popular Front of India (PFI) or the Social Democratic Party of India (SDPI) are not militant or terrorist organizations. There is no history of crimes against the party or its workers. They are not banned organizations. The SDPI is a political party recognized by the Election Commission and the PFI is registered under the Societies Registration Act.

10. The respondent has alleged that he is a dental surgeon hailing from a respectable family in Aluva. His father Late Dr. Abdul Karim was a doctor loved and respected by all, who died as a Civil Surgeon while working in the Government Hospital, Perumbaroor. In 2001 the respondent started Al Ameen Multi-Speciality Dental Hospital in Aluva. Five other doctors including the respondent's wife, who is also a dental surgeon, are working in the said hospital. The respondent has a son aged

9 years and daughter aged 5 years. He claims that he has a very good reputation and is loved by all due to the services rendered by him to the poor and needy. The respondent's elder sister is a post graduate in zoology, and his younger sister is a law graduate. The book entitled 'Jihad' said to have been found in his house was a Malayalam translation of a book written in Urdu in 1927 by a well known and respected religious scholar, Maulana Sayyid Abul Ala Mandoodi and has been in circulation for 83 years, and is available in many book shops.

11. The respondent has alleged that he has been falsely implicated only because he medically treated one of the alleged assailants.

12. At this stage we are not expressing any opinion as to whether the allegations in the versions of the prosecution or defence are correct or not, as evidence has yet to be led. However, we would like to make certain observations :

(1) We are presently only considering the bail matter and are not deciding whether the respondent is guilty or not. Evidence has yet to be led and the trial yet to commence. Hence the prosecution is yet to establish by proof beyond reasonable doubt that the respondent was part of a conspiracy which led to the attack on Prof. Jacob.

(2) The case against the respondent is very different from that against the alleged assailants. There is no allegation that the respondent was one of the assailants.

We are of the opinion that at this stage there is no prima facie proof that the respondent was involved in the crime. Hence the proviso to Section 43D(5) has not been violated.

The respondent, being a doctor, was under the Hippocratic oath to attempt to heal a patient. Just as it is the duty of a lawyer to defend an accused, so also it is the

duty of a doctor to heal. Even a dentist can apply stitches in an emergency. Prima facie we are of the opinion that the only offence that can be leveled against the respondent is that under Section 202 I.P.C., that is, of omitting to give information of the crime to the police, and this offence has also to be proved beyond reasonable doubt. Section 202 is a bailable offence.

(3) As regards the allegation that the respondent belongs to the PFI, it is true that it has been held in *Redaul Husain Khan vs. National Investigation Agency* 2010 (1) SCC 521 that merely because an organization has not been declared as an 'unlawful association' it cannot be said that the said organization could not have indulged in terrorist activities. However, in our opinion the said decision is distinguishable as in that case the accused was sending money to an extremist organization for purchasing arms and ammunition. That is not the allegation in the present case. The decision in *State of Maharashtra vs. Dhanendra Shriram Bhurle* 2009(11) SCC 541 is also distinguishable because good reasons have been given in the present case by the High Court for granting bail to the respondent.

In the present case there is no evidence as yet to prove that the P.F.I. is a terrorist organization, and hence the respondent cannot be penalized merely for belonging to the P.F.I. Moreover, even assuming that the P.F.I. is an illegal organization, we have yet to consider whether all members of the organization can be automatically held to be guilty.

In **Scales** vs. **United States** 367 U.S. 203 Mr. Justice Harlan of the U.S. Supreme Court while dealing with the membership clause in the McCarran Act, 1950 distinguished between active 'knowing' membership and passive, merely nominal membership in a subversive organization, and observed :

"The clause does not make criminal all association with an organization which has been shown to engage in illegal activity. A person may be foolish, deluded, or perhaps mere optimistic, but he is not by this statute made a criminal. *There must be clear proof that the defendant specifically intends to accomplish the aims of the organization by resort to violence."*

In *Elfbrandt vs. Russell* 384 US 17-19 (1966) Justice Douglas of the U.S. Supreme Court speaking for the majority observed :

"Those who join an organization but do not share its unlawful purpose and who do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees. A law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms. It rests on the doctrine of 'guilt by association' which has no place here."

In *Joint Anti-Fascist Refugee Committee vs. McGrath* 341 US 123 at 174 (1951) Mr. Justice Douglas of the U.S. Supreme Court observed :

"In days of great tension when feelings run high, it is a temptation to take shortcuts by borrowing from the totalitarian techniques of our opponents. But when we do, we set in motion a subversive influence of our own design that destroys us from within."

We respectfully agree with the above decisions of the U.S. Supreme Court, and are of the opinion that they apply in our country too. We are living in a democracy, and the above observations apply to all democracies.

(4) In deciding bail applications an important factor which should certainly be taken into consideration by the Court

is the delay in concluding the trial. Often this takes several years, and if the accused is denied bail but is ultimately acquitted, who will restore so many years of his life spent in custody? Is Article 21 of the Constitution, which is the most basic of all the fundamental rights in our Constitution, not violated in such a case? Of course this is not the only factor, but it is certainly one of the important factors in deciding whether to grant bail.

13. In the present case the respondent has already spent 66 days in custody (as stated in paragraph 2 of his counter affidavit), and we see no reason why he should be denied bail. A doctor incarcerated for a long period may end up like Dr. Manette in Charles Dicken's novel 'A Tale of Two Cities', who forgot his profession and even his name in the Bastille.

14. With the above observations, this appeal is dismissed.

B.B.B. Appeal dismissed.

EXECUTIVE ENGINEER, KARNATAKA HOUSING BOARD
v.
LAND ACQUISITION OFFICER, GADAG & ORS.
(Civil Appeal Nos. 51-52 of 2011)

JANUARY 04, 2011

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

Land Acquisition Act, 1894:

s. 4(1) – Land acquisition for State Housing Board – Issuance of Notification dated 06.02.1992 – Determination of market value – Evidence relating to auction sales – Other sale transactions not applicable as they related to far away properties – Reference Court relying upon auction sale dated 02.01.1989 of a larger plot in the vicinity, arrived at the market value as Rs. 4,62,494/- per acre – Compensation determined as Rs. 2,17,372/- per acre, after deducting 53% towards development factor – However, the High Court relied on auction sale dated 20.11.1989 of a smaller plot and arrived at the market value as Rs. 6,60,977/- per acre – Compensation increased to Rs. 4,42,000/- per acre, after deducting 33% towards development factor – On appeal, held: Having regard to the proximity of location and the size of the acquired land, the Reference Court was justified in relying upon the auction sale transaction of a larger plot – On the basis of the sale price disclosed by the said auction sale, the value of the land in question works out to Rs. 4,62,494/- per acre – Deduction of 20% to be made to off-set the impact of competitive-hike involved in the auction sale and the market value per acre as on 02.01.89 would be Rs. 3,69,995/- – Relevant date for determination of compensation is 06.02.1992 and the date of auction is 02.01.1989, thus, there being a gap of three years, appropriate appreciation has to be provided for –The acquired lands being within the municipal limits with considerable development potential, a

cumulative increase of 10% per annum for three years is adopted – Market value as on 06.02.1992 would be Rs. 4,92,460/- per acre – Having regard to the partial access to infrastructural facilities, a deduction of 40% towards cost of development is applied – Thus, rate per acre for the acquired land as on 06.02.1992 is determined as Rs. 2,95,476/- per acre – Compensation awarded as Rs. 2,95,500/- per acre.

Market value of acquired land – Determination of - Comparable sale transaction – Auction Sale – Held: Element of competition in auction sales makes them unsafe guides for determining the market value – But where an open auction sale is the only comparable sale transaction available on account of proximity in situation and proximity in time to the acquired land, the court may with caution, rely upon the price disclosed by such auction sales, by providing appropriate deduction or cut to off-set the competitive-hike in value.

Raj Kumar v. Haryana State **2007 (7) SCC 609 – relied on.**

Executive Engineer (Electrical), Karnataka Power Transmission Corporation Ltd. Vs. Assistant Commissioner & LAO, Gadag CA Nos.**1768-1775 of 2010 decided on 11.2.2010 – referred to.**

Case Law Reference:

2007 (7) SCC 609	**Relied on.**	**Para 6**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 51-52-of 2011.

From the judgment & order dated 30.01.2008 of the High Court of Karnataka at Bangalore in M.F.A. No. 7037 of 2003 with M. F. A. CROB. No. 243 of 2004.

WITH

C. A. Nos. 53-54, 55-56, 57-58, 59-60, 61-62, 63-64,71-72 & 73-74,of 2011.

Jagjit Singh Chhabra for the Appellant.

Mallikarjun S. Mylar, E. R. Sumathy, Anitha Shenoy for the Respondents.

The order of the Court was delivered by

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

2. An extent of 127 acres 26 guntas of lands in Betegeri village within the municipal limits of Gadag-Betegeri Municipality, was acquired for Karnataka Housing Board in pursuance of Preliminary Notification dated 6.2.1992. The Land Acquisition Officer, Gadag, made an award dated 14.2.1997 awarding a compensation of Rs.45,000/- per acre.

3. On a reference being made at the instance of the land owners, the Reference Court, by judgment and award dated 11.7.2003, determined the compensation for the acquired lands as Rs.2,17,372/- per acre. For this purpose, the Reference Court relied upon Exhibit P-2 which is a sale deed dated 30.7.1992 executed by the Municipal Commissioner, Gadag-Betegeri Municipality in favour of one Manikamma in regard to a plot measuring 329 sq. meters which was sold for Rs.37,600/- in an auction sale on 2.1.1989 (which works out to Rs.114.29 per sq.m). The Reference Court, therefore, arrived at the market value per acre as Rs.4,62,494/-. It deducted 53% towards development (that is, towards areas to be set apart for roads, drains and vacant spaces and towards cost of development) and arrived at the market value as Rs.2,17,372/- per acre. The Reference Court referred to the evidence showing that the plot covered by Ex. P-2 was across the road from the acquired lands and was therefore a neighbouring property.

4. Feeling aggrieved, the Appellant (Housing Board) filed appeals. The land owners filed cross-objections. The High

Court, by impugned judgment dated 30.1.2008, dismissed the appeals of the appellant and allowed the cross-objections filed by the land owners and increased the compensation to Rs.4,42,000/- per acre. Instead of Ex. P-2 relied upon by the Reference Court, the High Court relied upon Ex. P-19 which related to another auction sale of a smaller plot measuring 150 sq.m. by the Gadag-Betegeri municipality on 20.11.1989, for a price of Rs.24500/- (which works out to a price of Rs.163.33 per sq.m). On that basis the High Court works out the market value per acre as Rs.6,60,977/-. The High Court was of the view that the deduction/cut towards development factor should be only 33% instead of 53% adopted by the Reference Court. By deducting 33% from Rs.6,60,977/- it arrived at the market value as Rs.4,42,875/- per acre which was rounded off to Rs.442,000/- per acre, while awarding the compensation.

5. Feeling aggrieved, the Housing Board has filed these appeals by special leave. The appellant have put forth the following contentions :

(i) Ex. P-19 relied upon by the High Court did not relate to a neighbouring land whereas there was specific evidence that the plot covered by Ex. P-2 was in regard to a nearby land. Therefore, Ex. P-2 ought to have been preferred to Ex. P-19. Further as Ex.P-19 related to a very small plot it ought to have been ignored and the transaction relating to the larger plot (Ex.P-2) should have been preferred.

(ii) The High Court ought to have maintained the cut towards cost of development as 53% instead of applying a cut of 33%.

(iii) Auction sales do not furnish a safe guide for determination of market value and therefore, the High Court and Reference Court ought not to be relied upon either Ex.P19 or ExP2 which relate to auction sales.

6. We may deal with the last submission first. The standard

method of determination of market value of any acquired land is by the valuer evaluating the land on the date of valuation (publication of notification under section 4(1) of the Land Acquisition Act, 1894 – 'Act' for short) notification, acting as a hypothetical purchaser willing to purchase the land in open market at the prevailing price on that day, from a seller willing to sell such land at a reasonable price. Thus, the market value is determined with reference to the open market sale of comparable land in the neighbourhood, by a willing seller to a willing buyer, on or before the date of preliminary notification, as that would give a fair indication of the market value. A 'willing seller' refers to a person who is not acting under any pressure to sell the property, that is, where the sale is not a distress sale. A willing seller is a person who knowing the advantages and disadvantages of his property, sells the property after ascertaining the prevailing market prices at the fair and reasonable value. Similarly, a willing purchaser refers to a person who is not under any pressure or compulsion to purchase the property, and who, having the choice of different properties, voluntarily decides to buy a particular property by assessing its advantages and disadvantages and the prevailing market value thereof. Of course, unless there are indications to hold otherwise, all sale transactions under registered sale deeds will be assumed to be normal sales by willing sellers to willing purchasers. Where however there is evidence or indications that the sale was not at prevailing fair market value, it has to be ignored. But auction sales stand on a different footing. When purchasers start bidding for a property in an auction, an element of competition enters into the auction. Human ego, and desire to do better and excel other competitors, leads to competitive bidding, each trying to outbid the others. Thus in a well advertised open auction sale, where a large number of bidders participate, there is always a tendency for the price of the auctioned property to go up considerably. On the other hand, where the auction sale is by banks or financial institutions, courts, etc. to recover dues, there is an element of distress, a cloud regarding title, and a chance

of litigation, which have the effect of dampening the enthusiasm of bidders and making them cautious, thereby depressing the price. There is therefore every likelihood of auction price being either higher or lower than the real market price, depending upon the nature of sale. As a result, courts are wary of relying upon auction sale transactions when other regular traditional sale transactions are available while determining the market value of the acquired land. This Court in *Raj Kumar v. Haryana State* - 2007 (7) SCC 609, observed that the element of competition in auction sales makes them unsafe guides for determining the market value.

7. But where an open auction sale is the only comparable sale transaction available (on account of proximity in situation and proximity in time to the acquired land), the court may have to, with caution, rely upon the price disclosed by such auction sales, by providing an appropriate deduction or cut to off-set the competitive-hike in value. In this case, the Reference Court and High Court, after referring to the evidence relating to other sale transactions, found them to be inapplicable as they related to far away properties. Therefore we are left with only the auction sale transactions. On the facts and circumstances, we are of the view that a deduction or cut of 20% in the auction price disclosed by the relied upon auction transaction towards the factor of 'competitive - price hike' would enable us to arrive at the fair market price.

8. There is clear evidence that the plot sold under Ex. P-2 was very near to the acquired lands whereas there is no such specific evidence in regard to the proximity of the plot sold under Ex.P19, though that plot was also in the vicinity. Further, though both Ex. P2 and P19 relate to developed plots, Ex. P19 relates to a comparatively small plot of 150 sq.m. whereas Ex. P2 refers to a larger plot of 329 sq.m. Having regard to the proximity of location and the size, we are of the view that the Reference Court was justified in relying upon the sale transaction under Ex. P2 and the High Court was not justified

in ignoring Ex. P2 and relying upon the transaction under Ex. P19. We may also note that the general rule that the highest of the comparable sales should be relied upon will not apply, where the sale transactions relied upon are auction sales, for the reasons mentioned in para (6) above. There is yet another important reason for ignoring the said auction sale for determining the market value of the acquired lands. In regard to acquisition of nearby lands within the Gadag-Betegeri municipal limits for the Karnataka Power Transmission Corporation in pursuance of a preliminary notification dated 15.9.1994 this court determined the compensation as Rs.426,670/- per acre (*Executive Engineer (Electrical), Karnataka Power Transmission Corporation Ltd. Vs. Assistant Commissioner & LAO, Gadag* – CA Nos.1768-1775 of 2010 decided on 11.2.2010). That land abutted the Sambarpur Road and was also near to the bus stand, market and educational institutions. That land was equally well-situated, if not better situated than the acquired lands. When this court has determined a market value of Rs.426,670/- in regard to a acquisition more than two and a half years later, that is 15.9.1994, the determination of higher compensation of Rs.4,42,875/- as on 6.2.1992 based on Ex. P19, is unsustainable.

9. We may now consider what should be the proper compensation with reference to Ex. P2. The sale price disclosed by the said auction sale on 2.1.1989 is Rs.37600 for 329 sq.m. On that basis the value of one acre of land works out to Rs.4,62,494. We have already held that a deduction of 20% has to be made to off-set the impact of competitive-hike involved in the auction sale. On such deduction of 20%, the market value per acre as on 2.1.1989 would be Rs.3,69,995. The relevant date for determination of compensation in this case is 6.2.1992 and there is a gap of three years for which appropriate appreciation has to be provided for. Having regard to the fact that the acquired lands were within the municipal limits with considerable development potential, adopting a

cumulative increase of 10% per annum for three years, would enable us to arrive at the market value as on 6.2.1992. By applying such increase, the market value as on 6.2.1992 will be Rs.4,92,460/- per acre.

10. Evidence shows that the acquired lands were situated within the municipal limits, though on the outskirts of Gadag-Betegeri within a distance of one kilometer from Gadag Railway Station and the bus stand; and that there were several residential colonies and colleges in the surrounding areas. Therefore though the lands were agricultural, they could be classified as lands having urban development potential. Having regard to the partial access to infrastructural facilities, we are of the view that a deduction of 40% towards cost of development would meet the ends of justice. On the facts and circumstances, the cut of 53% applied by the Reference Court is too high and the cut of 33% applied by the High Court is low. On applying a cut of 40%, the rate per acre for the acquired land as on 6.2.1992 would be Rs.2,95,476/- (rounded off to Rs.2,95,500).

11. Accordingly we allow these appeals in part and reduce the compensation awarded from Rs.4,42,875/- to Rs.295,500/- per acre. The respondents will be entitled to all statutory benefits as already awarded.

N.J. Appeals partly allowed.

M. NAGESHWAR RAO

v.

STATE OF ANDHRA PRADESH

(Criminal Appeal No.1449 of 2007)

JANUARY 5, 2011

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

Penal Code, 1860 – s.302 – Death of appellant's wife due to cyanide poisoning – Allegation that appellant had mixed up cyanide in a cold drink bottle of Limca and given it to his wife to drink – Trial Court held that the prosecution had failed to prove the guilt of the appellant beyond all reasonable doubts and, therefore, acquitted him of the charge under s.302 – Appeal by State Government – High Court reversed the judgment of acquittal and, convicted the appellant under s.302 and sentenced him to rigorous imprisonment for life – Justification of – Whether on the basis of the materials on record, the view taken by the trial Court, was so wrong and unreasonable as to warrant interference and reversal by the High Court – Held: There was hardly anything in the prosecution evidence to establish the charge against the appellant – The facts and circumstances of the case may give rise to a strong suspicion against the appellant but suspicion, howsoever strong, cannot take place of proof – Testimony of PW6 (on the issue of appellant mixing up cyanide in the cold drink bottle of Limca and giving it to the deceased to drink) was not reliable – Prosecution case on recovery of the Limca bottle from the residence of appellant was also highly suspect – There was no proof of the appellant's guilt and on the basis of the evidence on record it would be quite unsafe to hold him guilty of murder and to send him to imprisonment for life – Trial court had taken the perfectly correct view in the matter – High Court arrived at a completely erroneous conclusion

regarding the appellant's guilt – Judgment passed by the trial court accordingly restored.

The wife of the appellant died of cyanide poisoning. It was alleged by the prosecution that the appellant had mixed up cyanide in a cold drink bottle of Limca and given it to his wife to drink. Apart from the doctor (PW14) and the forensic expert (PW17), 16 more witnesses were examined to prove the culpability of the appellant. Out of them PWs 1 and 2 were the father and the brother respectively of the deceased. The trial Court on a consideration of all the evidence produced before it found that the prosecution had failed to prove the guilt of the accused beyond all reasonable doubts. It, therefore, acquitted him of the charge under section 302 IPC. Against the judgment of the trial Court, the State Government preferred appeal. The High Court allowed the government appeal, reversed the judgment of acquittal passed by the trial court and, accordingly, convicted the appellant under section 302 IPC and sentenced him to rigorous imprisonment for life.

In the instant appeal, the question which arose for consideration was whether on the basis of the materials on record, the view taken by the trial Court, was so wrong and unreasonable as to warrant interference and reversal by the High Court.

Allowing the appeal, the Court

HELD:1. PW7 was the landlady in whose house the appellant and the deceased lived on rent, and PW3 was her maid. These two witnesses stated before the Court how they had found the appellant's wife lying unconscious in a chair and had shifted her to Hospital for treatment. PW3 further stated that at that time the accused was not present in the house but he came to the hospital an hour after the deceased was admitted there.

In her cross-examination by the defence, she stated that the deceased was suffering from some kind of disease, and at that stage she was declared hostile by the prosecution. PW7 similarly stated that on receiving a telephone call she went to the portion of the house occupied by the deceased and found her there lying unconscious in a chair. She, then, called her maid PW3 and with her help, shifted her to hospital. She did not know what had happened to the deceased. In her cross examination she stated that the accused and the deceased were living amicably prior to the date of the incident. [Para 27] [624-G-H; 625-A-C]

2. PW4 was the goldsmith, from whom the appellant is supposed to have obtained the cyanide as per his confessional statement. In his deposition before the Court, PW4 stated that he was threatened and cajoled by the police to say that the appellant had obtained cyanide form him on the pretext of cleaning the computer parts. He stated before the court that he and his brother were brought to the Police Station where they were kept for 10 days and were threatened that they would be implicated in the case, unless they made statements as directed by the police. In the end, finding no way out, he yielded and made the statement before the police and the Magistrate as he was asked to do. He was declared hostile and was cross- examined by the prosecution, in course of which he bluntly denied that his statement under section 161 of Cr. P. C. was given voluntarily and not under coercion. The deposition of PW4 is a major blow to the prosecution case as regards the source of cyanide to the appellant and his access to the poison. [Para 28] [625-D-G]

3.1. On the issue of the appellant mixing up cyanide in the cold drink bottle of Limca and giving it to the deceased to drink, the prosecution relied upon the evidence of PW6, the owner of a general store, and the

recovery of the empty Limca bottle from one of the rooms in the occupation of the appellant and the deceased. PW6 deposed before the court that more than a year ago, at about 2.30 or 3 p.m., the accused went to his store and purchased a Limca bottle. Apart from the price of the cold drink, he was asked to deposit Rs.5 for the bottle. He paid Rs.15 and took away the bottle of Limca, but he didn't return the empty bottle. He did not know where and in which house the accused resided. In cross-examination, he stated that his store was a big shop and a number of customers came there. He remembered some customers and the articles purchased by them but didn't remember most of the customers or the articles purchased by them on a particular day. He also said that most of the time he went out for the purchase of supply for the shop and at those times his brother sat in the shop. He also said that he was a social worker and a reputed person in the locality. And he went to the police station whenever some disputes arose in the locality and tried to settle them amicably by compromise. [Para 29] [625-H; 626-A-D]

3.2. In appreciating the evidence of PW6, two or three things need to be kept in mind. First, though it is not impossible for a busy shop keeper to recall a person who is not a regular customer of the shop but comes there by chance for purchasing a bottle of cold drink, it is certainly a little unusual. Secondly, PW6 claimed himself to be a social worker and a reputed person in the locality. He was quite familiar with the police and used to visit the police station for settlement of the disputes arising in the locality. Thirdly, and most importantly, the appellant was presented before him after allegedly making the confessional statement before the police and the punch witnesses. The whole story was, thus, out in the open and the police had brought the culprit before him 'for a simple confirmation' that he would indeed do in order to oblige the police without any difficulty. For the aforesaid

reasons, this Court is very reluctant in accepting the testimony of PW6. [Para 30] [626-E-H]

4. As regards the recovery of the empty Limca bottle from one of the rooms at the appellant's residence that was found by the forensic laboratory to contain cyanide, the appellant's residence was thoroughly searched soon after the death of Laxmi Kumari. The 'Scene of Offence Panchnama' is in considerable detail and it describes the appellant's residence and the articles found there. On the 'sajja' of the appellant's bedroom, suit cases and some miscellaneous articles were found and on shelves there were portraits of goddesses, weekly magazines, other books and some clothes. It is rather strange, that in course of such a detailed examination, the Sub-Inspector should have missed out the empty Limca bottle that is shown to be recovered three days later from the same shelf. The seizure memo does not state that the bottle was taken out by the appellant from some hidden place from where normally it could not be recovered without his assistance. The seizure memo was prepared in presence of panchas. Only one of them was examined by the prosecution as PW12. He denied that any recovery was made in his presence. On the contrary he stated that police obtained his signatures on some papers of which some were written and some were blank. He denied that in his presence the appellant had led the police to his house and had produced the Limca bottle, that the police had seized it under the seizure memo, and that he and another panch attested the panchnama. Thirdly, it is in the seizure report under the column details of seizure what is stated is 'One empty Limca Bottle-300ml.' Thus, at the time of seizure there was no white powder visible inside the bottle as is mentioned in the report of the Forensic Science Laboratory. Also, the bottle reached the Forensic Science Laboratory much later and there is

absolutely no evidence as to where and with whom the bottle remained during this period. All these circumstances make the prosecution case on recovery of the Limca bottle from the residence of the appellant highly suspect. [Para 31] [627-A-H; 628-A]

5.1. There appears to be hardly anything in the prosecution evidence to establish the charge against the appellant. The facts and circumstances of the case may give rise to a strong suspicion against the appellant but suspicion, howsoever strong, can not take place of proof. There is no proof of the appellant's guilt and on the basis of the evidence on record it would be quite unsafe to hold him guilty of murder and to send him to imprisonment for life. [Para 32] [628-B-C]

5.2. The trial court had taken the perfectly correct view in the matter. The High Court was unable to keep aside the so called confessional statement made by the appellant. On the contrary, it put the confessional statement at the centre and proceeded to examine all other evidences in its back drop and, thus, reached to a completely erroneous conclusion regarding the appellant's guilt. The confessional statement was completely repudiated by the appellant before the trial court. Further, the statement was supposedly made in presence of 'panchas,' and it was shown to have been signed by them as witnesses along with the investigating officer (PW18). Of the two panchas, only one was examined as PW12, but he did not support the prosecution case either in regard to the appellant's confessional statement or the Seizure Report of the Limca bottle and was declared hostile. It was only PW18, the investigating officer, who stated before the trial court that the accused voluntarily made the confessional statement and voluntarily produced the empty Limca bottle from the 'sajja' at his residence. The confessional

statement, disowned by the appellant and not supported even by the witness, is of no use for judging the appellant's guilt and must be kept out of consideration. The impugned judgment of the High Court is, accordingly, set aside and the judgment passed by the trial court is restored. [Paras 25, 33] [623-H; 624-A-D; 628-D-E]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1449 of 2007.

From the Judgment & Order dated 13.9.2007 of the High Court of Judicature Andhra Pradesh at Hyderabad in Criminal Appeal No. 1009 of 2005.

Sushil Kumar, S. Udaya Kumar Sagar, Vinita Sasidharan, Aditya Kumar (for Lawyer's Knit & Co.) for the Appellant.

D. Mahesh Babu, Ramesh Allan, D. Bharathi Reddy for the Respondent.

The Judgment of the Court was delivered by

AFTAB ALAM, J. 1. This appeal by grant of special leave is directed against the judgment and order dated September 13, 2007 passed by the High Court of Andhra Pradesh in Criminal Appeal No. 1009 of 2005. The High Court allowed the government appeal, reversed the judgment of acquittal passed by the trial court, found the appellant guilty of the charge of killing his wife Laxmi Kumari by giving her cyanide in cold drink and, accordingly, convicted him under section 302 of the Penal Code and sentenced him to rigorous imprisonment for life and a fine of Rs.1,000/- and in default of payment of fine, simple imprisonment for 3 months.

2. The basic facts of the case which are admitted or are at any rate undeniable need to be stated in the sequence in which those facts were unfolded. The appellant and Laxmi

Kumari got married on April 30, 2000. After marriage they came to live in a rented house at Yellareddiguda, Hyderabad. The appellant and his wife lived on the first floor and the remaining portion of the house was occupied by its owner. The appellant had a graduate degree in Engineering and a diploma in Computer. He worked as a faculty member in Harica Information, situated at Rehamath Complex, Amarpreet, Hyderabad, and he also gave coaching to students in another computer centre. He was earning a salary of about Rs.20,000/- per month.

3. On September 2, 2000 in the afternoon the landlady, Saroja (PW7) received a telephone call asking for Laxmi Kumari. She went to the portion of the house where she lived and found her there lying on a chair. Then, with the help of her maid servant (PW3), she got her shifted to Mythri Hospital. After some time her husband, the appellant also reached there.

4. In the morning of September 3, 2000 Laxmi Kumari's father, PW1 received a phone call from the brother of the appellant, Seshagiri Rao intimating him that his daughter had fallen seriously ill and had been admitted to the hospital. He along with his wife proceeded to Hyderabad and on reaching there went to the hospital, where they found their daughter in an unconscious state. On the same day at 8.30 p.m. Laxmi Kumari was declared dead by the doctors of Mythri Hospital. In the death certificate issued by the Hospital (exhibit P-3) it was stated that she was admitted to the hospital on September 2, 2000 at about 7.15 p.m. At the time of admission she was unconscious and there was no pulse or blood pressure. She was diagnosed to have suffered a cardio-pulmonary arrest. She was put on Ventilator and given certain medicines that restored her cardiac activity. She suffered further cardiac arrest at 8.10 p.m. on September 3, that led to her death at 8.30 p.m.

5. After Laxmi Kumari was dead, her father PW1 went to S.R. Nagar Police Station and lodged a complaint there at 9.15 p.m. In the complaint, he simply stated that in the morning on

that day he received a telephone call from Seshagiri Rao from Hyderabad asking them to immediately come down to Hyderabad as their daughter was in danger. They started at 8 a.m., and on reaching Hyderabad went to Mythri Hospital where their daughter was in an unconscious state. After half an hour the doctors declared that their daughter had died. He further said that to his knowledge their daughter was not suffering from any aliment; he knew that she was in good health till 4 p.m. on September 2, 2000, and after completing her household work she became unconscious at 6 p.m. He did not know how this happened. He requested for necessary action so that her dead body could be handed over to him for the last rites. The complaint (exhibit P-1) was registered as Crime No. 589/2000 under section 174 of the Criminal Procedure Code (Cr. P.C.), and was formally incorporated in an FIR (exhibit P-14).

6. After recording the statement of the father of the deceased the Sub-Inspector (PW15) proceeded for Mythri Hospital and got the body of the deceased shifted to Gandhi Hospital for post mortem examination. At 11 p.m. on the same day, the Sub-Inspector went to the residence of the appellant and the deceased and in the presence of two 'panchas' made a thorough search of the three rooms which were in the occupation of the appellant and the deceased. He prepared the 'Scene of Offence Observation Panchnama' (exhibit P-5) and the 'Rough Sketch of the Scene of Offence' (exhibit P-6). From exhibit P-5, the 'Scene Panchnama,' it appears that the door on the eastern side of the bedroom was kept closed for separating it from the portion of the house under the use and occupation of its owners. A computer system was set up against this door. On the 'Sajjas' of the bedroom the Sub-Inspector found suit cases and some miscellaneous articles and on the shelves, goddess' pictures, weekly magazines, some books and clothes. There was also one double bed in the bedroom. No article or anything else that would shed light on the cause of death of Laxmi Kumari was found in the search.

7. Next morning (September 4, 2000) inquest was held on the body of Laxmi Kumari in course of which, her parents expressed suspicion on her husband (the present appellant) and his brother Seshagiri Rao in connection with her death. As a consequence, the case which was initially instituted under section 174 Cr. P. C. was changed to one under sections 498A and 306 of the Penal Code and further investigation began in that light.

8. On the same day at 4.05 p.m., post mortem was held on the body of the deceased Laxmi Kumari. According to the post mortem report, cyanosis was present in the fingers and nails and there was froth in the mouth and nostrils of the deceased. In the stomach there was 200 ml of yellowish liquid that smelled of bitter almonds. The mucosa of the stomach, small intestine and large intestine was congested; similarly congested were the organs liver, gall-bladder and biliary passages, pancreas, kidney and uterus. The doctor conducting post mortem took samples of small intestine, large intestine, liver and kidney and also collected a little of the liquid found in the stomach for forensic examination. The doctor reserved his opinion as to the cause of death awaiting report from the forensic experts.

9. According to the appellant, he was taken in custody by the police on September 4, 2000 itself, though was shown as formally arrested three days later, on September 7, 2000. But we may, for the present, discard the allegation made by the appellant and proceed with the incontrovertible facts of the case.

10. On September 7, 2000 one B.N. Chary (PW10) who knew the families of both the deceased and the appellant and who was one of the two mediators in the marriage between the appellant and Laxmi Kumari, along with 20 others, came from Velerupadu to Hyderabad, to meet their MLA, Tati Venkateswarlu. They took the MLA to the police station on September 7, 2000 between 8 and 9 in the morning where he

had a discussion with the Inspector in connection with the case. At that time, the appellant and his brother were also present at the Police Station.

11. On the same day and at about the same time (September 7, 2000 at 7.40 a.m.) the appellant is said to have made a detailed confessional statement that was recorded by Ashok Kumar Singh (PW18), Inspector of Police of S.R. Nagar Police Station, near AP Transco bill-payment office, Ameerpet in the presence of two panchas, namely, S. Chengaiah Chetty and G. Venkateswara Reddy (PW12).

12. In his confessional statement, the appellant is supposed to have said that his marriage with the deceased Laxmi Kumari was arranged by his parents and it was solemnized on April 30, 1999 at Annavaram Temple, East Godvari District. His in-laws had initially agreed to pay as dowry a sum of Rs.5,00,000/-, besides some furniture and a motor cycle, but they gave only Rs.3,69,000/- and some furniture that was worth no more than Rs.10,000/-. In May, 1999 he moved with his wife to Hyderabad where he took on rent the first floor of house no. 8-3-412 at Yellareddiguda owned by Sri Sudharshan, on a monthly rental of Rs.1,200/-. He made plans to go to the U.S.A. for better job prospects, and while continuing to work in the coaching centre he also obtained a passport in his name. But after a few months of marriage frictions arose between him and his wife. She did not co-operate with him at the time of sex, and used to pick up quarrels with him on several issues. She would complain about the stay of his brother with them and would strongly oppose his sending any money to his parents. She did not seem to care much for him or his work and despite persuasions by him showed no interest in learning computer. Distressed by the unhappiness of his matrimonial life, he thought of taking his own life and with that intention procured from his friend Brahmachary, who was a goldsmith, some cyanide on the pretext that he needed it for cleaning the computer parts. He kept the cyanide at a concealed place at

their residence in Hyderabad. At that time he got an opportunity to go to the U.S.A. through the Macro Technology Company, and he told his wife that he would go first and then call her there after a year, but she insisted on accompanying him. He even told her that he would call her to America only after three months of his going there, but she would not listen and insisted that he must take her along with him. Completely exasperated by his wife's nagging he thought of killing her rather than giving up his own life. He then decided to kill her by administering the poison that lay hidden at their residence and waited for a suitable chance to give her the poison. On August 22, 2000 his wife went to her native place to attend the marriage of her elder brother and she returned back to Hyderabad on September 1, 2000. During her absence from the house he had decided to kill her within the shortest possible time as he had to go to the U.S.A. in the month of October, 2000. In the night of September 1, 2000 his brother-in-law, Prasad stayed in his house. That night he was completely unable to sleep and he kept on thinking of ways to kill his wife by giving her cyanide. On the following day at about 2.30 in the afternoon he returned from the computer centre. His brother-in-law had already left the house in the morning. At around 4 in the afternoon his wife said she wanted to have a cold drink. And this suddenly gave him the idea to give her the poison by mixing it in the cold drink. He took out the cyanide packet from the place where it was hidden and went to a nearby general store from where he purchased a bottle of Limca. He got the bottle opened and on the way back went inside a STD booth where he put some cyanide into the opened cold drink bottle. At around 4.30 p.m. he arrived back at his house and gave the cold drink, spiked with cyanide, to his wife. His wife asked him to have some cold drink from that bottle but he declined the offer and left the house saying that he had some urgent work at the computer centre. On the way to the institute, he threw away the remaining cyanide in a nala. He was sure that his wife would consume the poisoned cold drink and would die. At about 6.45 p.m. he received the message at his office that his wife was seriously ill and was admitted to Mythri

Hospital. He knew that his wife would die. He went to the hospital and found his wife in unconscious state. He feigned ignorance about the reason for her falling ill. He rushed back to his house and found the Limca bottle by the side of the sofa. It still contained about half of its contents. He threw away the remaining contents of the bottle in the bathroom and concealed the bottle on the bedroom shelf. Then, he again went to the hospital. In the meanwhile some of his relatives had sent the message to his in-laws. On September 3, his in-laws reached the hospital. On the same day (September 3, 2000) around 8 p.m. the doctors declared his wife dead. On the death of his wife, his in-laws got agitated. They expressed doubt about the cause of her death and cast suspicion on him. Seeing the turn of the events he went away from the hospital. On the following morning, he came to know that the police was searching for him. He decided to escape from Hyderabad and go to his village. He was waiting near the Electricity Office, Ameerpet to meet the M.D. of his computer institute to take some money from him but in the meanwhile he was apprehended by the police at about 7.30 in the morning. At the conclusion of his confessional statement the appellant offered to take the police and the panchas to his house where the empty Limca bottle was hidden and to show the point at the culvert where he had thrown the remaining portion of the cyanide. The confessional statement was read over and explained in vernacular language and all accepted it to be true and correct.

13. In furtherance of the confessional statement, the appellant took the investigating officer along with the two panchas, S. Chengaiah Chetty and G. Venkateswara Reddy (who had witnessed the recording of his confessional statement) to his residence at Yellareddiguda where this time, at the instance of the accused, the police officer was able to find and recover one empty Limca bottle-300 m.l., lying on a shelf. The Limca bottle was seized in the presence of two 'panchas,' under Seizure Report (exhibit P-10 & exhibit P-18) which was prepared on September 7, 2000 at 10.30 a.m. The

Seizure Report is shown to have been signed by both S. Chengaiah Chetty and G. Venkateswara Reddy (PW12) as witnesses.

14. On the basis of the confessional statement and the recovery of the cold drink bottle made in pursuance to it, the case was further altered to be one under section 302 of the Penal Code.

15. On September 29, 2000 the investigating officer, Sub-inspector G. Prasada Rao (PW16) went to Bhradrachalam and recorded the statement of Brahmachary (PW4), the goldsmith from whom the appellant is said to have obtained cyanide. In the statement recorded under section 161 of Cr. P.C. (later produced before the court as exhibit P-2), Brahmachary confirmed that the appellant had obtained cyanide from him.

16. Later, on December 16, 2000 two reports were received from the Forensic Science Laboratory, Andhra Pradesh. The first report was in respect of the samples/ specimens preserved by the doctor holding post mortem on the body of the deceased. The forensic report stated that the samples in the three screw capped bottles were received in the laboratory on September 15, 2000 (samples were collected in course of post mortem held on September 4, 2000 and there is no explanation where the samples lay for 11 days). The three bottles contained specimens of (i) Stomach and piece of intestine, (ii) Pieces of liver and kidney and (iii) Reddish turbid liquid (collected from the stomach of the deceased). According to the report, cyanide, a chemical poison was found in all of them.

17. The second report of the same date was in respect of the Limca bottle, allegedly recovered from one of the rooms of the appellant's residence. This was received in the laboratory on September 27, 2000 (the recovery of the bottle was made on September 7, and it is not explained why it reached the laboratory after 20 days). In the forensic report it is noted that

the bottle labeled as 'Limca' contained "small amount of white powder." According to the report, on analysis it was found to be cyanide, a chemical poison.

18. On the basis of the forensic reports, the doctor who earlier held the post mortem gave the final opinion on the cause of death and stated that it was due to cyanide poisoning.

19. This finally tied up the investigation and the police submitted charge sheet on January 31, 2000 and the appellant was finally sent for trial for committing the murder of his wife.

20. It is significant to note here that the appellant was charged only under section 302 of the Penal Code. He was not charged under sections 304B or 498A of the Penal Code or under the provisions of the Dowry Prohibition Act, 1961.

21. Before the trial Court, the prosecution examined as many as 18 witnesses and produced 20 documents that were marked as exhibits. The appellant in the statement under section 313 Cr. P. C., of course denied all the allegations against him. He denied having made any confessional statement. He also denied that he led the investigating officer and the 'panchas' to his residence and there produced before them an empty Limca bottle from a 'sajja' in the bedroom. At the end of the statement he said that sometime after marriage his wife had become unwell and he had got her treated. She had gone to attend the marriage of his brother, PW2. After returning from the marriage of her brother, she was in a disappointing (*sic* depressed) mood. At the end of examination by the court he made further statement which was recorded as follows:

> "It is submitted that after the death of my wife on 3-9-2000 the body was shifted to Mortuary at Gandhi Hospital from Mythri Hospital, myself, my father-in-law (Bapaiah), my brother-in-law and my brothers were together and slept in my house at Yellareddyguda. Next Day i.e. 4-9-2000 we

all went to Mortuary where the police Sanjeeva Reddy Nagar was also present. After the post-mortem the police and my father-in-law took me and my brother to police station of Sanjeevareddynagar and where we were kept illegally and forced us to give money to my father-in-law. I pleaded my innocence, but neither the police nor my father-in-law listened me (*sic*). Subsequently relatives of my father-in-law and MLA visited the police station had the discussions with the police officials and put up a false case against me."

22. The trial Court on a consideration of all the evidence produced before it found that the prosecution had failed to prove the guilt of the accused beyond all reasonable doubts. It, therefore, acquitted him of the charge under section 302 of the Penal Code. Against the judgment of the trial Court, the state government preferred an appeal (Criminal Appeal No. 1009 of 2005). The High Court, by a long and detailed judgment set aside the judgment of the trial Court and convicted and sentenced the appellant as stated above.

23. We will now proceed to examine whether on the basis of the materials on record, the view taken by the trial Court, was so wrong and unreasonable as to warrant interference and reversal by the High Court.

24. The medical evidence by PW14, including the post mortem report (exhibit P-12) and the final opinion on the cause of death (exhibit P-13) coupled with the evidence of PW17, Joint Director F.S.L., Hyderabad and the report dated December 16, 2000 (exhibit P-15) leave no room for doubt that Laxmi Kumari died of cyanide poisoning. But the question is whether there is sufficient reliable evidence to show that the cyanide was given to her in the cold drink by the appellant.

25. Before proceeding to examine the evidence adduced by the prosecution in support of its case, it would be better to put aside the so called confessional statement made by the

appellant. It is seen above that the confessional statement was completely repudiated by the appellant before the trial court. Further, the statement was supposedly made in presence of 'panchas,' namely, Sri. S. Chengaiah Chetty and Sri. G. Venkateswar Reddy and it was shown to have been signed by them as witnesses along with Inspector Ashok Kumar Singh, the investigating officer (PW18). Of the two panchas, only Venkateswar Reddy was examined as PW12, but he did not support the prosecution case either in regard to the appellant's confessional statement or the Seizure Report of the Limca bottle and was declared hostile. It was only PW18, the investigating officer, who stated before the trial court that the accused voluntarily made the confessional statement and voluntarily produced the empty Limca bottle from the 'sajja' at his residence. The confessional statement, disowned by the appellant and not supported even by the witness, is of no use for judging the appellant's guilt and must be kept out of consideration.

26. Now, coming back to the evidence led by the prosecution; as noted above, apart from the doctor (PW14) and the forensic expert (PW17), 16 more witnesses were examined to prove the culpability of the appellant. Out of them PWs 1 and 2 were the father and the brother respectively of the deceased, Laxmi Kumari. Having regard to the charge on which the appellant was tried, and the nature of the prosecution case the relevance of their evidences is limited to the question, whether or not the appellant can be said to have the motive to commit the crime. But before that, the prosecution is required to establish other circumstances which are more important and directly relevant to the case.

27. PW7 was the landlady in whose house the appellant and the deceased lived on rent, and PW3 was her maid. These two witnesses stated before the Court how they had found Laxmi Kumari lying unconscious in a chair and had shifted her to Mythri Hospital for treatment. PW3 further stated that at that

time the accused was not present in the house but he came to the hospital an hour after the deceased was admitted there. In her cross-examination by the defence, she stated that the deceased was suffering from some kind of disease, and at that stage she was declared hostile by the prosecution. PW7 similarly stated that on receiving a telephone call she went to the portion of the house occupied by the deceased and found her there lying unconscious in a chair. She, then, called her maid PW3 and with her help, shifted her to Mythri hospital. She did not know what had happened to the deceased. In her cross examination she stated that the accused and the deceased were living amicably prior to the date of the incident.

28. PW4 was Brahmachary, the goldsmith residing at Bhadrachalam, from whom the appellant is supposed to have obtained the cyanide as per his confessional statement. In his deposition before the Court, PW4 stated that he was threatened and cajoled by the police to say that the appellant had obtained cyanide form him on the pretext of cleaning the computer parts. He stated before the court that in the last week of September 2000, S.R. Nagar Police came to his house at Bhadrachalam and from there brought him and his brother to S.R. Nagar Police Station in Hyderabad. There they were kept for 10 days and were threatened that they would be implicated in the case, unless they made statements as directed by the police. In the end, finding no way out, he yielded and made the statement before the police and the magistrate as he was asked to do. He was declared hostile and was cross- examined by the prosecution, in course of which he bluntly denied that his statement under section 161 of Cr. P. C. was given voluntarily and not under coercion. The deposition of PW4 is a major blow to the prosecution case as regards the source of cyanide to the appellant and his access to the poison.

29. Next comes, the issue of the appellant mixing up cyanide in the cold drink bottle of Limca and giving it to the deceased to drink. On this issue, the prosecution relies upon

the evidence of PW6, the owner of the general store and the recovery of the empty Limca bottle from one of the rooms in the occupation of the appellant and the deceased. PW6 deposed before the court that more than a year ago, at about 2.30 or 3 p.m., the accused went to his store and purchased a Limca bottle. Apart from the price of the cold drink, he was asked to deposit Rs.5 for the bottle. He paid Rs.15 and took away the bottle of Limca, but he didn't return the empty bottle. He did not know where and in which house the accused resided. In cross-examination, he stated that his store was a big shop and a number of customers came there. He remembered some customers and the articles purchased by them but didn't remember most of the customers or the articles purchased by them on a particular day. He also said that most of the time he went out for the purchase of supply for the shop and at those times his brother sat in the shop. He also said that he was a social worker and a reputed person in the locality. And he went to the police station whenever some disputes arose in the locality and tried to settle them amicably by compromise.

30. In appreciating the evidence of PW6, two or three things need to be kept in mind. First, though it is not impossible for a busy shop keeper to recall a person who is not a regular customer of the shop but comes there by chance for purchasing a bottle of cold drink, it is certainly a little unusual. Secondly, PW6 claimed himself to be a social worker and a reputed person in the locality. He was quite familiar with the police and used to visit the police station for settlement of the disputes arising in the locality. Thirdly, and most importantly, the appellant was presented before him after allegedly making the confessional statement before the police and the punch witnesses. The whole story was, thus, out in the open and the police had brought the culprit before him 'for a simple confirmation' that he would indeed do in order to oblige the police without any difficulty. For the reasons discussed above, we feel very reluctant in accepting the testimony of PW6.

31. Next comes, the recovery of the empty Limca bottle from one of the rooms at the appellant's residence that was found by the forensic laboratory to contain cyanide. Proceeding step by step, it may be noted that the appellant's residence was thoroughly searched soon after the death of Laxmi Kumari on September 3 itself. The 'Scene of Offence Panchnama' is in considerable detail and it describes the appellant's residence and the articles found there. On the 'sajja' of the appellant's bedroom, suit cases and some miscellaneous articles were found and on shelves there were portraits of goddesses, weekly magazines, other books and some clothes. It is rather strange, that in course of such a detailed examination, the Sub-Inspector should have missed out the empty Limca bottle that is shown to be recovered three days later from the same shelf. The seizure memo does not state that the bottle was taken out by the appellant from some hidden place from where normally it could not be recovered without his assistance. The seizure memo (exhibit P-10 and exhibit P-18) was prepared in presence of panchas, Sri. S. Chengaiah Chetty and Sri. Venkateswar Reddy. Only one of them, namely, Sri. Venkateshwar Reddy was examined by the prosecution as PW12. He denied that any recovery was made in his presence. On the contrary he stated that on September 7, 2000 S.R. Nagar police obtained his signatures on some papers of which some were written and some were blank. He denied that in his presence the appellant had led the police to his house and had produced the Limca bottle, that the police had seized it under the seizure memo, and that he and another panch attested the panchnama. Thirdly, it is to be noted that in the seizure report under the column details of seizure what is stated is 'One empty Limca Bottle-300ml.' Thus, at the time of seizure there was no white powder visible inside the bottle as is mentioned in the report of the Forensic Science Laboratory dated December 16, 2000. At this stage, it also needs to be recalled that the bottle reached the Forensic Science Laboratory only on September 27, 2000 and there is absolutely no evidence as to where and with whom the bottle remained during this period. All these

circumstances make the prosecution case on recovery of the Limca bottle from the residence of the appellant highly suspect.

32. Thus analysed, there appears to be hardly anything in the prosecution evidence to establish the charge against the appellant. The facts and circumstances of the case may give rise to a strong suspicion against the appellant but it has been said many times before that suspicion howsoever strong can not take place of proof. There is no proof of the appellant's guilt and on the basis of the evidence on record it would be quite unsafe to hold him guilty of murder and to send him to imprisonment for life.

33. We think that the trial court had taken the perfectly correct view in the matter. The High Court was, unfortunately, unable to keep aside the so called confessional statement. On the contrary, it put the confessional statement at the centre and proceeded to examine all other evidences in its back drop and, thus, reached to a completely erroneous conclusion regarding the appellant's guilt. We find the judgment of the High Court unsustainable. The impugned judgment of the High Court is, accordingly, set aside and the judgment passed by the trial court is restored. The appellant is acquitted of the charge and is directed to be released from jail forthwith unless he is required in connection with any other criminal case. The appeal is allowed.

B.B.B. Appeal allowed.

SAJJAN SHARMA

v.

STATE OF BIHAR

(Criminal Appeal No. 1283 of 2010)

JANUARY 7, 2011

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

Penal Code, 1860 – s.302 – Murder – Unlawful assembly carrying fire-arms caused the death of informant's uncle – Appellant's father and brother were seen as members of the unlawful assembly and were duly named in the Fard-e-beyan/ FIR – Weapons carried by them were also identified and expressly mentioned in the Fard-e-beyan – Though appellant was not identified as one of the accused at the time of the commission of the offence, he was later named among the accused – Conviction of accused-appellant – Challenge to – Dispute as to whether appellant was one of the accused taking part in the commission of the offence – Held: The informant did not name the appellant as one of the accused – The appellant was not named in the FIR – Had the appellant been actually present at the place of occurrence, there is no reason why his name along with his father and brother, should not have figured in the FIR – In the circumstances, it will not be wholly safe to maintain the conviction of the appellant under s.302 IPC and applying the rule of caution, he must be given the benefit of doubt – Conviction of appellant set aside.

Criminal Trial – Framing of charges and examination of accused under s.313 CrPC in the State of Bihar – Patna High Court asked to take note of the neglectful way in which some of the Courts in the State appear to be conducting trials of serious offences and take appropriate corrective steps – Code of Criminal Procedure, 1973 – s.313.

According to the prosecution, in view of old enmity, an unlawful assembly carrying fire-arms caused the

death of PW4's uncle. The prosecution case is based on the Fard-e-beyan of PW4.

The police submitted chargesheet against seven accused persons of whom five (including the appellant's father and brother) were named in the Fard-e-beyan/FIR while the other two accused (including the appellant) were not so named in the Fard-e-beyan/FIR. In the charge-sheet three accused were shown as absconders and the rest were in custody. Later one more accused was apprehended and he was also put on trial along with the accused who were in custody. The case of the two accused who remained absconding was separated and the other five accused were put on trial. Later on, the appellant's father died and in so far as he was concerned, the proceedings abated. The trial continued in respect of the four accused, including the appellant. The trial court finally convicted all the four accused under section 302 IPC and section 27 of the Arms Act and sentenced them to rigorous imprisonment for life under section 302 IPC and rigorous imprisonment for 1 year under section 27 of the Arms Act. One accused died after the judgment of the trial court. The rest three accused, including the appellant and his brother preferred appeals before the High Court. The appeals were dismissed.

Against the judgment of the High Court, the appellant and his brother jointly filed SLP before this Court. The third convict did not file any further appeal against the judgment of the High Court. The SLP insofar as the appellant's brother was dismissed while the appellant was granted leave to appeal.

Allowing the appeal, the Court

HELD: 1. Curiously, the trial court charged all the five accused (before the appellant's father died) only under section 302 IPC, without the aid of either section 149 or section 34 of IPC. Equally inexplicably, the trial court did

not charge the accused under section 148 IPC. Apart from section 302 IPC all the accused were charged under section 27 of the Arms Act; one accused was additionally charged under section 379 of the Penal Code for taking away the rifle of the deceased. [Para 12] [638-F-G]

2.1. The charge framed by the trial court was highly flawed. The appellant was examined by the court under section 313 of CrPC. This examination too is highly unsatisfactory and sketchy. [Paras 13, 14] [638-H; 639-C-D]

2.2. This is not an isolated case but it is almost a stereotype. In criminal trials in Bihar no proper attention is paid to the framing of charges and the examination of the accused under section 313 of the Code of Criminal Procedure, the two very important stages in a criminal trial. The framing of the charge and the examination of the accused are mostly done in the most unmindful and mechanical manner. The Patna High Court should take note of the neglectful way in which some of the Courts in the State appear to be conducting trials of serious offences and take appropriate corrective steps. [Para 15] [639-G-H; 640-A-B]

3.1. In any event, in the instant case, there is no reason to go into that technical aspect of the matter since the appellant has a good case on merit as well. [Para 16] [640-C]

3.2. The prosecution examined eight witnesses in support of its case. PWs 1 and 2 stated that they did not know anything about the occurrence and they had not given any statement before the police. They were declared hostile. PW3 who was the brother-in-law of the deceased and who was not only present at the time of recording of the Fard-e-beyan but had also signed it as a witness also turned hostile. In cross-examination he also said that

his brother-in-law had enmity with a large number of people. PW4 and PW6 are the two eye witnesses. PW5 did not claim to have witnessed the actual occurrence but said that on the date of occurrence, at about 2:30 in the afternoon he heard the report of the gun shots and saw some of the accused fleeing away with .315 rifles. In view of the evidences of PWs 4, 6 and 5 coupled with the medical evidence there is no room for doubt that the deceased was killed in the manner as stated by the prosecution. But the question is whether or not the appellant was one of the accused taking part in the commission of the offence. [Paras 17, 18] [640-D-H; 641-A]

3.3. PW4 in his deposition before the court stated what he had said in the Fard-e-beyan. He did not name the appellant as one of the accused. The name of the appellant figures in the deposition of PW6. PW6 named the appellant and two other accused (one absconding and one not charge-sheeted), in addition to the five accused named in the FIR. He did not assign them any particular weapon but said that they were carrying different arms and weapons. He then stated that all the accused surrounded the deceased but beyond this he did not assign any role to the appellant. PW5 stated that on the date of the occurrence he was scattering fertilizer in his banana field when all of a sudden on hearing the sound of firing and noise, he looked around and saw the accused persons, including the appellant coming. He saw a rifle in the hands of the appellant's brother and 2 rifles in the hands of one accused who passed him close by. The rest of the accused were carrying some small and big '3 noughts'. In cross examination he stated that he had told PW4 that he had seen the accused persons running away. But he had not said the names of all the accused persons to PW4. He further stated that the Inspector recorded his statement about 10-20 days after

the occurrence. [Para 19] [641-B-E]

3.4. The appellant was not named in the FIR. The appellant lived in the same village as the informant and PW6. The appellant's father and brother were seen as members of the unlawful assembly and were duly named in the Fard-e-beyan/FIR. The weapons being carried by them (.315 rifle) were also identified and expressly mentioned in the Fard-e-beyan. In the circumstances, had the appellant been actually present at the place of occurrence, there is no reason why his name along with his father and brother, should not have figured in the FIR. In case the informant missed him, PW6 would have given his name who was undeniably present at the time of recording of the Fard-e-beyan and who had signed it as one of the witnesses. [Para 20] [641-F-H; 642-A]

3.5. In this country, even while correctly naming the accused in cases of serious offences, it is endemic that some other innocent persons or even such of the members of the family of the accused who might not be present at the time of commission of offence are also roped in and falsely implicated. Had the appellant been identified at the time of commission of the offence, his name would have surely figured in the FIR. Though he was not identified as one of the accused at the time of the commission of the offence, he was later named among the accused. It is difficult to accept the evidence of PW6 insofar as he names the appellant also as one of the members of the unlawful assembly. [Paras 22, 23] [642-D-G]

3.6. This leaves PW5 only who claims to have seen the appellant among the accused while they were going away after the commission of the offence. But his statement was admittedly recorded by the police after ten or twenty days of the occurrence and till then he had not disclosed the name of the appellant as one of the accused

to PW4 or to any one else. In the facts and circumstances, it becomes difficult even to accept the testimony of PW5 insofar as the appellant is concerned. [Para 24] [642-G-H; 643-A]

3.7. In view of the evidence in the instant case, it will not be wholly safe to maintain the conviction of the appellant under section 302 of IPC and applying the rule of caution, he must be given the benefit of doubt. The conviction of the appellant and the sentence given to him is set aside. [Para 25] [643-B-C]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1283 of 2010.

From the Judgment & Order dated 10.9.2007 of the High Court of Judicature at Patna in Criminal Appeal Nos. 427 and 394 of 2001 (DB).

Nagendra Rai, Smarhar Singh, Preeti Reshmi and Alok Kumar for the Appellant.

Gopal Singh for the Respondent.

The Judgment of the Court was delivered by

AFTAB ALAM, J. 1. The appellant Sajjan Sharma stands convicted under section 302 of the Penal Code and sentenced to rigorous imprisonment for life.

2. The prosecution case that led to the conviction and sentence of the appellant is based on the Fard-e-beyan (Ext. 3) of one Mukesh Kumar (PW4) recorded by the officer-in-charge of Bihpur Police Station on November 24, 1994, at 4.00 p.m. at David Door Bahiar of village Marba (in local dialect 'bahiar' is the word for the agricultural lands at a distance from the dwelling part of the village). In his statement before the police officer, Mukesh Kumar stated that on that day at about 10.00 a.m., he along with his uncles Narain Kunwar and Bauku Kunwar had gone to the corn fields in David Door Bahiar

carrying a licensed .315 rifle and some rounds. There, they supervised the scattering of fertilizer over the land by the farm labourers. The work was over by 2.30 p.m. and then the labourers left. In the meanwhile, one Gunanand Sharma/ Sanghai, (PW3) s/o Ram Avtar Sharma of Amarpur Village came there to meet Narain Kunwar. He (the informant) and his uncle Bauku Kunwar were chatting, sitting at the other corner of the field. At that time the accused, Bodhan Rai @ Prabhu Narain Rai s/o Basu Rai came there carrying a rifle which is called a semi-rifle. He was wearing around his neck a belt full of cartridges. Accompanying him were Satto Sharma s/o Lalho Sharma who was carrying a .315 rifle, Shambhu Sharma s/o Satto Sharma carrying a .315 rifle, Sukesh Kunwar s/o Naney Kunwar holding a '3 nought' rifle, Paro Kunwar s/o Naney Kunwar holding a '3 nought' rifle and three unknown persons who were also carrying rifles. All the named accused were from the same village as the informant.

3. All the accused went up to his uncle, who on seeing them asked Gunanand to call the informant and his other uncle Bauku. As Gunanand came towards them, Bodhan Rai snatched the rifle from the hands of his uncle and pushed him towards south. Watching this, the informant, Bauku Kunwar and Gunanand started shouting as to where they were taking his uncle. Suddenly, Bodhan Rai fired a shot from his rifle in the air and warned them to go back, whereupon they got frightened and slowly fell back. Then, he took his uncle to the field of Laxmi Mishra that was vacant. All the while they were shouting and raising alarm to save their uncle. Then, Bodhan Rai, calling his uncle as "the bastard" exclaimed that he should be killed there only, lest others would come on alarm. Uttering those words, Bodhan Rai fired a shot hitting his uncle in the abdomen. His uncle fell down twisting on the ground. Then, Bodhan Rai again said that they would torture the bastard to death. On this, Shambhu Sharma and Sukesh Sharma also fired shots at him. His uncle was writhing in pain when Bodhan Rai put the barrel of the rifle near the ears of his uncle and fired another shot and

said to his fellow accused that they should go as he was finished.

4. The informant further said that they were watching from a little distance when Bodhan Rai turned towards them and said that if they gave evidence, they would also meet the same fate. The informant also said that his uncle was killed due to enmity from before, and earlier also Bodhan Rai had tried to kill his uncle. The informant further said that after the accused persons had left, he went near his uncle and saw that his uncle was lying dead with the face downward on the ground. On the report of the gun shots and their shouting, several persons from the vicinity gathered there. Bodhan Rai also carried away the licensed rifle of his uncle. He did not remember the number of his rifle.

5. The informant concluded by saying that his uncle was killed by Bodhan Rai @ Prabhu Narain Rai s/o Basu Rai, Satto Sharma s/o Lalho Rai, Shambhu Sharma s/o Satto Sharma, Sukesh Kunwar s/o Naney Kunwar, Paro Kunwar s/o Naney Kunwar, and other unknown persons, colluding together, due to old enmity, who also snatched away his licensed rifle no.AB0202.

6. He finally said that what was recorded by the police officer was his statement; he had read and understood it and finding it true put his signature in the presence of witnesses. The Fard-e-beyan was signed besides the informant Mukesh Kumar, by Bauku Kunwar and Gunanand Sanghai as witnesses.

7. The Fard-e-beyan was incorporated in the formal FIR (Ext. 5), instituted at 9.00 p.m. on the same date, giving rise to Bihpur P.S. case no.224/94 dated November 24, 1994 under sections 302, 379, 34 of the Penal Code and under section 27 of the Arms Act.

8. The first thing that needs to be noted in connection with

the Fard-e-beyan is that the appellant Sajjan Sharma is not named there as one of the accused. The Fard-e-beyan was recorded soon after the occurrence when there was hardly any time for deliberation and for false implication of anyone who was actually not among the accused. It gave the names of five accused, apart from the three persons who were unknown. All the five named accused were from the same village as the informant and his uncle Bauku Kunwar. Among the five accused the Fard-e-beyan gave the names of Satto Sharma, the father of the appellant and his brother Shambhu Sharma, the other son of Satto Sharma. More importantly, Bauku Kunwar, who later named the appellant in his deposition before the court was not only present at the time of recording of the Fard-e-beyan but had actually signed it as one of two witnesses.

9. The police after investigation submitted chargesheet against seven accused persons of whom five were named in the Fard-e-beyan/FIR and two namely, Sajjan Sharma (the appellant) and Mantu Chaudhri were not named in the Fard-e-beyan/FIR. In the charge-sheet three accused namely, Sukesh Kumar, Paro Kunwar and Mantu Chaudhri were shown as absconders and the rest were in custody. Later Paro Kunwar was apprehended and he was also put on trial along with the accused who were in custody. The ACJM, Naugachia separated the case of the two accused who remained absconding by order dated August 16, 1996, and the other five accused were put on trial. Later on Satto Sharma, the father of the appellant and the accused Shambhu Sharma died and in so far as he was concerned, the proceedings abated. The trial continued in respect of the four accused, including the appellant.

10. On the basis of the evidences adduced before it, the trial court (First Additional District and Sessions Judge, Naugachia) found and held that the prosecution was able to fully establish the guilt of the accused and by judgment and order dated August 2, 2001, convicted all the four accused under

section 302 of the Penal Code and section 27 of the Arms Act and sentenced them to rigorous imprisonment for life under section 302 of the Penal Code and rigorous imprisonment for 1 year under section 27 of the Arms Act. Bodhan Rai was also convicted under section 379 of the Penal Code and sentenced to rigorous imprisonment for 3 years. All the sentences of the accused were directed to run concurrently.

11. Bodhan Rai died after the judgment of the trial court. The rest of the three accused, including the appellant preferred separate appeals before the Patna High Court (being Criminal Appeal Nos. 391, 394 and 427 of 2001). All the three appeals were consolidated and heard together and were dismissed by judgment and order dated September 10, 2007. Against the judgment of the High Court, the two brothers Shambhu Sharma and Sajjan Sharma (the present appellant) jointly filed the SLP. (It is reported the third accused Paro Kunwar did not file any appeal against the judgment of the High Court). The SLP insofar as Shambhu Sharma is concerned was dismissed but the appellant was granted leave to appeal. That is how the appellant alone stands in appeal before this Court from amongst the several accused who were charge-sheeted and who later faced trial on the charge of killing Narain Kunwar.

12. Before adverting to the merits of the appellant's case, we need to take a look at the charge framed against the accused. Curiously, the trial court charged all the five accused (before Satto Sharma had died) only under section 302 of the Penal Code, without the aid of either section 149 or section 34 of the Penal Code. Equally inexplicably, the trial court did not charge the accused under section 148 of the Penal Code. Apart from section 302 of the Penal Code all the accused were charged under section 27 of the Arms Act; accused Bodhan Rai was additionally charged under section 379 of the Penal Code for taking away the rifle of the deceased.

13. Taking advantage of the highly flawed charge framed by the trial court, Mr. Nagendra Rai, Senior Advocate,

appearing for the appellant submitted that the appellant's conviction cannot be legally sustained under section 302 of the Penal Code alone. Mr. Rai further submitted that both PWs 4 and 6, the two prosecution witnesses who in their deposition before the court mentioned the name of the appellant did not attribute to him any overt act at all but simply named him among the accused. Hence, even if the prosecution evidence were to be accepted without any question the appellant could not be held guilty of committing murder without imputing to him a shared object or intention to commit the offence with the other accused.

14. Here we may also take a look at the examination of the appellant by the court under section 313 of the Code of Criminal Procedure. This examination too is highly unsatisfactory and sketchy. The first question by the court to the appellant (and for that matter to all the accused) was:

> "There is evidence against you that on 24.11.94 at Davidor Bahiyar in concert with the other accused (you) killed Narain Kunwar by firing shot at him."
>
> The appellant replied:
>
> "It is wrong (to say that)"
>
> Whereupon the court put the second and the last question:
>
> "In defence you wish to say anything?"
>
> The appellant replied:
>
> "I am innocent."

15. We are constrained to say that this is not an isolated case but it is almost a stereotype. It is our experience that in criminal trials in Bihar no proper attention is paid to the framing of charges and the examination of the accused under section 313 of the Code of Criminal Procedure, the two very important

stages in a criminal trial. The framing of the charge and the examination of the accused are mostly done in the most unmindful and mechanical manner. We wish that the Patna High Court should take note of the neglectful way in which some of the Courts in the State appear to be conducting trials of serious offences and take appropriate corrective steps.

16. Having regard to the charge that was framed against the appellant and his examination by the court under section 313 of the Code of Criminal Procedure the point raised by Mr. Rai cannot be said to be entirely without substance but we see no reason to go into that technical aspect of the matter since we find that the appellant has a good case on merit as well.

17. The prosecution examined eight witnesses in support of its case. PWs 1 and 2 (Bihari Mandal and Sadanand Kumar) stated that they did not know anything about the occurrence and they had not given any statement before the police. They were declared hostile. PW3 (Gunanand Sharma) who was the brother-in-law of the deceased, Narain Kunwar and who was not only present at the time of recording of the Fard-e-beyan but had also signed it as a witness along with Bauku Kunwar also turned hostile and said that he did not know who killed Narain Kunwar. In cross-examination he also said that his brother-in-law had enmity with a large number of people. PW4, Mukesh Kumar, the informant and PW6, Bauku Kunwar are the two eye witnesses. PW5, Binodanand Kumar did not claim to have witnessed the actual occurrence but said that on the date of occurrence, at about 2:30 in the afternoon he heard the report of the gun shots and saw some of the accused fleeing away with .315 rifles. PW7 is the doctor who conducted post mortem on the body of Narain Kunwar. PW8, Ranjit Kumar Mishra is the investigating officer of the case.

18. In view of the evidences of PWs 4, 6 and 5 coupled with the medical evidence there is no room for doubt that Narain Kunwar was killed in the manner as stated by the prosecution. But the question is whether or not the appellant

was one of the accused taking part in the commission of the offence.

19. PW4, Mukesh Kumar in his deposition before the court stated what he had said in the Fard-e-beyan. He did not name the appellant as one of the accused. The name of the appellant figures in the deposition of PW6, Bauku Kunwar. PW6 named the appellant and Mantu Chaudhri (absconding) and Munna Sharma (not charge-sheeted), in addition to the five accused named in the FIR. He did not assign them any particular weapon but said that they were carrying different arms and weapons. He then stated that all the accused surrounded Narain but beyond this he did not assign any role to the appellant. PW5, Binodanand Kumar stated that on the date of the occurrence he was scattering fertilizer in his banana field when all of a sudden on hearing the sound of firing and noise, he looked around and saw the accused persons, including the appellant coming from the Gohal. He saw a rifle in the hands of Shambhu Sharma and 2 rifles in the hands of Bodhan Rai who passed him close by. The rest of the accused were carrying some small and big '3 noughts'. In cross examination he stated that he had told Mukesh (PW4) that he had seen the accused persons running away. But he had not said the names of all the accused persons to Mukesh. He further stated that the Inspector recorded his statement about 10-20 days after the occurrence.

20. It is noted above that the appellant was not named in the FIR. The appellant lived in the same village as the informant and PW6, Bauku Kunwar. The appellant's father and brother were seen as members of the unlawful assembly and were duly named in the Fard-e-beyan/FIR. The weapons being carried by them (.315 rifle) were also identified and expressly mentioned in the Fard-e-beyan. In regard to Shambhu Sharma, it was stated that after the first shot fired by Bodhan Rai, he and Sukesh Sharma also fired at the victim. In those circumstances, had the appellant been actually present at the place of occurrence, there is no reason why his name along with his

father and brother, should not have figured in the FIR. In case the informant missed him, PW6 Bauku Sharma would have given his name who was undeniably present at the time of recording of the Fard-e-beyan and who had signed it as one of the witnesses.

21. PW6 in his deposition before the court made a statement suggesting that his statement was recorded by the police on the date of the occurrence itself after recording the statement of Mukesh but Mr. Nagendra Rai submitted that from the records it appeared that his statement was taken by the police on the day following the date of occurrence.

22. In this country, even while correctly naming the accused in cases of serious offences, it is endemic that some other innocent persons or even such of the members of the family of the accused who might not be present at the time of commission of offence are also roped in and falsely implicated. Satto Sharma, named as accused no.5 in the FIR, had two sons-Shambhu Sharma and Sajjan Sharma, the present appellant. Satto Sharma himself and Sambhu Sharma were duly named as the accused. Had the appellant been identified at the time of commission of the offence, his name would have surely figured in the FIR. It appears that though he was not identified as one of the accused at the time of the commission of the offence, it was later realized that one of the sons of Satto Sharma was left out and he too was later named among the accused.

23. For the reasons as discussed above, we are unable to accept the evidence of PW6 insofar as he names the appellant also as one of the members of the unlawful assembly.

24. This leaves PW5 only who claims to have seen the appellant among the accused while they were going away after the commission of the offence. But his statement was admittedly recorded by the police after ten or twenty days of the occurrence and till then he had not disclosed the name of the

appellant as one of the accused to Mukesh or to any one else. In the facts and circumstances as discussed above, it becomes difficult even to accept the testimony of PW5, Binodanand Kumar insofar as the appellant is concerned.

25. In this state of evidence, it will not be wholly safe to maintain the conviction of the appellant under section 302 of the Penal Code and applying the rule of caution, he must be given the benefit of doubt. We, accordingly, allow the appeal and set aside the conviction of the appellant and the sentence given to him. The appellant is directed to be released forthwith unless he is wanted in some other criminal case.

26. Let a copy of this order be placed before the Hon'ble Judge of the Patna High Court, in-charge of the State's Judicial Academy.

B.B.B. Appeal allowed.

MANOJ YADAV

v.

PUSHPA @ KIRAN YADAV & ORS.

(Criminal Appeal No. 107 of 2001)

JANUARY 11, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Code of Criminal Procedure, 1973:

s.125 – Maintenance to wife – Enhanced by High Court to Rs.4000/- per month – Challenged – Plea that State amendment allowed maintenance upto Rs.3000/- per month only – HELD: Section 125 has been further amended in Madhya Pradesh by a subsequent amendment of 2004 which does not contain any upper limit in the maintenance to be granted u/s 125 and it is left to the discretion of the Magistrate – Moreover, after the amendment to s.125, by the Code of Criminal Procedure (Amendment) Act, 2001 which deleted the words "not exceeding five hundred rupees in the whole", all State amendments to s. 125 by which a ceiling has been fixed to the amount of maintenance to be awarded to the wife have become invalid.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 107 of 2011.

From the Judgment & Order dated 23.1.2009 of the High Court of Madhya Pradesh Judicature at Jabalpur, bench at Gwalior in Criminal Revision No. 12 of 2008.

S.K. Dubey, Shail Kr. Dwivedi, AAG, Kamini Jaiswal, Jai Prakash Pandey, Shantanu Singh, Nikilesh Ramachandran, Alok Pandey, Gopal Singh, Rituraj Biswas, Sanjay V. Kharde, Asha Gopalan Nair, Kusumanjali Sharma, C.D. Milind Kumar, Manoj Kr. Dwivedi, Ashutosh Kr. Sharma, Gunnam

Venkateswara Rao, Aviral Shukla, Upendra Mishra for the appearing parties.

The following Order of the Court was delivered

ORDER

Heard learned counsel for the parties.

We also wish to express our appreciation of Ms. Kamini Jaiswal, learned counsel, whom we had appointed as Amicus Curiae in the case, and she has been of great assistance to us.

Leave granted.

This Appeal has been filed against the impugned judgment of the High Court of Madhya Pradesh, Bench at Gwalior, dated 23.01.2009 passed in Criminal Revision No. 12/2008. That judgment was given in a criminal revision filed against the order dated 04.10.2007 of the learned Additional Family Court, Gwalior granting maintenance of Rs. 1,500/- per month under Section 125 Cr.P.C. to respondent No.1. Respondent No.1 by means of her criminal revision applied for enhancement of the maintenance.

By the impugned judgment the High Court has granted a sum of Rs. 4,000/- per month as maintenance with effect from 01.01.2009 to the wife-respondent No.1 in this case. That order has been challenged before us.

Learned counsel for the appellant submitted that the amount which could be granted as maintenance under Section 125 Cr.P.C. in the State of Madhya Pradesh could at most be Rs. 3,000/- in view of the amendment to Section 125 Cr.P.C. by Madhya Pradesh Act 10 of 1998. It appears that Section 125 Cr.P.c. has been further amended in Madhya Pradesh by a subsequent amendment by Madhya Pradesh Act 15 of 2004 which does not contain any upper limit in the maintenance to

be granted under Section 125 Cr.P.C. and it is left to the discretion of the magistrate. Hence, there is no substance in the submission of the learned counesl for the appellant.

Moreover, we are of the opinion that after the amendment to Section 125 Cr.P.C., which is a Central Act, by the Code of Criminal Procedure (Amendment) Act, 2001 which deleted the words “not exceeding five hundred rupees in the whole”, all State amendments to Section 125 Cr.P.C. by which a ceiling has been fixed to the amount of maintenance to be awarded to the wife have become invalid.

For the reasons given above, there is no merit in the Appeal and it is dismissed accordingly.

R.P. Appeal dismissed.

KAMLESHWAR PASWAN
v.
STATE OF U.T. CHANDIGARH
(Criminal Appeal Nos.739-749 of 2009)

JANUARY 11, 2011

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

Penal Code, 1860: ss.302, 307 – Murder – Lathi blows given by accused-father to his three children resulting in death of 2 – Conviction u/s.302 and award of death sentence – Appeal against conviction and sentence – Held: Evidence of eye witnesses was supported by the medical evidence – The nature of the injuries revealed that they were the result of a direct attack in a brutal and violent manner with a lathi – The defence story projected by the wife of the accused not acceptable in view of the opinion of the doctor that the injuries suffered by the three victims could not have been caused in the manner suggested by her – However, the case did not fall under the category of the rarest of the rare case – The offence was committed while the accused was in an inebriated condition and after a quarrel with his wife – The accused was a rickshaw puller aged about 28 years and a migrant in Chandigarh with the attendant psychological and economic pressures – To meet the ends of justice, appeal filed by accused allowed to the extent of substitution of death sentence by imprisonment for life.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal NOs. 739-740 of 2009.

From the judgment & Order dated 30.04.2008 of the High Court of Panjab & Haryana at Chandigarh in Murder Reference No. 9 of 2007 and criminal appeal No. 1-DB of 2008

S. Usha Reddy for the Appellant.

Kamini Jaiswal, Advocate., for the Respondent.

The following order of the Court was delivered by

This is indeed a very unfortunate case.

On 15th January, Gurnam Singh (PW.3), a resident of House No.1 in village Kishangarh in the Union Territory of Chandigarh, had gone to meet a servant of one Milkha Singh for some personal work. As he reached the house of Pritam Singh, he found a woman standing outside shouting "killed them-killed them". PW.3, Gurnam Singh, also heard the voice of a screaming child from inside the house of Pritam Singh. PW.3 forced open the door and saw the accused/appellant Kamleshwar Paswan beating his three children with a wooden stick and Yashoda, the daughter of the appellant, lying on one side with serious injuries. He also noticed that the appellant's sons Sunil Paswan and Suraj Paswan (aged one and three years respectively) had also suffered injuries and were unconscious. Gurnam Singh PW accompanied by Sunaina (DW.2), the wife of the accused/appellant, took the children to Sharma Clinic in village Kishangarh. The Doctor told them that as the children were in a serious condition they should be taken to the PGI, Chandigarh. In the meantime a vehicle from the Police Control Room reached Sharma Clinic and PW.3 and DW.2 along with the three injured children were taken to the General Hospital, Sector 16, Chandigarh which referred them further to the PGI, for treatment. In the PGI PW.3 made a statement to PW.14 SI Sunehara Singh narrating the above facts on which a First Information Report was registered under Section 307 of the IPC at Police Station, Manimajra in the Union Territory of Chandigarh. The two boys thereafter died and case under Section 302 of the IPC was added on. PW.14 also visited the place of occurrence and made the necessary investigations. A challan was ultimately filed under Sections

302 and 308 of the IPC and the appellant was committed to stand trial. The Trial Court relying on the eye witnesses account of PW.1 Vinod, PW.2-Anil Kumar, the immediate neighbours of the appellant and his family and PW.3 Gurnam Singh held that the case against the appellant stood proved beyond doubt. Sunaina, the wife of the appellant, however, appeared as a defence witness and gave a statement that the three children had received injuries accidently and that the appellant had no role to play. The Trial Court relying on evidence of the three prosecution witnesses mentioned above as supported by the medical evidence given by PW.4-Dr. Dlbar Singh, who had conducted the post-mortem examination on the dead bodies and had also examined the injuries on Yashoda, convicted the appellant under Section 302 and 307 of the IPC and sentenced him to death for the murder of his two sons. No separate sentence was awarded for the offence under Section 307 of the IPC. The matter was thereafter referred to the High Court for the confirmation of the death sentence and the appellant also filed an appeal. The High Court has, by the impugned judgment, confirmed the death sentence and dismissed the appeal. The matter is before us in these circumstances.

We have heard the learned counsel for the parties very carefully. We see that the case of the prosecution is clearly spelt out from the evidence. No fault can be found with the eye-witness account of PWs. 1, 2 and 3 and their statements are clearly supported by the evidence of the Doctor PW.4. The defence story projected by DW.2, the wife of the appellant, is on the face is unacceptable as the Doctor opined that the injuries suffered by the three victims could not have been caused in the manner suggested by her. The very nature of the injuries clearly reveal that they were the result of a direct attack in a brutal and violent fashion with a lathi.

Mrs. S.Usha Reddy, the Legal Aid Counsel for the appellant, has however, pointed out that the present case did not fall under the category of the rarest of the rare cases in the

light of the fact that the appellant was a young man of 28 years on the date of the incident and that the offence had been committed by him (as per the prosecution story) while he was in an inebriated condition and after a quarrel with his wife. We cannot also ignore the fact that he was a rickshaw puller and a migrant in Chandigarh with the attendant psychological and economic pressures that so often overtake and overwhelm such persons. Village Kishangarh is a part of the Union Territory of Chandigarh and a stone throw from its elite Sectors that house the Governors of Punjab and Haryana, the Golf Club, and some of the cities most important and opulent citizens. It goes without saying that most such neighbourhoods are often the most unfriendly and indifferent to each others needs. Little wonder his frustrations apparently came to the fore leading to the horrendous incident. Nevertheless keeping in view the overall picture and in the light of what has been mentioned above, we feel that the ends of justice would be met if the appeal is allowed to the extent that the death sentence is substituted by a term of life imprisonment.

We accordingly dismiss the appeals but commute the sentence from death to life.

D.G. Appeals dismissed.

GHISALAL

v.

DHAPUBAI (DEAD) BY LRS. AND ORS.

(Civil Appeal Nos.6373-6374 of 2002)

JANUARY 12, 2011

[G.S. SINGHVI AND ASOK KUMAR GANGULY, JJ.]

Hindu Adoption and Maintenance Act, 1956:

s.7, proviso – Consent of wife is a condition precedent for adoption by a male Hindu – Consent should either be in writing or reflected by an affirmative/positive act voluntarily and willingly done by her – Presence of wife as a spectator in the assembly of people who gather at the place where the ceremonies of adoption are performed cannot be treated as her consent – Wife's silence or lack of protest on her part also would not give rise to an inference that she had consented to the adoption – In the instant case, Ghisalal claimed right in properties of Gopalji on the ground that Gopalji had adopted him with the consent of his wife Dhapubai – All the courts below held that the consent of Dhapubai could be presumed because she was present in the ceremonies of adoption – High Court went a step further and observed that failure of Dhapubai to challenge the adoption deed was a strong circumstance to show that she had consented to the adoption of Ghisalal by her husband – Courts below completely ignored that presence of Dhapubai in the ceremonies of adoption was only as a mute spectator and not as an active participant – Neither Ghisalal nor any of the witnesses examined by him stated that before taking Ghisalal in adoption, Gopalji had consulted Dhapubai or taken her in confidence and that the latter had given her consent or agreed to the adoption or that she had taken prominent part in the adoption ceremonies – All of them made a parrot like statement that Dhapubai was

sitting with other women below the chabutra – No evidence was produced by Ghisalal to prove that Dhapubai was a signatory to the adoption deed or was present at the time of its execution and/or registration – Therefore, the contents of adoption deed could not be made basis for assuming that Dhapubai was a party to the adoption – Testimony of Kishanlal, the natural father of Ghisalal was most crucial and yet he was not examined – The concurrent finding recorded by the courts below that Gopalji had adopted Ghisalal with the consent of Dhapubai was perverse inasmuch as the same was based on unfounded assumptions and pure conjectures – Dhapubai had succeeded in proving that the adoption of Ghisalal by Gopalji was not valid – Therefore, the suit filed by Ghisalal for partition of properties belonging to Gopalji was not maintainable.

s.7, proviso – Interpretation of the term 'consent' used in the proviso – Held: The term 'consent used in the proviso to s.7 and the explanation appended thereto has not been defined in the Act – Therefore, while interpreting the provision, the court has to keep in view the legal position obtaining before enactment of the 1956 Act, the object of the new legislation and apply the rule of purposive interpretation and if that is done, it would be reasonable to say that the consent of wife envisaged in the proviso to s.7 should either be in writing or reflected by an affirmative/positive act voluntarily and willingly done by her – Interpretation of statutes – Purposive interpretation.

Hindu law: Old and present law relating to adoption – Comparison between – Hindu Adoption and Maintenance Act, 1956.

The case of the appellant was that one Gopalji had taken him in adoption at the age of 5-6 years in 1959. He gave description of the adoption ceremonies by stating

that his natural father, Kishanlal had made him to sit in the lap of Gopalji and the latter accepted him as the adopted son. The deed of adoption was executed and got registered on 25.6.1964. Dhapubai, the wife of Gopalji had consented to the adoption.

The appellant filed a suit for partition with a prayer that he should be given one half share in the properties belonging to Gopalji. In the said suit, he challenged gift deed dated 22.10.1966 executed by Gopalji in favour of Dhapubai and sale deed dated 19.1.1973 executed by the latter in favour of one Sunderbai in respect of one parcel of land. Later on, an amendment was also made in the plaint that gift deed dated 29.11.1944 was invalid, inoperative and ineffective and did not affect his right to get share in the ancestral properties. He alleged that the gift deeds were obtained by fraud. In her written statement, Dhapubai not only disputed the adoption of Ghisalal by Gopalji, but categorically averred that she had not consented to the adoption. She also questioned the *locus standi* of Ghisalal to challenge the gift deeds.

The trial court held that the suit properties were ancestral properties of Gopalji and the appellant was validly adopted son of Gopalji and the consent of Dhapubai could be presumed from her presence in the adoption ceremonies; and the gift deeds and Will were not valid. The first appellate court upheld the order of the trial court. The High Court confirmed the findings recorded by the two courts on the legality of Ghisalal's adoption by Gopalji and that Ghisalal was not entitled to challenge the gift deed dated 29.11.1944 but held that Will Dated 27.10.1975 could not be treated to have been validly executed by Gopalji. Ghisalal and Dhapubai filed instant appeals before this Court.

Disposing of the appeals, the Court

HELD: 1. Section 6 of the Hindu Adoptions and Maintenance Act, 1956 lays down that no adoption shall be valid unless the person adopting has the capacity as also the right to take in adoption; the person giving in adoption has the capacity to do so; the person adopted is capable of being taken in adoption, and the adoption is made in compliance with the other conditions mentioned in Chapter II. Section 7 lays down that any male Hindu who is of sound mind and is not minor has the capacity to take a son or a daughter in adoption. This is subject to the rider enshrined in the proviso which lays down that if the male Hindu has a wife living then he shall not adopt except with the consent of his wife unless she is incapacitated to give the consent by reason of her having completely and finally renounced the world or her having ceased to be a Hindu or she has been declared by a court of competent jurisdiction to be of unsound mind. The explanation appended to Section 7 lays down that if a person has more than one wife living at the time of adoption, then the consent of all the wives is *sine qua non* for a valid adoption unless either of them suffers from any of the disabilities specified in the proviso to Section 7. Section 12 deals with effects of adoption. It declares that from the date of the adoption, an adopted child is deemed to be a child of his/her adoptive father or mother for all purposes and his ties in the family of his or her birth shall stand severed and replaced by those created in the adoptive family. Clause (b) of the proviso to Section 12 saves the vested right of the adopted child in the property subject to the obligations, if any, attached to the ownership of such property, including the obligation to maintain relatives in the family of his or her birth. Likewise, clause (c) to the proviso lays down that the adopted child shall not divest any person of any estate vested in him or her before the date of adoption. Section 16 which embodies a rule of presumption lays down that

whenever any document registered under any law for the time being in force evidencing adoption and signed by the person giving and person taking the child in adoption is produced before any court, then it shall presume that the adoption has been made after complying with the provisions of the Act unless proved otherwise. [Para 17] [673-C-H; 674-A-C]

2.1. In Indian society, a male spouse enjoyed the position of dominance for centuries together. This was particularly so in Hindu families. Under the old Hindu Law, a Hindu male had an absolute right to adopt a male child and his wife did not have the locus to question his right or to object to the adoption. A wife could adopt a son to her husband but she could not do so during her husband's lifetime without his express consent. After his death, she could adopt a son to him, in certain parts of India, only if he had expressly authorized her to do so. In other parts of India, she could adopt without such authority. However, in no case a wife or a widow could adopt a son to herself. An adoption by a woman married or unmarried of a son to herself was invalid and conferred no legal rights upon the adopted person. A daughter could not be adopted by a male or a female Hindu. The physical act of giving was a prime necessity of the ceremonial requirements relating to adoption. As to *datta homam*, that is, oblations of clarified butter to fire, the law was not finally settled and there was divergence of judicial opinion. After India became a sovereign, democratic republic, this position has underwent a sea change. The old Hindu Law was codified to a large extent on the basis of constitutional principles of equality. The Hindu Marriage Act, 1955 codifies the law on the subject of marriage and divorce. The Hindu Succession Act, 1956 codifies the law relating to intestate succession. The Hindu Minority and Guardianship Act, 1956 codifies the law relating to minority and guardianship among Hindus.

The 1956 Act is also a part of the scheme of codification of laws. Once the Hindu Succession Act was passed giving equal treatment to the sons and daughters in the matter of succession, it was only logical that the fundamental guarantee of equality of a status and equality before law is recognized in the matter of adoption. The 1956 Act now provides for adoption of boys as well as girls. By virtue of the proviso to Section 7, the consent of wife has been made a condition precedent for adoption by a male Hindu. The mandatory requirement of the wife's consent enables her to participate in the decision making process which vitally affects the family. If the wife finds that the choice of the person to be adopted by the husband is not appropriate or is not in the interest of the family then she can veto his discretion. A female Hindu who is of a sound mind and has completed the age of eighteen years can also take a son or daughter in adoption to herself and in her own right. A female Hindu who is unmarried or a widow or a divorcee can also adopt a son to herself, in her own right, provided she has no Hindu daughter or son's daughter living at the time of adoption [Sections 8, 11(1) and 11(2)]. However, if she is married, a female Hindu cannot adopt a son or a daughter during the lifetime of her husband unless the husband is of unsound mind or has renounced the world. By incorporating the requirement of wife's consent in the proviso to Section 7 and by conferring independent right upon a female Hindu to adopt a child, Parliament has tried to achieve one of the facets of the goal of equality enshrined in the Preamble and reflected in Article 14 read with Article 15 of the Constitution. [Paras 18, 19] [674-D-H; 675-A-G]

2.2. The term 'consent' used in the proviso to Section 7 and the explanation appended thereto has not been defined in the Act. Therefore, while interpreting these provisions, the court shall have to keep in view the legal

position obtaining before enactment of the 1956 Act, the object of the new legislation and apply the rule of purposive interpretation and if that is done, it would be reasonable to say that the consent of wife envisaged in the proviso to Section 7 should either be in writing or reflected by an affirmative/positive act voluntarily and willingly done by her. If the adoption by a Hindu male becomes subject matter of challenge before the Court, the party supporting the adoption has to adduce evidence to prove that the same was done with the consent of his wife. This can be done either by producing document evidencing her consent in writing or by leading evidence to show that wife had actively participated in the ceremonies of adoption with an affirmative mindset to support the action of the husband to take a son or a daughter in adoption. The presence of wife as a spectator in the assembly of people who gather at the place where the ceremonies of adoption are performed cannot be treated as her consent. In other words, the Court cannot presume the consent of wife simply because she was present at the time of adoption. The wife's silence or lack of protest on her part also cannot give rise to an inference that she had consented to the adoption. [Para 20] [675-H; 676-A-E]

3.1. This Court is extremely loath to interfere with the concurrent finding of fact recorded by the courts below more particularly when such finding has been approved by the High Court. In such matters, interference is warranted only when this Court is convinced that the finding is *ex facie* perverse. A finding of fact can be treated as perverse if it is based on no evidence or there is total misreading of pleadings and/or evidence of the parties or the finding is based on unfounded assumptions or conjectures. [Para 23] [680-A-B]

3.2. In support of his claim that he had been adopted by Gopalji, Ghisalal appeared in the witness box as PW-1 and examined PW-2, PW-3 and PW-4. He produced copy of the deed of adoption (Exhibit P-1), the plaint (Exhibit P-21) of Suit No.76A of 1964 filed by one Pannalal in which he and Gopalji were impleaded as defendant Nos.1 and 2 and copies of the written statements (Exhibits P-2 and P-3) filed in that suit. He also examined witnesses to prove these documents. In the cross-examination, Ghisalal disclosed that his father Kishanlal had got him admitted in the school and in the school records, the name of his natural father Kishanlal was entered. In the cross-examination, he stated that at the time of registration, Gopalji, his father Kishanlal and Dhapubai had come along with him but he did not know whether Dhapubai had signed on the registry. He also stated that there was no talk of obtaining signature of Dhapubai in his presence but volunteered to say that she was agreeable. The other three witnesses also spoke about the ceremonies of adoption. According to them, Dhapubai was sitting below the platform (chabutra). In her statement, Dhapubai categorically stated that Gopalji had not obtained her consent for the adoption of Ghisalal and that she had not gone to tehsil for the purpose of registry. Dhabubai also stated that she did not know whether Gopalji had gone to tehsil and got the registry of adoption deed. She expressed ignorance about the adoption of Ghisalal by Gopalji. She then stated that she did not want to take anyone in adoption. She also spelt reasons for some of the PWs deposing in favour of Ghisalal. The other witnesses examined by Dhapubai, namely, DW-2, DW-3, DW-4 and DW-5 also expressed their ignorance about the adoption of Ghisalal by Gopalji. [Paras 25, 27] [680-G-H; 681-C-G; 682-A-C]

3.3. The trial court, the lower appellate court and the High Court misdirected themselves in deciding the issue

relating to Dhapubai's consent to the adoption of Ghisalal by Gopalji. All the courts held that the consent of Dhapubai could be presumed because she was present in the ceremonies of adoption. The High Court went a step further and observed that failure of Dhapubai to challenge the adoption deed is a strong circumstance to show that she had consented to the adoption of Ghisalal by her husband. Unfortunately, all the courts completely ignored that presence of Dhapubai in the ceremonies of adoption was only as a mute spectator and not as an active participant. Neither Ghisalal nor any of the witnesses examined by him stated that before taking Ghisalal in adoption, Gopalji had consulted Dhapubai or taken her in confidence and the latter had given her consent or agreed to the adoption of Ghisalal or that she had taken prominent part in the adoption ceremonies. All of them made a parrot like statement that Dhapubai was sitting with other women below the platform (chabutra). By no stretch of imagination, this could be equated with her active participation in the adoption ceremonies so as to enable the courts to draw an inference that she had given consent for the adoption of Ghisalal. [Para 30] [684-C-G]

3.4. Another grave error committed by all the courts was that they had presumed the consent of Dhapubai by relying upon the contents of the deed of adoption (Exhibit P-1) in which Gopalji was said to have recorded that it was his and his wife's esteemed desire to take Ghisalal in adoption. It was neither the pleaded case of Ghisalal nor any evidence was produced by him to prove that Dhapubai was a signatory to Exhibit P-1 or that she was present at the time of execution and/or registration of Exhibit P-1. Therefore, the contents of Exhibit P-1 could not be made basis for assuming that Dhapubai was a party to the adoption of Ghisalal. The so called failure of Dhapubai to challenge Exhibit P-1 cannot be

used against her because Ghisalal did not adduce any evidence to show that after execution of the deed of adoption, Dhapubai was made aware of the same or a copy thereof was made available to her. In the absence of such evidence, it cannot be assumed that Dhapubai was aware of the execution and registration of the deed of adoption and she deliberately omitted to challenge the same. [Paras 31, 32] [684-H; 685-A-D]

4.1. While analyzing and evaluating the evidence of the parties, the courts below failed to notice an important lacuna in Ghisalal's case, that is, non examination of Kishanlal who, as per Ghisalal's own version had not only taken active part in the ceremonies of adoption but was also a signatory to the deed of adoption. The statements of PW-7, Advocate and his clerk PW-8 would show that the written statement in the suit filed by Pannalal was drafted under the instructions of Kishanlal and he had signed the same as guardian of Ghisalal. This would show that Kishanlal had played the most pivotal role in the adoption of Ghisalal by Gopalji. Therefore, he was the best person who could support Ghisalal's plea that he was taken in adoption by Gopalji and Dhapubai had given consent for the same. No explanation was given why Kishanlal was not examined despite the fact that he was not only actively involved at various stages of the adoption but was also instrumental in Ghisalal's admission in the school and defending the case filed by Pannalal. If the statements of Ghisalal and PW-3 are read in conjunction with the fact that written statement in Suit No.76A of 1964 Pannalal v. Ghisalal and another was filed by Kishanlal in February, 1966, there remains no doubt that testimony of Kishanlal was most crucial and yet he was not examined. The trial court did take cognizance of this omission but brushed aside the same with a cryptic observation that no objection was raised from the side of the defendants that Ghisalal was not given in adoption

by his natural father. The lower appellate court and the High Court did not even advert to this important lacuna which would have made any person of reasonable prudence to doubt the bonafides of Ghisalal's claim that he was adopted by Gopalji with the consent of Dhapubai. [Para 33] [685-D-H; 686-A-C]

4.2. The concurrent finding recorded by the trial court and the lower appellate court, which was approved by the High Court that Gopalji had adopted Ghisalal with the consent of Dhapubai was perverse inasmuch as the same was based on unfounded assumptions and pure conjectures. Dhapubai had succeeded in proving that the adoption of Ghisalal by Gopalji was not valid because her consent was not obtained as per the mandate of the proviso to Section 7 of the 1956 Act. Therefore, the suit filed by Ghisalal was not maintainable and the findings recorded by the trial court, the lower appellate court and/ or the High Court on the validity of gift deeds dated 29.11.1944 and 22.10.1966, Will dated 27.10.1975 executed by Gopalji in favour of Dhapubai and sale deed dated 19.1.1973 executed by her in favour of Sunderbai are liable to be set aside. [Para 34] [686-C-F]

***K. Laxmanan v. Thekkayil Padmini* (2009) 1 SCC 354; *Janki Narayan Bhoir v. Narayan Namdeo Kadam* (2003) 2 SCC 91; *Kashibai v. Parwatibai* (1995) 6 SCC 213; *Brajendra Singh v. State of M.P.* (2008) 13 SCC 161; *Moolchand Chhotalal v. Amritbai Manji Khoda Bhai and others* (1976) MPLJ 382 – referred to.**

Case Law Reference:

(2009) 1 SCC 354	**referred to**	**Para14**
(2003) 2 SCC 91	**referred to**	**Para 14**
(1995) 6 SCC 213	**referred to**	**Para 15**
(2008) 13 SCC 161	**referred to**	**Para 15**
(1976) MPLJ 382	**referred to**	**Para 29**

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 6373-6374 of 2002

From the Judgment & order dated 12.09.2000 of the High Court of Madhya Prades at Jabalpur in Second Appeal Nos. 25 & 61 of 1978.

WITH

C. A. Nos. 6375-6376 of 2002

Puneet Jain, Pretibha Jain for the Appellant.

Nikhil Majithia, Rameshwar Prsad Goyal for the Respondent

The Judgment of the Court was delivered by

G.S. SINGHVI, J. 1. Whether mere presence of Dhapubai in the ceremonies performed by her husband Gopalji for adoption of Ghisalal amounted to her consent as contemplated by the proviso to Section 7 of the Hindu Adoptions and Maintenance Act, 1956 (for short, 'the 1956 Act') is the main question which arises for consideration in these appeals filed against judgment dated 12.9.2000 of the learned Single Judge of the Madhya Pradesh High Court, Indore Bench whereby he partly allowed the second appeals filed by the parties and modified the decree passed by the lower appellate Court, which had substantially reversed the decree passed by the trial Court in a suit for declaration, partition and possession.

2. Although, Gopalji, Dhapubai and Sunderbai who were impleaded as defendant Nos.1 to 3 in Suit No.54A of 1973 filed by Ghisalal died during the pendency of litigation, for the sake of convenience, we shall refer to them by their names and not by the description given in the suit and the appeals.

3. The pleaded case of Ghisalal was that in Baisakh of Samvat 2016 (1959) his father, Kishanlal gave him in adoption to Gopalji; that ceremonies like putting of tilak on his forehead and distribution of sweets were performed; that registered deed of adoption was executed by Kishanlal and Gopalji on 25.6.1964; that Gopalji had inherited certain agricultural lands of villages Jeeran, Arnya Barona, Kuchrod, a two storeyed house and one court-yard from his father Roopji; that after adoption, he became coparcener in the family of Gopalji and thereby acquired right in the suit properties; that Gopalji executed three Gift Deeds dated 22.10.1966 whereby he transferred lands of villages Jeeran, Arnya Barona and Kuchrod to his wife Dhapubai and the latter sold a portion of land in survey No.945 of village Kuchrod to Sunderbai vide Sale Deed dated 19.1.1973; that the gift deeds executed by Gopalji in favour of Dhapubai were fraudulent and were intended to deprive him of his right in the ancestral properties and that even in his capacity as karta of the family, Gopalji could not have gifted more than 1/3rd of his share. On the basis of these pleadings, Ghisalal prayed that a decree of partition be passed and he be given one half share in the suit properties. He further prayed that Gopalji may be directed to give an account of the agricultural produce and pay him his share.

4. In the written statement filed by him, Gopalji pleaded that he had not adopted Ghisalal and no ceremony was performed; that the so called adoption deed was obtained by playing fraud and the same was not binding on him; that the suit properties were not ancestral and that he was entitled to execute gift deeds in favour of his wife. In her separate written statement, Dhapubai also denied the factum of the adoption of Ghisalal by Gopalji and claimed that she had not given consent for the same. She then pleaded that if by taking advantage of the simplicity of Gopalji, the plaintiff obtained some writing or deed, the same is not binding on them. She further pleaded that the gift deeds were valid and Ghisalal has no right to challenge the alienation of property by her husband.

5. After filing of the written statement, Dhapubai sought and was granted leave to amend the written statement whereby she pleaded that Gopalji had earlier executed registered Gift Deed dated 29.11.1944 in her favour in respect of the lands comprised in Survey Nos.2097, 2763 and 3170 (old Survey Nos.2856, 3042/2 and 3528) of village Jeeran and she was in possession of the same. As a sequel to this, Ghisalal amended the plaint and pleaded that Gift Deed dated 29.11.1944 was not valid because the land of village Jeeran was not capable of being gifted and, in any case, the same was not binding on him. He further pleaded that Gift Deed dated 29.11.1944 was not acted upon inasmuch as the property had not been transferred in the name of Dhapubai.

6. During the pendency of the suit, Gopalji executed registered Will dated 27.10.1975 purporting to bequeath the suit properties to his wife Dhapubai. After some time, Gopalji died.

7. In the light of the pleadings of the parties, the trial Court framed the following issues:

(1) Whether the suit properties mentioned in Para-6 of the plaint are the property of Joint Hindu Family?

(2) Whether the plaintiff is the legally adopted son of defendant No.1 and 2?

(3) Whether the Gift Deed dated 22.10.66 is illegal and void?

(4) Whether the sale deed dated 19.1.73 has no effect on the plaintiff?

(5) Whether the court fee has been properly paid?

(6) Whether the statement made by the defendant in Suit No. 76 of 1964 is binding on the defendants as per the law of estopple?

(7) Whether the lands mentioned in Paragraph 6 of the reply had been gifted on 29.11.1944 and what is its effect?

(8) Relief and expenses.

8. After considering the pleadings and evidence produced by the parties, the trial Court held as under:

(1) The suit properties were ancestral properties of Gopalji.

(2) Ghisalal was validly adopted son of Gopalji and the consent of Dhapubai can be presumed from her presence in the adoption ceremonies.

(3) Gift Deeds dated 22.10.1966 executed by Gopalji in favour of Dhapubai and Sale Deed dated 19.1.1973 executed by her in favour of Sunderbai were invalid.

(4) Will dated 27.10.1975 executed by Gopalji in favour of Dhapubai was invalid.

(5) Gift Deed dated 29.11.1944 executed by Gopalji in favour of Dhapubai was not valid inasmuch as there was no acceptance by the donee and alienation of ancestral property by Gopalji in favour of his wife was not for a pious purpose.

9. Dhapubai challenged the judgment and decree of the trial Court by filing an appeal under Section 96 read with Order XLI Rule 1 of the Code of Civil Procedure. The lower appellate Court agreed with the trial Court that the suit properties were ancestral; that the adoption of Ghisalal by Gopalji was valid and that the gift deeds executed in favour of Dhapubai were not valid. However, the findings recorded on the legality of Gift Deed dated 29.11.1944 and Will dated 27.10.1975 (both executed by Gopalji in favour of Dhapubai) were set aside and

it was declared that Ghisalal is entitled to 1/3rd share in the suit properties except the land covered by Gift Deed dated 29.11.1944. The lower appellate Court also directed that whole of the land situated at village Kuchrod may be given to Ghisalal as his 1/3rd share so that there may not be any dispute between the parties in future.

10. Both, Ghisalal and Dhapubai challenged the judgment of the lower appellate Court by filing Second Appeal Nos.25 of 1978 and 61 of 1978. During the pendency of the second appeals, Dhapubai died and her legal representatives were brought on record.

11. While admitting the second appeal filed by Ghisalal, the High Court framed the following substantial questions of law:

(1) What would be the respective shares of the plaintiff-appellant and defendant No.1 Dhapubai in the suit properties according to law in case the Will Ex.D.2 is held to have been proved and what would be their shares in case it were to be held otherwise?

(2) Whether the execution and attestation of the Will Ex.D/2 have been proved in accordance with law?

(3) Whether there is legal evidence to prove the gift of the properties comprised in Ex.D/1 by Gopal in favour of Dhapubai?

(4) Whether the lower Court has acted without jurisdiction or erroneously in giving directions with respect to the apportionment of the plaintiff's share in the suit land?

12. In the second appeal filed by Dhapubai, the High Court framed the following substantial questions of law:

(1) Whether there is any legal evidence on record to prove the consent of Mother Dhapubai as required by Section 7

of the Hindu Adoption and Maintenance Act, 1956 for the valid adoption of plaintiff Ghisalal?

(2) Whether the court below had jurisdiction to impose a condition that Dhapubai will not get the lands situated in village Kuchhdod?

(3) Whether the finding of the Court below that suit properties are ancestral is perverse?

13. The learned Single Judge confirmed the finding recorded by the two Courts on the legality of Ghisalal's adoption by Gopalji. The learned Single Judge also agreed with the lower appellate Court that Ghisalal was not entitled to challenge Gift Deed dated 29.11.1944 but held that Will dated 27.10.1975 cannot be treated to have been validly executed by Gopalji. The learned Single Judge further held that the lower appellate Court was not justified in issuing a direction that Ghisalal be given land in village Kuchrod and Dhapubai would not get any share in that land. He finally disposed of the second appeals with the following directions:

"The appeal filed by each of the party is partly allowed. It is directed that each of the party is entitled to half share in the agricultural lands of village Jeeran, Kuchrod and Arnya Barona, barring the lands already given to Dhapubai under gift deed dated 29.11.1944. Each of the party i.e. Ghisalal and Dhapubai through her successors have half share in the house property situate at Village Jeeran. The property, already sold by Dhapubai to the defendant No.3 Sundarbai shall be brought back to the hotchpot. If the plaintiff agrees that land survey No.347 admeasuring 0.375 hectare of village Kuchrod can be given to the defendant No.3 Sundarbai then the said property can be given to her and that much of the property shall stand reduced from the share of Dhapubai, but if the plaintiff does not agree to it then survey No.947 of village Kuchrod shall be brought to the hotchpot and the property shall be partitioned in accordance with the provisions of law. Sundabai shall be entitled to 0.375 hectares of land from the share of Dhapubai which property could be given to her may be mutually settled and agreed between the successors of Dhapubai and Sundarbai. On such an agreement particular land falling in share of Dhapubai may be given to Sundarbai but in case such an agreement cannot be arrived at then the officer competent to partition the property shall give 0.375 hectare land to Sundarbai from the share of Dhapubai, after firstly effecting the partition between Ghisalal and successors of Dhapubai. The parties shall be at liberty to make an application to the trial court to refer the matter to the Collector for effecting partition or in the alternative with the permission of the trial court the party/parties may make necessary application for partition to the Collector or the competent Officer. Regarding partition of the house the party/parties may make an application to the trial Court for appointment of Commissioner. The terms of the commission and the fees of the Commissioner shall be fixed by the trial court."

14. Shri Puneet Jain, learned counsel for Ghisalal argued that Dhapubai's challenge to the adoption of Ghisalal by Gopalji was rightly negatived by the trial Court, the lower appellate Court and the High Court and in exercise of power under Article 136 of the Constitution, this Court is not entitled to interfere with the concurrent finding of fact. He pointed out that the trial Court and the lower appellate Court had concurrently held that Ghisalal was taken in adoption strictly in accordance with law and a registered deed of adoption was also executed by the natural and adoptive fathers and argued that the High Court rightly declined to upset the said finding. Learned counsel emphasized that the consent of Dhapubai was rightly presumed by the Courts below because she was present in the ceremonies of adoption and did not question the adoption till the stage of filing written statement in the suit filed by Ghisalal. Shri Jain also referred to the averments contained in the written statement filed

by Gopalji in Civil Suit No.76A of 1964 – Pannalal v. Ghisalal and another wherein he admitted the adoption of Ghisalal and argued that the contrary assertion made in the written statement filed in the suit of Ghisalal was rightly discarded by the Courts below and the High Court. Learned counsel further argued that after his adoption Ghisalal became a coparcener in the family of Gopalji and was entitled to half share in the properties inherited by his adoptive father and, as such, the finding recorded by the lower appellate Court and the High Court on his locus to challenge Gift Deed dated 29.11.1944, which adversely affected his right in the suit properties is legally unsustainable. Learned counsel submitted that even though no specific prayer was made in the suit for setting aside Gift Deed dated 29.11.1944, the trial Court had rightly declared the same to be invalid, ineffective and inoperative because Ghisalal had challenged validity thereof by amending the plaint and the parties had adduced evidence knowing fully well that the legality of the gift deed of 1944 is subject matter of scrutiny by the Court. Shri Jain submitted that in the amended written statement, Dhapubai had pleaded Gift Deed dated 29.11.1944 as a weapon of defence with the sole object of defeating the right acquired by Ghisalal by virtue of his adoption and, therefore, the trial Court had rightly annulled the same on the ground of non fulfillment of the essentials of a valid gift and the lower appellate Court and the High Court committed serious error by invoking Section 12 of the 1956 Act and the bar of limitation for the purpose of non suiting him. Learned counsel relied upon the judgment of this Court in *K. Laxmanan v. Thekkayil Padmini* (2009) 1 SCC 354 and argued that the lower appellate Court seriously erred in reversing the finding and conclusion recorded by the trial Court on the issue of validity of Gift Deed dated 29.11.1944 ignoring that the burden to prove the competence of Gopalji to execute the gift deed in respect of a portion of the suit property was on Dhapubai, which she failed to discharge. Learned counsel also argued that gift of the joint family property was nullity and the same could be challenged at any time. Shri Jain referred to the judgment of

this Court in *Janki Narayan Bhoir v. Narayan Namdeo Kadam* (2003) 2 SCC 91 and submitted that the trial Court and the High Court rightly invalidated the Will executed by Gopalji in favour of Dhapubai.

15. Shri Nikhil Majithia, learned counsel for Dhapubai argued that even though all the Courts concurrently held that Ghisalal was validly adopted by Gopalji, the finding recorded on this issue is liable to be set aside because his client had not given consent for the adoption. Learned counsel submitted that the plaint filed by Ghisalal was totally bereft of the material particulars regarding the date, time and place of adoption as also the crucial ceremony of give and take and the Courts below as well as the High Court committed serious error by recording a finding that the adoption was validly made and that too by presuming the consent of Dhapubai. Learned counsel emphasized that mere presence of Dhapubai at the place where the ceremonies of adoption are said to have been performed could not be made basis for assuming that she had willingly consented to the adoption of Ghisalal by Gopalji. He submitted that the consent contemplated by the proviso to Section 7 of the 1956 Act is mandatory and unless the consent of the wife is proved, the adoption cannot be treated valid. In support of this argument, Shri Majithia placed reliance on the judgments of this Court in *Kashibai v. Parwatibai* (1995) 6 SCC 213 and *Brajendra Singh v. State of M.P.* (2008) 13 SCC 161. Learned counsel also assailed the High Court's finding on the legality of the Will executed by Gopalji in favour of Dhapubai and argued that examination of one attesting witness was sufficient to prove execution of the Will. Learned counsel supported the impugned judgment insofar as it relates to Gift Deed dated 29.11.1944 and argued that even if this Court was to approve the finding recorded by the Courts below on the issue of Ghisalal's adoption, his challenge to Gift Deed dated 29.11.1944 should be treated as misconceived and negatived because the adoption cannot relate back to any date prior to 1959.

16. We have considered the respective submissions and gone through the written arguments filed by the learned counsel. For deciding the question whether the adoption of Ghisalal by Gopalji was valid, it will be useful to notice the relevant provisions of the 1956 Act. The same read as under:

"6. Requisites of a valid adoption. – No adoption shall be valid unless –

(i) the person adopting has the capacity, and also the right, to take in adoption;

(ii) the person giving in adoption has the capacity to do so;

(iii) the person adopted is capable of being taken in adoption; and

(iv) the adoption is made in compliance with the other conditions mentioned in this Chapter.

7. Capacity of a male Hindu to take in adoption. **–** Any male Hindu who is of sound mind and is not a minor has the capacity to take a son or a daughter in adoption:

Provided that, if he has a wife living, he shall not adopt except with the consent of his wife unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.

Explanation. – If a person has more than one wife living at the time of adoption, the consent of all the wives is necessary unless the consent of any one of them is unnecessary for any of the reasons specified in the preceding proviso.

8. Capacity of a female Hindu to take in adoption. – Any female Hindu –

(a) who is of sound mind,

(b) who is not a minor, and

(c) who is not married, or if married, whose marriage has been dissolved or whose husband is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a Court of competent jurisdiction to be of unsound mind,

has the capacity to take a son or daughter in adoption.

12. Effects of adoption. – An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family:

Provided that –

(a) the child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth;

(b) any property which vested in the adopted child before the adoption shall continue to vest in such person subject to the obligations, if any, attaching to the ownership of such property, including the obligation to maintain relatives in the family of his or her birth;

(c) the adopted child shall not divest any person of any estate which vested in him or her before the adoption.

16. Presumption as to registered documents relating to

adoption. – Whenever any document registered under any law for the time being in force is produced before any Court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the Court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved."

17. Section 6 reproduced above enumerates the requisites of a valid adoption. It lays down that no adoption shall be valid unless the person adopting has the capacity as also the right to take in adoption; the person giving in adoption has the capacity to do so; the person adopted is capable of being taken in adoption, and the adoption is made in compliance with the other conditions mentioned in Chapter II. Section 7 lays down that any male Hindu who is of sound mind and is not minor has the capacity to take a son or a daughter in adoption. This is subject to the rider enshrined in the proviso which lays down that if the male Hindu has a wife living then he shall not adopt except with the consent of his wife unless she is incapacitated to give the consent by reason of her having completely and finally renounced the world or her having ceased to be a Hindu or she has been declared by a court of competent jurisdiction to be of unsound mind. The explanation appended to Section 7 lays down that if a person has more than one wife living at the time of adoption, then the consent of all the wives is *sine qua non* for a valid adoption unless either of them suffers from any of the disabilities specified in the proviso to Section 7. Section 8 enumerates the conditions, which must be satisfied for adoption by a female Hindu. Section 12 deals with effects of adoption. It declares that from the date of the adoption, an adopted child is deemed to be a child of his/her adoptive father or mother for all purposes and his ties in the family of his or her birth shall stand severed and replaced by those created in the adoptive family. Proviso (a) to this section contains a restriction on the marriage of adopted child with a person to whom he or she could not have married if he or she had

continued in the family of his or her birth. Clause (b) of the proviso saves the vested right of the adopted child in the property subject to the obligations, if any, attached to the ownership of such property, including the obligation to maintain relatives in the family of his or her birth. Likewise, clause (c) to the proviso lays down that the adopted child shall not divest any person of any estate vested in him or her before the date of adoption. Section 16 which embodies a rule of presumption lays down that whenever any document registered under any law for the time being in force evidencing adoption and signed by the person giving and person taking the child in adoption is produced before any court, then it shall presume that the adoption has been made after complying with the provisions of the Act unless proved otherwise.

18. In Indian society, a male spouse enjoyed the position of dominance for centuries together. This was particularly so in Hindu families. Under the old Hindu Law, a Hindu male had an absolute right to adopt a male child and his wife did not have the locus to question his right or to object to the adoption. A wife could adopt a son to her husband but she could not do so during her husband's lifetime without his express consent. After his death, she could adopt a son to him, in certain parts of India, only if he had expressly authorized her to do so. In other parts of India, she could adopt without such authority. However, in no case a wife or a widow could adopt a son to herself. An adoption by a woman married or unmarried of a son to herself was invalid and conferred no legal rights upon the adopted person. A daughter could not be adopted by a male or a female Hindu. The physical act of giving was a prime necessity of the ceremonial requirements relating to adoption. As to *datta homam*, that is, oblations of clarified butter to fire, the law was not finally settled and there was divergence of judicial opinion.

19. After India became a sovereign, democratic republic, this position has undergone a sea change. The old Hindu Law has been codified to a large extent on the basis of constitutional

principles of equality. The Hindu Marriage Act, 1955 codifies the law on the subject of marriage and divorce. The Hindu Succession Act, 1956 codifies the law relating to intestate succession. The Hindu Minority and Guardianship Act, 1956 codifies the law relating to minority and guardianship among Hindus. The 1956 Act is also a part of the scheme of codification of laws. Once the Hindu Succession Act was passed giving equal treatment to the sons and daughters in the matter of succession, it was only logical that the fundamental guarantee of equality of a status and equality before law is recognized in the matter of adoption. The 1956 Act now provides for adoption of boys as well as girls. By virtue of the proviso to Section 7, the consent of wife has been made a condition precedent for adoption by a male Hindu. The mandatory requirement of the wife's consent enables her to participate in the decision making process which vitally affects the family. If the wife finds that the choice of the person to be adopted by the husband is not appropriate or is not in the interest of the family then she can veto his discretion. A female Hindu who is of a sound mind and has completed the age of eighteen years can also take a son or daughter in adoption to herself and in her own right. A female Hindu who is unmarried or a widow or a divorcee can also adopt a son to herself, in her own right, provided she has no Hindu daughter or son's daughter living at the time of adoption [Sections 8, 11(1) and 11(2)]. However, if she is married, a female Hindu cannot adopt a son or a daughter during the lifetime of her husband unless the husband is of unsound mind or has renounced the world. By incorporating the requirement of wife's consent in the proviso to Section 7 and by conferring independent right upon a female Hindu to adopt a child, Parliament has tried to achieve one of the facets of the goal of equality enshrined in the Preamble and reflected in Article 14 read with Article 15 of the Constitution.

20. The term 'consent' used in the proviso to Section 7 and the explanation appended thereto has not been defined in the

Act. Therefore, while interpreting these provisions, the Court shall have to keep in view the legal position obtaining before enactment of the 1956 Act, the object of the new legislation and apply the rule of purposive interpretation and if that is done, it would be reasonable to say that the consent of wife envisaged in the proviso to Section 7 should either be in writing or reflected by an affirmative/positive act voluntarily and willingly done by her. If the adoption by a Hindu male becomes subject matter of challenge before the Court, the party supporting the adoption has to adduce evidence to prove that the same was done with the consent of his wife. This can be done either by producing document evidencing her consent in writing or by leading evidence to show that wife had actively participated in the ceremonies of adoption with an affirmative mindset to support the action of the husband to take a son or a daughter in adoption. The presence of wife as a spectator in the assembly of people who gather at the place where the ceremonies of adoption are performed cannot be treated as her consent. In other words, the Court cannot presume the consent of wife simply because she was present at the time of adoption. The wife's silence or lack of protest on her part also cannot give rise to an inference that she had consented to the adoption.

21. At this stage, we may notice some precedents which have bearing on the interpretation of proviso to Section 7 of the 1956 Act. In *Kashibai v. Parwatibai* (supra), this Court was called upon to consider whether in the absence of the consent of one of the two wives, the adoption by the husband could be treated valid. The facts of the case show that plaintiff No.1 and defendant No.1 were two widows of deceased Lachiram. Plaintiff No.2 was daughter of Lachiram from his first wife Kashibai and defendant No.2 was the daughter from his second wife Parwati. Defendant No.3, Purshottam son of Meena Bai and grandson of Lachiram. The plaintiffs filed suit for separate possession by partition of a double storey house, open plot and some agricultural lands. The defendants

contested the suit. One of the pleas taken by them was that Purshottam son of Meena Bai had been adopted by deceased Lachiram vide registered deed of adoption dated 29.4.1970, who had also executed deed of Will in favour of the adopted son bequeathing the suit properties to him and thereby denying any right to the plaintiffs to claim partition. The trial Court decreed the suit for separate possession by partition by observing that the defendants have failed to prove the adoption of Purshottam by Lachiram and the execution of Will in his favour. The High Court reversed the judgment of the trial Court and held that the defendants had succeeded in proving execution of the deed of adoption and the deed of Will in accordance of law and as such the plaintiffs were not entitled to any share in the suit properties. On appeal, this Court reversed the judgment of the High Court and restored the decree passed by the trial Court. On the issue of adoption of Purshottam, this Court observed:

> "It is no doubt true that after analysing the parties' evidence minutely the trial court took a definite view that the defendants had failed to establish that Plaintiff 1, Defendant 1 and deceased Lachiram had taken Defendant 3, Purshottam in adoption. *The trial court also recorded the finding that Plaintiff 1 was not a party to the Deed of Adoption as Plaintiff 1 in her evidence has specifically stated that she did not sign the Deed of Adoption nor she consented for such adoption of Purshottam and for that reason she did not participate in any adoption proceedings. On these findings the trial court took the view that the alleged adoption being against the consent of Kashi Bai, Plaintiff 1, it was not valid by virtue of the provisions of Section 7 of the Hindu Adoptions and Maintenance Act, 1956. Section 7 of the Act provides that any male Hindu who is of sound mind and is not a minor has the capacity to take a son or a daughter in adoption. It provides that if he has a wife living, he shall not adopt except with the consent of his wife. In the present*

> *case as seen from the evidence discussed by the trial court it is abundantly clear that Plaintiff 1 Kashi Bai the first wife of deceased Lachiram had not only declined to participate in the alleged adoption proceedings but also declined to give consent for the said adoption and, therefore, the plea of alleged adoption advanced by the defendants was clearly hit by the provisions of Section 7 and the adoption cannot be said to be a valid adoption."*
>
> (emphasis supplied)

22. In *Brajendra Singh v. State of M.P.* (supra), the Court considered the scope of Sections 7 and 8(c) of the 1956 Act in the backdrop of the claim made by the appellant that he was validly adopted son of Mishri Bai, who was married to Padam Singh but was forced to live with her parents. In 1970, Mishri Bai claims to have adopted the appellant. After some time, she was served with a notice under Section 10 of the M.P. Ceiling on Agricultural Holdings Act, 1960 indicating that her holding of agricultural land was more than the prescribed limit. In her reply, Mishri Bai claimed that she and her adopted son were entitled to retain 54 acres land. The competent authority did not accept her claim. Thereupon, Mishri Bai filed suit for declaration that the appellant is her adopted son. During the pendency of the suit, she executed a registered Will bequeathing all her properties in favour of the appellant. The trial Court decreed the suit. The first appellate Court dismissed the appeal preferred by the State of Madhya Pradesh. The High Court allowed the second appeal and held that in the absence of the consent of Mishri Bai's husband, adoption of the appellant cannot be treated as valid. This Court noticed that language of Sections 7 and 8 was different and observed:

> "A married woman cannot adopt at all during the subsistence of the marriage except when the husband has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of

competent jurisdiction to be of unsound mind. If the husband is not under such disqualification, the wife cannot adopt even with the consent of the husband whereas the husband can adopt with the consent of the wife. This is clear from Section 7 of the Act. Proviso thereof makes it clear that a male Hindu cannot adopt except with the consent of the wife, unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind. *It is relevant to note that in the case of a male Hindu the consent of the wife is necessary unless the other contingency exists. Though Section 8 is almost identical, the consent of the husband is not provided for. The proviso to Section 7 imposes a restriction in the right of male Hindu to take in adoption. In this respect the Act radically departs from the old law where no such bar was laid down to the exercise of the right of a male Hindu to adopt oneself, unless he dispossesses the requisite capacity. As per the proviso to Section 7 the wife's consent must be obtained prior to adoption and cannot be subsequent to the act of adoption. The proviso lays down consent as a condition precedent to an adoption which is mandatory and adoption without wife's consent would be void.* Both proviso to Sections 7 and 8(*c*) refer to certain circumstances which have effect on the capacity to make an adoption."

(emphasis supplied)

23. We shall now consider whether the trial Court and the lower appellate Court had rightly held that Ghisalal was validly adopted by Gopalji and he became coparcener in the family of adoptive father and the learned Single Judge of the High Court did not commit any error by declining to interfere with the concurrent finding recorded by the two Courts. The consideration of this issue deserves to be prefaced with an

observation that this Court is extremely loath to interfere with the concurrent finding of fact recorded by the Courts below more particularly when such finding has been approved by the High Court. In such matters, interference is warranted only when this Court is convinced that the finding is *ex facie* perverse. A finding of fact can be treated as perverse if it is based on no evidence or there is total misreading of pleadings and/or evidence of the parties or the finding is based on unfounded assumptions or conjectures.

24. A careful scrutiny of the record reveals that in the suit filed by him, Ghisalal had pleaded that Gopalji had taken him in adoption in Baisakh of Samvat 2016 and the deed of adoption was executed and got registered on 25.6.1964 and that Dhapubai had consented to the adoption. He challenged Gift Deeds dated 22.10.1966 executed by Gopalji in favour of Dhapubai and Sale Deed dated 19.1.1973 executed by the latter in favour of Sunderbai in respect of one parcel of land. Later on, he amended the plaint and pleaded that Gift Deed dated 29.11.1944 was invalid, inoperative and ineffective and did not affect his right to get share in the ancestral properties. He alleged that the gift deeds were obtained by fraud. Of course, he did not make a specific prayer for invalidation of Gift Deed dated 29.11.1944. In her written statement, Dhapubai not only disputed the adoption of Ghisalal by Gopalji, but categorically averred that she had not consented to the adoption. She also questioned the *locus standi* of Ghisalal to challenge the gift deeds.

25. In support of his claim that he had been adopted by Gopalji, Ghisalal appeared in the witness box as PW-1 and examined PW-2 Omkar Lal, PW-3 Devram and PW-4 Ramniwas. He produced copy of the deed of adoption (Exhibit P-1), the plaint (Exhibit P-21) of Suit No.76A of 1964 filed by Pannalal in which he and Gopalji were impleaded as defendant Nos.1 and 2 and copies of the written statements (Exhibits P-2 and P-3) filed in that suit. He also examined PW-5 Gumbhir

Singh, PW-6 Hiralal, PW-7 Ramchander Sharma, PW-8 Imdad Ali, PW-9 Moolchand, PW-10 Soorajmal and PW-11 Dhoolchand to prove these documents. According to Ghisalal, he was taken in adoption at the age of 5-6 years. He gave description of the adoption ceremonies by stating that his natural father, Kishanlal had made him to sit in the lap of Gopalji and the latter accepted him as the adopted son. In paragraph 3 of his statement, Ghisalal gave out that the adoption ceremonies were performed in village Jeeran on the road in front of the house of Gopalji and about 25 to 30 persons including PW-2 Omkar Lal, PW-3 Devram were present. He further stated that Dhapubai was also there. In cross-examination, he admitted that after one to two years of adoption, he started his education in the school at Jeeran and in the school records the name of his natural father, Kishanlal was entered. He then volunteered to say that when he had gone to the Principal to get the name of his father changed, the latter told him that it will involve cost and, therefore, the change was not effected. In paragraph 5 of the cross-examination, Ghisalal disclosed that his father Kishanlal had got him admitted in the school. He then stated that after three years of execution of the adoption deed, he was separated by Gopalji. In para 10 of the cross-examination, he stated that at the time of registration, Ramlal, Gopalji, his father Kishanlal, brother Ramniwas and Dhapubai had come along with him but he does not know whether Dhapubai had signed on the registry. He also stated that there was no talk of obtaining signature of Dhapubai in his presence but volunteered to say that she was agreeable. The other three witnesses also spoke about the ceremonies of adoption. According to them, Dhapubai was sitting below the platform (chabutra). In his cross-examination, Omkar Lal stated that he does not know whether Ghisalal was taken to Dhapubai. He further stated that in his presence no talk had taken place with Dhapubai. In his cross-examination, Devram stated that Dhapubai was also there and she was sitting with the other ladies. Similarly, Ramniwas spoke about presence of Dhapubai by stating that she was sitting by the side of the platform along

with other ladies. In her statement, Dhapubai categorically stated that Gopalji had not obtained her consent for the adoption of Ghisalal and that she had not gone to tehsil for the purpose of registry. Dhabubai also stated that she does not know whether Gopalji had gone to tehsil and got the registry of adoption deed. In paragraph 11 of the cross-examination, she expressed ignorance about the adoption of Ghisalal by Gopalji. She then stated that she did not want to take anyone in adoption. She also spelt reasons for some of the PWs deposing in favour of Ghisalal. The other witnesses examined by Dhapubai, namely, Rajaram (DW-2), Bherulal (DW-3), Khanhiram (DW-4) and Madhulal (DW-5) expressed their ignorance about the adoption of Ghisalal by Gopalji.

26. The trial Court relied upon the statements of Ghisalal and his witnesses and recorded its conclusion in the following words:

> "From the statements of plaintiff witnesses Ghisalal, Onkarlal, Devram and Ramniwas, it becomes clear that at the adoption ceremony, Ghisalal was made to sit in the laps of Gopal and a turbon was tied on his head, batashe and coconuts were distributed, Havan was not performed. And Dhapubai was also present there along with other men and women. With respect to the aforesaid facts and also about the adoption ceremony, no contradiction has been noticed in the statement of these witnesses. *In these circumstances, it becomes clear that when the adoption ceremony was conducted in the presence of Dhapubai, then certainly her consent was there and it can be taken as implied consent of Dhapubai.*"
>
> (emphasis supplied)

27. The trial Court also gave weightage to the statement contained in the adoption deed suggesting that Gopalji and his wife were anxious to take Ghisalal in adoption.

28. The lower appellate Court briefly referred to the contents of the adoption deed and proceeded to observe:

> "…….. It is true that there is no mention as to on which date the formalities of adoption were completed, either in the plaint or in the adoption deed, whereas the witnesses have stated in their statements that it was in Sambat, 2016 on the day of Teej when the adoption formalities were completed. Adoption deed is Exhibit P-1. Ghisalal's original father Kishan Lal has given in writing that he has given Ghisalal in adoption to Gopal and he has accepted to take him in adoption. Similarly, Gopal has also accepted that he has adopted Ghisalal as his son and he has affixed his signatures. Under Section 6 of the Hindu Adoption Act, the document Exh. P-1 proved that Ghisalal was taken in adoption. It has not been proved as to whether the mother of Ghisalal gave her consent for adoption. Such an argument was advanced by the learned advocate of the appellant, but acceptance of such type is essential. There is no such provision in the aforesaid Hindu Adoption Act. *It is proved by the circumstantial evidence that the appellant Dhapubai had given her consent to Gopal to adopt Ghisalal as his son.* The brothers of Ghisalal i.e. Ramnivas (P.W.4), Omkarlal, PW-2 and Devram, PW-3 in their statements have accepted that customary function of adoption was held and in that function the appellant Dhapubai herself was present."
>
> (emphasis supplied)

29. Though, the trial Court and the lower appellate Court did not advert to Section 7 of the 1956 Act, the learned Single Judge referred to that section and the judgment of the Madhya Pradesh High Court in *Moolchand Chhotalal v. Amritbai Manji Khoda Bhai and others* (1976) MPLJ 382 and held that the consent of wife can be inferred from the circumstances. The learned Single Judge noted that the adoption deed was duly registered and held that in view of Section 16 of the 1956 Act,

a presumption can be raised that the adoption had been made after complying with the relevant provisions. The learned Single Judge then observed that Dhapubai had not challenged the correctness, authenticity and validity of the adoption deed till the filing of written statement and held that the gift deeds appear to have been executed to frustrate the effect of the adoption and ordinarily there was no reason for the husband to gift his entire estate to his wife.

30. In our view, the trial Court, the lower appellate Court and the learned Single Judge of the High Court misdirected themselves in deciding the issue relating to Dhapubai's consent to the adoption of Ghisalal by Gopalji. All the Courts held that the consent of Dhapubai can be presumed because she was present in the ceremonies of adoption. The learned Single Judge went a step further and observed that failure of Dhapubai to challenge the adoption deed is a strong circumstance which goes to show that she had consented to the adoption of Ghisalal by her husband. Unfortunately, all the Courts completely ignored that presence of Dhapubai in the ceremonies of adoption was only as a mute spectator and not as an active participant. Neither Ghisalal nor any of the witnesses examined by him stated that before taking Ghisalal in adoption, Gopalji had consulted Dhapubai or taken her in confidence and the latter had given her consent or agreed to the adoption of Ghisalal or that she had taken prominent part in the adoption ceremonies. All of them made a parrot like statement that Dhapubai was sitting with other women below the platform (chabutra). By no stretch of imagination, this could be equated with her active participation in the adoption ceremonies so as to enable the Courts to draw an inference that she had given consent for the adoption of Ghisalal.

31. Another grave error committed by all the Courts is that they have presumed the consent of Dhapubai by relying upon the contents of the deed of adoption (Exhibit P-1) in which Gopalji is said to have recorded that it was his and his wife's

esteemed desire to take Ghisalal in adoption. It was neither the pleaded case of Ghisalal nor any evidence was produced by him to prove that Dhapubai was a signatory to Exhibit P-1 or that she was present at the time of execution and/or registration of Exhibit P-1. Therefore, the contents of Exhibit P-1 could not be made basis for assuming that Dhapubai was a party to the adoption of Ghisalal.

32. The so called failure of Dhapubai to challenge Exhibit P-1 cannot be used against her because Ghisalal did not adduce any evidence to show that after execution of the deed of adoption, Dhapubai was made aware of the same or a copy thereof was made available to her. In the absence of such evidence, it cannot be assumed that Dhapubai was aware of the execution and registration of the deed of adoption and she deliberately omitted to challenge the same.

33. While analyzing and evaluating the evidence of the parties, the Courts below failed to notice an important lacuna in Ghisalal's case, that is, non examination of Kishanlal who, as per Ghisalal's own version had not only taken active part in the ceremonies of adoption but was also a signatory to the deed of adoption. The statements of PW-7 Ramchander Sharma, Advocate and his clerk PW-8 Imdad Ali show that the written statement in the suit filed by Pannalal was drafted under the instructions of Kishanlal and he had signed the same as guardian of Ghisalal. This shows that Kishanlal had played the most pivotal role in the adoption of Ghisalal by Gopalji. Therefore, he was the best person who could support Ghisalal's plea that he was taken in adoption by Gopalji and Dhapubai had given consent for the same. No explanation has been given why Kishanlal was not examined despite the fact that he was not only actively involved at various stages of the adoption but was also instrumental in Ghisalal's admission in the school and defending the case filed by Pannalal. If the statements of Ghisalal and Devram are read in conjunction with the fact that written statement in Suit No.76A of 1964 Pannalal v. Ghisalal and another was filed by Kishanlal in February, 1966, there

remains no doubt that testimony of Kishanlal was most crucial and yet he was not examined. The trial Court did take cognizance of this omission but brushed aside the same with a cryptic observation that no objection was raised from the side of the defendants that plaintiff was not given in adoption by his natural father. The lower appellate Court and the learned Single Judge of the High Court did not even advert to this important lacuna which, in our view, would have made any person of reasonable prudence to doubt the bonafides of Ghisalal's claim that he was adopted by Gopalji with the consent of Dhapubai.

34. In view of the above discussion, we hold that the concurrent finding recorded by the trial Court and the lower appellate Court, which was approved by the learned Single Judge of the High Court that Gopalji had adopted Ghisalal with the consent of Dhapubai is perverse inasmuch as the same is based on unfounded assumptions and pure conjectures. We further hold that Dhapubai had succeeded in proving that the adoption of Ghisalal by Gopalji was not valid because her consent had not been obtained as per the mandate of the proviso to Section 7 of the 1956 Act. As a corollary, it is held that the suit filed by Ghisalal for grant of a decree that he is entitled to one half share in the properties of Gopalji was not maintainable and the findings recorded by the trial Court, the lower appellate Court and/or the High Court on the validity of Gift Deeds dated 29.11.1944 and 22.10.1966, Will dated 27.10.1975 executed by Gopalji in favour of Dhapubai and Sale Deed dated 19.1.1973 executed by her in favour of Sunderbai are liable to be set aside.

35. In the result, Civil Appeal Nos.6375-6376 of 2002 are allowed. The judgments and decrees passed by the trial Court, the lower appellate Court and the High Court are set aside and the suit filed by Ghisalal is dismissed. As a sequel to this, Civil Appeal Nos.6373-6374 of 2002 are dismissed. The parties are left to bear their own costs.

D.G. Appeals disposed of.

STATE OF JHARKHAND & ORS.
v.
PAKUR JAGRAN MANCH & ORS.
(Civil Appeal No. 436 of 2011)

JANUARY 12, 2011

[R.V. RAVEENDRAN AND H.L. GOKHALE, JJ.]

Santhal Parganas Settlement Regulations, 1872 – Regulations 24 and 25 – De-reserve or de-notify gochar (village grazing land) – Power of State Government – Record of rights whereby certain land recorded as Gochar, village grazing land – Identification of the said land as suitable for construction of hospital – Notification by State Government de-notifying and releasing Gochar land and in its place declaring Gairmajarua (Government) Khas land as Gochar – Writ petition seeking prohibition of construction of hospital in the said gochar, allowed by High Court – On appeal held: Land recorded as a gochar in the record-of-rights of a village in pursuance of a settlement under the Regulations, can be re-opened and altered at any time, without waiting for the next settlement, with the previous sanction of the State Government – On facts, Deputy Commissioner, authority empowered to re-open the record-of-rights for de-reserving the land recorded as gochar, made a proposal seeking the sanction of the State Government, for de-reserving the gochar – State Government by the Notification granted approval for de-reservation and earmarked alternative land as gochar – Notification has to be read as an order granting re-opening of the final record of rights of the village for the purpose of de-reserving the gochar for constructing a hospital for the public purpose and the same was consented to by the village headman and all Jamabandi Raiyats – Thus, Notification is valid – Order of High Court is set aside and the hospital is allowed to function in ex-gochar land – Santhan Parganas Tenancy (Supplementary

Provisions) Act, 1949 – s. 38 (2).

Santhan Parganas Tenancy (Supplementary Provisions) Act, 1949:

s. 2(1) – Scope of – Held: De-reservation or re-categorisation of a land recorded as gochar in the record-of-rights is not within the scope of the Act –s. 2(1) cannot be treated as the source of power to issue a Notification de-reserving gochar.

s. 38 – Grazing land shall not be cultivated – Prohibition u/s. 38(1), in regard to non-grazing use – Applicability of – Held: If the land is not recorded as gochar or village grazing land, or if the land ceases to be shown as gochar or village grazing land in the Record-of-Rights for valid reasons, bar u/s. 38(1) would not apply.

Practice and Procedure – Omission to refer provision of law which is the source of power, or mentioning of a wrong provision – Held: Would not by itself render the government order invalid or illegal, if government had the power under an appropriate provision of law

The Settlement Officer notified a land measuring 4.40 acres as Gochar, village grazing land (Plot no. 1061). In pursuance to the order of the High Court for implementation of health programme, the said gochar was identified as being suitable for construction of the hospital with the consent of village headman and community. The first respondent filed a writ petition seeking prohibition of construction of a hospital in the said gochar. Subsequently, the State Government issued a Notification dated 31.5.2007 de-notifying and releasing 4.44 acres of gochar land and declared 4.44 acres of Gairmajarua (Government) khas land (Plot Nos. 62, 199 and 427) as gochar land. In the Writ Petition, the High Court held that the State had no authority to construct a

hospital in the land earmarked as Gochar meant for grazing cattles; and that the Notification de-notifying and releasing Gochar for construction of a hospital was not valid. Therefore, the appellants filed the instant appeals.

Allowing the appeals, the Court

HELD: 1. Sub-section (1) of section 2 of the Santhal Pargansas Tenancy (Supplementary Provisions) Act, 1949 enables the State Government to re-organise or delimit any portion of the Santhal Parganas Division for convenient revenue administration. De-reserving certain land which has been recorded as *gochar* in the record-of-rights in pursuance of a settlement under the Settlement Regulations, has nothing to do with withdrawing the applicability of the 1949 Act or any part thereof from any portion of Santhal Parganas Division. De-reservation or re-categorisation of a land recorded as *gochar* in the record-of-rights is not within the scope of the 1949 Act. Therefore, Section 2(1) of the 1949 Act has no relevance and cannot be treated as the source of power to issue a Notification de-reserving *gochar*. [Para 8] [699-E-G]

2.1 It is not the case of the appellants that the lands in question were declared reserved or notified as *gochar* by issue of a Notification under any State Act or Regulation. The Notification dated 31.5.2007 was not issued to add, amend, vary or rescind any Notification issued in exercise of power under a State Act or Regulations. Therefore, the implied power to rescind, vary or amend an existing Notification, recognized by Section 24 of the State General Clauses Act is of no assistance to support the power to issue a Notification de-reserving a land recorded as *gochar*. [Para 10] [699-G-H; 700-A-B]

2.2 The High Court erroneously assumed that as there is no provision in the 1949 Act for de-reserving

A *gochar* for other uses, the State Government has no power to de-reserve any land recorded as *gochar,* under any circumstances and, therefore, the Notification dated 31.5.2007 was invalid; and that once a land is recorded as *gochar,* such land should forever be *gochar*. The B prohibition under Section 38(1) of the 1949 Act in regard to settlement, cultivation or utilization for non-grazing purposes *is applicable only to land recorded as village grazing land or gochar*. If the land is not recorded as *gochar* or village grazing land, or if the land ceases to be C shown as *gochar* or village grazing land in the Record-of-Rights for valid reasons, then the bar under Section 38(1) would not apply. The manner of recording a land as *gochar* (or village grazing land), or the manner of de-reserving any land recorded as *gochar* (or village grazing D land) is not governed or regulated by Section 38 of the 1949 Act. If the State Government has the power to de-reserve or denotify *gochar* (village grazing land) under any other law, and such power is validly exercised, then the land would cease to be *gochar* and the prohibition under section 38(1) of the 1949 Act in regard to non-E grazing use would not apply. [Para 11] [700-B-F]

2.3 The appropriate provision as regards the State Government's power to de-reserve or de-notify *gochar* (village grazing land) is found in the Santhal Parganas F Settlement Regulations, 1872. It is evident from Regulation 25 read with Regulation 24 that though normally once the record of rights has become final, it shall not be re-opened until a fresh settlement is made, the entries in the record of rights can be re-opened and G altered with the previous sanction of the State Government. Therefore, even if a land had been recorded as a gochar in the record-of-rights of a village in pursuance of a settlement under the Regulations, it can be re-opened and altered at any time, without waiting for

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the next settlement, with the previous sanction of the State Government. All that the State Government did by the Notification dated 31.5.2007 was to de-reserve gochar in pursuance of a proposal/request for sanction by the Deputy Commissioner so that it is no longer recorded as gochar. [Para 12] [702-F-H; 703-A-B]

2.4 The Deputy Commissioner is the authority empowered to re-open the record-of-rights for the purpose of de-reserving the land recorded as *gochar* by altering its use. He made a proposal seeking the sanction of the State Government, for de-reserving the *gochar* (4.40 acres in Thane No.24, Plot No.1061) and the State Government by the impugned Notification dated 31.5.2007 granted such approval by passing an order of de-reservation. By the very same Notification, it ensured that Section 38(2) of the 1949 Act was also fulfilled by earmarking alternative land as *gochar*. The only possible objection that could be raised to the Notification dated 31.5.2007 is that having regard to the Regulation 25(3), the State Government had to merely sanction the de-reservation and could not by itself de-reserve the land. This technical objection has no merit as de-reservation is effected by the Deputy Commissioner in pursuance of the approval granted by the State Government, by making appropriate entry in the record-of-rights of the village. Therefore, the Notification has to be read as an order granting re-opening of the final record of rights of the village for the purpose of de-reserving the *gochar* of 4.40 acres for the purpose of constructing a hospital with the consent of the village headman and Jamabhandi Raiyats and at the same time instructing and directing the Deputy Commissioner to ensure that appropriate suitable land is set apart for grazing so as to make up 5% of the total land of the village as required under Section 38(2) of the Act. [Para 13] [703-C-G]

2.5 The Notification no doubt does not refer to Regulations 24 and 25(3). The omission to refer to the provision of law which is the source of power, or the mentioning of a wrong provision, would not by itself render an order of the government invalid or illegal, if the government had the power under an appropriate provision of law. Such de-reservation of any government land reserved as *gochar*, should only be in exceptional circumstances and for valid reasons, having regard to the importance of *gochar* in every village. Any attempt by either the villagers or others to encroach upon or illegaly convert the *gochar* to house plots or other non-grazing use should be resisted and firmly dealt with. Any requirement of land for any public purpose should be met from available waste or unutilized land in the village and not *gochar*. Whenever it becomes inevitable or necessary to de-reserve any *gochar* for any public purpose, which should be as a last resort, the procedure contemplated in Regulations 24 and 25 and Section 38(2) should be strictly followed. When the *gochar* is not government land, but is *village common land* vesting in the villagers and not the government, the consent of village headman and the Jamabandi Raiyats/villagers in whom the land vests would have to be obtained, before de-reservation and diversion of use of *gochar*. [Para 15] [704-E-H; 705-A-D]

2.6 In the instant case, the urgent need for de-reserving the *gochar* of 4.40 acres and diversion of its use for the public purpose of hospital is not in dispute. The village headman and all the Jamabandi Raiyats have consented to the de-reservation and use of the land for hospital. The land was found to be most suitable for constructing the hospital. Alternative land was immediately notified as *gochar*. The Hospital has already been constructed in the land. Any delay would come in the way of health care of the villagers/tribals. In the

circumstances, the Notification dated 31.5.2007 of the Government is upheld. Respondent Nos. 6 and 9 would carry out necessary amendments in the Record of Rights of the village, showing Plot No.1061 as used non-grazing public purpose and record Plot Nos.62, 199 and 427 as *gochar*. [Para 16] [705-E-H]

2.7 The *gochar* measuring 4.40 acres in plot No.1061 was chosen for the hospital having regard to its easy accessibility as it adjoins a main road. Any interior land would be disadvantageous for construction of a hospital but would not be disadvantageous for being used as a grazing land. Therefore, the decision of the authorities to locate the hospital in Plot No.1061 in question cannot be faulted with. [Para 17] [706-B-C]

3. The first respondent submitted that Plot Nos. 62, 199 and 427 are rocky land and not suitable for grazing land for being declared/earmarked as gochar. But such an objection has not been raised by the village community who are entitled to use the gochar. If the alternative lands notified as gochar were unsuitable, they would have raised the objection. When the village headman and Raiyats have agreed for the alternative area as gochar, such a contention is not available to the first respondent. The submission that there were some irregularities and misuse of funds in the construction of the hospital building, during the pendency of the litigation, as it was done without inviting tenders may be agitated by the first respondent by lodging a complaint with appropriate authorities. [Paras 18 and 19] [706-D-F]

4. The impugned order of the High Court is set aside and the public interest litigation is dismissed, and the hospital is permitted to function in ex-*gochar* land namely Plot No.1061. [Para 20] [706-G-H]

CIVIL APPELLATE JURISDCITION : Civil Appeal No. 436 of 2011.

From the Judgment & Order dated 17.08.2007 of the High Court of Jharkhand at Ranchi in W.P. (PIL) No. 6779 of 2006.

WITH

C.A. No. 437 of 2011.

Amarendra Sharan, Anil K Jha, Santosh Kumar, Manish Kumar Saran for the Appellants.

Arup Banerjee, R.K. Prasad, R.K. Srivastava for the Respondents.

The Judgment of the Court was delivered by

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

2. The Settlement Officer notified and published a record of rights under section 24 of the Santhal Parganas Settlement Regulations, 1872 ('Regulations' for short) under which land measuring 4.40 acres in Thana No.24, Plot No.1061, Mouza Solagaria, Circle and District Pakur, Jharkhand, was recorded as *gochar* (village grazing land) for the said village Solagaria.

3. In a public interest litigation (W.P. No.5332/2001), the High Court of Jharkhand issued certain directions for effective implementation of national leprosy eradication programme and for improving the standards of health of the tribal residents of the area. In pursuance of it, the Department of Health & Family Welfare, Government of Jharkhand and the Deputy Commissioner, Pakur, on 21.12.2005, authorized the Executive Engineer, Rural Development, Special Division, Pakur, to construct a hospital building. The said *gochar* was identified as being suitable for construction of the Hospital with the consent of village headman and village community (all the

Jamabandi Raiyats of the village), vide consent letter dated 10.11.2006.

4. When the construction commenced, the first respondent filed a public interest litigation [W.P. (PIL) No.6779/2006] in the Jharkhand High Court inter alia contending that the grazing land (*gochar*) could not be used for any other purpose and seeking prohibition of construction of a hospital in the said *gochar*.

5. On 31.5.2007, the State government issued a notification denotifying releasing the said 4.44 acres of *gochar* in Plot No.1061 and in its place declaring an extent of 4.44 acres of Gairmajarua (Government) Khas land in Khata No.44, Plot Nos. 62, 199 and 427 as *gochar* under section 38(2) of the Santhal Parganas Tenancy (Supplementary Provisions) Act, 1949 ('Tenancy Act' for short). On the basis of the said notification it was contended by the appellants in the two appeals before the High Court that the land in question had ceased to be *gochar* and therefore, there was no impediment for using the said land for construction of an hospital. The High Court by the impugned order dated 17.8.2007 allowed the said writ petition holding as follows : (i) The State had no authority to construct a hospital in the land earmarked as *gochar* meant for grazing of cattle. (ii) The notification dated 31.5.2007, denotifying and releasing the *gochar* in order to hand over the same to the health department for construction of a hospital, was not valid in law, having regard to the bar contained in section 38(1) read with sections 67 and 69 of the Tenancy Act.

6. The said order of the High Court is challenged by the State of Jharkhand and by the village headman in these two appeals by special leave. The contentions of the appellants, in brief, are as under:

(i) Having regard to section 2(1) read with section 38(2) of the Tenancy Act, the State Government had the authority to denotify/release/withdraw any land from its status as *gochar*, provided other suitable land is set apart as *gochar*

to make up 5% of the total area of the village as required under section 38(2) of the Tenancy Act.

(ii) As the State had settled the said land as *gochar* for cattle grazing in the settlement made in 1932, it had the implied authority to denotify/de-reserve the said land from its status as *gochar* having regard to section 24 of the Bihar and Orissa General Clauses Act (for short 'General Clauses Act') subject to compliance with section 38(2) of the Tenancy Act.

(iii) Only the raiyats of the village Solagaria have the right to graze their cattle in the said *gochar*. The village headman and the entire village community (all the Jamabandi raiyats) have given their consent in writing on 10.11.2006 for the land in question being used for construction of a hospital. None else had any right to use the said land and therefore, the first respondent (writ petitioner) was not a person aggrieved.

(iv) Large amounts had already been invested for construction of a huge hospital building. If at this stage the said land is to be declared or confirmed or restored as *gochar*, it would result in irreparable financial loss to the Government as it would involve demolition of the recently constructed huge structure and construction of another building for the hospital at some other place. Such an exercise would also delay in extending health facilities to the residents/ tribals who are in dire need of the same.

(v) Having regard to the declaration of an alternative area of 4.44 acres in the same village as *gochar* under section 38(2) of the Tenancy Act, there was no reduction in the village *gochar* nor violation of the provisions of the Tenancy Act.

(vi) In several other cases, the Jharkhand High Court had accepted and recognized the denotification of the *gochar*

to enable the use thereof for other purposes and therefore the Government bonafide proceeded on the basis that such a procedure of denotification was permissible.

7. The first respondent on the other hand, supported the decision of the High Court. It contended that having regard to the bar contained in section 38(1) of the Tenancy Act, the land earmarked and settled as *gochar* could not be used for any other purpose (including the use as a hospital) under any circumstances. They relied upon the following passage from the final Report on "Revision Survey and Settlement Operations in the District of Santhal Parganas" submitted by Mr. J.F. Gantzer in 1935 (vide Para 63) to highlight the object of setting apart some Government land as *gochar* :

"Gochar and its Object

63. That there are mainly two objects of *gochar* or grazing land :

(a) It provides rights to Jamabandi Raiyats (Poor Tribal Agriculturist) to graze their cattle free of cost, and without any money. These tribal people are very poor and illiterate, and they cannot afford to purchase expensive feed and fodder for their domestic animals to provide them good health and nutrient foods. Grazing lands provides economic support to these indigent people, and it is a very source and means of livelihood for them.

(b) Grazing land is a part of our ecology, and helps a lot in maintaining our ecological balance by providing domestic animals of the tribes, their natural habitation, natural home and natural environmental and natural vegetation, where they eat food (grass), drink water, get pure air, sunlight, rest, move and enjoy freedom, freedom from the shackles of farm-house, freedom from the fetters of rope, and freedom from every iron bar. Their habitats are necessary, and necessary to be preserved, as otherwise it would be

a perpetration of cruelty, torture, exploitation and degrading treatment of domestic animals unbalancing our ecological system."

Whether section 2(1) of the Tenancy Act has any bearing ?

8. The appellants relied upon section 2(1) of the Tenancy Act, as the source of power, to support the validity of the notification dated 31.5.2007 and the said section is extracted below :

"2. Power to vary local extent of the Act and effect of the withdrawal of the Act from any area.—(1) The State Government may, by notification withdraw this Act, or any part thereof, from any portion of the Santhal Parganas Division and may likewise extend this Act, or any part thereof to the area from which the same has been so withdrawn."

Sub-section (1) of section 2 of the Tenancy Act enables the state Government to re-organise or delimit any portion of the Santhal Parganas Division for convenient revenue administration. De-reserving certain land which has been recorded as *gochar* in the record-of-rights in pursuance of a settlement under the Settlement Regulations, has nothing to do with withdrawing the applicability of the Tenancy Act or any part thereof from any portion of Santhal Parganas Division. De-reservation or re-categorisation of a land recorded as *gochar* in the record-of-rights is not within the scope of the Tenancy Act. We are therefore, of the view that section 2(1) of the Tenancy Act has no relevance and cannot be treated as the source of power to issue a notification de-reserving *gochar*.

Whether the Notification dated 31.5.2007 is valid?

9. The core issue is whether section 38(1) of the Tenancy Act was violated by the State Government, in using the *gochar*

for constructing a hospital, after de-reserving it from its status as *gochar*. Section 38 of the Tenancy Act reads thus

> *"38. Grazing land shall not be cultivated*.—(1) No land recorded as village grazing land or gochar shall be settled or brought under cultivation or utilized for any purpose other than grazing by any one.
>
> (2) If the area recorded as grazing land or *gochar* be less than five per centum of the total area of the village, the Deputy Commissioner may, in consultation with the landlord, village headman or mulraiyat, and raiyats, set apart suitable area of village waste land for grazing. Such land when so set apart shall be governed by the provision of sub-section (1)."

Sub-section (1) of section 38 prohibits any land *recorded as village grazing land or gochar* being (i) settled or (ii) brought under cultivation or (iii) utilized for any purpose other than grazing, by anyone.

10. The appellants seek to support the notification dated 31.5.2007 with reference to section 24 of the State General Clauses Act (corresponding to section 21 of the Central Act) which provides that where by any State Act or Regulation, a power to issue notifications, orders, rules or bye-laws is conferred, then that power includes a power exercisable in the like manner and subject to like sanction and conditions if any, to add to, amend, vary or rescind any notification, orders, rules or bye-laws so issued. The power implied from the said provision of General Clauses Act would be available only to add, amend, vary or rescind a notification issued in exercise of power conferred by a State Act or Regulation (which does not specifically confer the power to add, amend, vary or rescind such notification). It is not the case of the appellants that the lands in question were declared reserved or notified as *gochar* by issue of a notification under any State Act or Regulation. The notification dated 31.5.2007 was not issued to add, amend, vary

or rescind any notification issued in exercise of power under a State Act or Regulations. Therefore, the implied power to rescind, vary or amend an existing notification, recognised by section 24 of the State General Clauses Act is of no assistance to support the power to issue a notification de-reserving a land recorded as *gochar*.

11. The High Court has erroneously assumed that as there is no provision in the Tenancy Act for dereserving *gochar* for other uses, the State Government has no power to dereserve any land recorded as *gochar,* under any circumstances and therefore the notification dated 31.5.2007 was invalid. The High Court has also erroneously assumed that once a land is recorded as *gochar,* such land should forever be *gochar*. The prohibition under section 38(1) of the Tenancy Act in regard to settlement, cultivation or utilization for non-grazing purposes *is applicable only to land recorded as village grazing land or gochar*. If the land is not recorded as *gochar* or village grazing land, or if the land ceases to be shown as *gochar* or village grazing land in the Record-of-Rights for valid reasons, then the bar under section 38(1) will not apply. The manner of recording a land as *gochar* (or village grazing land), or the manner of de-reserving any land recorded as *gochar* (or village grazing land) is not governed or regulated by section 38 of the Tenancy Act. If the State Government has the power to dereserve or denotify *gochar* (village grazing land) under any other law, and such power is validly exercised, then the land will cease to be *gochar* and the prohibition under section 38(1) of the Tenancy Act in regard to non-grazing use will not apply.

12. Let us now consider whether the State Government has the power to de-reserve or de-notify *gochar* (village grazing land). We find that appropriate provision therefor is found in the Regulations. The preamble of the Regulations make it clear that it was made for securing the peace and good governance of the territory known as Santhal Parganas (as contrasted from the preamble to the Tenancy Act which shows that the Act was

made to amend and supplement certain laws relating to landlords and tenants in Santhal Parganas).

12.1) Regulation 10 empowers the state government to appoint the officers by whom the settlement is to be made and make rules for the procedure of such officers in the investigation into rights in the land and hearing of suits, and generally for the guidance of such officers.

12.2) Regulation 13 provides that the record of rights to be prepared by a settlement officer shall show the nature and incidents of each rights and interest held by each class of occupiers or owners in a village and if need be, of each individual owner, occupier or headman in a village. The second part of Regulation 14 provides that the Settlement Officer shall inquire into, settle and record all rights in, or claims to, the lands of a village of which he is preparing a record-of-rights, even though such claims or rights may not be urged by the parties interested.

12.3) Regulation 24 relates to publication or record of rights and it is extracted below :

> *"Publication or record-of-rights* – After the Settlement the Settlement Officer shall have made the record-of-rights for any village, he shall notify and publish the contents of such record to the persons interested by posting it conspicuously in the village and otherwise in such manner as may be convenient.
>
> *Objections against such record* – Any person interested shall thereupon be allowed to bring forward (in the Settlement Courts) within a period of six months from the date of publication of such record-of-rights, any objection he may desire to make to any part of such record; and the objection so made shall be inquired into and disposed of by a decision in writing under the hand of the officer presiding in the court."

12.4) Regulation 25 provides when and how the record-of-rights of any village becomes final. Sub-sections (1) and (3) thereof which are relevant for our purpose are extracted below :

> "25. *Record to be final after six months publication* : (1) After a period of six months from the date of the publication of the record-of-rights of any village, such records shall be conclusive proof of the rights and customs therein recorded, other than the rights mentioned in section 25-A, except so far as concerns entries in such record regarding which objections by parties interested may still be pending in the Original or Appellate Courts, or may still be open to appeal.
>
> xxxxxxx
>
> (3) When a record-of-rights has become final, or any objection to any entry in a record-of-rights has been finally disposed of in the Settlement Courts, and when all final decisions and orders, including such as may have been passed on revision as provided in sub-section (2), have been correctly embodied therein, such record shall not, until a fresh settlement is made or a new table of rates and rent-rols are prepared, be re-opened without the previous sanction of the State government."

12.5) It is evident from Regulation 25 read with Regulation 24 that though normally once the record of rights has become final, it shall not be re-opened until a fresh settlement is made, the entries in the record of rights can be re-opened and altered *with the previous sanction of the state government.* It is therefore clear that even if a land had been recorded as a *gochar* in the record-of-rights of a village in pursuance of a settlement under the Regulations, it can be re-opened and altered at any time, without waiting for the next settlement, *with the previous sanction of the state government*. Therefore the contention

of the first respondent that once a *gochar*, always a *gochar,* and there is no power in any one at any time, to alter its status as *gochar* is without merit. All that the state government did by the notification dated 31.5.2007 was to dereserve *gochar* in pursuance of a proposal/request for sanction by the Deputy Commissioner so that it is no longer recorded as *gochar* (or village grazing land).

13. The Deputy Commissioner is the authority empowered to reopen the record-of-rights for the purpose of dereserving the land recorded as *gochar* by altering its use. He made a proposal seeking the sanction of the state government, for de-reserving the *gochar* in question (4.40 acres in Thane No.24, Plot No.1061, Solagoria) and the state government by the impugned notification dated 31.5.2007 granted such approval by passing an order of de-reservation. By the very same notification, it ensured that section 38(2) of the Tenancy Act was also fulfilled by earmarking alternative land as *gochar*. The only possible objection that can be raised to the notification dated 31.5.2007 is that having regard to the Regulation 25(3), the state government had to merely sanction the dereservation and could not by itself de-reserve the land. This technical objection has no merit as de-reservation is effected by the Deputy Commissioner in pursuance of the approval granted by the state government, by making appropriate entry in the record-of-rights of the village. Therefore, the notification in question has to be read as an order granting reopening of the final record of rights of the village Solgaria for the purpose of dereserving the *gochar* of 4.40 acres for the purpose of constructing a hospital with the consent of the village headman and Jamabhandi Raiyats and at the same time instructing and directing the Deputy Commissioner to ensure that appropriate suitable land is set aside for grazing so as to make up 5% of the total land of the village as required under section 38(2) of the Act.

14. The notification no doubt does not refer to Regulations

24 and 25(3). But it is now well settled the omission to refer to the provision of law which is the source of power, or the mentioning of a wrong provision, will not by itself render an order of the government invalid or illegal, if the government had the power under an appropriate provision of law — vide *K.K. Parmar vs. High Court of Gujart* – 2006 (5) SCC 789 and *Kedar Shashikant Deshpande vs. Bhor Municipal Council* (CA Nos.10452-457/2010 dated 10.12.2010).

15. We should however note that such de-reservation of any government land reserved as *gochar*, should only be in exceptional circumstances and for valid reasons, having regard to the importance of *gochar* in every village. Any attempt by either the villagers or others to encroach upon or illegaly convert the *gochar* to house plots or other non-grazing use should be resisted and firmly dealt with. Any requirement of land for any public purpose should be met from available waste or unutilized land in the village and not *gochar*. Whenever it becomes inevitable or necessary to de-reserve any *gochar* for any public purpose (which as stated above should be as a last resort), the following procedure contemplated in Regulations 24 and 25 and section 38(2) should be strictly followed :

(a) The jurisdictional Deputy Commissioner shall prepare a note/report giving the reasons why the *gochar* had been identified for any non-grazing public purpose and record the non-availability of other suitable land for such public purpose. Deputy Commissioner shall send the said proposal for de-reservation to the State government for its previous sanction.

(b) The state government should consider the request for sanction keeping in view the object of *gochar* and the need for maintaining a minimum of five percent of village area as *gochar*, and call for suggestions/objections from the villagers before granting sanction.

(c) If the state Government grants the sanction, the Deputy Commissioner should proceed to make an order de-reserving, the *gochar* by making appropriate entries in the record-of-rights and re-classifying the same for the purpose for which it was de-reserved.

(d) Whenever the *gochar* in a village is de-reserved and diverted to non-grazing use, simultaneously or at least immediately thereafter the State should make available alternative land as *gochar*, in a manner and to an extent that the *gochar* continues to be not less than 5% of the total extent of the village as provided under section 38(2) of the Tenancy Act.

When the *gochar* is not government land, but is *village common land* vesting in the villagers and not the government, the consent of village headman and the Jamabandi Raiyats/villagers in whom the land vests shall have to be obtained, before de-reservation and diversion of use of *gochar*.

16. In this case the urgent need for de-reserving the *gochar* of 4.40 acres and diversion of its use for the public purpose of hospital is not in dispute. The village headman and all the Jamabandi Raiyats have consented to the de-reservation and use of the land in question for hospital. The land in question was found to be most suitable for housing the hospital. Alternative land was immediately notified as *gochar*. The Hospital has already been constructed in the land. Any delay would come in the way of health care of the villagers/tribals. In the circumstances, the notification dated 31.5.2007 of the Government is upheld. It is needless to say that respondents 6 and 9 will carry out necessary amendments in the Record of Rights of the village, showing Plot No.1061 as used non-grazing public purpose and record Plot Nos.62, 199 and 427 as *gochar*.

Other objections of first respondent

17. Learned counsel for the first respondent submitted that the hospital could have as well been put up in Plot Nos.62, 199 and 427 measuring 4.44 acres which has now been declared as alternative *gochar*. The *gochar* measuring 4.40 acres in plot No.1061 was chosen for the hospital having regard to its easy accessibility as it adjoins a main road. Any interior land would be disadvantageous for construction of a hospital but will not be disadvantageous for being used as a grazing land. Therefore the decision of the authorities to locate the hospital in Plot No.1061 in question cannot be faulted with.

18. The first respondent next submitted that Plot Nos.62, 199 and 427 are rocky land and not suitable for grazing land for being declared/earmarked as *gochar*. But such an objection has not been raised by the village community who are entitled to use the *gochar*. If the alternative lands notified as *gochar* were unsuitable, they would have raised the objection. When the village headman and Raiyats have agreed for the alternative area as *gochar*, such a contention is not available to the first respondent.

19. The first respondent lastly submitted that there were some irregularities and misuse of funds in the construction of the hospital building, during the pendency of the litigation, as it was done without inviting tenders. That is a separate issue. If there is any irregularity in regard to construction, the first respondent may agitate the issue by lodging a complaint with appropriate authorities.

20. We therefore allow these appeals, set aside the impugned order of the High Court and dismiss the public interest litigation (W.P. (PIL) No. 6779/2006) and permit the hospital to function in ex-*gochar* land namely Plot No.1061, Mohza Solagaria.

N.J. Appeals allowed.

STATE OF RAJASTHAN & ORS.
v.
DAYA LAL & ORS.
(Civil Appeal No. 486 of 2011)

JANUARY 13, 2011

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

Service law:

Regularization – Legal principles relating to regularization and parity in pay – Discussed.

Regularization – Persons appointed as Superintendents in aided non-governmental Hostels – Claim for absorption by way of regularization in government service or salary on par with Superintendents in Government Hostels – Held: Not maintainable – Government is liable only to extend aid to the aided non-governmental hostels by way of a grant to students staying in such hostels, to meet the expenditure of food, water, electricity, clothes, hair-cutting, soap, oil and shoes and another grant for books and stationery of such students – Government is not liable to bear the expenses of salary and allowances of the employees of the aided hostels and it is for the private organizations which run the aided hostels to meet the salaries of employees from their own resources – The persons employed in the aided hostels are the employees of the respective organizations running those hostels and are not the employees of the Government – Government merely prescribed the eligibility conditions to be fulfilled by the private organizations to get grants to meet the food and education expenses of students staying in such hostels – Therefore, persons employed by the aided hostels could not be termed as persons employed by the State Government – Nor could the Government be held liable for their service conditions, absorption, regularisation or salary of employees of private

hostels – Government and Aided Hostels Management Rules, 1982 – rr.5, 9 and 11.

Temporary employee – Part-time cooks and chowkidars employed on temporary basis in the Government hostels, with few years of service – Claim for regularization by framing a special scheme – Held: Not entitled – Service for a period of one or two years or continuation for some more years by virtue of final orders under challenge, or interim orders, would not entitle them to any kind of relief either with reference to regularization nor for payment of salary on par with regular employees of the Department – If there was a one time scheme for regularisation of those who were in service prior to a cut off date, there cannot obviously be successive directions for scheme after scheme for regularization of irregular or part-time appointments – Interim order.

Regularisation – Jurisdiction of High Courts to direct regularization, absorption or permanent continuance – Held: High Courts, in exercising power under Article 226 of the Constitution will not direct regularization, absorption or permanent continuance, unless the employees claiming regularization had been appointed in pursuance of a regular recruitment in accordance with relevant rules in an open competitive process, against sanctioned vacant posts – Constitution of India, 1950 – Articles 14, 16 and 226.

The questions which arose for consideration in the instant appeals were whether persons appointed as Superintendents in aided non-governmental Hostels are entitled to claim absorption by way of regularization in government service or salary on par with Superintendents in Government Hostels and whether part-time cooks and chowkidars appointed temporarily by Mess Committees of Government Hostels, with two or three years service, are entitled to regularization by framing a special scheme.

Allowing the appeals, the Court

HELD: 1.1 High Courts, in exercising power under Article 226 of the Constitution will not issue directions for regularization, absorption or permanent continuance, unless the employees claiming regularization had been appointed in pursuance of a regular recruitment in accordance with relevant rules in an open competitive process, against sanctioned vacant posts. The equality clause contained in Articles 14 and 16 should be scrupulously followed and courts should not issue a direction for regularization of services of an employee which would be violative of constitutional scheme. While something that is irregular for want of compliance with one of the elements in the process of selection which does not go to the root of the process, can be regularized, the back door entries and appointments contrary to the constitutional scheme and/or appointment of ineligible candidates cannot be regularized. [Para 8] [717-F-H]

1.2 Mere continuation of service by a temporary or *ad hoc* or daily-wage employee, under cover of some interim orders of the court, would not confer upon him any right to be absorbed into service, as such service would be 'litigious employment'. Even temporary, *ad hoc* or daily-wage service for a long number of years, let alone service for one or two years, will not entitle such employee to claim regularization, if he is not working against a sanctioned post. Sympathy and sentiment cannot be grounds for passing any order of regularization in the absence of a legal right. [Para 8] [718-E-F]

1.3 Even where a scheme is formulated for regularization with a cut off date (that is a scheme providing that persons who had put in a specified number of years of service and continuing in employment as on the cut off date), it is not possible to others who

were appointed subsequent to the cut off date, to claim or contend that the scheme should be applied to them by extending the cut off date or seek a direction for framing of fresh schemes providing for successive cut off dates. [Para 8] [718-E-F]

1.4 Part-time employees are not entitled to seek regularization as they are not working against any sanctioned posts. There cannot be a direction for absorption, regularization or permanent continuance of part time temporary employees. Part time temporary employees in government run institutions cannot claim parity in salary with regular employees of the government on the principle of equal pay for equal work. Nor can employees in private employment, even if serving full time, seek parity in salary with government employees. The right to claim a particular salary against the State must arise under a contract or under a statute. [Para 8] [718-G-H; 719-A-B]

Secretary, Staste of Karnataka vs. Uma Devi **2006 (4) SCC 1;** *M. Raja vs. CEERI Educational Society, Pilani* **2006 (12) SCC 636;** *S.C. Chandra vs. State of Jharkhand* **2007 (8) SCC 279;** *Kurukshetra Central Co-operative Bank Ltd vs. Mehar Chand* **2007 (15) SCC 680;** *Official Liquidator vs. Dayanand* **2008 (10) SCC 1 – relied on.**

2.1 The respondents in the instant appeals were appointed in pursuance of the Government and Aided Hostels Management Rules, 1982 which were issued by the State Government on 18.1.1982. Though they were referred to as Rules, they were not statutory rules framed by the State Government in pursuance of any power vested in the State by the legislature under any enactment. They were more in the nature of executive instructions and guidelines framed for administrative convenience. The said rules were intended to apply to Government hostels run by the Social Welfare

Department as also aided hostels which received any aid in the form of grant from the Social Welfare Department. Insofar as aided hostels are concerned, the Government is liable only to extend aid by way of a grant to students of 6 to 8 standards and students of 8 to 11 standards, staying in such hostels, to meet the expenditure of food, water, electricity, clothes, hair-cutting, soap, oil and shoes and another grant for books and stationery of such students. The Government is not liable to bear the expenses of salary and allowances of the employees of the aided hostels and it is for the private organizations which run the aided hostels to meet the salaries of employees from their own resources. The persons employed in the aided hostels are the employees of the respective organizations running those hostels and not the employees of the Government. The Government has merely prescribed the eligibility conditions to be fulfilled by the private organizations to get grants to meet the food and education expenses of students staying in such hostels. Therefore under no stretch of imagination, persons employed by the aided hostels could be termed as persons employed by the State Government. Nor could the Government be held liable for their service conditions, absorption, regularisation or salary of employees of private hostels. If the employees (either permanent or temporary) of the aided hostels are not the employees of the Government, but of the aided private charitable organizations which run such aided hostels, they could not obviously maintain any writ petition claiming the status or salary on par with the corresponding post-holders in State Government service, nor claim regularization of service under the state government. The writ petitions by persons employed in aided hostels for relief of regularization or parity in pay, were not maintainable and the decision of the High Court granting any relief to them cannot be sustained. [Paras 9, 10] [719-D-F; 722-A-D; 721-E-H]

2.2 The part-time cooks and chowkidars were employed on temporary basis in the Government hostels in the years 1995, 1996, 1997 and 1998. They approached the High court in the year 1999 (except one who approached in the year 1997). The services of some of them had been terminated within one or two years from the date of temporary appointment. Though the State had taken a decision to terminate all those who were appointed on consolidated wage basis, the other respondents continued because of the interim orders by courts. Service for a period of one or two years or continuation for some more years by virtue of final orders under challenge, or interim orders, would not entitle them to any kind of relief either with reference to regularization nor for payment of salary on par with regular employees of the Department. If there was a one time scheme for regularisation of those who were in service prior to 1.5.1995, there cannot obviously be successive directions for scheme after scheme for regularization of irregular or part-time appointments. [Paras 11, 12] [722-E-G; 723-A-D]

Daily Rated Casual Labour vs. Union of India **1988 (1) SCC 122;** *Bhagwati Prasad vs. Delhi State Mineral Development Corporation* **1990 (1) SCC 361;** *Dharwad District PWD Literate Dalit Wage Employees Association vs. State of Karnataka* **1990 (2) SCC 396 – relied on.**

Case Law Reference

2006 (4) SCC 1	**relied on**	**Para 8**
2006 (12) SCC 636	**relied on**	**Para 8**
2007 (8) SCC 279	**relied on**	**Para 8**
2007 (15) SCC 680	**relied on**	**Para 8**
2008 (10 SCC 1)	**relied on**	**Para 8**

1988 (1) SCC 122	**relied on**	**Para 12**
1990 (1) SCC 361	**relied on**	**Para 12**
1990 (2) SCC 396	**relied on**	**Para 12**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 486 of 2011.

From the Judgment & Order dated 16.08.2004 of the High Court of Judicature for Rajasthan at Jodhpur in D.B. Civil Special Appeal (Writ)No. 454 of 2004.

WITH

C.A. Nos. 487, 488, 489, 490, 491, 492, 493, 494, 495 of 2011.

Madhurima Tatia, Milind Kumar, Aruneshwar Gupta for the Appellants.

Vineet Dhanda, J.P. Dhanda, Raj Rani Dhanda, Amrendra Kr. Singh, Manu Mridul, Anant Vats, Pranav Vyas, Surya Kant, Rakhi Banerjee, Sharmila Upadhay, M.P. Jha, Ram Ekbal Roy, Harshvarhdan Jha for the Respondents.

The Judgment of the Court was delivered b

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

2. The first matter relates to persons temporarily appointed as Assistant Superintendents in 1985 and 1986 in aided hostels. The prefix 'Assistant' was omitted in 1996 and thereafter the respondents were known as Superintendents. The second matter relates to a person temporarily appointed as a Superintendent on 30.6.1998 in an aided hostel. They filed writ petitions contending that they were employed on full-time basis and were discharging functions similar to those of Superintendents in Government hostels, but were being paid only a meagre salary while their counterparts in Government

hostels are paid much higher pay in the scale of Rs.4000-6100 in the category (A) and (B) Hostels and Rs.3200-4900 in category 'C' hostels. They sought regularization in the posts of Hostel Superintendent from the date of initial appointment and payment of salary on par with hostel Superintendent of class 'C' hostels of the Social Welfare Department.

3. The respective respondents in the remaining eight appeals, claim that they were appointed in the years 1995, 1996, 1997 and 1998, as part-time cooks/chowkidars in government hostels run by Social Welfare Department. They claim that their appointment orders were issued by the respective Mess Committee of the hostel where they were employed; that the State Government was paying a fixed amount of Rs.600/- per month in the form of aid to the concerned Hostel Mess Committee which, in turn, was being paid to them as remuneration. The State Government issued an order dated 28.12.1998, stopping the practice of appointing Class IV employees on consolidated wages and to remove any person appointed on that basis. By subsequent circular dated 21.1.1999, the District Social Welfare Officers were directed to remove part time chowkidars/cooks employed by the Department with effect from 1.2.1999 and replace them by ex-servicemen or widows of ex-servicemen. In view of the Government directives, the respondents apprehended their services may be dispensed with. [The services of two of the respondents – Madan Lal Yogi and Kurda Ram who were appointed on 15.7.1995 and 1.7.1995 respectively were however terminated even earlier, on 17.3.1997 and 28.12.1998]. The respondents submitted that this Court had earlier approved a scheme under which part time cooks and chowkidars who were working as on 1.5.1995 were regularized; and that as they (respondents) were all appointed subsequent to 1.5.1995 and were not therefore covered under the said scheme, a fresh scheme should be framed to benefit them. They therefore sought a declaration that the circulars

dated 28.12.1998 and 1.2.1999, were invalid and a direction for regularization by framing an appropriate scheme similar to the scheme framed by the State Government in pursuance of the order dated 26.5.1995 of the Rajasthan High Court in WP No.3453/1994 — *Anshkalin Samaj Kalyan Sangh, Banswara vs. The State of Rajasthan.*

4. In the first seven appeals, a learned Single Judge by a common order dated 7.5.2003 allowed the writ petitions. He held that the writ petitioners working on the posts of Superintendent, Cooks and Chowkidars are entitled to salary on par with the salary which was paid to their counterparts holding similar posts in the hostels run by the Social Welfare Department of the State Government with effect from the dates of their respective writ petitions. He also held that any attempt to terminate the services of employees working in the hostels on consolidated salary was unjust and illegal and therefore the writ petitioners should be permitted to continue to work on the posts which they were holding as on the date of filing their respective writ petitions. He directed the State Government to frame a scheme on the same lines in which the State Government had earlier framed a scheme relating to part-time cooks and chowkidars (who were serving as on 1.5.1995). He also quashed the orders dated 28.12.1998 and 21.1.1999 (which directed chowkidars and cooks employed on consolidated wages should be removed with immediate effect from 1.2.1999 and should be replaced by ex-servicemen or widows of ex-servicemen). The scheme referred to by the learned Single Judge was the scheme which was framed by the State Government in pursuance of the directions of the Rajasthan High Court in *Anshkalin Samaj Kalyan Sangh* (supra) which was approved by this court in 1996 (in CA No.365/1994 – *State of Rajasthan vs. Mod Singh*). Feeling aggrieved, the State filed appeals which were dismissed by a common judgment dated 16.8.2004. The said judgments are challenged in the first seven appeals by the State and its functionaries.

5. In the next two appeals, a learned Single Judge by common order dated 5.2.2001 allowed the writ petitions of the respondent in terms of the following directions issued in *Anshkalin Samaj Kalyan Sangh* (supra) :

> "In the circumstances of the case, it would be just and proper to direct that the Chowkidars and Cooks employed in the hostels run by the Government or Government aided institutions, shall be paid at the rate of the minimum of the pay scale applicable to Class IV employees and Cooks in the Government employment respectively from the date of their filing of the petition. In cases of those who have filed the petition, in cases of those who have not filed the petition, it shall be paid from the date of this order. So far as the regularization is concerned, the cases of all such employees who have put in service of five years or more shall be immediately taken up for consideration for regularization and scheme for regularization of their services shall be framed and put into effect within a period of six months from today. A scheme for regularization of employment of such employees who have not completed five years service shall also be framed within a reasonable time by the Government. These directions shall be applicable in the cases of all the employees similarly situated working in the hostels under the Social Welfare Department of the State irrespective of the fact whether such employees have filed petitions in this Court or not. The benefit of this Order shall be available to only those employees who were in service on the day of filing of petition or the date of this order as the case may be."

The writ appeals filed by the State against the said order were dismissed by a division bench by common order dated 16.11.2005.

6. In the last appeal (relating to Kurda Ram), the writ petition for regularization was dismissed by a learned Single Judge by order dated 3.5.1999. However, the special appeal

filed by the respondent was allowed by order dated 2.12.2005 and the order of termination was set aside following the decision dated 16.8.2004 (which is the subject matter of the first seven appeals). The division bench observed that the respondents' case may be considered in the light of the decision of this court in the pending challenge to the order dated 16.8.2004.

7. Two questions therefore arise for consideration in these appeals :

(i) Whether persons appointed as Superintendents in aided non-governmental Hostels are entitled to claim absorption by way of regularization in government service or salary on par with Superintendents in Government Hostels?

(ii) Whether part-time cooks and chowkidars appointed temporarily by Mess Committees of Government Hostels, with two or three years service, are entitled to regularization by framing a special scheme?

8. We may at the outset refer to the following well settled principles relating to regularization and parity in pay, relevant in the context of these appeals:

(i) High Courts, in exercising power under Article 226 of the Constitution will not issue directions for regularization, absorption or permanent continuance, unless the employees claiming regularization had been appointed in pursuance of a regular recruitment in accordance with relevant rules in an open competitive process, against sanctioned vacant posts. The equality clause contained in Articles 14 and 16 should be scrupulously followed and courts should not issue a direction for regularization of services of an employee which would be violative of constitutional

scheme. While something that is irregular for want of compliance with one of the elements in the process of selection which does not go to the root of the process, can be regularized, back door entries, appointments contrary to the constitutional scheme and/or appointment of ineligible candidates cannot be regularized.

(ii) Mere continuation of service by an temporary or *ad hoc* or daily-wage employee, under cover of some interim orders of the court, would not confer upon him any right to be absorbed into service, as such service would be 'litigious employment'. Even temporary, *ad hoc* or daily-wage service for a long number of years, let alone service for one or two years, will not entitle such employee to claim regularization, if he is not working against a sanctioned post. Sympathy and sentiment cannot be grounds for passing any order of regularization in the absence of a legal right.

(iii) Even where a scheme is formulated for regularization with a cut off date (that is a scheme providing that persons who had put in a specified number of years of service and continuing in employment as on the cut off date), it is not possible to others who were appointed subsequent to the cut off date, to claim or contend that the scheme should be applied to them by extending the cut off date or seek a direction for framing of fresh schemes providing for successive cut off dates.

(iv) Part-time employees are not entitled to seek regularization as they are not working against any sanctioned posts. There cannot be a direction for absorption, regularization or permanent continuance of part time temporary employees.

(v) Part time temporary employees in government run institutions cannot claim parity in salary with regular employees of the government on the principle of equal pay for equal work. Nor can employees in private employment, even if serving full time, seek parity in salary with government employees. The right to claim a particular salary against the State must arise under a contract or under a statute.

(See : *Secretary, State of Karnataka vs. Uma Devi* – 2006 (4) SCC 1, *M. Raja vs. CEERI Educational Society, Pilani* – 2006 (12) SCC 636, *S.C. Chandra vs. State of Jharkhand* – 2007 (8) SCC 279, *Kurukshetra Central Co-operative Bank Ltd vs. Mehar Chand* – 2007 (15) SCC 680, and *Official Liquidator vs. Dayanand* – 2008 (10 SCC 1)

9. As noticed above, the respondents in these appeals were appointed in pursuance of the Government & Aided Hostels Management Rules, 1982 which were issued by the State Government on 18.1.1982. Though they were referred to as Rules, they were not statutory rules framed by the State Government in pursuance of any power vested in the State by the legislature under any enactment. They were more in the nature of executive instructions and guidelines framed for administrative convenience. The said rules were intended to apply to Government hostels run by the Social Welfare Department as also aided hostels which received any aid in the form of grant from the Social Welfare Department. We may refer to the relevant provisions of these Rules.

9.1) Rule 5 indicated the staff pattern in Government Hostels. Clause (2) of Rule 5 provided that every government hostel should have an Assistant Superintendent and the salary of the Assistant Superintendent in 'A' and 'B' category hostels will be in the pay scale of Rs.385-650 and in 'C' category hostels, the salary will be in the pay-scale of Rs.350-570. Clauses (4), (5) and (6) of Rule 5 provided that every hostel will have one temporary Doctor (who will be paid a monthly

conveyance allowance of Rs.75/- in 'A' & 'B' category Hostels and Rs.50/- in 'C' category Hostels), a Class IV employee who was to stay in the hostel by being provided accommodation and a Safai Karamchari who was to be appointed on temporary basis.

9.2) Clause 9 provided that every Government hostel will have a Mess Committee consisting of Superintendent/Warden as the President, one elected Secretary from among the students, five other students as members and an Assistant Superintendent as accountant-cum-cashier. Clause (3) of Rule 9 provided that the Mess Committee will arrange for the food, breakfast, water, electricity, clothes, hair-cutting, soap, oil and shoes etc. for the students for which the Government would pay to the Mess Committee a sum of Rs.80/- per student (relating to students of Classes 6 to 8) and Rs.85/- per month (relating to students of Classes 9 to 11). For every academic session, the Government would also pay in a lumpsum to the District Officer, a sum calculated at the rate of Rs.60/-per student (for classes 9 to 11) and Rs.40/- per student (for classes 6 to 8) for providing books, stationery and fees for the students in the Hostels. Clause (7) of Rule 9 provided that Mess Committee of Government Hostels will not be provided departmental cooks but each Mess Committee will be given a grant of Rs.250/- per month per cook and the number of cooks will be decided with reference to the number of students (one cook for 25 students) and the appointment of cooks will be on part-time basis for ten months in a year.

9.3) Rule 11 related to recognition of aided hostels and their management. Clause (1) thereof provided that registered voluntary service organizations are required to submit applications to the Director for management of hostels, recognition and permission of grant. Clause (2) provided that the Director, Social Welfare Department, will dispose of the applications taking note of the availability of sufficient building and other sources, whether sufficient means for meeting the

necessary expenses are available with the organization in the proposed hostel, whether the organization is capable of providing the prescribed facilities in the hostel. Clause (3) provided that one of the conditions for sanction of the hostel is the admission of students belonging to scheduled castes, scheduled tribes and backward classes as declared by the Government from time to time. Clause (5) of Rule 11 provided that 90% of the amount payable by the Social Welfare Department to the Aided Hostels (for providing food, clothes etc. to the students) will be paid to the account of the Mess Committee (calculated with reference to the number of students) and grant for fees and books of the students will be distributed by the District Offices. It further provided that *the expenses on the salary and allowances of Assistant Superintendent, class IV employees appointed by the Aided organization, cost of fixed assets and rent of building will be borne by the aided organization which runs the hostel.*

Re : Question (i) – First two appeals relating to aided hostels

10. It is thus evident that insofar as aided hostels were concerned, the Government was liable only to extend aid by way of a grant to students of 6 to 8 standards and students of 8 to 11 standards, staying in such hostels, to meet the expenditure of food, water, electricity, clothes, hair-cutting, soap, oil and shoes and another grant for books and stationery of such students. The Government was not liable to bear the expenses of salary and allowances of the employees of the aided hostels and it was for the private organizations which ran the aided hostels to meet the salaries of employees from their own resources. The persons employed in the aided hostels were the employees of the respective organizations running those hostels and not the employees of the Government. The Government has merely prescribed the eligibility conditions to be fulfilled by the private organizations to get grants to meet the food and education expenses of students staying in such

hostels. Therefore under no stretch of imagination persons employed by the aided hostels could be termed as persons employed by the State Government. Nor could the Government be held liable for their service conditions, absorption, regularisation or salary of employees of private hostels. If the employees (either permanent or temporary) of the aided hostels are not the employees of the Government, but of the aided private charitable organizations which run such aided hostels, they could not obviously maintain any writ petition claiming the status or salary on par with the corresponding post-holders in State Government service, nor claim regularization of service under the state government. Hence, the writ petitions by persons employed in aided hostels for relief of regularization or parity in pay, were not maintainable and the decision of the High Court granting any relief to them cannot be sustained.

Re : Question (ii) - The other appeals relating to part-time cooks/chowkidars in government hostels.

11. The part-time cooks and chowkidars were employed on temporary basis in the Government hostels in the years 1995, 1996, 1997 and 1998. They approached the High court in the year 1999 (except Madan Lal Yogi who approached in the year 1997). The services of some of them had been terminated within one or two years from the date of temporary appointment. Though the State had taken a decision to terminate all those who were appointed on consolidated wage basis, the other respondents continued because of the interim orders by courts. Service for a period of one or two years or continuation for some more years by virtue of final orders under challenge, or interim orders, will not entitle them to any kind of relief either with reference to regularization nor for payment of salary on par with regular employees of the Department.

12. The decision relied upon by the High Court namely the decision in *Anshkalin Samaj Kalyan Sangh* of the High Court no doubt directed the state government to frame a scheme for

regularization of part-time cooks and chowkidars. It is clear from the said decision, that such scheme was intended to be an one-time measure. Further said decision was rendered by the High Court prior to *Uma Devi,* relying upon the decision of this Court in *Daily Rated Casual Labour vs. Union of India* [1988 (1) SCC 122], *Bhagwati Prasad vs. Delhi State Mineral Development Corporation* [1990 (1) SCC 361] and *Dharwad District PWD Literate Dalit Wage Employees Association vs. State of Karnataka* [1990 (2) SCC 396]. These directions were considered, explained and in fact, overruled by the Constitution Bench in *Uma Devi*. The decision in *Anshkalin Samay Kalyan Singh* is no longer good law. At all events, even if there was an one time scheme for regularisation of those who were in service prior to 1.5.1995, there cannot obviously be successive directions for scheme after scheme for regularization of irregular or part-time appointments. Therefore the said decision is of no assistance.

Conclusion

13. In view of the above, both the questions are answered in the negative and in favour of the appellants. Therefore, none of the respondents is entitled to any relief. All the appeals are allowed and the orders of the High Court challenged in these appeals are set aside. Consequently, the writ petitions filed by the respondents before the High Court stand dismissed.

D.G. Appeals allowed.

BANSI LAL

v.

STATE OF HARYANA

(Criminal Appeal No. 1322 of 2004)

JANUARY 14, 2011

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

Penal Code, 1860:

s.498A – Suicide by married woman – Allegation of maltreatment and cruelty against husband on account of demand of dowry – Victim-deceased had left matrimonial home just after one year of marriage and stayed with her parents for 14 months continuously – She rejoined matrimonial home only at the assurance given in the panchayat by accused and his family members that she would not be humiliated and subjected to cruelty – Three years after marriage, she committed suicide – Conviction of husband u/s.498A – Challenged – Held: While considering the case u/s.498-A, cruelty has to be proved during the close proximity of time of death and should be continuous making life of the deceased miserable forcing her to commit suicide – In the instant case, there was demand of scooter by the accused in the close proximity of the death – The demand was consistent and persistent as the father and the brother of the deceased had specifically deposed that the demand was only in respect of scooter and nothing else – Both these witnesses were subjected to long cross-examination, however, nothing could be elicited from them to show that the allegations made by the prosecution could be false – Conviction upheld – Evidence Act, 1872 – s.113B.

Evidence Act, 1872:

s.113A and s.113B – Distinction between.

s.113B – Necessary ingredients – Discussed.

Evidence:

Suicide note – Evidentiary value of – On facts, held: The authorship of the suicide note was not proved by producing witnesses nor the said document was sent to handwriting expert along with the admitted signature of the deceased for comparison – Prosecution could not establish nexus of the deceased with the said note – Onus was on the accused to establish his defence by sufficient evidence to rebut presumption that he had caused the dowry death, which he failed to discharge – Courts below were right in ignoring the said note – Penal Code, 1860 – ss.304B, 498A.

The prosecution case was that the victim-deceased was married to the appellant on 4th April, 1988. After one year of marriage, the deceased came and stayed with her parents for about 14 months and after convening a panchayat of close relatives, she returned to her matrimonial home. On 25th June, 1991, the father of the deceased lodged an FIR that the deceased had committed suicide, making allegations that the deceased was consistently harassed by the appellant and was maltreated and harassed for bringing dowry. The trial court convicted the appellant and his mother under Sections 498-A, 304-B and 306, IPC. The High Court acquitted appellant's mother but dismissed the appeal of the appellant.

In the instant appeal, the defence raised by the appellant was that there was no demand of scooter or dowry and that the deceased wanted to marry some other person and her marriage with the appellant was against her will, due to which she felt suffocated and committed suicide, leaving a suicide note (Ex P-2) to that effect.

Dismissing the appeal, the Court

HELD: 1. The theory of love affair of the deceased was disbelieved by the courts below. Ex.P-2, the note allegedly recovered by the Investigating Officer was totally rejected from consideration in evidence for the simple reason that no nexus of the deceased could be established with this document. There was no evidence worth the name from the side of the prosecution or from the defence to indicate that the writing Ex.P-2 was, in fact, in the hand of the deceased. The father and the brother of the deceased when stepped into the witness-box did not say even a word that the document Ex.P-2 was written in the hand of the deceased. Even the defence counsel did not put any specific question/suggestion to these witnesses about authorship of this document, knowing very well that the Investigating Officer had taken it into possession from the almirah of their house. The Investigating Officer (PW6) in his cross-examination stated that the diary, letter and ball-pen were lying in the room and he enquired about the author of the said letter Ex.P-2 and it was revealed that the same was written by the deceased. This statement could be termed as a hear say evidence, having no legal sanctity when the main witnesses were not asked about the authorship thereof. A mere suggestion was put to the father and the brother of the deceased to the effect that the deceased had left a suicide note regarding her relations with some other person. The authorship of this letter could be proved either by producing some witness who had seen the deceased writing and signing or the said document could be sent to some handwriting expert alongwith the admitted writing of the deceased for comparison. Both the situations were missing. Even the Investigating Officer did not say a word as to from whom he had verified about authorship of the said letter. In case this document is taken to be a proved one, this would amount to bye-passing the provisions of the Evidence Act. The

witnesses of panchnama of recovery of this letter were not examined. The father and the brother of the deceased both had denied the suggestion of recovery of any such letter nor the letters had been shown to them for identifying the handwriting of the deceased. More so, there was nothing on record to show that she was educated. The Investigating Officer had not stated anywhere that he knew the handwriting of the deceased nor he has disclosed on whose information he had inferred that the letter had been written by the deceased. In such a fact situation, the recovery of such letter is to be disbelieved and the letter is required to be ignored totally. More so, it has no probative value because it is no body's case that the alleged suicide note is in the handwriting of the deceased. Evidently, the suicide note, Ext.P-2 purported to have been written by the deceased had been taken by appellant as his defence while making his statement under section 313 Cr.P.C. Therefore, the onus was on him to establish his defence by leading sufficient evidence to rebut the presumption that he has caused the dowry death. The appellant miserably failed to discharge that onus. The defence of the appellant, thus, was very weak and fragile. In view of that, there is no cogent reason to take a view contrary to the view taken by the courts below that Ex.P2, the suicide note was not worth consideration. [Paras 11, 12, 13, 19]] [734-H; 735-G-H; 736-A-H; 737-A-F; 738-A-B]

2.1. The demand of scooter had been consistent and persistent as the father and the brother of the deceased had specifically deposed that the demand was only in respect of scooter and nothing else. Had this allegation been false, the said witnesses could have also mentioned other articles purported to have been demanded by the appellant or his other family members. Therefore, the veracity of the evidence of these two witnesses on this issue cannot be doubted. Both the witnesses were

subjected to long cross- examination at the behest of the appellant, however, nothing could be elicited from them to the extent that the allegations made by the prosecution could be false. [Para 14] [737-G-H; 738-A-B]

2.2. While considering the case under Section 498-A, IPC, cruelty has to be proved during the close proximity of time of death and it should be continuous and such continuous harassment, physical or mental, by the accused should make life of the deceased miserable which may force her to commit suicide. In the instant case, the conduct of the accused forced the deceased to leave her matrimonial home just after one year of marriage and stay with her parents for 14 months continuously. It was only at the assurance given by the panchayat that the accused or his family members would not humiliate or subject the deceased with cruelty, that she rejoined her matrimonial home. It was specific evidence of the brother of the deceased that just few days before her death, when he went to see his sister, there was a demand of scooter by the appellant. In such a fact situation, it cannot said that there was no demand of scooter in the close proximity of the death. [Paras 15] [738-B-E]

2.3. In the provision of Section 113B of the Evidence Act, 1872, the legislature in its wisdom has used the word "shall" thus, making a mandatory application on the part of the court to presume that death had been committed by the person who had subjected her to cruelty or harassment in connection with or demand of dowry. It is unlike the provisions of Section 113A of the Evidence Act where a discretion has been conferred upon the court wherein it had been provided that court may presume to abatement of suicide by a married woman. Therefore, onus lies on the accused to rebut the presumption and in case of Section 113B relatable to Section 304B IPC, the

onus to prove shifts exclusively and heavily on the accused. The only requirement is that death of a woman has been caused by means other than any natural circumstances; that death has been caused or occurred within 7 years of her marriage; and such woman had been subjected to cruelty or harassment by her husband or any relative of her husband in connection with any demand of dowry. Therefore, in case the essential ingredients of such death have been established by the prosecution, it is the duty of the court to raise a presumption that the accused has caused the dowry death. The expression shown before her death has not been defined in either of the statutes. Therefore, in each case, the court has to analyse the facts and circumstances leading to the death of the victim and decide if there is any proximate connection between the demand of dowry and act of cruelty or harassment and the death. [Paras 16 to 18] [738-F-H; 739-A-G]

T. Aruntperunjothi v. State through S.H.O., Pondicherry **AIR 2006 SC 2475;** *Devi Lal v. State of Rajasthan* **AIR 2008 SC 332;** *State of Rajasthan v. Jaggu Ram* **AIR 2008 SC 982;** *Anand Kumar v. State of M.P.,* **AIR 2009 SC 2155;** *Undavalli Narayana Rao v. State of Andhra Pradesh,* **AIR 2010 SC 3708 – referred to.**

Case Law Reference:

AIR 2006 SC 2475	**referred to**	**Para 18**
AIR 2008 SC 332	**referred to**	**Para 18**
AIR 2008 SC 982	**referred to**	**Para 18**
AIR 2009 SC 2155	**referred to**	**Para 18**
AIR 2010 SC 3708	**referred to**	**Para 18**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1322 of 2004.

From the Judgment & Order dated 05.04.2004 of the High Court of Punjab & Haryana at Chandigarh in Crl. Appeal No. 708-SB of 1998.

Mahabir Singh, Rishi Malhotra, Prem Malhotra for the Appellant.

Manjit Singh, AAG, Rao Ranjit, Harikesh Singh, Kamal Mohan Gupta for the Respondent.

The Judgment of the Court was delivered by

Dr. B.S. CHAUHAN, J. 1. This criminal appeal has been preferred against the judgment and order of the Punjab and Haryana High Court at Chandigarh dated 5th May, 2004 in Criminal Appeal No. 708-SB of 1998, by which the conviction of the appellant by Additional Sessions Judge, Gurgaon, vide judgment and order dated 22nd August, 1998 and 25th August, 1998 for offences under Sections 498-A, 304-B and 306 of Indian Penal Code, 1860 (hereinafter referred as 'IPC') and awarding the sentence to undergo rigorous imprisonment for two years and to pay a fine of Rs. 500/- and in default of payment of fine to further undergo rigorous imprisonment for two months, has been upheld. However, for the offence under Section 304-B IPC sentence to undergo for ten years and pay a fine of Rs.2,000/- in default of payment of fine, to further undergo rigorous imprisonment for six months, has been reduced to seven years with fine.

2. Facts and circumstances giving rise to this case are that the appellant was married to Sarla (deceased) on 4th April, 1988. An FIR was lodged by Shyam Lal (PW.4) father of Sarla (deceased) on 25th June, 1991 making allegations that the appellant, his mother, brother and sister-in-law had consistently harassed his daughter Sarla (deceased) by making dowry demand i.e. a scooter. She had been maltreated by them. After one year of marriage, Sarla (deceased) came and stayed with

her family for about 14 months. It was only after convening a panchayat of close relatives, she had returned to her matrimonial home. Again they maltreated and insisted for the demand of a scooter, thus, she had been subjected to cruelty, harassment by demand of dowry to the extent that she committed suicide on 25th June, 1991, at her matrimonial home.

3. After investigation of the case, the prosecution filed the chargesheet against the appellant and his mother Smt. Shanti Devi and charges were framed against them under Sections 498-A, 304-B and 306 IPC. The said two accused pleaded not guilty, thus, they were put on trial. It was on 17th May, 1995, that in view of the evidence of the prosecution witnesses, the learned Sessions Judge in exercise of his power under Section 319 of the Code of Criminal Procedure, 1973 (hereinafter called Cr.P.C.) summoned the other two accused Ashok Kumar, brother and Smt. Shakuntala, sister-in-law of the appellant and charges were reframed against all the four accused under Sections 498-A, 304-B and 306 IPC vide order dated 6th July, 1995.

4. In order to substantiate its case, the prosecution examined several witnesses including complainant Shyam Lal (PW.4), Gulshan (PW.5), brother of Sarla (deceased), Dr. B.B. Agarwal (PW.1), Shri Arjun Singh Yadav, ASI, (PW.6), Constable Jai Pal (PW.2), Shri Mool Chand Punia, Draftsman (PW.3), and other formal witnesses.

5. While making their statement under Section 313 Cr.P.C., the accused persons denied all the allegations against them and set up the defence as under:

> *"Sarla was in love with some other person. She was forced to marry with accused Bansi Lal against her will, due to which she felt suffocated and committed suicide, leaving a suicide note to that effect. There was no demand of Scooter."*

Further, accused Ashok Kumar (A.3) and Shakuntala (A.4) pleaded that they had been living separately from the appellant and his mother and they had no involvement so far as the demand of dowry was concerned. In defence only three witnesses i.e. Bal Kishan, an official of HSEB (DW.1), Vidya Nand, an Inspector of Food and Supplies Department (DW.2) and Surender Singh, Sarpanch of the village Gram Panchayat (DW.3) were examined only to prove that accused Ashok Kumar (A.3) and Shakuntala (A.4) were living separately from the appellant and his mother Smt. Shanti Devi.

6. After considering the entire evidence on record and the submissions made by the prosecution as well as defence, the trial court convicted the appellant and his mother Smt. Shanti Devi under Sections 498-A, 304-B and 306 IPC and awarded the sentences as referred to hereinabove. The court acquitted Ashok Kumar and Shakuntala of all the charges against them. The Trial Court did not award any separate sentence under Section 306 IPC.

7. Being aggrieved, the appellant and his mother Smt. Shanti Devi preferred Criminal Appeal No. 708-SB of 1998 which has been disposed of by the impugned judgment and order dated 5th May, 2004, acquitting Smt. Shanti Devi, not being beneficiary of the demand of dowry, as only scooter had been demanded but dismissed the appeal so far as the present appellant is concerned. However, considering the facts and circumstances of the case, the sentence under Section 304-B IPC has been reduced from 10 years to 7 years. Hence, this appeal.

8. Shri Mahabir Singh, learned senior counsel appearing for the appellant, has submitted that no charge could be brought home against the appellant under any of the penal provisions as there was no demand of dowry by the appellant. The harassment was not in close proximity of time of death. The prosecution itself had submitted that Sarla (deceased) wanted to marry one Shiv Parkash Singh and thus, she was not happy

with the appellant. She had left a suicide note to that effect and the said note had been exhibited before the trial court as Ex.P2. Thus, the appeal deserves to be allowed.

9. On the contrary, Shri Rao Ranjit, learned advocate appearing for the State, has vehemently opposed the appeal contending that the facts and circumstances of the case do not warrant interference with the concurrent finding of facts recorded by the courts below. The suicide note Ex.P2 has to be ignored as it has not been proved as per requirement of law. No witness has been examined for comparing the handwriting of the deceased nor it has been signed by the deceased. It had not even been shown to father of the deceased i.e. Shyam Lal (PW.4), complainant or her brother Gulshan (PW.5). More so, it had been the defence of the appellant while making his statement under Section 313 Cr.P.C. Thus, he should have led evidence to substantiate the defence. Thus, the appeal lacks merit and is liable to dismissed.

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

The admitted facts of the case remain as under:

(i) There was no demand of scooter at the initial stage of marriage in 1988.

(ii) Complainant Shyam Lal (PW.4) and Gulshan (PW.5) had deposed that there had been consistent and persistent demand of scooter by the appellant.

(iii) After one year of the marriage, when Sarla (deceased) came to the house of her parents, she stayed with them for a period of 14 months.

(iv) During this period of 14 months, no attempt had been made by the appellant to call her newly

wedded wife back to the matrimonial home.

(v) A Panchayat of very close relatives was convened and they had assured the parents and family members of Sarla (deceased) that appellant and his other family members would behave properly with Sarla (deceased) and she would not be maltreated or humiliated or subjected to any kind of cruelty for demand of dowry.

(vi) It was on this assurance that Sarla (deceased) came back to stay with the appellant at her matrimonial home.

(vii) Sarla committed suicide by hanging herself on 25th June, 1991.

(viii) The appellant or any of his family members did not inform Shyam Lal, (PW.4), complainant or any of his family members about the death of Sarla (deceased).

(ix) Shyam Lal (PW.4) and Gulshan (PW.5) reached her matrimonial home alongwith others getting information from other persons.

(x) Shyam Lal (PW.4) immediately lodged the FIR against the appellant and other family members and, set the law in motion.

(xi) Sarla (deceased) was found dead at her matrimonial home when she stayed with the appellant and other family members. They had not furnished any satisfactory explanation as for which reason and under what circumstances she had committed suicide.

11. So far as the theory of love affair of Sarla (deceased) is concerned, it has been disbelieved by the courts below. The

Trial Court dealt with the issued observing as under :

> "If the husband was doubting her fidelity towards him there was no reason for him to have come with his father and other relatives to the parents of the deceased to take her back after 14 months of her stay with her parents. It also cannot be said that the deceased was not having any liking for her husband and was frustrated because she allegedly could not marry the person of her choice. Rather the circumstances are otherwise. Had she developed hatred for her husband, there was no reason for her to join him after 14 months of her staying away from the matrimonial home. There was every reason for her to believe the husband and his relatives that demand of dowry and other torture and maltreatment would not be there. Better sense definitely, after such a lapse of time, was naturally to be expected to have dawned on them. Parents of the deceased also did not create any hassles as they felt satisfied from the assurance of the accused on this score. At any rate melodramatic story of her love affairs with some one and her frustration in her married life with accused Bansi Lal can hardly be taken as genuine. If it was so, she could not have continued to wait to die for her alleged lover for three long years, having consummated the marriage with her husband and having cohabited with him all-through she was with him in the matrimonial home."

12. Again, the High Court has dealt with the issue elaborately and recorded the following findings:

> "Much has been said by the learned counsel about Ex.P-2, the note allegedly recovered by the Investigating Officer. In my considered view, this document has to be totally rejected from consideration in evidence for the simple reason that no nexus of the deceased has been established with this document. There is no evidence worth the name from the side of the prosecution or from the defence, which may indicate that the writing Ex.P-2 was,

> in fact, in the hand of Sarla deceased. Shyam Lal and Gulshan PWs when stepped into the witness-box do not say even a word that the document Ex.P-2 is written in the hand of Sarla deceased. Even the defence counsel did not put any specific question/suggestion to these witnesses about authorship of this document, knowing very well that ASI Arjun Singh Yadav, Investigating Officer had taken it into possession from the almirah of their house. The Investigating Officer (PW6) in his cross examination has stated that the diary, letter and ball-pen were lying in the room and he enquired about the author of the said letter Ex.P-2 and it was revealed that the same was written by the deceased. This statement can be termed as a hear say evidence, having no legal sanctity when the main witnesses were not asked about the authorship thereof. A mere suggestion put to Shyam Lal and Gulshan PWs to the effect that Sarla had left a suicide note regarding her relations with some other person, takes us no where. The authorship of this letter could be proved either by producing some witness who had seen the deceased writing and signing or the said document could be sent to some handwriting expert alongwith the admitted writing of Sarla deceased for comparison. Both the situations are missing. Even the Investigating Officer does not say a word as to from whom he had verified about authorship of the said letter. In case this document is taken to be a proved one, this would amount to bye-passing the provisions of the Evidence Act. The Investigating Officer cannot be all and all. The irresistible conclusion, thus, is that the document Ex.P-2, the so-called suicide note has to be taken out of the zone of consideration. The defence of the Bansi Lal appellant thus becomes very weak and fragile."

13. In view of the above, we do not see any cogent reason to take a view contrary to the view taken by the courts below that Ex.P2, the suicide note was not worth consideration. It

has rightly been held by the courts below that it was to be ignored.

Ext.P.2, the so-called suicide note disclosing that Sarla (deceased) committed suicide as she developed love affair with Shiv Parkash has been referred to by the Investigating Officer Arjun Singh, ASI (PW.6) where in his cross-examination he has stated as under:-

"The diary, letter, and ball pen were lying in a window of the room. He had enquired about the author of the letter Ext.P.2 and it was revealed that it is written by Sarla, deceased."

The witnesses of panchnama of recovery of this letter had not been examined though they had been Mahabir Singh, Chowkidar of village Shiwari and Hoshiar Singh, Ex. Sarpanch of Shiwari. Shyam Lal (PW.4) and Gulshan (PW.5) both have denied the suggestion of recovery of any such letter nor the letters had been shown to them for identifying the handwriting of Sarla (deceased). More so, there is nothing on record to show that she was educated. Arjun Singh, ASI (PW.6) has not stated anywhere that he knew the handwriting of Sarla (deceased) nor he has disclosed on whose information he had inferred that the letter had been written by Sarla (deceased). In such a fact situation, the recovery of such letter is to be disbelieved and the letter is required to be ignored totally. More so, it has no probative value because it is no body's case that the alleged suicide note is in the handwriting of Sarla (deceased).

14. The demand of scooter had been consistent and persistent as Shyam Lal (PW.4) and Gulshan (PW.5) had specifically deposed that the demand was only in respect of scooter and nothing else. Had this allegation be false, the said witnesses could also mention other articles purported to have been demanded by the appellant or his other family members. Therefore, the veracity of the evidence of these two

witnesses on this issue cannot be doubted. Both the witnesses had been subjected to long cross examination at the behest of the appellant, however, nothing could be elicited from them to the extent that the allegations made by the prosecution could be false.

15. While considering the case under Section 498-A, cruelty has to be proved during the close proximity of time of death and it should be continuous and such continuous harassment, physical or mental, by the accused should make life of the deceased miserable which may force her to commit suicide. In the instant case, the conduct of the accused forced the deceased Sarla to leave her matrimonial home just after one year of marriage and stay with her parents for 14 months continuously. It was only at the assurance given by the panchayat that the accused or his family members would not humiliate or subject the deceased Sarla with cruelty, that she rejoined her matrimonial home. It is specific evidence of Gulshan (PW.5) that just few days before her death, when he went to see her sister, there was a demand of scooter by the appellant. In such a fact situation, we do not find any force in the submission made on behalf of the appellant that there was no demand of scooter in the close proximity of the death.

16. In such a fact situation, the provisions of Section 113B of the Indian Evidence Act, 1872 providing for presumption that accused is responsible for dowry death, have to be pressed in service. The said provisions read as under:-

"Presumption as to dowry death.—When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the court shall presume that such person had caused the dowry death." (emphasis supplied)

It may be mentioned herein that the legislature in its

wisdom has used the word "shall" thus, making a mandatory application on the part of the court to presume that death had been committed by the person who had subjected her to cruelty or harassment in connection with or demand of dowry. It is unlike the provisions of Section 113A of the Evidence Act where a discretion has been conferred upon the court wherein it had been provided that court may presume to abetment of suicide by a married woman. Therefore, in view of the above, onus lies on the accused to rebut the presumption and in case of Section 113B relatable to Section 304 IPC, the onus to prove shifts exclusively and heavily on the accused.

17. The only requirement is that death of a woman has been caused by means other than any natural circumstances; that death has been caused or occurred within 7 years of her marriage; and such woman had been subjected to cruelty or harassment by her husband or any relative of her husband in connection with any demand of dowry.

18. Therefore, in case the essential ingredients of such death have been established by the prosecution, it is the duty of the court to raise a presumption that the accused has caused the dowry death. It may also be pertinent to mention herein that the expression shown before her death has not been defined in either of the statutes. Therefore, in each case, the court has to analyse the facts and circumstances leading to the death of the victim and decide if there is any proximate connection between the demand of dowry and act of cruelty or harassment and the death. (vide: *T. Aruntperunjothi v. State through S.H.O., Pondicherry,* AIR 2006 SC 2475; *Devi Lal v. State of Rajasthan,* AIR 2008 SC 332; *State of Rajasthan v. Jaggu Ram,* AIR 2008 SC 982; *Anand Kumar v. State of M.P.,* AIR 2009 SC 2155; and *Undavalli Narayana Rao v. State of Andhra Pradesh,* AIR 2010 SC 3708).

19. In the instant case, evidently, the suicide note, Ext.P-

2 purported to have been written by Sarla (deceased) had been taken by appellant as his defence while making his statement under section 313 Cr.P.C. Therefore, the onus was on him to establish his defence by leading sufficient evidence to rebut the presumption that he has caused the dowry death. The appellant miserably failed to discharge that onus.

20. In view of the above, the submissions advanced on behalf of the appellant are rejected. The appeal does not have any special features warranting interference by this court. The appeal lacks merit and stands dismissed.

D.G. Appeal dismissed.

MEDLEY PHARMACEUTICALS LTD.

v.

THE COMMISSIONER OF CENTRAL EXCISE AND CUSTOMS, DAMAN

(Civil Appeal No. 3626 of 2005)

JANUARY 14, 2011

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

Central Excise Act, 1944:

Object of the Act – Discussed.

s.3 – "Physician Samples" manufactured and distributed as free samples – Liability to pay excise duty – Held: Liable to excise duty – Excise is a duty on manufacture, duty is payable whether goods are sold or not – Sale is not necessary condition for charging excise duty – The distribution of physician sample serves as a marketing tool in the hands of pharmaceutical company – It is not mandatory for the company to distribute the physician samples of every drug they manufacture – Prohibition on the sale of physician samples intended for distribution to medical practitioner as free samples by rule 65(18) of Drugs Rules shall have no bearing or effect on the levy of excise duty – Constitution of India, 1950 – Seventh Schedule, List I, Entry 84 – Drugs and Cosmetics Act, 1940 – Drugs and Cosmetics Rules, 1945 – r.96(1)(ix) – Central Excise Valuation Rules, 1975

Central Excise Valuation Rules, 1975:

*s.6(b)(ii) – Valuation of Physician's samples – Held: To be v*alued on pro-rata basis – Central Excise Act, 1944.

Drugs and Cosmetics Act, 1940:

Object of the Act – Discussed.

Prohibition on the sale of physician samples intended for distribution to medical practitioner as free samples by rule 65(18) of Drugs Rules – Effect on the levy of excise duty – Held: Shall have no bearing or effect on the levy of excise duty since excise is duty on manufacture and duty is payable whether or not goods are sold – The Central Excise Act and the Drugs Act and the Rules made thereunder, operate in entirely two different fields having different objects, purposes and schemes – The conditions or restrictions contemplated by one statute should not be lightly and mechanically imported and applied to fiscal statue for non levy of excise duty, thereby causing a loss of revenue – Interpretation of statutes.

Drugs and Cosmetics Rules, 1945:

Rule 96(1)(ix) – Labeling – Label "Physician Samples-Not to be sold" – Process of labeling is distinct or different from the overprinting on the label of a physician's sample – Manufacture for the purpose of the Central Excise Tariff Act cannot be said to be incomplete until 'Physicians Sample-Not to be Sold' is printed on the label – Drugs and Cosmetics Act, 1940.

Precedent:

Doctrine of merger – Held: In case, the appeal is dismissed without reasons, such order entail application of the doctrine of merger, wherein the superior court upholds the decision of the lower court from which the appeal has arisen – Doctrines.

The questions which arose for consideration in the instant appeals were whether "Physician Samples" manufactured and distributed as free samples are liable to excise duty in view of the fact that they are statutorily prohibited from being sold under the Drugs and Cosmetics Act, 1940 and the Rules made thereunder and

if physician's samples are held to be excisable, then what is the appropriate method of valuing physician samples for the purpose of excise duty.

Disposing of the appeals and remitting the matter to adjudicating authority, the Court

HELD: 1. A duty of excise is a tax upon the goods and not upon sales or proceeds of sale of goods. In terms of Entry 84, List I of Seventh Schedule to the Constitution, taxable event in respect of excise is manufacture or production. Since excise is a duty on manufacture, duty is payable whether the goods are sold or not. Therefore, sale is not necessary condition for charging excise duty. Marketability is an essential criteria for charging duty. The test of marketability is that the product which is made liable to duty must be marketable in the condition in which it emerges. The word 'marketable' means saleable or suitable for sale. It need not in fact be marketed. The article should be capable of being sold to consumers, as it is without anything more. The essence of marketability of goods is neither in the form nor in the shape or condition in which the manufactured article is found. It is the commercial identity of the article known to the market for being bought and sold. The fact that the product in question is generally not being bought or sold or has no demand in the market, would be irrelevant. [Paras 7, 8] [753-A-C; 754-C-E]

Shinde Brothers v. Deputy Commissioner **AIR 1967 SC 1512;** *CCE v. Acer India Ltd.* **2004 AIR SCW 5496;** *Indian Cable Co. Ltd. v. CCE* **1994(74) ELT 22(SC) – relied on.**

Ram Krishna Ramanath Agarwal v. Secretary, Municipal Commissioner, Kamptee **1950 SCR 15;** *Province of Madras v. Boddu Paidanna and Sons* **(1942) FCR 90 – referred to.**

2.1. The main object or real purpose of the Drugs and Cosmetics Act, 1940 and Rules made thereunder, is to

regulate the manufacture of drugs in order to maintain the standard or quality of drugs for sale and distribution as a drug. Therefore, any requirement or condition imposed by the Drugs Act and Rules made thereunder, is in furtherance of its object of regulating and maintaining the quality of Drugs. The primary object of the Central Excise Act, 1944 is to raise revenue by imposing duty on goods that are manufactured. The scope of the Excise Act extends to the event of manufacture of goods, for the levy of excise duty. These two Statutes and the Rules made thereunder, operate in entirely two different fields having different objects, purposes and schemes. The conditions or restrictions contemplated by one statute should not be lightly and mechanically imported and applied to fiscal statue for non levy of excise duty, thereby causing a loss of revenue. Therefore, the prohibition on the sale of Physician Samples intended for distribution to medical practitioners as free samples by Rule 65 (18) of the Drugs Rules shall have no bearing or effect upon the levy of excise duty under the Act, since excise is a duty on manufacture, duty is payable whether or not goods are sold. Excise duty is payable even in case of free supply, since sale is not a necessary condition for charging duty under the Act. The Revenue is only concerned with the manufacture of the goods and the possibility of marketability of the goods. When the product is manufactured by a Pharmaceutical Company, it is for the purpose of sale i.e., every such product including Physician Sample is capable of being sold in the open market, but the pharmaceutical company makes the choice to distribute the same as a free sample. In other words, it is not mandatory for the pharmaceutical company to distribute free physician samples of every drug they manufacture. This choice made by the pharmaceutical companies in terms of Rule 96 (1) (ix) of the Drugs Rules by overprinting words '*Physician's sample-Not to be sold*' on the label of the drugs will not

come in the way of the Revenue from levying excise duty on the drugs so manufactured. [Paras 23-27] [760-E-F; 761-A-D-G-H; 762-A-C]

Union of India v. Delhi Cloth and General Mills **AIR 1968 SC 922;** *Union Carbide India Ltd. v. Union of India* **(1986) 2 SCC 547***; Bhor Industries Ltd. v. Collector of Central Excise, Bombay* **(1989) 1 SCC 602;** *Hindustan Polymers v. CCE* **(1989) 4 SCC 323;** *A.P. State Electricity Board v. CCE, Hyderabad*, **(1994) 2 SCC 428;** *Indian Cable Company Ltd.., Calcutta v. Collector of Central Excise and Others* **(1994) 6 SCC 610***; Triveni Engineering & Industries Ltd. v. CCE,* **(2000) 7 SCC 29;** *Union of India v. Sonic Electrochem (P) Ltd.,* **(2002) 7 SCC 435***; ITC Ltd. v. Collector of Central Excise, Patna*, **(2003) 1 SCC 678;** *Cadila Laboratories (P) Ltd v. CCE, Vadodara,* **(2003) 4 SCC 12;** *Hindustan Zinc Ltd. v. CCE,* **(2005) 2 SCC 662;** *Dharampal Satyapal v. CCE*, **(2005) 4 SCC 337;** *Gujarat Narmada Valley Fertilizer Co. Ltd. v. Collector of Excise and Customs* **(2005) 7 SCC 94;** *Moriroku UT India (P) Ltd. v. State of Uttar Pradesh and Ors.* **(2008) 4 SCC 548;** *State of Bihar v. Shree Baidyanath Ayurved Bhawan (P) Ltd.* **(2005) 2 SCC 762;** *Kedia Agglomerated Marbles Ltd. v. CCE*, **(2003) 2 SCC 494;** *CCE v. Shree Baidyanath Ayurved Bhavan Ltd.,* **(2009) 12 SCC 419 – relied on.**

2.2. Although it is correct to say that the manufacture of patent and proprietary drugs is complete only after the labelling is completed, for the purpose of levy of excise duty, however, a perusal of the labelling provisions in the Drug Rules shows that they deal with the name of drug, contents of the drug, name and address of manufacturer, a distinctive batch number (details of manufacture of drug is recorded and available for inspection as a particular batch), preparation of drug, date of manufacture and date of expiry of drug, its storage conditions, etc., which are in aid of the object of the Act, viz. promoting the use of good quality drugs, and ensuring that drugs that do not

live upto quality do not find their way into the market. Rule 96(1)(ix) of the Drug Rules states that while complying with the labelling provisions under clauses (i) to (viii) of Rule 96 (1), the manufacturer must further *overprint* on the label '*Physician's Sample-Not to be Sold'*, in case they are to be distributed free of cost as physicians samples. Further, the bare perusal of Rule 96 shows that its heading bears 'Manner of Labelling' and clause 1 of this Rule contemplates or govern the manner of labelling in a way that the particulars on the label of the container of a drug shall be either printed or written in indelible ink and shall appear in conspicuous manner. This gives ample clarification that the process of labelling is distinct or different from the *overprinting* on the label of a physician's sample, and, therefore, it is incorrect to state that the manufacture for the purpose of the Central Excise Tariff Act is not completed until '*Physicians Sample – Not to be Sold*' is printed on the label. [Para 28] [762-E-H; 763-A-C]

2.3. The primary reason of distributing free physician samples by the manufacturer of pharmaceutical drugs appears to be only for the purpose of advertising of the product and thereby enhancing the sale of the product in the open market. It was shown by research that the market of a pharmaceutical company is enhanced substantially by the distribution of free physician samples. In other words, the distribution of such physician samples serves as a marketing tool in the hands of the pharmaceutical companies [Para 29] [763-D-E]

Characteristics of Recipients of Free Prescription Drug Samples: A Nationally Representative Analysis, **98 Am. J. Pub. Health 284 (2008) – referred to.**

3. This Court has consistently held that the medical supplies supplied to the Doctors are liable to excise duty.

This Court, in catena of cases, has opined that in case, the appeal has been dismissed in the absence of detailed reasons or without reasons, such order will entail the application of the doctrine of merger, wherein the superior court upholds the decision of the lower court from which the appeal has arisen. It is settled law that this Court should follow an earlier decision that has withstood the changes in time, irrespective of the rationale of the view taken. [Paras 32, 34] [764-G-H; 765-A-B; 766-E-F]

Ranbaxy Laboratories Ltd. v. Commissioner of Central Excise, Pune, **(2003) 9 SCC 199;** *Bharat Heavy Electricals Ltd. v. Commissioner of Customs & Central Excise* **(2003) 9 SCC 185;** *V.M. Salgaocar & Bros.(P) Ltd. v. C.I.T.*, **(2000) 5 SCC 373;** *Kunhayammed v. State of Kerala* **(2000) 6 SCC;** *Waman Rao v. Union of India*, **(1981) 2 SCC 362 – relied on.**

4. The physician's samples have to be valued on pro-rata basis. [Para 41] [769-D]

Commissioner of Central Excise, Calicut vs. Trinity Pharmaceuticals Pvt. Ltd., **reported as 2005 (188) ELT 48 – relied on.**

Delhi Cloth and General Mills v. Joint Secretary **1978(2) ELT (J121);** *Amar Lal v. CCE,* **(2004) 172 ELT 466;** *Pfizer v. Commissioner of Central Excise* **2002 (146) ELT;** *Hindustan Petroleum Corporation Ltd. v. CCE* **(2007) 210 ELT 407 (CESTAT;** *Himalaya Drug Company v. C.C.E.* **(2005) 187 ELT 427 – held inapplicable.**

Case Law Reference:

AIR 1967 SC 1512	**relied on**	**Para 7**
AIR SCW 5496	**relied on**	**Para 7**
1950 SCR 15	**referred to**	**Para 7**

(1942) FCR 90	**referred to**	**Para 7**
1994(74) ELT 22(SC)	**relied on**	**Para 8**
AIR 1968 SC 922	**relied on**	**Para 9**
(1986) 2 SCC 547	**relied on**	**Para 10**
(1989) 1 SCC 602	**relied on**	**Para 11**
(1989) 4 SCC 323	**relied on**	**Para 12**
(1994) 2 SCC 428	**relied on**	**Para 13**
(1994) 6 SCC 610	**relied on**	**Para 14**
(2000) 7 SCC 29	**relied on**	**Para 15**
(2002) 7 SCC 435	**relied on**	**Para 16**
(2003) 1 SCC 678	**relied on**	**Para 17**
(2003) 4 SCC 12	**relied on**	**Para 18**
(2005) 2 SCC 662	**relied on**	**Para 19**
(2005) 4 SCC 337	**relied on**	**Para 20**
(2005) 7 SCC 94	**relied on**	**Para 21**
(2008) 4 SCC 548	**relied on**	**Para 22**
(2005) 2 SCC 762	**relied on**	**Para 23**
(2003) 2 SCC 494	**relied on**	**Para 25**
(2009) 12 SCC 419	**relied on**	**Para 25**
(2003) 9 SCC 199	**relied on**	**Para 30**
(2003) 9 SCC 185	**relied on**	**Para 31**
(2000) 5 SCC 373	**relied on**	**Para 32**
(2000) 6 SCC 359	**relied on**	**Para 33**
(1981) 2 SCC 362	**relied on**	**Para 34**

2005 (188) ELT 48	**relied on**	**Para 41**
1978(2) ELT (J121)	**held inapplicable**	**Para 35**
(2004) 172 ELT 466	**held inapplicable**	**Para 36**
2002 (146) ELT 477	**held inapplicable**	**Para 37**
(2007) 210 ELT 407	**held inapplicable**	**Para 38**
(2005) 187 ELT 427	**held inapplicable**	**Para 39**

CIVIL APPELLATE JURISDICTION : Civil Appeal No.3626 of 2005.

From the Judgment & Order dated 03.12.2004 of the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Mumbai in Appeal Nos. E/549/03.

WITH

C.A. No. 1354-1355 of 2010.

S. Ganesh, Pratap Venugopal, Manoj Sanklecha, Surekha Raman, Ramdas Gadiyar, Ananjay Singh, Namrata Sood (for K.J. John & Co.) for the Appellant.

R.P. Bhatt, Sunita Rani Singh, Rekha Pandey, B. Krishna Prasad for the Respondent.

The Judgment of the Court was delivered by

H.L. DATTU, J. 1. A group of three appeals is filed by the appellant – Medley Pharmaceuticals Ltd., under Section 35 L (b) of the Central Excise Act, 1944 (hereinafter referred to as 'the Act'). In Civil Appeal No.3626 of 2005, the appellant calls in question the correctness or otherwise of the order passed by Customs Excise and Service Tax Appellate Tribunal (CESTAT) (in short, "The Tribunal") in Appeal No. E/549 to E 551/2003-Mum, dated 3.12.2004. By the impugned order, the Tribunal has confirmed the order passed by Commissioner of

Customs and Central Excise, Valsad dated 30.12.2002. In this appeal, the appellant has raised the following question of law for our consideration and decision:-

"Whether Physician samples manufactured and distributed as free samples have to be assessed on the basis of cost of manufacture plus normal profits, if any, earned on the sale under Rule 6(b)(ii) of the Central Excise Valuation Rules, 1975 (for short, "Rules 1975") upto 1st July, 2000 and thereafter, on application of Rule 8 of Central Excise Valuation Rules, 2000 (for short, "Rules 2000") i.e. on cost of manufacture plus 15% profit basis and not on pro-rata basis as has been done by the Revenue?"

2. The Commissioner, while passing the order in Original No. 01/MP/Valsad/2002 dated 30.12.2002, has held that the value should be determined under Rule 4 of Rules 1975. In the appeal filed by the appellant, the Tribunal, following the judgment in the case of *Mayo India Ltd.* and *Cheryl Laboratories (P) Ltd.,* held that the value of Physician samples should be determined in accordance with the principle laid down in Rule 6(b)(i) read with Rule 7 of the Rules 2000. After coming to the aforesaid conclusion, the Tribunal has accepted the method of assessable value adopted by the Commissioner, though it was under Rule 4 of the Rules 1975.

3. In Civil Appeal Nos. 1354-1355 of 2010, the appellant is aggrieved by the final order passed by the Tribunal, bearing No.A/490/WZB /AHD/2009 dated 27th February, 2009 and the order No.H/853/WZB/AHD/2009 dated 4th August, 2009 passed on the rectification application in Appeal No. E/384/ 2005. By the impugned order, the Tribunal dismissed the appellant's appeal and upheld the order passed by the Commissioner of Central Excise (Appeals) dated 24th November, 2004 holding that for the purpose of payment of Excise duty, Physician samples have to be valued for the period post 1st July, 2000 upto December, 2001 on pro-rata basis on the value of trade packs under Rule 4 read with Rule

11 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules 2000. The Tribunal, while rejecting the application filed for rectification of the order dated 27th February, 2009, held that merely because a product is statutorily prohibited from being sold, would not mean that the product is not capable of being sold. In this appeal, the appellant has raised the following questions of law for our consideration and decision. They are:-

(A) Whether "Physician Samples" are excisable goods in view of the fact that they are statutorily prohibited from being sold under the Drugs and Cosmetics Act, 1940 (in short, "Drugs Act") and the Rules made thereunder?

(B) If physician's samples are held to be excisable, then what is the appropriate method of valuing physician samples for the purpose of excise duty?

4. Shri S. Ganesh, learned senior counsel for the appellant, submitted that the Physician Samples of Patent and proprietory medicines come into existence as a manufactured product only when the same are labeled and packed for the purpose of sale and distribution. Our attention is invited to Note 5 of Chapter 30 of Central Excise Tariff Act, 1985, wherein it is provided that packing and labeling would amount to manufacture. Therefore, it is contended that the Physician Samples of Patent and proprietary Medicines become manufactured goods only when the same are packed and labeled. It is further contended that the physician samples of patent and proprietory medicines, at the time they are manufactured, are statutorily prohibited from being sold by virtue of Section 18 of the Drugs Act read with Rule 65(18) of the Drug Rules and the breach of the Drug Rules invites prosecution under Section 27(d) of the Drugs Act, and also invites penalty under Section 27(c) of the Drugs Act. It is further submitted that the two conditions that require to be satisfied for levy of excise duty are existence of manufacturing process and as a result of such process, goods are produced

which are capable, in the ordinary course, of being taken to the market for being bought and sold. It is further submitted that the word 'excisable goods' has been construed to mean not only goods specified in the Schedule to the Central Excise Tariff Act, 1985, but also goods which are capable of being sold i.e. marketable. In the present case, the 'Physician Samples' are statutorily prohibited from being sold and therefore, do not satisfy the twin test required to make physician samples excisable goods.

5. Shri R. P. Bhatt, learned senior counsel for the Revenue, justifies the reasoning and conclusion reached by the Tribunal.

6. In pith and substance, the submission of learned senior counsel Shri Ganesh is that the physician samples of patent and proprietary medicines are statutorily prohibited from being sold by virtue of Rule 65(18) and Rule 95 and Rule 96 (1) (ix) of the Drugs Rules. It is contended that every drug intended for distribution as physicians sample while complying with the labeling provisions under Drugs and Cosmetic Rules further bear on the label of the container the words "*Physician's Sample- Not to be Sold*" requires to be over printed and further, the sale of such Physician samples is expressly prohibited under Rule 65 (18) of the Drug Rules. He contends that patent and proprietory drugs are excisable only after the labeling is complete. Since these physician samples cannot be sold in the market after the completion of the labeling in view of the statutory prohibition, the physician samples are not marketable and hence, no excise duty is leviable on their manufacture.

7. The Central Excise Act, apart from others, provides for charging of duty, valuation etc. Section 3 of the Act is the charging provision. It states, there shall be levied and collected in such a manner as may be prescribed duties on excisable goods which are produced or manufactured in India. Basic excise duty and special excise duty are levied under the charging provision at the rates specified in First and Second Schedule to Central Excise Tariff Act, 1985. The duty is on

excisable goods which are manufactured or produced in India. This Court in *Shinde Brothers vs. Deputy Commissioner,* AIR 1967 SC 1512 has held that excise duty is imposed on goods, and the taxable event for the levy is manufacture or production of the goods. A duty of excise is a tax upon the goods and not upon sales or proceeds of sale of goods. In terms of Entry 84, List I of Seventh Schedule to the Constitution, taxable event in respect of excise is manufacture or production (See *CCE vs. Acer India Ltd.*, 2004 AIR SCW 5496). The levy is on the manufacture or production of goods. The collection is shifted to stage of removal. Since excise is a duty on manufacture, duty is payable whether or not goods are sold. Therefore, sale is not necessary condition for charging excise duty. This Court in the case of *Ram Krishna Ramanath Agarwal Vs. Secretary, Municipal Commissioner, Kamptee 1950 SCR 15,* has referred to the distinction made by the Federal Court between the duty of excise and a tax on sale in *Province of Madras vs. Boddu Paidanna and Sons (1942) FCR 90,* wherein it is observed:

> *" Plainly, a tax levied on the first sale must, in the nature of things, be a tax on the sale by the manufacturer or producer; but it is levied upon him qua seller and not qua manufacturer or producer. It may well be that a manufacturer or producer is sometimes doubly hit... If the taxpayer who pays sales tax is also a manufacturer or producer of commodities subject to a central duty of excise, there may no doubt be overlapping in one sense, but there is no overlapping in law. The two taxes which he is called on to pay are economically two separate and distinct imposts. <u>There is, in theory, nothing to prevent the Central Legislature from imposing a duty of excise on a commodity as soon as it comes into existence no matter what happens to it afterwards, whether it be sold consumed, destroyed, or given away... It is the fact of manufacture which attracts the duty even though it may</u>*

> *<u>be collected later.</u> In the case of a sales tax, the liability to tax arises on the occasion of a sale and a sale has no necessary connection with manufacture or production." ..."* **[emphasis supplied]**

8. The consistent view of this Court is that for the purpose of levy of excise duty, an article must satisfy two requirements to be 'Goods' i.e. (a) it must be movable and (b) it must be marketable. In these appeals, we are primarily concerned whether the 'Goods' namely Physician samples of patent and proprietory medicines intended for distribution to the medical practitioner as free samples, satisfies the test of 'Marketability'. Marketability is an essential criteria for charging duty. The test of marketability is that the product which is made liable to duty must be marketable in the condition in which it emerges. The word 'Marketable' means saleable or suitable for sale. It need not in fact be marketed. The article should be capable of being sold to consumers, as it is without anything more. The essence of marketability of goods is neither in the form nor in the shape or condition in which the manufactured article is found. It is the commercial identity of the article known to the market for being bought and sold. The fact that the product in question is generally not being bought or sold or has no demand in the market, would be irrelevant. [See *Indian Cable Co. Ltd. vs. CCE*, 1994(74) ELT 22(SC)]. We will now refer to some of the decisions of this Court, which have explained the concept of 'Marketability' for the purpose of the Act.

9. The Constitution Bench of this Court, in the case of *Union of India vs. Delhi Cloth and General Mills,* AIR 1968 SC 922, after referring to definition of 'excisable goods', stated:

> *"These definitions makes it clear that to become goods an article must be something which can ordinarily come to the market to be bought or sold".*

10. A three Judge Bench of this Court in the case of *Union Carbide India Ltd. v. Union of India,* (1986) 2 SCC 547 has

discussed the concept of 'marketability' in order for the Revenue to impose excise duty as under:

> *"6. It does seem to us that in order to attract excise duty the article manufactured must be capable of sale to a consumer. Entry 84 of List I of Schedule VII to the Constitution specifically speaks of "duties of excise on tobacco and other goods manufactured or produced in India....", and it is now well accepted that excise duty is an indirect tax, in which the burden of the imposition is passed on to the ultimate consumer. In that context, the expression "goods manufactured or produced" must refer to articles which are capable of being sold to a consumer. In Union of India v. Delhi Cloth & General Mills, AIR 1963 SC 791, this Court considered the meaning of the expression "goods" for the purposes of the Central Excises and Salt Act, 1944 and observed that "to become 'goods' an article must be something which can ordinarily come to the market to be brought and sold", a definition which was reiterated by this Court in South Bihar Sugar Mills Ltd. v. Union of India, AIR 1968 SC 922".*

11. In *Bhor Industries Ltd. vs. Collector of Central Excise, Bombay*, (1989) 1 SCC 602, it was held:

> "Excise is a duty on goods as specified in the Schedule. The taxable event in the case of excise duties is the manufacture of goods. Under the Central Excise Act, as it stood at the relevant time, in order to be goods as specified in the entry, it was essential that as a result manufacture goods must come into existence. For articles to be goods these must be known in the market as such or these must be capable of being sold in the market as goods. Actual sale in the market is not necessary, user in the captive consumption is not determinative but the articles must be capable of being sold in the market or known in the market as goods. It is, therefore, necessary to find out whether there are goods, that is to say, articles

> as known in the market as separate distinct identifiable commodities and whether the tariff duty levied would be as specified in the Schedule. Simply because a certain article falls within the Schedule it would not be dutiable under excise law if the said article is not `goods' known to the market. Marketability, therefore, is an essential ingredient in order to be dutiable under the Schedule to Central Excise Tariff Act, 1985."

12. In *Hindustan Polymers* v. *CCE* (1989) 4 SCC 323, this Court observed:

> "*11. Excise duty is a duty on the act of manufacture. Manufacture under the excise law, is the process or activity which brings into being articles which are known in the market as goods and to be goods these must be different, identifiable and distinct articles known to the market as such. It is then and then only that manufacture takes place attracting duty. In order to be goods, it was essential that as a result of the activity, goods must come into existence. For articles to be goods, these must be known in the market as such and these must be capable of being sold or are being sold in the market as such. In order, therefore, to be manufacture, there must be activity which brings transformation to the article in such a manner that different and distinct article comes into being which is known as such in the market."*

13. In *A.P. State Electricity Board vs. CCE, Hyderabad*, (1994) 2 SCC 428, this Court stated:

> "Marketability is an essential ingredient in order to be dutiable under the Schedule to the Act.....The `marketability' is thus essentially a question of fact to be decided in the facts of each case. There can be no generalization. The fact that the goods are not in fact marketed is of no relevance. So long as the goods were marketable, they are goods for the purposes of Section

3. It is not also necessary that the goods in question should be generally available in the market. Even if the goods are available from only one source or from a specified market, it makes no difference so long as they are available for purchasers..... The marketability of articles does not depend upon the number of purchasers nor is the market confined to the territorial limits of this country."

14. In *Indian Cable Company Ltd.., Calcutta vs. Collector of Central Excise and Others*, (1994) 6 SCC 610, this Court has stated:

"Marketability is a decisive test for dutiability. It only means ` saleable' or "suitable for sale". It need not be in fact ` marketed'. The article should be capable of being sold or being sold, to consumers in the market, as it is —— without anything more."

15. In *Triveni Engineering & Industries Ltd. v. CCE,* (2000) 7 SCC 29, this Court, while demonstrating the attributes of excisable goods under the excise law, has observed that:

"13. … The article in question should be capable of being brought and sold in the market — a test which is too well established by a series of decisions of this Court to be elaborated here."

16. In *Union of India v. Sonic Electrochem (P) Ltd.,* (2002) 7 SCC 435, this court has held:

"9. … It is difficult to lay down a precise test to determine marketability of articles. Marketability of goods has certain attributes. The essence of marketability is neither in the form nor in the shape or condition in which the manufactured articles are to be found, it is the commercial identity of the articles known to the market for being bought and sold. The fact that the product in question is generally not being bought and sold or has no demand in the market would be irrelevant."

17. In the case of *ITC Ltd. v. Collector of Central Excise, Patna*, (2003) 1 SCC 678, this Court while applying the test of marketability for the purpose of levy of excise duty on the manufacture of the cigarette, has observed:

"17. From a conspectus of the aforesaid decisions, it would be clear that for the purposes of levy of excise duty, the test to be applied is whether the goods manufactured are marketable or not. In the present case, the cigarette, which is the end product of tobacco, is fit for consumption before the same is removed for test. Packing of the cigarettes cannot be said to be incidental or ancillary to the manufacturing process, but the same may be incidental or ancillary to its sale only. In case it is laid down that packing of cigarettes is incidental or ancillary to the completion of manufactured products, the same may result in evasion of excise duty as before packing the cigarettes the same may be regularly supplied to each and every employee for his consumption without payment of excise duty thereon. The definition of "manufacture" under Section 2(f) very clearly includes process which is incidental or ancillary to the completion of manufactured product. Manufacture of cigarette is completed when the same emerges in the form of sticks of cigarettes which are sent to the laboratory for quality control test. Sticks of cigarettes can be consumed and manufacture of the end product i.e. cigarette, which is commercially known in the market as such, is completed before its removal for test and after testing only packing of the same, which is the requirement of Rule 93 of the Rules, is done. Thus, we hold that sticks of cigarettes which are removed for the purpose of test in the quality control laboratory located within the factory premises of the appellant Company are liable to excise duty."

18. In the case of *Cadila Laboratories (P) Ltd v. CCE, Vadodara,* (2003) 4 SCC 12, this Court has held:

"9. Thus the law is that in order to be excisable, not only goods must be manufactured i.e. some new product brought into existence, but the goods must be marketable. By marketable it does not mean that the goods must be actually bought and sold in the market. But the goods must be capable of being bought or sold in the market. The law also is that goods which are in the crude or unstable form and which require a further processing before they can be marketed, cannot be considered to be marketable goods merely because they fall within the Schedule to the Excise Act".

19. In *Hindustan Zinc Ltd. v. CCE,* (2005) 2 SCC 662, this Court observed:

"5**.** Excise duty is levied under Section 3 on goods manufactured or produced in India. Thus, before excise duty is levied on an item, even if it is mentioned in the tariff, two conditions have to be cumulatively satisfied, namely, that the process by which an item is obtained is a process of manufacture and that the item so obtained is commercially marketable and bought and sold in the market or known to be so in the market."

20. In *Dharampal Satyapal v. CCE*, (2005) 4 SCC 337, it was held by this Court:

"18. … Marketability is an attribute of manufacture. It is an essential criteria for charging duty. Identity of the product and marketability are the twin aspects to decide chargeability. Dutiability of the product depends on whether the product is known to the market. The test of marketability is that the product which is made liable to duty must be marketable in the condition in which it emerges. Marketable means saleable. The test of classification is, how are the goods known in the market. These tests have been laid down by this Court in a number of judgments including Moti Laminates (P) Ltd. v. CCE (1995) 3 SCC

23, Union of India v. Delhi Cloth & General Mills Co. Ltd. (1997) 5 SCC 767 and Cadila Laboratories (P) Ltd. v. CCE (2003) 4 SCC 12"

21. In *Gujarat Narmada Valley Fertilizer Co. Ltd. vs. Collector of Excise and Customs*, (2005) 7 SCC 94, it was held that unless the product is capable of being marketed and is known to those who are in the market, as having an identity as a distinct and identifiable commodity, that the article is subject to excise duty. Simply because certain articles fall within the Schedule does not make them marketable. Actual sale in market is not necessary, but the articles must be capable of being sold in the market or known in the market as goods.

22. In *Moriroku UT India (P) Ltd. vs. State of Uttar Pradesh and Ors.*, (2008) 4 SCC 548, it was observed that excise duty is a levy on a taxable event of 'manufacture'. Liability under excise law is event based on manufacture and irrespective of whether the goods are sold or captively consumed. Excise duty is not concerned with ownership or sale.

23. Having said so in so far as exciseability of Goods for the purpose of duty under the Act, we may notice the purpose and object of Drugs Act. In our opinion, the main object or real purpose of the Drugs Act, 1940 and Rules made thereunder, is to regulate the manufacture of drugs in order to maintain the standard or quality of drugs for sale and distribution as a drug. This Court in *State of Bihar v. Shree Baidyanath Ayurved Bhawan (P) Ltd.,* (2005) 2 SCC 762, has held:

"14. … The object of the Drugs Act is to maintain the quality of drugs as drugs. Its use as any other commodity in the hands of the consumer is not regulated. Hence, the Drugs Act is relatable to Entry 19 of List III, which deals with drugs and poisons, subject to Entry 59 of List I regarding opium. Lastly, the said Act regulates the manufacture of drug for sale and distribution as a drug."

24. Therefore, any requirement or condition imposed by the Drugs Act and Rules made thereunder, is in furtherance of its above stated object of regulating and maintaining the quality of Drugs.

25. The primary object of the Act is to raise revenue by imposing duty on goods that are manufactured as mentioned above (see *Kedia Agglomerated Marbles Ltd. v. CCE*, (2003) 2 SCC 494). In other words, the scope of the Act extends to the event of manufacture of goods, for the levy of excise duty. These two Statutes and the Rules made thereunder, operate in entirely two different fields having different objects, purposes and schemes. The conditions or restrictions contemplated by one statute should not be lightly and mechanically imported and applied to fiscal statue for non levy of excise duty, thereby causing a loss of revenue. This Court in *CCE v. Shree Baidyanath Ayurved Bhavan Ltd.,* (2009) 12 SCC 419 has held:

> **"**55. True it is that Section 3(a) of the Drugs and Cosmetics Act, 1940 defines "Ayurvedic, siddha or unani drug" but that definition is not necessary to be imported in the new Tariff Act. The definition of one statute having different object, purpose and scheme cannot be applied mechanically to another statute. As stated above, the object of the Excise Act is to raise revenue for which various products are differently classified in the new Tariff Act."

26. Therefore, the prohibition on the sale of Physician Samples intended for distribution to medical practitioners as free samples by Rule 65 (18) of the Drugs Rules shall have no bearing or effect upon the levy of excise duty under the Act, since excise is a duty on manufacture, duty is payable whether or not goods are sold. Excise duty is payable even in case of free supply, since sale is not a necessary condition for charging duty under the Act.

27. Even assuming that Shri. Ganesh is correct, when he contends that physician samples are not allowed to be sold in the open market in view of the statutory prohibition on their sale, and hence are not marketable; the Revenue is only concerned with the manufacture of the goods and the possibility of marketability of the goods. When the product is manufactured by a Pharmaceutical Company, it is for the purpose of sale i.e., every such product including Physician Sample is capable of being sold in the open market, but the pharmaceutical company makes the choice to distribute the same as a free sample. In other words, it is not mandatory for the pharmaceutical company to distribute free physician samples of every drug they manufacture. This choice made by the pharmaceutical companies in terms of Rule 96 (1) (ix) of the Drugs Rules by overprinting words '*Physician's sample-Not to be sold*' on the label of the drugs will not come in the way of the Revenue from levying excise duty on the drugs so manufactured.

28. We agree with Shri Ganesh, learned senior counsel for the appellant, that the manufacture of patent and proprietary drugs is completed only after the labelling is completed, for the purpose of levy of excise duty. However, on a perusal of the labelling provisions in the Drug Rules, we find that they deal with the name of drug, contents of the drug, name and address of manufacturer, a distinctive batch number (details of manufacture of drug is recorded and available for inspection as a particular batch), preparation of drug, date of manufacture and date of expiry of drug, its storage conditions, etc., which are in aid of the object of the Act, viz. promoting the use of good quality drugs, and ensuring that drugs that do not live upto quality do not find their way into the market. Rule 96 (1) (ix) of the Drug Rules on which Shri Ganesh heavily relies in support of his submission, states that while complying with the labelling provisions under clauses (i) to (viii) of Rule 96 (1), the manufacturer must further *overprint* on the label '*Physician's Sample – Not to be Sold'*, in case they are to be distributed free of cost as physicians samples. Further, the bare perusal

of Rule 96 shows that its heading bears 'Manner of Labelling' and clause 1 of this Rule contemplates or govern the manner of labelling in a way that the particulars on the label of the container of a drug shall be either printed or written in indelible ink and shall appear in conspicuous manner. This gives ample clarification that the process of labelling is distinct or different from the *overprinting* on the label of a physician's sample, and hence we are unable to agree with him that the manufacture for the purpose of the Central Excise Tariff Act is not completed until '*Physicians Sample – Not to be Sold*' is printed on the label.

29. The primary reason of distributing free physician samples by the manufacturer of pharmaceutical drugs to us appears to be only for the purpose of advertising of the product and thereby enhancing the sale of the product in the open market. It has been shown by research that the market of a pharmaceutical company is enhanced substantially by the distribution of free physician samples. In other words, the distribution of such physician samples serves as a marketing tool in the hands of the pharmaceutical companies [See Sarah L. Cutrona et al., *Characteristics of Recipients of Free Prescription Drug Samples: A Nationally Representative Analysis*, 98 Am. J. Pub. Health 284 (2008)].

30. Before we conclude, in our view, the issue raised in these appeals is no more res-integra. This issue came up for consideration before this Court in the case of *Ranbaxy Laboratories Ltd. Vs. Commissioner of Central Excise, Pune*, (2003) 9 SCC 199, wherein it was held:

> "1. In these appeals, the question is whether free medical samples supplied to the doctors are liable to excise duty. In our view, this question is answered by a decision of this Court rendered today in Civil Appeal No. 3643-44 of 1999.
>
> 2. However, in these matters one further question arises i.e. how are the samples to be valued. The question arises as to whether the price of physician samples are to be worked out on pro-rata basis for the samples as per Section 4(1)(b) of the Central Excise Act read with Rules 7 and 6(b) of the Central Excise (Valuation) Rules, 1975 or on some other basis. The Tribunal has not decided this question even after holding that the goods were excisable. We, therefore, remit these matters back to the Tribunal for a decision on this point. The appeals stand disposed of accordingly. No order as to costs."

31. This Court, while passing the aforementioned order, has relied on the judgment and order passed in the case of *Bharat Heavy Electricals Ltd. v. Commissioner of Customs & Central Excise*, (2003) 9 SCC 185 [referred to as Civil Appeal No. 3643-44 of 1999], in which this Court held:

> "4. It is next submitted that the value of an assessable goods can be zero. It is submitted that when a part is replaced under a warranty to the assessee the value is zero. It is submitted that as the value is zero, no excise duty should be payable on that part. We are unable to accept this submission also. In order to promote sales manufacturers and dealers very often offer incentives e.g. supply of free TV or some other equipment or goods. One of the incentives offered, is a warranty to replace a part within a particular period. *Merely because manufacturers and dealers choose to offer such incentives does not mean that goods which are otherwise excisable, should be exempted from paying excise duty. When offering the incentive, the manufacturer or dealer is choosing to take upon himself the cost of those goods. So far as the Revenue is concerned, those goods remain excisable."*

32. This Court has consistently held that the medical supplies supplied to the Doctors are liable to excise duty. Elaborate consideration may not be forthcoming in these judgments, but, in our view, the issue stands concluded. We say so for the reason that this Court, in catena of cases, has opined

that in case, the appeal has been dismissed in the absence of detailed reasons or without reasons, such order will entail the application of the doctrine of merger, wherein the superior court upholds the decision of the lower court from which the appeal has arisen. In the case of *V.M. Salgaocar & Bros.(P) Ltd. Vs. C.I.T.*, (2000) 5 SCC 373, this Court held:

> "8. Different considerations apply when a special leave petition under Article 136 of the Constitution is simply dismissed by saying "dismissed" and an appeal provided under Article 133 is dismissed also with the words "the appeal is dismissed". In the former case it has been laid by this Court that when a special leave petition is dismissed this Court does not comment on the correctness or otherwise of the order from which leave to appeal is sought. But what the Court means is that it does not consider it to be a fit case for exercise of its jurisdiction under Article 136 of the Constitution. That certainly could not be so when an appeal is dismissed though by a non-speaking order. Here the doctrine of merger applies. In that case, the Supreme Court upholds the decision of the High Court or of the Tribunal from which the appeal is provided under clause (3) of Article 133. This doctrine of merger does not apply in the case of dismissal of a special leave petition under Article 136."

33. In the case of *Kunhayammed v. State of Kerala,* (2000) 6 SCC 359, it was held:

> "41. Once a special leave petition has been granted, the doors for the exercise of appellate jurisdiction of this Court have been let open. The order impugned before the Supreme Court becomes an order appealed against. Any order passed thereafter would be an appellate order and would attract the applicability of doctrine of merger. It would not make a difference whether the order is one of reversal or of modification or of dismissal affirming the order appealed against. It would also not make any difference if

> the order is a speaking or non-speaking one. Whenever this Court has felt inclined to apply its mind to the merits of the order put in issue before it though it may be inclined to affirm the same, it is customary with this Court to grant leave to appeal and thereafter dismiss the appeal itself (and not merely the petition for special leave) though at times the orders granting leave to appeal and dismissing the appeal are contained in the same order and at times the orders are quite brief. Nevertheless, the order shows the exercise of appellate jurisdiction and therein the merits of the order impugned having been subjected to judicial scrutiny of this Court.
>
> 42. "To merge" means to sink or disappear in something else; to become absorbed or extinguished; to be combined or be swallowed up. Merger in law is defined as the absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist, but the greater is not increased; an absorption or swallowing up so as to involve a loss of identity and individuality. (See Corpus Juris Secundum, Vol. LVII, pp. 1067-68.)"

34. It is settled law that this Court should follow an earlier decision that has withstood the changes in time, irrespective of the rationale of the view taken. It was held by a Constitution Bench in the case of *Waman Rao v. Union of India*, (1981) 2 SCC 362:

> "40. It is also true to say that for the application of the rule of stare decisis, it is not necessary that the earlier decision or decisions of longstanding should have considered and either accepted or rejected the particular argument which is advanced in the case on hand. Were it so, the previous decisions could more easily be treated as binding by applying the law of precedent and it will be unnecessary to take resort to the principle of stare decisis. It is, therefore, sufficient for invoking the rule of stare decisis that a certain decision was arrived at on a question which arose

or was argued, no matter on what reason the decision rests or what is the basis of the decision. In other words, for the purpose of applying the rule of stare decisis, it is unnecessary to enquire or determine as to what was the rationale of the earlier decision which is said to operate as stare decisis. …"

35. Now we may notice the decisions on which reliance placed by learned senior counsel Shri Ganesh. In *Delhi Cloth and General Mills Vs. Joint Secretary*, 1978(2) ELT (J121) (Delhi High Court), the question before the court was whether calcium carbide, which does not comply with regard to purity and packaging with statutory rules answers the test of 'Marketability'. The Court on facts has found that the calcium carbide manufactured by the company was for further utilization in the production of acetylene gas was not of purity that rendered it marketable nor was it packed in such a way as to make it marketable that is to say, in air tight containers. The Court has further noticed that the commodity in question would require further processing to make it marketable and therefore, the commodity in question is not marketable and hence, not excisable.

36. Reliance is placed on the decision of CESTAT in *Amar Lal Vs. CCE,* (2004) 172 ELT 466. That was a case where assessee manufactured a new drug for trial which were supplied for clinical trials. In view of the Drugs Control Act and the Rules framed thereunder, any drug could be marketed only after successful clinical trials and after approval and licence from Drugs Controller. Hence, the Tribunal held that the drug supplied free for clinical trials is not excisable Goods as it cannot be bought and sold at that stage.

37. In *Pfizer vs. Commissioner of Central Excise 2002 (146) ELT 477,* the question before the Tribunal was, whether excise duty is leviable on 'Sugar syrup' manufactured by the assessee for use in the manufacture by it for cough syrup. The Tribunal, while answering the issue, has stated that since the

sale of Sugar Syrup containing artificial sweetener sodium saccharin would contravene the provisions of Prevention of Food Adulteration Rules, the Goods cannot be considered as marketable.

38. In *Hindustan Petroleum Corporation Ltd. vs. CCE*, (2007) 210 ELT 407 (CESTAT), it was a case where assessee manufactured 'diesel stem' by refining the sour crude for captive consumption and sale in the market. The sale of 'diesel stem' containing high sulphur content was prohibited by Ministry of Petroleum and Natural Gas in the light of the notification issued by Ministry of Environment and Forest for preventing environmental pollution caused by emission due to burning of sulphur along with fuel. In the light of the notification issued by Ministry of Environment & Forest, the 'diesel stem' in its high content of sulphur is incapacitated from being sold in the market. In other words, this inherent incapability in the ingredients of the Goods, from being sold in the market makes it non-marketable and hence not excisable.

39. In *Himalaya Drug Company vs. C.C.E.,* (2005) 187 ELT 427, the question before the Tribunal was, whether the excise duty is leviable on 'vegetable extracts' manufactured by the assessee for use in the manufacture of Ayurvedic, Unani or Siddha Medicines. The Tribunal, while answering the issue, concluded that such vegetable extracts, unless subjected to preservative process, are not liable to be considered as Goods attracting excise duty and such Goods should be considered as only intermediary Goods. Further, in view of the fact that the licence issued by the Drug Controller prohibits assessee from selling such semi finished products. Therefore, the Tribunal concluded that such intermediary or semi finished Goods manufactured by assessee cannot be compared with the products manufactured by others for sale, for the purpose of 'marketability'.

40. In our considered view, the reliance placed by the learned senior counsel for the appellant on some of the

decisions of the Tribunal would not assist him in support of his submission for the reason that the goods therein were not marketable and hence, excise duty was not leviable, not because of any statutory prohibition for the sale of the goods, but because they had not reached the stage of satisfying the test of marketability of the goods.

41. Now coming to the valuation of the physician samples for the purpose of levy of excise duty, in our view, this issue need not detain us long in view of the decision of this Court in the case of Commissioner of Central Excise vs. M/s. Bal Pharma [Civil Appeal No. 1697 of 2006]. This Court has upheld the conclusion of the Tribunal that the physician's samples have to be valued on pro-rata basis. The Tribunal, while arriving at the aforesaid conclusion, had relied upon its earlier decision in the case of *Commissioner of Central Excise, Calicut vs. Trinity Pharmaceuticals Pvt. Ltd.*, reported as 2005 (188) ELT 48, which has been accepted by the department. Therefore, we hold that physician samples have to be valued on pro-rata basis for the relevant period.

42. In view of the above discussion, we pass the following order:-

(a) Civil Appeal No. 3626 of 2005 is allowed and the matter is remitted to the Adjudicating Authority with a direction to value the goods in question on pro-rata basis for the relevant period.

(b) We dismiss Civil Appeal Nos. 1354-1355 of 2010. Parties to bear their own costs.

D.G. Appeals disposed of.

LAKHAN LAL

v.

STATE OF BIHAR

(Criminal Appeal No. 573 of 2005)

JANUARY 14, 2011

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

Juvenile Justice (Care and Protection of Children) Act, 2000 – s. 2(k), 2(l), 7A, 20 and 49 – Juvenile – Determination of – Commission of offence punishable u/s. 302/34 IPC, in the year 1985 – Accused not 'juvenile within the meaning of the Juvenile Justice Act, 1986 when offence was committed, but had not completed 18 years of age when offence was committed – Benefit and protection under the provisions of the 2000 Act whereby 'juvenile' is a person who has not completed eighteen years of age – Held: Accused entitled to the benefit of the 2000 Act – Accused would be treated as juveniles even if the claim of juvenility is raised after they have attained the age of eighteen years on or before the date of the commencement of the Act of 2000 – Both the accused have crossed the age of 18 years, yet for the purposes of hearing of the said appeal ,continued to be 'juvenile' – Accused have undergone sentence of more than three years the maximum period provided under the 2000 Act, thus, sentences of life imprisonment awarded to them are set aside – Sentence/Sentencing – Juvenile Justice Act, 1986 – Juvenile Justice (Care and Protection of Children) Rules, 2007 – rr. 12, 98 – Penal Code, 1860 – s. 302/34.

The appellants were convicted for the offence punishable u/s. 302/34 IPC for committing murder of 'S' and sentenced to life imprisonment by the courts below. On the date of occurrence of the crime, i.e. 09.05.1985, the

appellant 'L' was aged about 16 years 10 months and the appellant 'P' was aged about 16 years 5 months.

The present matters have been filed by the appellants contending that since they were 'juvenile' within the meaning of Section 2(k) of the Juvenile Justice (Care and Protection of Children) Act, 2000, on the date of occurrence of the crime, the order of sentence passed against them be set aside.

Partly allowing the appeals, the Court

HELD: 1.1 The relevant date for determining the age of a person who claims to be a juvenile/child would be the date on which the offence has been committed and not the date when he is produced before the authority or in the court. [Para 9] [776-G-H; 777-A]

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

1.2 The Bihar Children's Act that was in operation as on the date of the incident i.e. 09.05.1985. The Juvenile Justice Act, 1986 came into operation on 3rd December, 1986. The said Act which defines a 'juvenile' as a boy who has not attained the age of sixteen years or a girl who has not attained the age of eighteen years. Section 63 of the 1986 Act provides "Repeal and savings" that, if immediately before the date on which the Act comes into force in any State, there is in force in that State, any law corresponding to the Act, that law shall stand repealed on the said date. The said provision further states that any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; and the legal proceedings in respect of any such right,

privilege, obligation would continue as if the 1986 Act had not been passed. [Para 10] [777-B-E]

1.3 The Juvenile Justice (Care and Protection of Children) Act, 2000 came into force w.e.f. 1st April, 2001. Section 2(k) of the 2000 Act provides that 'juvenile' or 'child' means a person who has not completed eighteenth year of age and Section 2(l) says that 'juvenile in conflict with law' means a juvenile who is alleged to have committed an offence and has not completed eighteen years of age as on the date of commission of such offence. It is manifest from a conjoint reading of Sections 2(k), 29l), 7A, 20 and 49 of the Act of 2000, read with Rules 12 and 98 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 that all persons who are below the age of eighteen years on the date of commission of the offence even prior to 1st April 2001 would be treated as juveniles even if the claim of juvenility is raised after they have attained the age of eighteen years on or before the date of the commencement of the Act of 2000 and were undergoing sentences upon being convicted. [Paras 12, 13 and 15] [777-F-H; 779-F-G; 780-G-H; 781-A]

2.1 Neither in the decision of the Court of Sessions it was noted that the appellants were aged about 20 years which could imply that they were under the age of 18 at the time of commission of the offence, nor in the High Court judgment as to the plea of 'juvenile' was discussed. [Para 11] [777-E-F]

2.2 In the instant case, when the inquiry was initiated against the appellants, they were admittedly not 'juvenile' under the provisions of 1986 Act but the said issue was ignored by the trial court and as well as the appellate court. There is no dispute whatsoever that both the appellants have crossed the age of 18 years, yet both the appellants, for the purposes of hearing of the said appeal

continued as if they were to be 'juvenile'. [Para 15] [780-C-D]

Dharambir vs. State (NCT of Delhi) and Anr. **(2010) 5 SCC 344;** *Umesh Singh and Anr. vs. State of Bihar* **(2000) 6 SCC 89; – relied on.**

Bhola Bhagat vs. State of Bihar **(1997) 8 SCC 720;** *Gopinath Ghosh vs. State of W.B.* **1984 Supp. SCC 228;** *Bhoop Ram vs. State of U.P.* **(1989) 3 SCC 1 – referred to.**

3. As regards the order and sentence to be passed against the appellants for the offences committed by them under Section 302 read with Section 34 IPC, both the appellants have crossed the age of 40 years as at present and, therefore, it would not be conducive to the environment in the special home and at any rate, they have undergone an actual period of sentence of more than three years the maximum period provided under Section 15 of the 2000 Act. In the circumstances, while sustaining the conviction of the appellants for the offences punishable under Section 302 read with Section 34 IPC, the sentences awarded to them are set aside. They are accordingly directed to be released forthwith, if not required in any other case. [Paras 18 and 19] [782-G-H; 783-A-C]

Dharambir Vs. State (NCT of Delhi) and Anr. **(2010) 5 SCC 344 – relied on.**

Case Law Reference:

(2005) 3 SCC 551	**Followed**	**Paras 9, 14**
(2010) 5 SCC 344	**Referred to**	**Paras 15, 18**
(2000) 6 SCC 89	**Relied on**	**Para 17**
(1997) 8 SCC 720	**Referred to**	**Para 17**
1984 Supp. SCC 228	**Referred to**	**Para 17**
(1989) 3 SCC 1	**Referred to**	**Para 17**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 573 of 2005.

From the Judgment & Order dated 27.4.2010 of the High Court of Judicature at Patna in Criminal Appeal No. 14 of 1988.

WITH

Crl. A. No. 138 of 2011, Crl. M.P. No. 1049 of 2011.

K.V. Vishwanathan, Abhijit Sinha, Ashwani Kumar, Niranjana Singh for the Appellant.

Manish Kumar (for Gopal Singh) for the Respondent.

The Judgment of the Court was delivered by

B. SUDERSHAN REDDY, J. 1. Criminal Miscellaneous Petition in Special Leave Petition (Crl.) No. 4724 of 2004 has been taken up and allowed. The Special Leave Petition shall stand restored to the file. Leave granted.

2. These appeals are directed against the common judgment and order dated 27th April, 2004 of the High Court of Judicature at Patna in Criminal Appeal Nos. 649 of 1987 and 14 of 1988 whereby the High Court dismissed the Criminal Appeals filed by the appellants, confirmed their conviction for the offence punishable under Section 302 read with Section 34 of I.P.C. for committing murder of one Surender Choudhary and accordingly sentenced them to undergo life imprisonment.

3. When the matter came up for hearing, Shri K.V. Vishwanathan, learned senior counsel appearing for the appellant Lakhan Lal, submitted that since at the time of commission of the said offence, the appellant had not completed 18 years of age, he was a 'juvenile' within the meaning of Section 2(k) of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as "the

2000 Act") and therefore, the order of sentence passed against the appellant for the offence committed by him under Section 302 read with Section 34, IPC is to be set aside.

4. We find that the conviction of the appellants is based upon the evidence of Malti Devi (PW1), wife, Sumitra Devi (PW2), mother and Lakhan Choudhary (informant) (PW3), father of the deceased Surender Choudhary who were all eyewitnesses to the incident and there is absolutely no reason to disbelieve their evidence. Dr. R.P. Jaiswal (PW5) who conducted the postmortem examination over the dead body of Surender Choudhary found ante mortem injuries on his person and according to him, the cause of death was shock and hemorrhage as a result of the injuries caused by sharp cutting penetrating substance such as *churra* (dagger). Those injuries were attributed to have been caused by the appellants Pappu Lal who was armed with a *churra* and Lakhan Lal who was armed with a country made pistol. These facts need not detain us any further since the conviction of the appellants for the offence punishable under Section 302 read with Section 34, IPC is not in issue.

5. Sofaras Pappu Lal @ Manoj Kumar Srivastava, the appellant in SLP (crl) No. 4724 of 2004 is concerned, the special leave petition preferred by him was dismissed by this Court on 8th April, 2005 with the following order:

> "It is admitted that neither The Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000) nor the Juvenile Justice Act, 1986 nor the Bihar Childrens Act would apply as on the date of the occurrence the appellant was 16 years and 10 months old. On merits we see no reason to interfere. Accordingly, the petition shall stand dismissed".

In fact, on the date of occurrence, that is to say 9.5.1985, the appellant was aged about 16 years and 5 months as the same is evident from the certificate dated 6.8.1983 of the Bihar

School Education Board wherein the date of birth of Pappu Lal is recorded as 9.12.1968. This certificate is made available for the perusal of the court.

6. The appellant Pappu Lal, relying on the judgment of this Court in *Dharambir Vs. State (NCT of Delhi) & Anr.*[1] filed an application to recall the order dated 8th April, 2005 passed by this Court dismissing his Special Leave Petition and to restore the special leave petition to its original number. The application is ordered accordingly and that is how we have taken up both the appeals for hearing.

7. There is no dispute whatsoever before us as it is fairly conceded by the learned counsel Shri Manish Kumar, appearing for Shri Gopal Singh, learned counsel for the State of Bihar that both the appellants were minors as on the date of incident i.e., 9th May, 1985. The appellant Lakhan Lal was aged about 16 years 10 months and the other appellant Pappu Lal was aged about 16 years 5 months as on the date of occurrence of the crime. Thus the claim made by the appellants that they were 'juveniles' as on the date of occurrence of the crime remains free from any controversy.

8. The question that arises for our consideration is whether or not the appellants who were admittedly not 'juvenile' within the meaning of the Juvenile Justice Act, 1986 (for short "the 1986 Act") when the offences were committed but had not completed 18 years of age on that date are entitled for the benefit and protection under the provisions of the 2000 Act? Whether they are entitled to be declared as 'juvenile' in relation to the offences committed by them?

9. The issue with regard to the date, relevant for determining the applicability of either of the two Acts is no longer *res integra.* A Constitution Bench of this Court in *Pratap Singh Vs. State of Jharkhand & Anr.*[2] in its authoritative

1. (2010) 5 SCC 344.
2. (2005) 3 SCC 551.

pronouncement held that the relevant date for determining the age of a person who claims to be a juvenile/child would be the date on which the offence has been committed and not the date when he is produced before the authority or in the Court.

10. The Act that was in operation as on the date of the incident was Bihar Children's Act. The Act of 1986 came into operation on 3rd December, 1986. The said Act which defines a 'juvenile' as a boy who has not attained the age of sixteen years or a girl who has not attained the age of eighteen years. Section 63 of the 1986 Act provides "Repeal and savings" that, if immediately before the date on which the Act comes into force in any State, there is in force in that State, any law corresponding to the Act, that law shall stand repealed on the said date. The said provision further states that any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; and the legal proceedings in respect of any such right, privilege, obligation will continue as if the 1986 Act had not been passed.

11. The fact remains neither in the decision of the Sessions Court dated 9.12.1987 which noted that the appellants were aged about 20 years which could imply that they were under the age of 18 at the time of commission of the offence, nor in the High Court judgment as to the plea of 'juvenile' has been discussed.

12. The 2000 Act came into force w.e.f. 1st April, 2001. It is an act to consolidate and amend the law relating to juveniles in conflict with law and children in need of care and protection, by providing for proper care, protection and treatment by catering to their development needs, and by adopting a child-friendly approach in the adjudication and disposition of matters in the best interest of children and for their ultimate rehabilitation and for matters connected therewith or incidental thereto. It will

be useful to have a look at the Statement of Objects and Reasons:

> A review of the working of the Juvenile Act, 1986 (53 of 1986) would indicate that much greater attention is required to be given to children in conflict with law or those in need of care and protection. The justice system as available for adults is not considered suitable for being applied to a juvenile or the child or any one on their behalf including the police, voluntary organizations, social workers, or parents and guardians, throughout the country. There is also an urgent need for creating adequate infrastructure necessary for the implementation of the proposed legislation with a larger involvement of informal systems specially the family, the voluntary organizations and the community.
>
> In this context, the following further proposals have been made—
>
> (i) to lay down the basic principles for administering justice to a juvenile or the child in the Bill;
>
> (ii) to make the juvenile system meant for a juvenile or the child more appreciative of the developmental needs in comparison to criminal justice system as applicable to adults;
>
> (iii) to bring the juvenile law in conformity with the United Convention on the Rights of the Child;
>
> (iv) to prescribe a uniform age of eighteen years for both boys and girls;
>
> (v) to ensure speedy disposal of cases by the authorities envisaged under this Bill regarding juvenile or the child within a time limit of four months;
>
> (vi) to spell out the role of the State as a facilitator rather

than doer by involving voluntary organizations and local bodies in the implementation of the proposed legislation;

(vii) to create special juvenile police units with a humane approach through sensitization and training of police personnel;

(viii) to enable increased accessibility to a juvenile or the child by establishing Juvenile Justice Boards and Child Welfare Committees and Homes in each district or group of districts;

(ix) to minimize the stigma and in keeping with the developmental needs of the juvenile or the child, to separate the Bill into two parts—one for juveniles in conflict with law and the other for the juvenile or the child in need of care and protection;

(x) to provide for effective provisions and various alternatives for rehabilitation and social reintegration such as adoption, foster care, sponsorship and aftercare of abandoned, destitute, neglected and delinquent juvenile and child.

The Bill seeks to repeal and re-enact the Juvenile Justice Act, 1986 with a view to achieving the above objects.

13. Section 2(k) of the 2000 Act provides that 'juvenile' or 'child' means a person who has not completed eighteenth year of age and Section 2(l) says that '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.

14. In *Pratap Singh* (supra), the Constitution Bench taking into consideration the provisions of Sections 3 and 20 and the relevant definitions of 'juvenile' in Section 2(k) of the 2000 Act, held that the 2000 Act would be applicable in a pending

proceeding in any Court/Authority initiated under the 1986 Act and is pending when the 2000 Act came into force and the person concerned has not completed 18 years of age as on 1.4.2001. It is further held "…even where an inquiry has been initiated and the juvenile ceases to be a juvenile *i.e.* crosses the age of 18 years, the inquiry must be continued and orders made in respect of such person as if such person had continued to be a juvenile".

15. In the present case, when the inquiry has been initiated against the appellants herein, they were admittedly 'juvenile' even under the provisions of 1986 Act but this issue has been ignored by the trial Court and as well as the appellate Court. There is no dispute whatsoever that both the appellants have crossed the age of 18 years, yet both the appellants, for the purposes of hearing of this appeal continued as if they were to be 'juvenile'. In *Dharambir* (supra) this Court took the view:

"It is plain from the language of the Explanation to Section 20 that in all pending cases, which would include not only trials but even subsequent proceedings by way of revision or appeal, etc., the determination of juvenility of a juvenile has to be in terms of Clause (l) of Section 2, even if the juvenile ceases to be a juvenile on or before 1st April, 2001, when the Act of 2000 came into force, and the provisions of the Act would apply as if the said provision had been in force for all purposes and for all material times when the alleged offence was committed".

It is further held:

"It is, thus, manifest from a conjoint reading of Sections 2(k), 2(l), 7A, 20 and 49 of the Act of 2000, read with Rules 12 and 98 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 that all persons who were below the age of eighteen years on the date of commission of the offence even prior to 1st April, 2001 would be treated as juveniles even if the claim of juvenility

is raised after they have attained the age of eighteen years on or before the date of the commencement of the Act of 2000 and were undergoing sentences upon being convicted. In the view we have taken, we are fortified by the dictum of this Court in a recent decision in *Hari Ram* v. *State of Rajasthan and Anr.* (2009) 13 SCC 211".

16. Thus this is the complete answer for the determination of the issues that have arisen for our consideration.

17. The fact remains that the issue as to whether the appellants were juvenile did not come up for consideration for whatever reason, before the Courts below. The question is whether the same could be considered by this Court at this stage of the proceedings. A somewhat similar situation had arisen in *Umesh Singh & Anr. Vs. State of Bihar*[3] wherein this Court relying upon the earlier decisions in *Bhola Bhagat Vs. State of Bihar*[4], *Gopinath Ghosh Vs. State of W.B.* and *Bhoop Ram Vs. State of U.P.*[6] while sustaining the conviction of the appellant therein under all the charges, held that the sentences awarded to them need to be set aside. It was also a case where the appellant therein was aged below 18 years and was a child for the purposes of the Bihar Children Act, 1970 on the date of the occurrence. The relevant paragraph reads as under:

"So far as Arvind Singh, appellant in Crl.A.No.659/99, is concerned, his case stands on a different footing. On the evidence on record, the learned counsel for the appellant, was not in a position to point out any infirmity in the conviction recorded by the trial court as affirmed by the appellate court. The only contention put forward before the court is that the appellant is born on 1.1.67 while the date of the incident is 14.12.1980 and on that date he was

3. (2000) 6 SCC 89.

4, (1997) 8 SCC 720.

5. 1984 Supp SCC 228.

6. (1989) 3 SCC 1.

hardly 13 years old. We called for report of experts being placed before the court as to the age of the appellant, Arvind Singh. The report made to the court clearly indicates that on the date of the incident he may be 13 years old. This fact is also supported by the school certificate as well as matriculation certificate produced before this court which indicate that his date of birth is 1.1.67. On this basis, the contention put forward before the court is that although the appellant is aged below 18 years and is a child for the purpose of the Bihar Children Act, 1970 on the date of the occurrence, his trial having been conducted along with other accused who are not children is not in accordance with law. However, this contention had not been raised either before the trial court or before the High Court. In such circumstances, this Court in Bhola Bhagat vs. State of Bihar, 1997(8) SCC 720, following the earlier decisions in Gopinath Ghosh vs. State of West Bengal, 1984 Supp.SCC 228 and Bhoop Ram vs. State of U.P. 1989(3) SCC 1 and Pradeep Kumar vs. State of U.P., 1995 Supp(4) SCC 419, while sustaining the conviction of the appellant under all the charges, held that the sentences awarded to them need to be set aside. In view of the exhaustive discussion of the law on the matter in Bhola Bhagat case [supra], we are obviated of the duty to examine the same but following the same, with respect, we pass similar orders in the present case. Conviction of the appellant, Arvind Singh, is confirmed but the sentence imposed upon him stand set aside. He is, therefore, set at liberty, if not required in any other case".

18. The next question for our consideration is as to what order and sentence is to be passed against the appellants for the offences committed by them under Section 302 read with Section 34 of the IPC? Both the appellants have crossed the age of 40 years as at present and therefore it will not be conducive to the environment in the special home and at any rate, they have undergone an actual period of sentence of more

than three years the maximum period provided under Section 15 of the 2000 Act. In the circumstances, while sustaining the conviction of the appellants for the offences punishable under Section 302 read with Section 34 of the IPC, the sentences awarded to them are set aside. They are accordingly directed to be released forthwith. This view of ours to set aside the sentence is supported by the decision of this Court in *Dharambir* (supra).

19. The appellants are directed to be released forthwith if not required in any other case. The appeals are partly allowed accordingly.

20. We place on record our appreciation for the invaluable and dispassionate assistance rendered by Shri Manish Kumar, Advocate, appearing for Shri Gopal Singh, learned counsel for the State of Bihar.

N.J. Appeals partly allowed.

ORIENTAL INSURANCE CO. LTD.
v.
DHANBAI KANJI GADHVI & ORS.
(Civil Appeal No. 682 of 2011)

JANUARY 17, 2011

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

Motor Vehicles Act, 1988 – ss. 163A and 166 – Proceedings both u/ss. 163A and 166 – Permissibility of – Motor accident resulting in death of a person – Application u/s.166 by legal heirs of the deceased – Subsequent application u/s. 163A claiming no-fault compensation – Application u/s. 163A partly allowed by the Tribunal – Thereafter, Tribunal permitting the claimants to proceed with the application filed u/s. 166 – Order of the Tribunal upheld by High Court – On appeal, held: Claimant must opt/elect to go either for a proceeding u/s. 163A or u/s. 166 but not under both – Claimants having obtained compensation, finally determined u/s. 163A were precluded from proceeding further with the petition filed u/s. 166 – Thus, order of the Tribunal permitting the claimants to proceed further with the petition filed u/s. 166 as upheld by the High Court, not sustainable and is set aside.

Deepali Girishbhai Soni and Ors. vs. United India Insurance Co. Ltd.Board **(2004) 5 SCC 385 – relied on.**

Oriental Insurance Co. Ltd. vs. Hansrajbhai V. Kodala and Ors. **(2001) 5 SCC 175 – referred to.**

Case Law Reference:

1993 (3) SCC 634	**Referred to.**	**Para 5**
(2004) 5 SCC 385	**Relied on.**	**Para 13**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 682 of 2011.

From the Judgment & Order dated 15.01.2010 of the High Court of Gujarat at Ahmedabad in Special Civil Application No. 9400 of 2006.

M.K. Dua for the Appellant.

Brajesh Kumar for the Respondents.

The following oder of the Court was delivered

O R D E R

1. Leave granted.

2. This appeal is directed against the judgment dated 15.1.2010 rendered by the learned Single Judge of the High Court of Gujarat at Ahmedabad in Special Civil Application No.9400 of 2006 by which the order dated 23.12.2005 passed by the Motor Accident Claims Tribunal (MACT) Bhuj, Kachchh in M.A.C.P. No.759/97 permitting the respondents, who had already obtained compensation under Section 163A of the Motor Vehicles Act 1988 ('the Act' for short), to proceed with the application filed under section 166 of the Motor Vehicles Act 1988, is affirmed.

3. The respondents are the original claimants. On 17.6.97, the deceased viz. Kanji Keshavbhai Gadhvi was riding his two wheeler i.e. Luna. When he reached near IFFCO, the driver of taxi bearing No.GJ-12-C-9484 who was coming from the opposite direction dashed the taxi with the Luna as result of which Kanjibhai lost his life. Therefore, the respondents who are legal heirs of the deceased respondent filed MACP No.759 of 1997 under Section 166 of the Motor Vehicles Act against the driver and owner of the taxi as well as against the petitioner who is insurer of the taxi and claimed compensation of Rs.7,50,000/-. The respondents had thereafter filed an

application at Exhibit 6 under section 163A of the Act and claimed compensation of Rs. 3,93,500/- on the principle of no fault liability.

4. The Tribunal had partly allowed the application filed by the respondents under Section 163A of the Act and ordered the petitioner to pay a sum of Rs.2,65,500/- with 12% interest vide judgment dated 18.10.2000. The case of the petitioner is that the petitioner had deposited the said amount and the respondents have already withdrawn and invested the amount of compensation as directed by the Tribunal.

5. The present petitioner filed an application with a prayer that the application filed under Section 166 which was pending be rejected in view of the decision of this Court in *Oriental Insurance Co. Ltd. Vs. Hansrajbhai V. Kodala & Ors.* (2001) 5 SCC 175.

6. The Tribunal by order dated 25.6.2002 granted stay of further proceedings of the petition filed under Section 166 of the Act till further orders. In the meanwhile, the petitioner challenged the award passed by the Tribunal under Section 163A of the Act by filing First Appeal No.3019 of 2007. The appeal was dismissed on the ground of delay.

7. The respondents thereafter filed an application with a prayer that they be permitted to proceed with the petition filed under Section 166 of the Motor Vehicles Act and they were ready to give undertaking to give credit of the amount awarded to them as compensation in the claim petition filed under Section 163A of the Act. The Tribunal by an order dated 23.12.2005 permitted the respondents to proceed with the petition filed under Section 166 of the Act. The Tribunal also directed that amount already disbursed in favour of the respondents and invested by them, pursuant to the award made under Section 163A shall be adjusted to the final award to be passed under Section 166 of the Motor Vehicles Act.

8. Feeling aggrieved, the petitioner preferred Special Civil Application No.9400 of 2006 before the High Court. The learned Single judge of the High Court has rejected the same by judgment dated 15.1.2010 giving rise to the instant appeal.

9. This Court has heard the learned counsel for the parties.

10. This Court has perused the impugned judgment of the High Court. The reasons given by the High Court for upholding permission granted by the Tribunal, to the respondents to proceed further with the petition filed under Section 166 of the Act, read as under.

> "After hearing and on perusal of the record and from the scheme of the Act, it is clear that proceedings under Sections 163A and 166 of the Act i.e. both proceedings are permissible. In my view, claimant can file both the proceedings and opt for either of proceedings. The only condition is that application for proceeding under section 166 should be filed before the award is passed . Here, in this case, the proceedings were filed before the award is passed".

11. On consideration of the object of section 163A of the Act which was inserted by Section 51 of the Act 54 of 1994 w.e.f. 14-11-1994, and the non-obstante clause with which sub-section (1) of Sec. 163A commences, it is manifest that the legislature did not intend to prevent the claimant from getting compensation as per the structured formula merely because in his original claim petition he had prayed for compensation on the basis of "fault liability" principle. There is no prohibition in any provision of the Motor Vehicles Act 1988 against the claimant praying for compensation as per the structured formula after having filed a claim petition under section 166 of the Act. Therefore, this Court finds that the respondents were perfectly justified in making an application at Exhibit 6 in MACP No.759 of 1997 which was filed under Section 166 of the Act and praying the Tribunal to award compensation to them on the

basis of the structured formula mentioned in Section 163A of the Act. This Court further finds that the Tribunal did not commit any error in entertaining the said application and awarding a sum of Rs.2,65,500/- as compensation to the respondents under Section 136A of the Act.

12. However, in *Deepal Girishbhai Soni & Ors.Vs. United India Insurance Co. Ltd., Baroda* (2004) 5 SCC 385, the question which was considered by a three Judge Bench of this Court was whether a proceeding under Section 163A of the Motor Vehicles Act, 1988 is a final proceeding, by reason whereof, the claimant who has been granted compensation under Section 163A, is debarred from proceeding with any further claims on the basis of fault liability in terms of Section 166. After considering the scheme envisaged by Section 163A of the Act, it is held in the said case that Parliament intended to lay down a comprehensive scheme for the purpose of grant of adequate compensation to a section of victims who would require the amount of compensation without fighting any protracted litigation. What is ruled therein is that the compensation determined and paid under Section 163A of the Act is final and not an interim one. The clear proposition of law which emerges from the decision of this Court in Deepal G. Soni (supra) is that the remedy for payment of compensation both under Sections 163A and 166 being final and independent of each other as statutorily provided, a claimant cannot pursue his remedies thereunder simultaneously. As explained by this Court in the said decision, a claimant, thus, must opt/elect to go either for a proceeding under Section 163A or under Section 166 of the Act, but not under both.

13. Applying the principle laid down in Deepal Soni (supra) to the facts of the case, it will have to be held that the respondents having obtained compensation, finally determined under Section 163A of the Act are precluded from proceeding further with the petition filed under Section 166 of the Act. The exception mentioned by the learned Single Judge in the

impugned judgment that a petition under Section 166 of the Act can be proceeded further if it is filed before passing of an award passed under Section 163A of the Act is not supported by the scheme envisaged under Sections 163A and 166 of the Act and is contrary to the principle of law laid down by this Court in Deepal Soni's case. Therefore, this Court is of the opinion that the impugned judgment of the High Court upholding the order passed by the Tribunal to permit the respondents to proceed further with the petition filed under Section 166 of the Act cannot be sustained and will have to be set aside.

14. For the foregoing reasons, the appeal succeeds. The order of the Tribunal dated 23.12.2005 allowing the respondents to proceed with the petition filed under Section 166 of the Motor Vehicles Act, 1988 on the certain terms and conditions mentioned therein and the impugned judgment of the High Court upholding order of the Tribunal are hereby set aside.

15. The appeal accordingly stands disposed of

N.J. Appeal disposed of.

STATE OF MADHYA PRADESH
v.
VISHWESHWAR KOL
(Criminal Appeal No. 1361 of 2006)

JANUARY 18, 2011

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

Penal Code, 1860: s.302 – Brutal murder – Accused burnt his wife and daughters – Dying declaration of daughter recorded by police – The declarant stated that accused came home late at night in inebriated state and poured kerosene oil first on her mother and then on her and her sisters and when declarant tried to escape, accused caught hold of her, and in the process he himself received burn injuries – Conviction by trial court based on dying declaration – High Court held that the dying declaration did not inspire confidence and ordered acquittal – Held: The fact that the accused received burn injuries was corroborated by the medical evidence – Dying declaration was recorded after the doctor certified fitness of the declarant to give dying declaration – There was no reason to disbelieve the dying declaration – High Court erred in passing order of acquittal – Order of conviction passed by trial court restored and accused directed to undergo sentence of life imprisonment.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1361 of 2006.

From the Judgment & Order dated 06.12.2004 of the High Court of Madhya Pradesh at Jabalpur in Criminal Reference No. 855 of 2004.

Aishwarya Bhati, Rashid Khan, C.D. Singh for the Appellant.

Rajesh for the Respondent.

The following order of the Court was delivered

O R D E R

This appeal, at the instance of the State of Madhya Pradesh, arises out of the following facts:

The first wife of the respondent (hereinafter called "the accused"), had died of tuberculosis and several years prior to the date of occurrence (19th October 2003) he had started living with Leelawati Bai deceased as a second wife. Out of this arrangement, 4 daughters, namely, Sandhya about 6 years, Lovely 3 years, Madhu 1 year and Jyoti 10 or 11 years had been born. As Leelawati Bai had abandoned her previous husband and belonged to a community different from that of the accused, she had not been accepted as a member of his family and even otherwise there was suspicion that she was not of good character. On the evening of 18th October 2003 the accused went to see a dance performance at Chandiya. He, however, returned home at about 1.00 a.m. i.e. in the early morning hours of 19th October 2003 before the performance had ended and after picking up a plastic can which contained kerosene oil, he poured the oil on his wife and four daughters. Jyoti who was the eldest, woke up and tried to escape but the accused got hold of her and in that process, he too sustained burn injuries on his body. As a consequence of the serious burn injuries, Leelawati Bai, Sandhya, Lovely and Madhu died almost instanteously and house was completely burnt down. Jyoti, who had sustained severe injuries, was removed to the Primary Health Centre by her uncle and brother of the accused, Nandi Kol PW-7 where she was examined by Doctor Ashish Pandey, PW-1. The Doctor also informed the police on which Sub-Inspector S.K.Mishra, PW-10 reached the hospital and after ascertaining from Dr. Ashish Pandey as to Jyoti's fitness to make a statement, recorded the same between 1.40 and 2.15 a.m.. In this dying declaration, she gave the story as already

given above. The accused was accordingly brought to trial for an offence punishable under Section 302 of the IPC on the completion of the investigation. The trial court relying on the dying declaration and partly on the evidence of Nandi Kol PW-7 and Jognibai PW-8, the mother of the accused, held that the fact that the accused and Leelawati Bai were living as a man and wife had been proved on record. The court, however, held that the story as to the motive for the burning of Leelawati Bai and particularly her daughters could not be entirely accepted as the witnesses aforesaid had resiled from their police statements in an attempt to help the accused who was a very close relative and accordingly the primary evidence against the accused was the dying declaration made by Jyoti. The court observed that this was the main link in the chain of circumstances against the accused. It was pointed out that the dying declaration had been recorded by PW-10 after the Doctor had opined that Jyoti was fit to make a statement. Support for the dying declaration was also found from the evidence of PW-4 Balwant, a medical assistant, who too had been present in the Primary Health Centre. PW-10 also deposed that no Executive Magistrate was posted at Chandiya and as Jyoti was in a very serious condition it had not been feasible to secure the services of an Executive Magistrate from Umariya which was about one hour distant and that in any case the wireless set at the Headquarters had been shut down at midnight and the telephone too was not in working order. PW-10 also explained that soon after the recording of the dying declaration Jyoti too had died. The trial court observed that a dying declaration to be more reliable and plausible ought to be recorded by a Magistrate but if the circumstances did not make that possible and a dying declaration was recorded by a police officer and was found to be credible, there was no law or practice that it could not be relied upon. The trial court also noted that in the light of the fact that PWs.7 and 8, the brother and the mother of the accused, had resiled from their statements though admittedly PW-7 had brought Jyoti to the hospital, no other evidence could be produced as the incident

had happened at 1 a.m., an extremely awkward time. The court then took up the question of the sentence to be awarded and held that the case fell within the rarest of the rare category as four innocent girls between the ages of 1 and 10 and their mother had been murdered by their father only because he had some strained relations with the mother. It was found that the murders had been committed in an excessively brutal manner. An appeal was thereafter taken to the High Court and a reference was also made under Section 366 of the Cr.P.C. The High Court has, by the impugned judgment, allowed the appeal and acquitted the accused, thereby declining the murder reference. The High Court analyzed the law relating to dying declarations and held that such a statement could by itself form the basis for conviction provided it inspired confidence and with this background examined the dying declaration and gave a few rather unusual reasons for discarding it; they being (1) that as per the dying declaration, all victims had been sleeping when the oil had been poured on them and the fire lit but if all (including Jyoti) were asleep, there was no question of Jyoti having seen the incident; (2) that there was no smell of kerosene oil on the dead bodies of the children which belied the story that kerosene oil had first been poured on the victims and they had subsequently been set afire and (3) that it appeared that a bottle containing kerosene oil which was being used as a crude lamp (chimney) appeared to have caused the fire and that the story that the kerosene oil had been poured directly on the victims was a concoction. The High Court also referred to certain passages from Dr. Modi's Medical Jurisprudence and Toxicology to support its views. The State is in appeal before us.

Ms. Aishwarya Bhati, the learned counsel for the State of Madhya Pradesh, has argued that the three reasons given by the High Court for making an order of acquittal were completely unjustified, as they ignored the basic fact that the dying declaration had been recorded within a very short time of the incident and by PW-10 after getting a fitness certificate from

the Doctor who had given the certificate in the presence of PW-4 Balwant, an employee of the hospital. She has pointed out that realizing the gravity and urgency of the situation and Jyoti's serious condition, it had not been possible to secure the services of a Magistrate from Umariya which was some distance away and that PW-10 was thus fully justified in recording the dying declaration. These pleas have been controverted by Mr. Rajesh, the learned counsel for the accused who has supported the judgment of the High Court.

We have gone through the evidence with the help of the learned counsel and also examined the reasons which have weighed with the High Court in rendering its judgment. With great respect, we are unable to accept any of the reasons given by the High Court. It has to be highlighted that a dying declaration cannot be analyzed as if it were a statute and it was only if the Court was to find that the injured was not in a fit condition to make a statement or the possibility that it was tutored or motivated or the story given was completely unacceptable could be some of the reasons for discarding it. It has come in Jyoti's statement that her father had returned home completely inebriated and before the dance performance had ended is supported by PW-7 as well. Jyoti also stated that the accused had walked to the kitchen and picked up a can of kerosene oil and had first poured its contents on her mother and thereafter on her and her siblings and then set them ablaze. She further stated that she being the eldest had managed to get up and had attempted to escape but she had been got hold of by the accused with the result he too had received burn injuries in that process. The fact that the accused received burn injuries is corroborated by the medical evidence.

We find absolutely no reason as to why the story given in the dying declaration should not be believed. Admittedly, Jyoti had been brought to the hospital by PW-7 and he so admitted in his statement. Dr. Pandey, the attending doctor, had immediately sent for the police which had brought PW-10 to

the hospital and after ascertaining from the doctor as to Jyoti's fitness, the dying declaration had been recorded in the presence of the doctor as also Balwant PW. The argument that had found favour with the High Court that as the presence of a chimney was conceded by the prosecution, it appeared that the kerosene oil had spilt out after the chimney had been accidentally broken and caused the burn injuries to all the victims. This story is, however, not based on any material but is an inference which does not flow from the evidence.

The question is as to the sentence that is to be awarded in such a matter. The trial court had rightly held that the incident was in the category of the rarest of the rare cases. Nothing can be said in exoneration of the accused on the facts of the case, and we are constrained to hold that the High Court by rendering a judgment which is completely against the evidence makes it difficult for us to re-impose the capital sentence at this stage. As already indicated above, the incident had happened in October 2003. The trial court had convicted the accused under Section 302 of the IPC and sentenced him to death vide judgment dated 30th April 2004. The acquittal judgment was rendered on the 6th December 2004. The accused has been free on acquittal for more than 6 years now. In this view of the matter, notwithstanding the horrendous nature of the crime and that it called for the capital punishment, we find it difficult to re-impose the death sentence on the accused at this stage. We nevertheless give this opinion with regret. We accordingly allow the appeal, set aside the judgment of the High Court dated 6th December 2004 and restore that of the trial court in so far as the conviction under Section 302 of the IPC in concerned, but direct the accused to undergo a sentence of life imprisonment.

D.G. Appeal allowed.

KALYAN KUMAR GOGOI
v.
ASHUTOSH AGNIHOTRI AND ANOTHER
(Civil Appeal No. 4820 of 2007)

JANUARY 18, 2011

[J.M. PANCHAL AND GYAN SUDHA MISRA, JJ.]

Representation of the People Act, 1951:

s. 100(i)(d)(iv) – Election petition – Allegation that change of venue of the polling station was illegal and deprived many voters from exercising their right due to chaos – Declaration sought to the effect that election of the returned candidate from constituency was void and order directing re-polling in the polling station notified be made – Petition dismissed by High Court – On appeal held: Defeated candidate totally failed to prove that the election of the returned candidate was materially affected because of non-compliance with the provisions of the 1951 Act or Rules or orders made under it – Evidence adduced by the defeated candidate does not establish beyond reasonable doubt that about 200 to 300 voters had gone away, without casting their votes when it was found that no arrangements were made for casting votes at the notified place – Non-compliance with the provisions of the 1951 Act and Rules of 1961 was by the officers, in charge of the conduct of the election and not by the elected candidates – Thus, order passed by the High Court upheld – Conduct of Election Rules, 1961 – r. 15.

s. 100 (i)(d)(iv) – Grounds for declaring election to be void – Result of election of returned candidate whether materially affected because of change of venue of the polling station – Standard of proof to be adopted – Held: It would be proof beyond reasonable doubt or beyond pale of doubt and not test of proof – Election of a returned candidate should not

normally be set aside unless there are cogent and convincing reasons – Burden of proving that the votes not cast would have been distributed in such a manner between the contesting candidates as would have brought about the defeat of the returned candidate lies upon one who objects to the validity of the election – Court has to see whether the burden has been successfully discharged by the election petitioner.

Election Laws – Trial of election petition – Rule of appreciation of hearsay evidence – Application of – To determine whether the result of the election of the returned candidate was materially affected due to change of venue of the polling station – Held: Rule of appreciation of hearsay evidence would apply – Evidence – Hearsay evidence.

Evidence:

Hearsay evidence – Meaning of.

Hearsay evidence – Not received as relevant evidence – Reasons for – Explained.

The State Legislature Assembly Elections were held. The respondent No. 2 was declared elected. The appellant-defeated candidate lodged a complaint before the Returning Officer demanding re-poll at one of the polling station on the ground of shifting of the polling at a non-notified area and its subsequent shifting to the notified place had materially affected the result of the election of respondent No. 2. The complaint was not entertained. The appellant then filed an election petition u/ss. 80, 80(A) and 81 of the Representation of the People Act, 1951 seeking declaration that the election of respondent No. 2, the returned candidate from the said constituency was void and to order directing repolling in Polling Station notified be made. The Single Judge of the High Court dismissed the election petition. Therefore, the appellant filed the instant appeal.

Dismissing the appeal, the Court

HELD: 1.The heads of substantive rights in Section 100(1) of the Representation of the People Act, 1951 are laid down in two parts: the first dealing with situations in which the election must be declared void on proof of certain facts and the second in which the election can only be declared void if the result of the election, insofar as it concerns the returned candidate, can be held to be materially affected on proof of some other facts. The appellant-defeated candidate has totally failed to prove that the election of the respondent No. 2, who is returned candidate, was materially affected because of non-compliance with the provisions of the Act of 1951, or Rules or Orders made under it. On the facts and in the circumstances of the case, the Single Judge of the High Court did not commit any error in dismissing the petition filed by the appellant challenging the election of the respondent No. 2. [Paras 25 and 26] [828-C-G]

2.1 Having read the evidence on record, the decision of the Single Judge of the High Court that by the change of venue of casting votes, breach of the provisions of Sections 25 and 56 of the Representation of the People Act, 1951 read with Rule 15 of the Conduct of Election Rules, 1961 was committed by the officials in charge of the conduct of the election at the constituency and not by the elected candidate, is accepted. It is true that if Section 100 (1) (d) (iv) is read in isolation, then one may be tempted to come to the conclusion that any non-compliance with the provisions of the Constitution or of the Act of 1951 or any Rules of 1961 Rules or orders made under the Act would render the election of the returned candidate void, but clause (d) begins with a rider that the result of the election, insofar as it concerns a returned candidate, must have been materially affected. This means that if it is not proved to the satisfaction of

the court that the result of the election insofar as it concerns a returned candidate has been materially affected, the election of the returned candidate would not be liable to be declared void notwithstanding non-compliance with the provisions of the Constitution or of the Act or of any Rules of 1961 Rules or Orders made thereunder. The election of a returned candidate should not normally be set aside unless there are cogent and convincing reasons. The success of a winning candidate at an election cannot be lightly interfered with. This is all the more so when the election of a successful candidate is sought to be set aside for no fault of his but of someone else. That is why the scheme of Section 100 of the Act, especially clause (d) of sub-Section (1) thereof clearly prescribes that in spite of the availability of grounds contemplated by sub-clauses (i) to (iv) of clause (d), the election of a returned candidate shall not be declared unless and until it is proved that the result of the election insofar as it concerns a returned candidate is materially affected. The burden of proving that the votes not cast would have been distributed in such a manner between the contesting candidates as would have brought about the defeat of the returned candidate lies upon one who objects to the validity of the election. Therefore, the standard of proof to be adopted, while judging the question whether the result of the election insofar as it concerns a returned candidate is materially affected, would be proof beyond reasonable doubt or beyond pale of doubt and not the test of proof. [Paras 11 and 14] [814-B-C; 815-C-H; 816-A-C]

2.2 The court has to see whether the burden has been successfully discharged by the election petitioner by demonstrating to the court positively that the poll would have gone against the returned candidate if the breach of the provisions of the Act and the Rules had not

occurred and proper poll had taken place at the notified polling station. [Para 16] [820-C-D]

Vashisht Narain Sharma vs. Dev Chandra **(1955) 1 SCR 509;** *Paokai Haokip vs. Rishang and Ors.* **AIR 1969 SC 663 – relied on.**

3.1 The word 'evidence' is used in common parlance in three different senses: (a) as equivalent to relevant (b) as equivalent to proof and (c) as equivalent to the material, on the basis of which courts come to a conclusion about the existence or non-existence of disputed facts. Though, in the definition of the word 'evidence' given in Section 3 of the Evidence Act one finds only oral and documentary evidence, this word is also used in phrases such as: best evidence, circumstantial evidence, corroborative evidence, derivative evidence, direct evidence, documentary evidence, hearsay evidence, indirect evidence, oral evidence, original evidence, presumptive evidence, primary evidence, real evidence, secondary evidence, substantive evidence, testimonial evidence, etc. The idea of best evidence is implicit in the Evidence Act. Evidence under the Act, consists of statements made by a witness or contained in a document. If it is a case of oral evidence, the Act requires that only that person who has actually perceived something by that sense, by which it is capable of perception, should make the statement about it and no one else. If it is documentary evidence, the Evidence Act requires that ordinarily the original should be produced, because a copy may contain omissions or mistakes of a deliberate or accidental nature. These principles are expressed in Sections 60 and 64 of the Evidence Act. [Para 18] [820-F-H]

3.2 The term 'hearsay' is used with reference to what is done or written as well as to what is spoken and in its

legal sense, it denotes that kind of evidence which does not derive its value solely from the credit given to the witness himself, but which rests also, in part, on the veracity and competence of some other person. The word 'hearsay' is used in various senses. Sometimes it means whatever a person is heard to say. Sometimes it means whatever a person declares on information given by someone else and sometimes it is treated as nearly synonymous with irrelevant. The sayings and doings of third person are, as a rule, irrelevant, so that no proof of them can be admitted. Every act done or spoken which is relevant on any ground must be proved by someone who saw it with his own eyes and heard it with his own ears. [Para 19] [821-D-F]

3.3 It cannot be said that the rule of appreciation of hearsay evidence would not apply to determination of the question whether change of venue of polling station has materially affected the result of the election of the returned candidate, since this question has to be determined in a properly constituted election petition to be tried by a High Court in view of the provisions contained in Part VI of the Representation of the People Act, 1951 and Section 87(2) of the Act of 1951, which specifically provides that the provisions of the Evidence Act, 1872, shall subject to the provisions of the Act, be deemed to apply in all respects to the trial of an election petition. No provision of the Act of 1951 could be pointed out, which excludes the application of rule of appreciation of hearsay evidence to the determination of the said question. [Para 20] [821-G-H; 822-A-B]

3.4 Hearsay evidence is excluded on the ground that it is always desirable, in the interest of justice, to get the person, whose statement is relied upon, into court for his examination in the regular way, in order that many possible sources of inaccuracy and untrustworthiness

can be brought to light and exposed, if they exist, by the test of cross-examination. The phrase 'hearsay evidence' is not used in the Evidence Act because it is inaccurate and vague. It is a fundamental rule of evidence under the Indian Law that hearsay evidence is inadmissible. A statement, oral or written, made otherwise than a witness in giving evidence and a statement contained or recorded in any book, document or record whatever, proof of which is not admitted on other grounds, are deemed to be irrelevant for the purpose of proving the truth of the matter stated. An assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact asserted. This species of evidence cannot be tested by cross-examination and that, in many cases, it supposes some better testimony which ought to be offered in a particular case, are not the sole grounds for its exclusion. Its tendency to protract legal investigations to an embarrassing and dangerous length, its intrinsic weakness, its incompetency to satisfy the mind of a judge about the existence of a fact, and the fraud which may be practiced with impunity, under its cover, combine to support the rule that hearsay evidence is inadmissible. [Para 21] [822-C-H]

3.5 The reasons why hearsay evidence is not received as relevant evidence are: (a) the person giving such evidence does not feel any responsibility. The law requires all evidence to be given under personal responsibility, i.e., every witness must give his testimony, under such circumstance, as expose him to all the penalties of falsehood, (b) truth is diluted and diminished with each repetition and (c) if permitted, gives ample scope for playing fraud by saying "someone told me that.....". It would be attaching importance to false rumour flying from one foul lip to another. Thus,

statement of witnesses based on information received from others is inadmissible. [Para 22] [823-A-C]

4.1 The analysis of the evidence tendered by the witnesses of the appellant makes it very clear that none of them had seen big number of voters, i.e., 200/300 returning back without casting their votes, because the polling station was initially arranged at a non-notified place and was subsequently shifted to the notified place. A close analysis of the evidence tendered by the witnesses of the appellant indicates that they have exaggerated the facts. It means that the witnesses are not only unreliable but have tendency to state untrue facts. [Para 24] [823-F-H]

4.2 One of the grounds mentioned by the Single Judge of the High Court for disbelieving the witnesses of the appellant is that they were illiterate, but their affidavits were got prepared in English language through lawyer which were treated as their examination-in-chief. There is no denial by the appellant that the witnesses were illiterate and that their affidavits were prepared by the lawyer and were presented before the court. The persons, who had put their thumb marks on the affidavits, which were in English language, could have been hardly made aware about the English contents of the affidavits sworn by them. [Para 24] [825-E-G]

4.3 The election in question took place on 3.4.2006 and the result was declared on 11.5.2006. However, for the first time the appellant filed a complaint regarding polling having taken place at a non-notified place only on 12.5.2006. Further, in the belatedly filed complaint, it was never claimed by the appellant that casting of the votes had taken place initially at a non-notified place and, therefore, about 200 to 300 voters, who had gone to the notified place to cast their votes, had returned back without casting their votes, when they had learnt that the

polling station was not set up at the notified place. Similarly, in the election petition the said fact is nowhere mentioned. [Para 24] [826-B-D]

4.4 The evidence adduced by the appellant does not establish beyond reasonable doubt that about 200 to 300 voters had gone away, without casting their votes when it was found by them that no arrangements were made for casting votes at the notified place. The finding recorded by the Single Judge of the High Court on this point is eminently just and is upheld. The Single Judge of the High Court had advantage of observing demeanour of the witnesses. On re-appreciation of the said evidence, it has not inspired confidence of this Court also. Under the circumstances, it is hazardous to rely upon the evidence adduced by the appellant for coming to the conclusion that because of specification of wrong place as polling station, the result of respondent No. 2, was materially affected. It is relevant to notice that out of 1050 voters, whose names were registered at the notified polling station, 557 voters had cast their votes. It means that the voting percentage was 53.8%. The assertion made by the witnesses of the appellant that roughly about 200 to 300 voters could not cast their votes because of shifting of official polling station, cannot be believed for the other weighty reason that the general pattern of polling not only in this constituency but in the whole of India is that all the voters do not always go to the polls. Voting in India is not compulsory and, therefore, no minimum percentage of votes has been prescribed either for treating an election in a constituency as valid or for securing the return of a candidate at the election. The voters may not turn up in large number to cast their votes for variety of reasons such as an agitation going on in the State concerned on national and/or regional issues or because of boycott call given by some of the recognized State parties, in the wake of certain political

developments in the State or because of disruptive activities of some extremist elements, etc. It is common knowledge that voting and abstention from voting as also the pattern of voting, depend upon complex and variety of factors, which may defy reasoning and logic. Depending on a particular combination of contesting candidates and the political party fielding them, the same set of voters may cast their votes in a particular way and may respond differently on a change in such combination. Voters, it is said, have a short lived memory and not an inflexible allegiance to political parties and candidates. Election manifestos of political parties and candidates in a given election, recent happenings, incidents and speeches delivered before the time of voting may persuade the voters to change their mind and decision to vote for a particular party or candidate, giving up their previous commitment or belief. Therefore, 200 to 300 voters not casting their votes can hardly be attributed to change of venue of the polling station, though the evidence on record does not indicate at all that about 200 to 300 voters had gone back without casting their votes. Even if it assumed for sake of argument that about 200 to 300 voters had gone away without casting their votes on learning that no polling station was set up at the notified place, no evidence relating to the pattern of voting as was disclosed in the various polling booths at which the voters had in fact gone, was adduced by the appellant. Therefore, it is very difficult to accept the *ipse dixit* of the appellant and his witnesses that if 200 to 300 had not gone away without casting their votes due to non-setting up of notified polling station, they would have voted in favour of the appellant. There is no warrant for drawing presumption that those, who had gone away without casting votes, would have cast their votes in favour of the appellant, if there had been no change of

venue of voting. The matter cannot be considered on possibility. There is no room for a reasonable judicial guess. [Para 24] [826-E-H; 827-A-H; 828-A-C]

Paokai Haokip vs. Rishang **AIR 1969 SC 663 – relied on.p**

Case Law Reference:

(1955) 1 SCR 509	**Relied on**	**Para 14**
AIR 1969 SC 663	**Relied on**	**Paras 15, 24**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4820 of 2007.

From the Judgment & Order dated 28.08.2007 of the High Court of Gauhati in Election Petition No. 4 of 2006.

Rajiv Dhavan, Anupam Chowdhury, Anupam Lala Das, Raktim Gogoi for the Appellant.

Nagendra Rai, Amit Yadav, Smarhar, Sanjay Kumar Visen, Bijender Singh, Ambar Qamaruddin for the Respondent.

The Judgment of the Court was delivered by

J.M. PANCHAL, J. 1. This appeal, filed under Section 116A of the Representation of People Act, 1951 ("the Act" for short), is directed against judgment dated August 28, 2007, rendered by the learned Single Judge of the Gauhati High Court in Election Petition No. 4 of 2006, by which the prayers made by the appellant to declare the election of the respondent No. 2, who is returned candidate from Legislative Assembly Constituency of Dibrugarh, to be void and to order repoll in Polling Station No. 124 Manik Dutta L.P. School (Madhya) of 116 Dibrugarh Legislative Assembly Constituency, are rejected.

2. The facts emerging from the record of the case are as under: -

A notice was published inviting nominations from eligible candidates to contest the Assam State Legislative Assembly Election for 116 Dibrugarh Constituency as required by Section 31 of the Act read with Rule 3 of the Conduct of Election Rules, 1961, notifying the schedule of the election, which was as under: -

1.	Issue of notification	10.3.2006
2.	Last date for making nomination	17.3.2006
3.	Scrutiny of nomination papers	18.3.2006
4.	Last date for withdrawal of candidature	20.3.2006
5.	Date of poll	03.4.2006
6.	Counting of votes	11.5.2006
7.	Date before which election process Shall be completed	20.5.2006

The appellant filed his nomination papers to contest the Assam State Legislative Assembly Elections from 116 Dibrugarh Legislative Assembly Constituency as an approved candidate of the Indian National Congress. Along with him, the respondent No. 2 herein filed his nomination papers as the candidate of Bhartiya Janata Party for the said constituency. There were six other candidates also, who were in fray and had filed their nomination papers for contesting the said election. Upon scrutiny of the nomination papers of the eight candidates, papers of seven candidates including those of the appellant and the respondent No. 2 were declared valid by the Returning Officer. The polling took place for the Constituency in question on April 3, 2006. It may be mentioned that in 116 Dibrugarh Legislative Assembly Constituency, in all there were 126 notified polling stations, names/particulars of which were published under Section 25 of the Act. On the date of polling one notified polling station, i.e., Polling Station No. 124 was not

set up in the notified school, namely, Manik Dutta L.P. School (Madhya) and instead, the polling was conducted in another school, namely, Chiring Gaon Railway Colony L.P. School, which was admittedly not a notified polling station. It is not in dispute that the polling in the said non-notified polling station started at 7.00 A.M. The case of the appellant is that as the polling in the non-notified polling station continued up to 12.30 P.M., there was confusion and chaos amongst the voters and many of them went away without casting their votes. The appellant claims that his election agent lodged complaint before the Deputy Commissioner, Dibrugarh, who was also the Returning Officer, for the constituency concerned and, therefore, the polling station was shifted to the notified school and was made functional later on. It is necessary to mention that out of the total 1050 voters whose names were registered at the polling station located at the school notified, 557 voters had cast their votes, which constitute, according to the appellant, 53.8% of votes while the total polling percentage in the entire constituency was 67.23%. The counting of the votes for the election of the said constituency took place on May 12, 2006 and results were declared on the same day. The respondent No. 2 was declared elected having polled 28,424 votes as the appellant could secure 28,249 votes out of total valid votes of 79,736. Thus the margin of the votes between the appellant and the respondent No. 2 was of 175 votes.

On the same day, the appellant lodged a complaint before the Returning Officer demanding repoll at the polling station concerned inter alia making grievance that the shifting of the polling station from the notified area to Chiring Gaon Railway Colony L.P. School was illegal and deprived many voters from exercising their right of franchise due to utter confusion and/or chaos. The appellant also made grievance about the manner in which the Electronic Voting Machines were shifted from Chiring Gaon Railway Colony L.P. School to Manik Dutta L.P. School (Madhya). In response to this complaint the Deputy Commissioner and District Election Officer, Dibrugarh,

addressed a letter dated May 20, 2006 to the appellant mentioning that the problem about the functioning of Polling Station notified was solved immediately on the day of the polling under the guidance of the Election Observer in the presence of the Zonal Officer, Sector Officer of the Constituency Magistrate and Polling Agents and as the complaint lodged by the appellant was found to be an after thought, the same was not entertained.

3. Thereupon, the appellant filed Election Petition No. 4 of 2006 on June 21, 2006 before the Gauhati High Court under Sections 80, 80(A) and 81 of the Act seeking a declaration that the election of the respondent No. 2 from constituency concerned was void and an order directing repolling in Polling Station notified be made.

4. The respondent No. 2 filed his written statement mentioning amongst other facts that the shifting of the polling station from a notified place to a non-notified place and thereafter rectifying the defect did not vitiate the election nor had materially affected his result of the election. The respondent No. 1, i.e., Mr. Ashutosh Agnihotri, who was then District Election Officer, Dibrugarh and Returning Officer, filed his reply mentioning, inter alia, that though in the morning polling was held at a non-notified polling station, namely, Chiring Gaon Railway Colony L.P. School instead of Manik Dutta L.P. School (Madhya), voters were not deprived of their right of casting vote. The respondent No. 1 further stated that the appellant had never raised, prior to the declaration of the result, any objection or made any complaint about initial voting having taken place at the polling station which was not notified or about subsequent shifting of the polling station to the notified place.

5. On the basis of pleadings of the parties, necessary issues for determination were framed and evidence was led by the parties. The appellant examined in all twelve witnesses whereas the respondent No. 2 examined six witnesses.

6. According to the learned Judge since the election petition was filed challenging the result of the returned candidate on the ground of non-compliance of the provisions of the Act and the Rules of 1961, the election petitioner, i.e., the appellant was required to prove such non-compliance and also that such non-compliance had materially affected the result of the election as proof of mere non-compliance of any of the provisions of the Act or the Rules framed thereunder by itself without showing that such non-compliance had materially affected the result of the election of the returned candidate would not be sufficient to declare the election of the respondent No. 2 void under Section 100(1)(d)(iv) of the Act. The learned Judge held that the evidence adduced established that the distance between the two schools was hardly about 100 meters. The learned Judge also noticed that the evidence established that polling in the Chiring Gaon Railway Colony L.P. School had continued only up to 9.30 A.M. and after shifting the polling station to the notified school at around 9.45 A.M., the polling was resumed/ had restarted at about 9.55 A.M. On consideration of the evidence, the learned Judge concluded that the Polling Station No. 124 was not set up in the notified place initially but was subsequently set up at the notified place and thus there was breach of provisions of Sections 25 and 56 of the Act as well as Rule 15 of the Rules of 1961. The learned Judge examined the contention of the appellant that the Presiding Officer having found that the Polling Station No. 124 was set up in a non-notified place was duty bound to adjourn the polling which was taking place at the said polling station in exercise of powers conferred by Section 57(1) of the Act and the Presiding Officer having not done so, the election of the respondent No. 2 was liable to be set aside. However, the learned Judge found that the appellant had neither pleaded violation of any of the provisions of Section 57 of the Act nor led evidence to prove that the setting up of the Polling Station in a non-notified place and its subsequent shifting to the notified place amounted to 'sufficient cause' within the meaning of Section 57 of the Act and, therefore, concluded that it was not necessary to decide

the said contention. On examination, the contention of the appellant, that the error and/or irregularity, namely, setting up of the polling station at the wrong place and subsequent shifting of the same at the notified place, committed during the conduct of the election, should have been reported by the Returning Officer forthwith to the Election Commission and failure to so report, has vitiated the election of the respondent No. 2, was found to be without any substance because, according to the learned Judge, there was no pleading relating to breach of Section 58(1)(b) or commission of irregularity and/or error likely to vitiate the poll and it was further held that question of taking steps under Section 58 of the Act would arise only in a case where destruction of ballot boxes, E.V.M. is pleaded and proved and not otherwise. The case of the appellant that shifting was made to the notified place without sealing the EVM and other election materials also, was not accepted by the learned Judge because except the appellant, no other person present at that point of time at Chiring Gaon Railway Colony L.P. School had stated anything about the non-sealing of the EVM and other election materials.

7. Having held that there was non-compliance of the provisions of Sections 25 and 56 of the Act and Rule 15 of 1961 Rules, the learned Judge further examined the question whether such non-compliance had materially affected the result of the election. After noticing that the question as to whether the infraction of law has materially affected the result of the election or not, is purely a question of fact, it was held that no presumption or any inference of fact can be raised that the result of the election of the returned candidate must have been materially affected and the fact that such infraction had materially affected the result of the election, must be proved by adducing cogent and reliable evidence. The learned Judge thereafter discussed the evidence on record and concluded that none of the witnesses had stated that a large number of voters had left the notified place without casting their votes because of non-availability of the polling facility at the notified place. In

view of the above mentioned conclusions, the learned Judge held that initially voting, which had taken place at the non-notified place, had not materially affected the election result of the respondent No. 2 and dismissed the election petition by the impugned judgment, giving rise to the instant appeal.

8. 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 present appeal.

9. The first grievance made by Dr. Rajiv Dhavan, learned senior counsel for the appellant, was that a wrong test of burden of proof, namely, absolute test was adopted by the learned Judge of the High Court, which could not have been adopted in view of the provisions of Section 100(1)(d)(iv) of the Act and the test of either broad probabilities or the test of sufficiency of evidence should have been applied while considering the question whether polling at the non-notified place and curtailing of time of voting had materially affected the result of the election. According to the learned counsel for the appellant, the hearsay rule on appreciation of evidence cannot be made applicable while determining the question whether polling at the non-notified place and curtailing of time of voting had materially affected the result of the election, so far as a candidate contesting election and his agents are concerned and, therefore, reliable testimony of the appellant and that of his agents should have been accepted by the learned Judge. According to the learned counsel for the appellant, one of the reasons given by the High Court for disbelieving some of the witnesses was that though they were illiterate, they had filed affidavits in English language through their lawyer and on being asked about the contents of the affidavit, they had stated that they were not in position to explain the same, forgetting the material fact that they had acted through their lawyer and the lawyer on the basis of instructions given by them had prepared their affidavits. The learned counsel argued that the reasons assigned by the learned Judge in the impugned judgment for dismissing the

Election Petition filed by the appellant are not only erroneous but contrary to the evidence on record and, therefore, this Court should accept the appeal.

10. Mr. Nagendra Rai, learned counsel for the respondent No. 2, argued that burden of proof was rightly placed on the appellant in view of several reported decisions of this Court, which firmly lay down the principle that the ground pleaded for setting aside an election, must be proved beyond reasonable doubt and, therefore, no error can be said to have been committed by the learned Judge in applying the principle of burden of proof to the facts of the case. According to the learned counsel for the respondent No. 2, hearsay evidence remains hearsay and the said rule has to be applied to all matters including the determination of the question whether voting at the non-notified place and curtailing of time of voting had materially affected the result of the election of the respondent No. 2. It was, therefore, pleaded that it is not correct to argue that hearsay rule cannot be made applicable while determining the validity of election of the returned candidate under Section 100(1)(d)(iv) of the Act. What was maintained before this Court by the learned counsel for the respondent No. 2 was that on behalf of the illiterate people, affidavits were prepared by lawyer without making the illiterate people aware about the contents of the affidavits and, therefore, the High Court was justified in brushing aside the evidence of those witnesses while considering the question whether polling at a non-notified place had, in fact, affected the result of election materially. The learned counsel submitted that cogent and convincing reasons have been given by the learned Judge in the impugned judgment for dismissing the election petition filed by the appellant and, therefore, this Court should not interfere with the same in the instant appeal, more particularly, when the period left at the disposal of the respondent No. 2, so far as his term as MLA is concerned, is less than a year.

11. The first question to be considered is whether there

had been or not a breach of the Act and the Rules in the conduct of the election at this constituency. It is hardly necessary for this Court to go over the evidence with a view to ascertaining whether there was or was not a breach of the Act and the Rules in the conduct of the election concerned. Having read the evidence on record, this Court is in entire agreement with the decision of the learned Single Judge that by the change of venue of casting votes, breach of the provisions of Sections 25 and 56 of the Act read with Rule 15 of the Rules of 1961 was committed by the officials who were in charge of the conduct of the election at this constituency.

12. This shows that the matter is governed by Section 100(1)(d)(iv) of the Act. The question still remains whether the condition precedent to the avoidance of the election of the returned candidate which requires proof from the election petitioner, i.e., the appellant that the result of the election had been materially affected insofar as the returned candidate, i.e., the respondent No. 2, was concerned, has been established in this case.

13. This Court finds that the learned Judge has recorded a finding that cogent and reliable evidence should be adduced by an election petitioner when election of the successful candidate is challenged on the ground of breach of provisions of Section 100(1)(d)(iv) of the Act. The contention advanced by Dr. Rajiv Dhavan, learned counsel for the appellant, that the test of either broad probabilities or the test of sufficiency of evidence should be applied while deciding the question whether the result of the elected candidate is materially affected or not cannot be accepted. Section 100(1)(d)(iv) of the Act reads as under: -

> "**100. Grounds for declaring election to be void.** – (1) Subject to the provisions of sub-section (2) if the High Court is of opinion –
>
> (a) to (c) .....

(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected –

(i) to (iii) .....

(iv) by any non-compliance with the provisions of the Constitution or of this Act or any rules or orders made under this Act, the High Court shall declare the election of the returned candidate to be void."

14. It may be mentioned that here in this case non-compliance with the provisions of the Representation of People Act, 1951 and the Election Rules of 1961 was by the officers, who were in-charge of the conduct of the election and not by the elected candidate. It is true that if clause (iv) is read in isolation, then one may be tempted to come to the conclusion that any non-compliance with the provisions of the Constitution or of the Act of 1951 or any Rules of 1961 Rules or orders made under the Act would render the election of the returned candidate void, but one cannot forget the important fact that clause (d) begins with a rider, namely, that the result of the election, insofar as it concerns a returned candidate, must have been materially affected. This means that if it is not proved to the satisfaction of the Court that the result of the election insofar as it concerns a returned candidate has been materially affected, the election of the returned candidate would not be liable to be declared void notwithstanding non-compliance with the provisions of the Constitution or of the Act or of any Rules of 1961 Rules or orders made thereunder. It is well to remember that this Court has laid down in several reported decisions that the election of a returned candidate should not normally be set aside unless there are cogent and convincing reasons. The success of a winning candidate at an election cannot be lightly interfered with. This is all the more so when the election of a successful candidate is sought to be set aside for no fault of his but of someone else. That is why the scheme of Section 100 of the Act, especially clause (d) of sub-Section (1) thereof clearly prescribes that in spite of the availability of grounds

contemplated by sub-clauses (i) to (iv) of clause (d), the election of a returned candidate shall not be voided unless and until it is proved that the result of the election insofar as it concerns a returned candidate is materially affected. The volume of opinion expressed in judicial pronouncements, preponderates in favour of the view that the burden of proving that the votes not cast would have been distributed in such a manner between the contesting candidates as would have brought about the defeat of the returned candidate lies upon one who objects to the validity of the election. Therefore, the standard of proof to be adopted, while judging the question whether the result of the election insofar as it concerns a returned candidate is materially affected, would be proof beyond reasonable doubt or beyond pale of doubt and not the test of proof as suggested by the learned counsel for the appellant.

This part of the case depends upon the ruling of this Court in *Vashisht Narain Sharma vs. Dev Chandra* (1955) 1 SCR 509 : AIR 1954 SC 513. In that case, there was a difference of 111 votes between the returned candidate and the candidate who had secured the next higher number of votes. One candidate by name of Dudh Nath Singh was found not competent to stand election and the question arose whether the votes wasted on Dudh Nath Singh, if they had been polled in favour of remaining candidates, would have materially affected the fate of the election. Certain principles were stated as to how the probable effect upon the election of the successful candidate, of votes which were wasted (in this case effect of votes not cast) must be worked out. Two witnesses were brought to depose that if Dudh Nath Singh had not been a candidate for whom no voting had to be done, the voters would have voted for the next successful candidate. Ghulam Hasan, J. did not accept this kind of evidence. It is observed as follows: -

"It is impossible to accept the ipse dixit of witnesses coming for one side or the other to say that all or some of

the votes would have gone to one or the other on some supposed or imaginary ground. The question is one of fact and has to be proved by positive evidence. If the petitioner is unable to adduce evidence in a case such as the present, the only inescapable conclusion to which the Tribunal can come is that the burden is not discharged and the election must stand."

While interpreting the words "the result of the election has been materially affected" occurring in Section 100(1)(c), this Court in the said case notified that these words have been the subject of much controversy before the Election Tribunals and the opinions expressed were not uniform or consistent. While putting the controversy at rest, it was observed as under: -

"These words seem to us to indicate that the result should not be judged by the mere increase or decrease in the total number of votes secured by the returned candidate but by proof of the fact that the wasted votes would have been distributed in such a manner between the contesting candidates as would have brought about the defeat of the returned candidate."

In another para in the said decision it is observed: -

"It will not do merely to say that all or a majority of the wasted votes might have gone to the next highest candidate. The casting of votes at an election depends upon a variety of factors and it is not possible for any one to predicate how many or which proportion of the votes will go to one or the other of the candidates. While it must be recognized that the petitioner in such a case is confronted with a difficult situation, it is not possible to relieve him of the duty imposed upon him by Section 100(1)(c) and hold without evidence that the duty has been discharged."

15. Again, in *Paokai Haokip vs. Rishang and others* AIR 1969 SC 663, the appellant who was the returned candidate

from the Outer Manipur Parliamentary Constituency had received 30,403 votes as against the next candidate, who had received 28,862 votes. There was thus a majority of 1541 votes.

The candidate, who had secured the second largest number of votes, had filed election petition. The main ground of attack, which had succeeded in the Judicial Commissioner's Court, was that polling was disturbed because of numerous circumstances. These were that the polling centres were, in some cases, changed from the original buildings to other buildings of which due notification was not issued earlier, with the result that many of the voters who had gone to vote at the old polling booths had found no arrangement for voting and rather than going to the new polling station, had gone away without casting their votes. The second ground was that owing to firing by the Naga Hostiles, the voting at some of the polling stations was disturbed and almost no votes were cast. The third ground was that the polling hours, at some stations, were reduced with the result that some of the voters, who had gone to the polling station, were unable to cast their votes.

This Court considered the evidence led in the said case and after concluding that by the change of venue and owing to the firing, a number of voters had, probably failed to record their votes, held that the matter was governed by Section 100(1)(d)(iv) of the Act. Having held so, the Court then proceeded to consider the question whether the condition precedent to the avoidance of the election of the returned candidate, which requires proof from the election petitioner that the result of the election had been materially affected insofar as the returned candidate was concerned, was established. After extensively quoting from *Vashisht Narain Sharma's* case the Court noticed that witnesses were brought forward to state that a number of voters did not vote because of change of venue or because of firing and that they had decided to vote en bloc for the election petitioner. This Court, on appreciation of evidence led in that case held that the kind of evidence

adduced was merely an assertion on the part of the witnesses, who could not have spoken for 500 voters for the simple reason that casting of votes at an election depended upon a variety of factors and it was not possible for anyone to predict how many or which proportion of votes would have gone to one or the other of the candidates. Therefore, the Court refused to accept the statement even of a Headman that the whole village would have voted in favour of one candidate to the exclusion of the others. The Court in the said case examined the polling pattern in the election and after applying the law of averages, concluded that it was demonstrated at once that the election petitioner could not have expected to wipe off the large arrears under which he was labouring and that he could not have, therefore, made a successful bid for the seat, even with the assistance of the voters who had not cast their votes. Noting that the learned Judicial Commissioner had reached the conclusion by committing the same error, which was criticized in *Vashisht Narain Sharma's* case, this Court observed that the learned Judicial Commissioner had taken the statement of the witnesses at their worth and had held on the basis of those statements that all the votes that had not been cast, would have gone to the election petitioner. This Court ruled in the said case that for this approach adopted by the learned Judicial Commissioner there was no foundation in fact, it was a surmise and it was anybody's guess as to how these people who had not voted, would have actually voted. This Court, on appreciation of evidence, held that the decision of the learned Judicial Commissioner that the election was in contravention of the Act and the Rules was correct, but that did not alter the position with regard to Section 100(1)(d)(iv) of the Act, which required that election petitioner must go a little further and prove that the result of the election had been materially affected. After holding that the election petitioner had failed to prove that the result of the election insofar as it concerned the returned candidate, had been materially affected, the appeal was allowed and it was declared that the election of the returned candidate would stand. What is important to notice is that while

allowing the appeal of the returned candidate, the Court has made following pertinent observations regarding burden of proof which hold the field even today: -

> It is no doubt true that the burden which is placed by law is very strict; even if it is strict it is for the courts to apply it. It is for the Legislature to consider whether it should be altered. If there is another way of determining the burden, the law should say it and not the courts. It is only in given instances that, taking the law as it is, the courts can reach the conclusion whether the burden of proof has been successfully discharged by the election petitioner or not."

16. In the light of the principles stated above what this Court has to see is whether the burden has been successfully discharged by the election petitioner by demonstrating to the Court positively that the poll would have gone against the returned candidate if the breach of the provisions of the Act and the Rules had not occurred and proper poll had taken place at the notified polling station.

17. Before considering the question posed above, it would be relevant to deal with the argument raised by the learned counsel for the appellant that hearsay rule of appreciation of evidence would not be applicable to the determination of the question whether the result of the election of the respondent No. 2 was materially affected because of change of venue of the polling station.

18. The word 'evidence' is used in common parlance in three different senses : (a) as equivalent to relevant (b) as equivalent to proof and (c) as equivalent to the material, on the basis of which courts come to a conclusion about the existence or non-existence of disputed facts. Though, in the definition of the word "evidence" given in Section 3 of the Evidence Act one finds only oral and documentary evidence, this word is also used in phrases such as : best evidence, circumstantial evidence, corroborative evidence, derivative evidence, direct

evidence, documentary evidence, hearsay evidence, indirect evidence, oral evidence, original evidence, presumptive evidence, primary evidence, real evidence, secondary evidence, substantive evidence, testimonial evidence, etc. The idea of best evidence is implicit in the Evidence Act. Evidence under the Act, consists of statements made by a witness or contained in a document. If it is a case of oral evidence, the Act requires that only that person who has actually perceived something by that sense, by which it is capable of perception, should make the statement about it and no one else. If it is documentary evidence, the Evidence Act requires that ordinarily the original should be produced, because a copy may contain omissions or mistakes of a deliberate or accidental nature. These principles are expressed in Sections 60 and 64 of the Evidence Act.

19. The term 'hearsay' is used with reference to what is done or written as well as to what is spoken and in its legal sense, it denotes that kind of evidence which does not derive its value solely from the credit given to the witness himself, but which rests also, in part, on the veracity and competence of some other person. The word 'hearsay' is used in various senses. Sometimes it means whatever a person is heard to say. Sometimes it means whatever a person declares on information given by someone else and sometimes it is treated as nearly synonymous with irrelevant. The sayings and doings of third person are, as a rule, irrelevant, so that no proof of them can be admitted. Every act done or spoken which is relevant on any ground must be proved by someone who saw it with his own eyes and heard it with his own ears.

20. The argument that the rule of appreciation of hearsay evidence would not apply to determination of the question whether change of venue of polling station has materially affected the result of the election of the returned candidate, cannot be accepted for the simple reason that, this question has to be determined in a properly constituted election petition to be tried by a High Court in view of the provisions contained

in Part VI of the Representation of the People Act, 1951 and Section 87(2) of the Act of 1951, which specifically provides that the provisions of the Indian Evidence Act, 1872, shall subject to the provisions of the Act, be deemed to apply in all respects to the trial of an election petition. The learned counsel for the appellant could not point out any provision of the Act of 1951, which excludes the application of rule of appreciation of hearsay evidence to the determination of question posed for consideration of this Court in the instant appeal.

21. Here comes the rule of appreciation of hearsay evidence. Hearsay evidence is excluded on the ground that it is always desirable, in the interest of justice, to get the person, whose statement is relied upon, into court for his examination in the regular way, in order that many possible sources of inaccuracy and untrustworthiness can be brought to light and exposed, if they exist, by the test of cross-examination. The phrase "hearsay evidence" is not used in the Evidence Act because it is inaccurate and vague. It is a fundamental rule of evidence under the Indian Law that hearsay evidence is inadmissible. A statement, oral or written, made otherwise than a witness in giving evidence and a statement contained or recorded in any book, document or record whatever, proof of which is not admitted on other grounds, are deemed to be irrelevant for the purpose of proving the truth of the matter stated. An assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact asserted. That this species of evidence cannot be tested by cross-examination and that, in many cases, it supposes some better testimony which ought to be offered in a particular case, are not the sole grounds for its exclusion. Its tendency to protract legal investigations to an embarrassing and dangerous length, its intrinsic weakness, its incompetency to satisfy the mind of a Judge about the existence of a fact, and the fraud which may be practiced with impunity, under its cover, combine to support the rule that hearsay evidence is inadmissible.

22. The reasons why hearsay evidence is not received as relevant evidence are: (a) the person giving such evidence does not feel any responsibility. The law requires all evidence to be given under personal responsibility, i.e., every witness must give his testimony, under such circumstance, as expose him to all the penalties of falsehood. If the person giving hearsay evidence is cornered, he has a line of escape by saying "I do not know, but so and so told me", (b) truth is diluted and diminished with each repetition and (c) if permitted, gives ample scope for playing fraud by saying "someone told me that.....". It would be attaching importance to false rumour flying from one foul lip to another. Thus statement of witnesses based on information received from others is inadmissible.

23. In the light of the above stated principles of law, this Court will have to decide the question whether it is proved by the appellant, beyond reasonable doubt that the result of the election, insofar as the respondent No. 2 is concerned, was materially affected because of change of venue of the polling station. The first attempt made by the appellant is to establish that about 200 to 300 voters had gone away without casting their votes when they found that no arrangements were made for casting votes at the notified place.

24. The evidence in this case, which has been brought out by the election petitioner, is the kind of evidence which has been criticized by this Court in several reported decisions. The analysis of the evidence tendered by the witnesses of the appellant makes it very clear that none of them had seen big number of voters, i.e., 200/300 returning back without casting their votes, because the polling station was initially arranged at a non-notified place and was subsequently shifted to the notified place. In fact, a close analysis of the evidence tendered by the witnesses of the appellant indicates that they have exaggerated the facts. For example, Dr. Kalyan Kumar Gogoi, i.e., the appellant as PW-1, had stated in his evidence that the distance between Manik Dutta L.P. School (Madhya) and

Chiring Gaon Railway Colony L.P. School was about one and half kilometers whereas as a material fact, the distance found was hardly 440 feet and the schools were visible from each other. What is relevant to notice is that his evidence further discloses that he was informed by his workers, i.e., Durlav Kalita and Pushpanath Sharma that a large number of voters could not cast their votes. He does not claim that he himself had seen the voters returning because of specification of non-notified place as place for voting. The worker Durlav Kalita has not been examined by appellant and the second worker Pushpanath Sharma, who has been examined as PW3, has not been found to be reliable by this Court, hence the assertion of the appellant that he was told by his abovenamed two workers that a large number of voters had gone away without casting their votes when they found that no arrangements for casting votes at the notified place were made, will have to be regarded as hearsay evidence and, therefore, inadmissible in evidence. The evidence of Dugdha Chandra Gogoi PW-2 establishes that he was the election agent of the appellant and according to him he had informed the appellant that about 200 to 300 voters had gone away when they had found that no arrangements were made for voting at the notified venue. However, he has in no uncertain terms stated during his cross-examination that he had set up booths at Manik Dutta L.P. School (Madhya) Polling Station as well as Chiring Gaon Railway Colony L.P. School. If that was so, those who had come for voting at Manik Dutta L.P. School (Madhya) Polling Station between 7.00 A.M. to 9.45 A.M., could have been directed to go to Chiring Gaon Railway Colony L.P. School Polling Station and vice versa after the polling station was shifted from non-notified place to the notified place. Therefore, his assertion that he had informed the appellant that about 200 to 300 voters had gone away without casting their votes when it was found by them that no voting arrangements were made at the notified venue, does not inspire confidence of this Court. Similarly, witness Pushpanath Sharma, examined by the appellant as PW-3, has stated that on reaching Manik Dutta L.P. School (Madhya), he had learnt

that the polling station was not set up there and there was utter confusion. The witness has thereafter stated that he had enquired about non-setting up of polling station at the notified place and learnt that, unable to locate the polling station set up at a place which was not notified, many voters had left without casting their votes. This is nothing else but hearsay evidence and it would be hazardous to act upon such an evidence for the purpose of setting aside the election of an elected candidate. Moreover, this Court finds that PW-6, i.e., Sri Pranjal Borah, has stated that on the day of the poll, i.e., on April 3, 2006 at about 11.30 O'clock in the morning when he went to cast his vote at 124 Manik Dutta L.P. School (Madhya) polling station, i.e., the notified place, he found that the polling station was not set up there. This has turned out to be utter lie because as per the finding recorded by the learned Single Judge on appreciation of evidence with which this Court completely agrees on re-appreciation of evidence, is that by 9.45 A.M. the notified Polling Station had started functioning fully and the voters were found standing in queue to cast their votes. Similar is the state of affairs so far as evidence of witness No. 8 Smt. Subarna Borah and witness No. 9 Smt. Pratima Borah are concerned. It means that the witnesses are not only unreliable but have tendency to state untrue facts. One of the grounds mentioned by the learned Single Judge of the High Court for disbelieving the witnesses of the appellant is that they were illiterate, but their affidavits were got prepared in English language through lawyer which were treated as their examination-in-chief. There is no denial by the appellant that the witnesses were illiterate and that their affidavits were prepared by the lawyer and were presented before the Court. The persons, who had put their thumb marks on the affidavits, which were in English language, could have been hardly made aware about the English contents of the affidavits sworn by them. The evidence tendered by the appellant to establish that about 200 to 300 voters had gone back on not finding the polling station at the notified place has not inspired the confidence of the learned Single Judge of the High Court, who

had advantage of observing demeanour of the witnesses. On re-appreciation of the said evidence it has not inspired confidence of this Court also. Under the circumstances, this Court finds that it is hazardous to rely upon the evidence adduced by the appellant for coming to the conclusion that because of specification of wrong place as polling station, the result, so far as the same concerns respondent No. 2, was materially affected. It is relevant to notice that the election in question had taken place on April 3, 2006 and the result was declared on May 11, 2006. However, for the first time the appellant filed a complaint regarding polling having taken place at a non-notified place only on May 12, 2006. Further, in the belatedly filed complaint, it was never claimed by the appellant that casting of the votes had taken place initially at a non-notified place and, therefore, about 200 to 300 voters, who had gone to the notified place to cast their votes, had returned back without casting their votes, when they had learnt that the polling station was not set up at the notified place. Similarly, in the Election Petition it is nowhere mentioned by the appellant that before the shifting of the notified place polling station, voters, who were roughly 200 to 300 in number, had to return back without casting their votes. The evidence adduced by the appellant does not establish beyond reasonable doubt that about 200 to 300 voters had gone away, without casting their votes when it was found by them that no arrangements were made for casting votes at the notified place. The finding recorded by the learned Single Judge on this point is eminently just and is hereby upheld. What is relevant to notice is that out of 1050 voters, whose names were registered at the notified polling station, 557 voters had cast their votes. It means that the voting percentage was 53.8%. The assertion made by the witnesses of the appellant that roughly about 200 to 300 voters could not cast their votes because of shifting of official polling station, cannot be believed for the other weighty reason that the general pattern of polling not only in this constituency but in the whole of India is that all the voters do not always go to the polls. Voting in India is not compulsory and, therefore, no minimum

percentage of votes has been prescribed either for treating an election in a constituency as valid or for securing the return of a candidate at the election. The voters may not turn up in large number to cast their votes for variety of reasons such as an agitation going on in the State concerned on national and/or regional issues or because of boycott call given by some of the recognized State parties, in the wake of certain political developments in the State or because of disruptive activities of some extremist elements, etc. It is common knowledge that voting and abstention from voting as also the pattern of voting, depend upon complex and variety of factors, which may defy reasoning and logic. Depending on a particular combination of contesting candidates and the political party fielding them, the same set of voters may cast their votes in a particular way and may respond differently on a change in such combination. Voters, it is said, have a short lived memory and not an inflexible allegiance to political parties and candidates. Election manifestos of political parties and candidates in a given election, recent happenings, incidents and speeches delivered before the time of voting may persuade the voters to change their mind and decision to vote for a particular party or candidate, giving up their previous commitment or belief. In *Paokai Haokip vs. Rishang* AIR 1969 SC 663, this Court has taken judicial notice of the fact that in India all the voters do not always go to the polls and that the casting of votes at an election depends upon a variety of factors and it is not possible for anyone to predicate how many or which proportion of votes will go to one or the other of the candidate. Therefore, 200 to 300 voters not casting their votes can hardly be attributed to change of venue of the polling station, though the evidence on record does not indicate at all that about 200 to 300 voters had gone back without casting their votes. Even if it assumed for sake of argument that about 200 to 300 voters had gone away without casting their votes on learning that no polling station was set up at the notified place, this Court finds that no evidence relating to the pattern of voting as was disclosed in the various polling booths at which the voters had in fact gone, was

adduced by the appellant, as was adduced in case of *Paokai Haokip* (supra) on the basis of which the law of averages was arrived at against the election petitioner therein. Therefore, it is very difficult to accept the *ipse* dixit of the appellant and his witnesses that if 200 to 300 had not gone away without casting their votes due to non-setting up of notified polling station, they would have voted in favour of the appellant. There is no warrant for drawing presumption that those, who had gone away without casting votes, would have cast their votes in favour of the appellant, if there had been no change of venue of voting. *Vashisht Narain's* case insists on proof. In the opinion of this Court, the matter cannot be considered on possibility. There is no room for a reasonable judicial guess.

25. The heads of substantive rights in Section 100(1) are laid down in two parts: the first dealing with situations in which the election must be declared void on proof of certain facts and the second in which the election can only be declared void if the result of the election, insofar as it concerns the returned candidate, can be held to be materially affected on proof of some other facts. The appellant has totally failed to prove that the election of the respondent No. 2, who is returned candidate, was materially affected because of non-compliance with the provisions of the Representation of the People Act, 1951, or Rules or Orders made under it.

26. On the facts and in the circumstances of the case this Court is of the firm opinion that the learned Single Judge of the High Court did not commit any error in dismissing the petition filed by the appellant challenging the election of the respondent No. 2. Therefore, the appeal, which lacks merits, deserves to be dismissed.

27. For the foregoing reasons, the appeal fails and is dismissed. There shall be no order as to costs.

N.J. Appeal dismissed.

RAMESHBHAI CHANDUBHAI RATHOD
v.
THE STATE OF GUJARAT
(Criminal Appeal No. 575 of 2007)

JANUARY 24, 2011

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

Sentence/Sentencing: Death sentence or life imprisonment – In case of rape and murder of young girl of tender age – Difference of opinion between Judges on sentencing part – Pasayat, J. observed that the case fell within the category of the rarest of rare cases as the deceased was a helpless child of tender age and the appellant, being a watchman in the building in which she was residing was in a position of trust, and as the murder and rape was particularly brutal, the death sentence was the only adequate one – Ganguli, J. differed on this aspect and held that a sentence of life imprisonment was proper one in the light of mitigating circumstance particularly the young age of the appellant and the possibility that he could be rehabilitated and would not commit any offence later on – Held: There is a very thin line on facts which separates the award of a capital sentence from a life sentence in the case of rape and murder of a young child by a young man – The broad principle is that the death sentence is to be awarded only in exceptional cases – The appellant was a young man, only 27 years of age, it was obligatory on the trial court to have given a finding as to a possible rehabilitation and reformation and the possibility that he could still become a useful member of society in case he was given a chance to do so – In the light of the findings recorded by Ganguli, J., it would not be proper to maintain the death sentence on the appellant – At the same time, the gravity of the offence, the behaviour of the appellant and the

fear and concern such incidents generate in ordered society, cannot be ignored – The death sentence awarded is commuted to life which must extend to the full life of the appellant subject to any remission or commutation at the instance of the Government for good and sufficient reasons – Crime against women – Penal Code, 1860 – s.302 – Code of Criminal Procedure, 1973 – s.235 r.w. s.354, s.433-A.

The trial court convicted the accused-appellant for raping and murdering a girl of tender age. The High Court upheld the conviction order. The judgment of the High Court was challenged by the appellant in the Supreme Court and after the grant of special leave, the matter was heard by Division Bench. The Bench delivered two judgments on 25th February 2009. The two Hon'ble Judges were of the unanimous opinion that the conviction of the appellant was to be maintained, however, a difference of opinion arose on the sentencing part. *Pasayat, J.* observed that the case fell within the category of the rarest of rare cases as the deceased was a helpless child of tender age and the appellant, being a watchman in the building in which she was residing with her parents, was in a position of trust, and as the murder and rape was particularly brutal, the death sentence was the only adequate one. *Ganguli, J.* however differed on this aspect and held that as there was some uncertainty with the nature of the circumstantial evidence and that mitigating circumstance particularly the young age of the appellant and the possibility that he could be rehabilitated and would not commit any offence later on, could not be ruled out, and that the statutory obligation cast on the trial court under Section 235 (2) read with Section 354(3), Cr.P.C. had been violated in as much that the appellant was not given adequate opportunity to plead that the sentence of life imprisonment was not proper. Accordingly, the matter came up before this Court only on the question of sentence.

Disposing of the appeal, the Court

HELD: 1. There is a very thin line on facts which separates the award of a capital sentence from a life sentence in the case of rape and murder of a young child by a young man and the subjective opinion of individual Judges as to the morality, efficacy or otherwise of a death sentence cannot entirely be ruled out. The broad principle is that the death sentence is to be awarded only in exceptional cases. Both Hon'ble Judges had relied extensively on **Dhanonjoy Chatterjee's* case. In that case, death sentence was awarded by the trial court on similar facts and confirmed by the High Court and the appeal too was dismissed by this Court leading to the execution of the accused. *Ganguli J.* had, however, drawn a distinction on the facts of that case and the instant one and held that as the appellant was a young man, only 27 years of age, it was obligatory on the trial court to have given a finding as to a possible rehabilitation and reformation and the possibility that he could still become a useful member of society in case he was given a chance to do so. In the light of the findings recorded by *Ganguli, J.,* it would not be proper to maintain the death sentence on the appellant. At the same time, the gravity of the offence, the behaviour of the appellant and the fear and concern such incidents generate in ordered society, cannot be ignored. A via-media ought to be adopted in the light of the judgment of this Court in ***Ramraj's* and ****Mulla's* case. In these two cases, this Court had held that the term imprisonment for life which is found in Section 302, IPC, would mean imprisonment for the natural life of the convict subject to the powers of the President and the Governor under Articles 72 and 161 of the Constitution of India or of the State Government under Section 433-A, Cr.P.C. It was held that the Court should be free to determine the length of imprisonment which would suffice the offence committed. Thus, despite

the nature of the crime, the mitigating circumstances can allow the court to substitute the death penalty with life sentence. In the instant case, the death sentence awarded to him is commuted to life with directions that the life sentence must extend to the full life of the appellant but subject to any remission or commutation at the instance of the Government for good and sufficient reasons. [Para 2] [835-E-H; 836-A-D-F; 837-B]

***Ramraj vs. State of Chhattisgarh* **(2010) 1 SCC 573;** ****Mulla & Anr. State of Uttar Pradesh* **(2010) 3 SCC 508 – relied on.**

Bachan Singh vs. State of Punjab **1980 (2) SCC 684;** *Machi Singh vs. State of Punjab* **1993 (3) 470;** *Dhanonjoy Chatterjee vs. State of West Bengal* **1994 (2) SCC 220 – referred to.**

2. Some observations were made by Ganguly, J. on the omission of the trial court in dealing with the question of sentence on the principles underlying Section 235 read with Section 354, Cr.P.C. The observations made were a little broad based on the facts of the instant case and would present insurmountable practical difficulties for a trial court. Even otherwise, the facts indicated that the appellant had been given enough time and opportunity for pleading on the question of sentence. [Para 3] [837-D-E]

Case Law Reference

1980 (2) SCC 684	referred to	Para 1
1993 (3) SCC 470	referred to	Para 1
1994 (2) SCC 220	referred to	Paras 1, 2
(2010) 1 SCC 573	relied on	Para 2
(2010) 3 SCC 508	relied on	Para 2

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 575 of 2007.

From the Judgment & Order dated 16.02.2006 of the High Court of Gujarat at Ahmedabad in Confirmation Case No. 4 of 2005 with the Criminal Appeal No. 1221 of 2005.

Sudhir Kulshrehtha for the Appellant.

K. Enatoli Sema, Jesal, Hemantika Wahi for the Respondent.

The Judgment of the Court was delivered by

HARJIT SINGH BEDI,J. 1. As the facts have been very comprehensively given in the order of Pasayat, J., we will only refer to such facts as are necessary for the disposal of the reference which has been made to us. Suffice it to say that the accused-appellant Rameshbhai Chandubhai Rathod, aged about 28 years, was employed as a watchman in Sanudip Apartments, Rander Road, Surat City. Flat No.A/2 was occupied by the complainant Nareshbhai Thakorebhai Patel, his wife, a son Brijesh, aged 16 years, and the deceased, a daughter, a Class IV student in Ankur School. The accused-appellant was residing with his wife Savita and two children in a one room tenement close by. On the 17th December 1999, the complainant and his wife went to Udhana at about 8.00 p.m. to attend a religious ceremony and on returning therefrom found that their daughter was missing. Frantic enquiries made by the family, bore no result. The complainant thereupon lodged a FIR at 2.30 a.m. on the 18th December 1999 with the Rander Police Station to that effect. The complainant nevertheless continued to search for the child and in due course ascertained from one Bipinbhai Bhandari, one of his friends, who told him that his (Bhandari's) old servant Bishnubhai had told him that he had seen the appellant taking the girl with him on his bicycle. This information was conveyed to the police by the complainant.

The police made a search for the appellant but he could not be immediately found but was ultimately located the next day i.e. on the 19th December 1999 by Chandravadan Patel who spotted him sitting in an open space near the vegetable market. The appellant made an extra judicial confession to him that he had raped and killed the child. The police was, accordingly, informed and they took the appellant into custody. The appellant also made a disclosure to the complainant as to the place of incident and the dead body was recovered from that place. On the completion of the investigation, the accused was charged for offences punishable under Sections 363, 366,376,302 and 397 of the IPC and brought to trial. The trial court on a minute appreciation of the evidence which was exclusively circumstantial in nature, held that the case against the appellant had been proved beyond doubt, and accordingly convicted him and sentenced him to death for the commission of the offence punishable under section 302 and to various terms of imprisonment for the other offences. The matter was, thereafter, referred to the High Court and the accused also filed an appeal challenging his conviction. The High Court confirmed the reference and dismissed the appeal. The High Court also found that the case against the accused fell within the category of the rarest of the rare cases, as envisaged in *Bachan Singh vs. State of Punjab* 1980 (2) SCC 684 and *Machi Singh vs. State of Punjab* 1993 (3) SCC 470 as followed and clarified in a series of other judgments subsequently, particularly, in *Dhanonjoy Chatterjee vs. State of West Bengal 1994 (2) SCC 220* and observing that in the balance sheet of the aggravating and mitigating circumstances, the former were pre-dominant, confirmed the death sentence. The judgment of the High Court was challenged by the appellant in this Court and after the grant of special leave, the matter was heard by a Division Bench. The Bench delivered two judgments on the 25th February 2009 and while the two Hon'ble Judges were of the unanimous opinion that the conviction of the appellant was to be maintained, a difference of opinion arose as to the sentence that was to be awarded with Pasayat,J. observing that the case fell within the

category of the rarest of rare cases as the deceased was a helpless child of tender age and that the appellant, being a watchman in the building in which she was residing with her parents, was in a position of trust, and as the murder and rape was particularly brutal, the death sentence was the only adequate one. Ganguli, J. however differed on this aspect and held that as there was some uncertainty with the nature of the circumstantial evidence and that the mitigating circumstance particularly the young age of the appellant and the possibility that he could be rehabilitated and would not commit any offence later on, could not be ruled out, and that the statutory obligation cast on the trial court under Section 235 (2) read with Section 354 (3) of the Cr.P.C. had been violated inasmuch that the accused had not been given adequate opportunity to plead on the question of sentence and also citing a large number of cases including those of rape and murder of young children, opined that a sentence of life imprisonment was the proper one. This matter has, accordingly, been referred to us only on the question of the sentence.

2. As already mentioned above, both Hon'ble Judges have relied on a number of cases which are on almost identical facts in support of their respective points of view. We notice that there is a very thin line on facts which separates the award of a capital sentence from a life sentence in the case of rape and murder of a young child by a young man and the subjective opinion of individual Judges as to the morality, efficacy or otherwise of a death sentence cannot entirely be ruled out. It is now well settled that as on today the broad principle is that the death sentence is to be awarded only in exceptional cases. Both Hon'ble Judges have relied extensively on *Dhanonjoy Chatterjee's* case (supra). In this case the death sentence had been awarded by the trial court on similar facts and confirmed by the Calcutta High Court and the appeal too dismissed by this Court leading to the execution of the accused. Ganguli,J. has, however, drawn a distinction on the facts of that case and the present one and held that as the appellant was a young

man, only 27 years of age, it was obligatory on the trial court to have given a finding as to a possible rehabilitation and reformation and the possibility that he could still become a useful member of society in case he was given a chance to do so. We are, therefore, of the opinion that in the light of the findings recorded by Ganguli,J. it would not be proper to maintain the death sentence on the appellant. At the same time the gravity of the offence, the behaviour of the appellant and the fear and concern such incidents generate in ordered society, cannot be ignored. We, therefore, feel that a via-media ought to be adopted in the light of the judgment of this Court in *Ramraj vs. State of Chhattisgarh* (2010) 1 SCC 573 and *Mulla & Anr. State of Uttar Pradesh* (2010) 3 SCC 508. In these two cases, this Court has held that the term imprisonment for life which is found in Section 302 of the IPC, would mean imprisonment for the natural life of the convict subject to the powers of the President and the Governor under Articles 72 and 161 of the Constitution of India or of the State Government under Section 433-A of the Code of Criminal Procedure. In *Mulla's* case (supra), this Court has said :

> "We are in complete agreement with the above dictum of this Court. It is open to the sentencing court to prescribe the length of incarceration. This is especially true in cases where death sentence has been replaced by life imprisonment. The court should be free to determine the length of imprisonment which will suffice the offence committed. Thus we hold that despite the nature of the crime, the mitigating circumstances can allow us to substitute the death penalty with life sentence.
>
> Here we would like to note that the punishment of life sentence in this case must *extend to their full life, subject to any remission by the Government for good reasons.*
>
> For the foregoing reasons and taking into account all the aggravating and mitigating circumstances, we confirm the conviction, however, commute the death

sentence into that of life imprisonment. The appeal is disposed of accordingly."

In arriving at its conclusion, the Court relied on similar observations made in the case of *Ramraj* (supra). We are, therefore, of the opinion that the appellant herein ought to be awarded a similar sentence. We accordingly commute the death sentence awarded to him to life but direct that the life sentence must extend to the full life of the appellant but subject to any remission or commutation at the instance of the Government for good and sufficient reasons.

3. As already noticed above, Ganguli, J. has made some observations on the omission of the trial court in dealing with the question of sentence on the principles underlying Section 235 read with Section 354 of the Cr.P.C. We are of the opinion that some of the observations made are a little broad based on the facts of the present case and would present insurmountable practical difficulties for a trial court. Even otherwise the facts indicate that the appellant had been given enough time and opportunity for pleading on the question of sentence. We accordingly dispose of this appeal in the above manner.

D.G. Appeal disposed of.

KESHAV PRASAD SHARMA
v.
INDIAN OIL CORPORATION & ORS.
(SLP (CRL.) NOS. 1646-1647 OF 2009)

JANUARY 25, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Constitution of India, 1950 – Article 136 – Application under s.319 Cr.P.C. to implead respondents no. 3 to 9 as co-accused in the trial of the petitioner – Trial Court allowed the application – High Court set aside the order of trial court – Special leave petitions – Plea of petitioner that question of prejudice is not relevant in proceedings u/s.319 – Held: The question of prejudice in proceedings u/s.319 may not be relevant at the stage of proceedings before the trial court u/s.319 but it is certainly relevant to proceedings under Article 136 which is discretionary jurisdiction – Article 136 is not a regular form of appeal – It is a residual provision which enables the Supreme court to interfere with any order of any court or tribunal in its discretion and in exceptional circumstances – It is not a regular forum of appeal like s.100 or s.96, CPC – In the instant case, the impugned judgment of High Court did not cause any prejudice to the petitioner since no observation on the merits of the case was made by the High Court against the petitioner – Merely because the petitioner alleged that the respondent Nos. 3 to 9 were also guilty of the same crime is not relevant to interfere with the impugned judgment u/Article 136 when no prejudice had been caused to the petitioner – Trial court directed to complete the trial uninfluenced by any observations made by the High Court – Special leave petitions dismissed – Code of Criminal Procedure, 1973 – s.319 – Code of Civil Procedure, 1908 – ss.96, 100.

Lok Ram vs. Nihal Singh and Anr. **(2006) 10 SCC 192;**

Bholu Ramvs. State of Punjab and Anr. **(2008) 9 SCC 140;** *Suman vs. State ofRajasthan and Anr.* **2009 (13) SCALE 716 – Referred to.**

Case Law Refetrence:

(2006) 10 SCC 192	**Referred to**	**Para 4**
(2008) 9 SCC 140	**Referred to**	**Para 4**
2009 (13) SCALE 716	**Referred to**	**Para 4**

CRIMINAL APPELLATE JURISDICTION : SLP (Crl.) No. 1646-1647 of 2009.

From the Judgment & Order dated 19.12.2008 of the High Court of Punjab & Haryana at Chandigarh in Criminal Misc. No 52791-M of 2007 and Crl. Rev. No. 71 of 2008.

Dr. Abhishek Manu Singhvi, Amit Bhandari, Ajay Veer Singh, Nitin Jain, Mohd. Irshad Hanif for the Petitioner.

Dr. Rajiv Dhawan, R.S. Cheema, K.V. Viswanathan, Kamal Mohan Gupta, Kawaljit Kochar, Ashok K. Sharma, Kusum Chaudhary, D.P. Singh, Tarannum Cheema, Sanjay Jain, Anuj Prakash, Abhishek Kaushik, Samir Ali Khan for the Respodents.

The following order of the Court was delivered

O R D E R

Heard leave counsel for the appearing parties.

These special leave petitions have been filed against the impugned judgment of the Punjab & Haryana High Court dated 19.12.2008.

It appears that in the trial of the petitioner an application was filed by the public prosecutor to implead respondents No.

3 to 9 herein as co-accused under Section 319 of the Code of Criminal Procedure. That application was allowed by the trial court, but the High Court has set aside the said order.

We have carefully perused the impugned order of the High Court. We find that there is no observation made by the High Court on the merits of the case which in any manner prejudice the trial of the petitioner. The learned counsel for the petitioner has relied on the decisions of this Court in *Lok Ram Vs. Nihal Singh & Anr.,* (2006) 10 SCC 192, *Bholu Ram Vs. State of Punjab & Anr.,* (2008) 9 SCC 140 and *Suman Vs. State of Rajasthan & Anr.,* 2009 (13) SCALE 716.

On the basis of these judgments the learned counsel for the petitioner has submitted that the question of prejudice is not relevant in proceedings under Section 319 Cr.P.C. We are of the opinion that it may not be relevant at the stage of proceedings before the trial court under Section 319 Cr.P.C. but it is certainly relevant to proceedings under Article 136 of the Constitution of India, which is discretionary jurisdiction.

Article 136 of the Constitution of India is not a regular form of appeal at all. It is a residual provision which enables the Supreme Court to interfere with any order of any court or tribunal in its discretion and in exceptional circumstances. It is not a regular forum of appeal like Section 100 or Section 96 of the Code of Civil Procedure. Hence, the question of prejudice is certainly relevant to proceedings in Article 136 of the Constitution of India.

In the present case, the impugned judgment of the High Court does not cause any prejudice to the petitioner since no observation on the merits of the case has been made by the High Court against the petitioner. Merely because the petitioner alleged that the aforementioned respondent Nos. 3 to 9 were also guilty of the same crime is not relevant for us to interfere with the impugned judgment of the High Court under Article 136

of the Constitution of India, when no prejudice has been caused to the petitioner.

The State has not filed any special leave petition before us and the position may have been different if a special leave petition had been filed by the State.

We direct the trial court to complete the trial uninfluenced by any observations made by the High Court in the impugned judgment expeditiously, preferably within six months from the date of production of a copy of this Order.

With these observations, the special leave petitions are dismissed.

D.G. Special Leave Petitions dismissed.

KANAKA REKHA NAIK
v.
MANOJ KUMAR PRADHAN & ANR.
(Criminal Appeal No.225 of 2011)

JANUARY 25, 2011

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

Code of Criminal Procedure, 1973:

s.389 – Suspension of sentence pending appeal – Respondent, a sitting M.L.A. convicted u/ss. 147, 326 r.w. s. 149 IPC and sentenced to seven years rigorous imprisonment – Appeal filed by respondent alongwith another convict before High Court – High Court granting bail to him on the ground that he was a sitting M.L.A. – Held: High Court ought to have considered serious nature of allegations, the findings recorded by trial court and alleged involvement of respondent in more than one case for deciding as to whether it was a fit case for suspending the sentence awarded by trial court and his release on bail during pendency of appeal – The High Court was mainly impressed by the fact that respondent was a sitting M.L.A. – High Court did not record even a single reason confining the relief of releasing on bail only to the respondent through there was another convict who had preferred appeal challenging the judgment of trial court – Law does not make any distinction between representatives of the people and others, accused of criminal offences – Neither they can claim any privilege nor can it be granted by any court – Law treats all equally – The order of High Court is set aside and matter remitted to it for afresh consideration – Penal Code, 1860 – ss. 147, 326 r.w. s. 149.

s.482 – Scope of, while hearing the applications seeking

suspension of sentence filed by the convicted person – Held: High Court in exercise of its power u/s.482 can always pass order and may hear even an intervener while considering the application seeking suspension of the sentence pending the appeal.

The respondent was a sitting M.L.A. He was convicted under Sections 147, 326 read with Section 149, IPC and sentenced to seven years rigorous imprisonment. The respondent along with another convict filed appeal in the High Court against the conviction and sentence passed by the trial court. The appeal was taken up for admission by the High Court and on the same day, the High Court granted bail to the respondent holding that he was a sitting M.L.A.

In the instant appeal, it was contended for the appellant that the High Court committed serious error in directing the release of the respondent convicted for the offences punishable under Sections 147, 326 read with Section 149, IPC. purely on the ground that he was a sitting M.L.A.; that the findings recorded by the trial court against the convict were very serious in nature and the High Court failed to take into consideration the fact that the respondent was involved in more than one such similar cases and being an influential person, there was every likelihood of his tampering with the evidence in those cases pending against him. On the other hand, it was contended for the respondent that the appellant had no right to challenge the order directing the release of the respondent on bail.

Allowing the appeal and remitting the matter to the High Court, the Court

HELD: 1. The High Court in exercise of its power under Section 482 Cr.P.C. can always pass order and may hear even an intervener while considering the application seeking suspension of the sentence pending the appeal. It is for the High Court to decide as to the circumstances and the person who could be permitted to intervene while hearing the applications seeking suspension of sentence filed by the convicted person. [Para 11] [850-F-G]

2. It is true that when a convicted person is sentenced to a fixed period of sentence and when he files an appeal under any statutory right, suspension of sentence can be considered by the appellate court liberally unless there are exceptional circumstances. But if for any reason, the sentence of a limited duration cannot be suspended, every endeavour should be made to dispose of the appeal on merits more so when a motion for expeditious hearing of the appeal is made in such cases. Otherwise, the very valuable right of appeal would be an exercise in futility by efflux of time. But, suspension of sentence, pending any appeal by a convicted person and consequential release on bail is not a matter of course. The appellate court is required to record reasons in writing for suspending the sentence and release of a convict on bail pending the appeal. [Para 12] [851-B-D]

3. No doubt, the respondent was involved in more than one case of similar nature of rioting etc. This fact was not taken into consideration at all by the High Court. The High Court did not even suspend the execution of the sentence awarded by the trial Court but directed his release on bail. The High Court was obviously impressed by the singular fact that the respondent was a sitting M.L.A. The High Court did not record even a single reason confining the relief of releasing on bail only to the respondent, though there was another convict who had preferred appeal challenging the judgment of the trial court. The law does not make any distinction between the representatives of the people and others, accused of criminal offences. Neither they can claim any privilege nor

can it be granted by any court. The law treats all equally. The High Court ought to have taken the serious nature of allegations, the findings recorded by the trial court and the alleged involvement of the respondent in more than one case, for deciding as to whether it is a fit case for suspending the sentence awarded by the trial court and his release on bail during the pendency of the appeal. The impugned order does not record any reason whatsoever except vague observation that nature of allegation have been taken into consideration. The order clearly reflected that the High Court was mainly impressed by the fact that the respondent was a sitting M.L.A. In the circumstances, the impugned order is set aside. [Paras 13, 14] [851-F-H; 852-A-D]

Case Law Reference:

2004 Cri L.J. 3635	**Referred to**	**Para 11**
(1999) 4 SCC 421	**Relied on**	**Para 12**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 225 of 2011.

From the Judgment and Order dated 07.07.2010 of the High Court of Orissa, Cuttack in Misc. Case No. 891 of 2010 in Criminal Appeal No. 312 of 2010.

Colin Gonsalves and P.S. Narasimha, Lansinglu Rongmei, Dibya Paricha, Jyoti Mend iratta, Sagar, S.S. Shamshery, Bhupender Yadav, Bala Subrahmaniyam, Jyotika Kalra and Suresh Chandra for the appearing parties.

The Judgment of the Court was delivered by

B. SUDERSHAN REDDY, J. 1. Leave granted.

2. This appeal impugns the order dated 7th July, 2010 passed by the High Court of Orissa in Miscellaneous Case No. 891 of 2010 in Criminal Appeal No. 312 of 2010, whereby the High Court has granted bail to the respondent Manoj Kumar

Pradhan, a sitting M.L.A., who has been convicted under Sections 147, 326 read with Section 149, IPC and sentenced to seven years rigorous imprisonment.

3. The appellant herein is the wife of the deceased who was killed and burnt during the Kandhamal riots in Orissa in the year 2008.

4. The trial Court found that at the time of occurrence, the present respondent along with others obstructed the deceased and his family members at Barepanga. Thereafter, the rioters arrived there being called by them. The trial Court observed:

"They became part of the unlawful assembly after the arrival of the rioters.

…

At that time the members of the unlawful assembly were armed with deadly weapons like *tangia* (axe), knife etc. which, used as weapons of offence is likely to cause death. Some members of the unlawful assembly started assaulting the deceased brutally and mercilessly immediately arriving there. Thereafter, some members of the mob burnt him there. Arrival of several persons of ore than five at the place of occurrence, armed with deadly weapons, being called by the accused persons and assaulting the deceased with various weapons clearly indicate that the common object of such unlawful assembly was to show criminal force or to cause violence and to commit hurt to the deceased with such weapons which endangered his life which amounts to cause grievous hurt. From their behaviour and conduct at the spot the same is apparent.

…

While assaulting the deceased, some members of the unlawful assembly exceeded their power and brutally killed

the deceased at the spot beyond the common object of the unlawful assembly. Thereafter, some members of such unlawful assembly set fire to him. After killing him, some members of the unlawful assembly thought it prudent to wipe out the evidence of murder and accordingly they buried the burnt dead body of the deceased…

All the members of the unlawful assembly including the present two accused persons … can be held guilty for commission of the offence punishable under Section 326 read with Section 149, IPC as they shared the common object of the unlawful assembly to cause grievous hurt to the deceased…

After critical evaluation of the entire materials and the position of law, it is found that both the accused were involved for commission of the offence of rioting punishable under Section 147, IPC on the day of occurrence at the spot.

…with the same materials they are found guilty for commission of the offences punishable under Section 147 and 326/149, IPC not under Section 302/149, IPC and I convict them there under".

5. The trial Court also made a separate order of sentence which is as under:

"Convict Manoj Ku. Pradhan is a responsible person of the locality and he is also a public representative. Commission of riot by him with others can not be considered lightly. The crime committed by the convicts was not only against the individual victim but also the same was against the society at large. It is required under the law that punishment to be awarded for a crime must not be irrelevant but it should be conformed to and being consisted with the atrocity and brutality with which the crime has been perpetrated.

Keeping in view such principle and the circumstances under which the offence was committed if the convicts are sentenced to undergo rigorous imprisonment of seven years and to pay fine of Rs.5000/- each for the offence under Section 326/149, IPC and undergo rigorous imprisonment of one year and to pay fine of Rs.1000/- each for the offence under Section 147, IPC it will meet the ends of justice.

Both the convicts are hereby sentenced to undergo rigorous imprisonment of seven years and to pay fine of Rs.5000/- (Rupees five thousand) in default to undergo further rigorous imprisonment of six months for the offence under Section 326/149 and to undergo rigorous imprisonment of one year and to pay fine of Rs.1000/- (Rupees one thousand) in default to undergo further rigorous imprisonment of three months for the offence under Section 147, IPC. Substantive sentences are to run concurrently".

6. The respondent along with another convict preferred Criminal Appeal No. 312 of 2010 in the High Court of Orissa against the conviction and sentence passed by the trial Court. The appeal was taken up for admission on 7.7.2010 by the High Court and on the same day the High Court directed release of the respondent herein. The said order reads as under:

"Considering the nature of allegation and the fact that the petitioner No.1 is a sitting M.L.A. of G.Udayagiri constituency, I directed that on petitioner's furnishing bail bond of Rs.20,000/- (Rupees twenty thousand) with two sureties each for the like amount to the satisfaction of the learned Ad hoc Addl. Sessions Judge, FTC-I, Phulbani, Kandhamal, they shall be released on bail. It is further directed that the petitioners shall not threaten the witnesses examined. Mr. Patnaik, learned Senior Advocate appearing for the informant states that since the petitioner

No. 1 is an influential person, he may tamper with the evidence in other cases pending against him. He further states that security may be given to the informant Kanak Rekha Naik.

Considering the above submission, I direct the Superintendent of Police, Kandhamal to provide adequate protection to her, if she applies for the same".

7. The above order is challenged on various grounds in this appeal.

8. Shri Colin Gonsalves, learned senior counsel appearing for the appellant submitted that the High Court committed serious error in directing the release of the respondent who has been convicted for the offences punishable under Sections 147, 326 read with Section 149, IPC. purely on the ground that he is a sitting M.L.A. The findings recorded by the trial Court against the convict are very serious in their nature. The learned senior counsel also submitted that the High Court failed to take into consideration the fact that the respondent is involved in more than one such similar cases and being an influential person, there is every likelihood of his tampering with the evidence in those cases pending against him.

9. Shri P.S. Narasimha, learned senior counsel for the respondent, on the other hand, submitted that the appellant has no right to challenge the order directing the release of the respondent on bail. The learned senior counsel further submitted that the respondent had made a clear case for the suspension of his sentence pending the appeal preferred by him which may come up for hearing only after a considerable time and not in the near future. It was also submitted that during the trial, the appellant was on bail which is one of the important aspect to be taken into consideration.

10. We have heard both the learned senior counsel at a considerable length. For the purposes of disposal of this

appeal, it is not necessary to recapitulate all the findings recorded by the trial Court as against the respondent for his conviction under Section 326 read with Section 149, IPC. Suffice it to note that there is a clear finding that he was involved in the commission of the offences punishable under Sections 147, 326/149, IPC. Of course, the same is under challenge in the criminal appeal preferred by him before the High Court. Precisely for that reason, we wish to make no comment whatsoever on the findings recorded by the trial Court against the respondent.

11. We are unable to accept the submission made by Shri P.S. Narasimha, learned senior counsel for the respondent as to the maintainability of the present appeal preferred by the wife of the deceased for more than one reason. Firstly, it is evident from the impugned order that the appellant was heard by the High Court while considering the application filed by the respondent herein seeking suspension of the sentence pending the appeal. Secondly, we have granted permission to the appellant to file the appeal challenging the impugned order passed by the High Court. In the circumstances, it is not necessary to go into the correctness of the observations made by the Madras High Court in *Srinath Prasad Vs. State*[1] upon which reliance has been placed by the learned senior counsel. They are too broadly stated and it does not deal with jurisdiction of the High Court. In that case, the High Court took the view that the intervener has no right to be heard while deciding the petition to suspend the execution of sentence pending appeal. In our view, the High Court in exercise of its power under Section 482 of the Code of Criminal Procedure can always pass order and may hear even an intervener while considering the application seeking suspension of the sentence pending the appeal. It is for the High Court to decide as to the circumstances and the person who could be permitted to intervene while hearing the applications seeking suspension of sentence filed by the convicted person. It is a matter of exercise

1. 2004 Cri L.J. 3635.

of jurisdiction by the High Court. But it cannot be said that the High Court has no jurisdiction to permit any intervener opposing the suspension of sentence and grant of bail by it in exercise of its power under Section 389 of the Code.

12. It is true that when a convicted person is sentenced to a fixed period of sentence and when he files an appeal under any statutory right, suspension of sentence can be considered by the appellate Court liberally unless there are exceptional circumstances. But if for any reason, the sentence of a limited duration cannot be suspended, every endeavour should be made to dispose of the appeal on merits more so when a motion for expeditious hearing of the appeal is made in such cases. Otherwise, the very valuable right of appeal would be an exercise in futility by efflux of time [*see Bhagwan Rama Shinde Gosai & Ors. Vs. State of Gujarat*[2]*].* But, suspension of sentence, pending any appeal by a convicted person and consequential release on bail is not a matter of course. The appellate Court is required to record reasons in writing for suspending the sentence and release of a convict on bail pending the appeal. Therefore, the only question that falls for our consideration in the instant case is whether the High Court has taken into consideration all the facts and recorded any reason directing the release of the respondent pending the appeal preferred by him challenging his conviction by the trial Court?

13. There is no dispute that the respondent herein is involved in more than one case of similar nature of rioting etc. This fact has not been taken into consideration at all by the High Court. The High Court did not even suspend the execution of the sentence awarded by the trial Court but directed his release on bail. The High Court was obviously impressed by the singular fact that the respondent is a sitting M.L.A. The High Court did not record even a single reason confining the relief of releasing on bail only to the respondent, though there are two appellants in the appeal preferred challenging the judgment of the trial Court. What are the reasons for confining the relief only to the respondent herein and directing his release? The only reason appears to be the fact that the respondent is a sitting M.L.A. The law does not make any distinction between the representatives of the people and others, accused of criminal offences. Neither they can claim any privilege nor can it be granted by any Court. The law treats all equally.

14. In our considered opinion, the High Court ought to have taken the serious nature of allegations, the findings recorded by the trial Court and the alleged involvement of the respondent in more than one case, for deciding as to whether it is a fit case for suspending the sentence awarded by the trial Court and his release on bail during the pendency of the appeal. The impugned order does not record any reason whatsoever except vague observation that nature of allegations have been taken into consideration. The order clearly reflects that the High Court was mainly impressed by the fact that the respondent is a sitting M.L.A. In the circumstances, we find it difficult to sustain the order.

15. For the aforesaid reasons, the impugned order is set aside and the matter is remitted to the High Court for its fresh consideration in accordance with law. We make it clear that we have not expressed any opinion whatsoever as to whether it is a fit case for the suspension of sentence of the respondent No. 1 during the pendency of the appeal and for release on bail. It is for the High Court to arrive at a proper conclusion for which purpose, reasons are required to be recorded.

16. The appeal is allowed accordingly.

D.G. Appeal allowed.

2. (1999) 4 SCC 421.