INDO RAMA SYNTHETICS (I) LTD.
v.
C.I.T., NEW DELHI
(Civil Appeal No.33 of 2011)

JANUARY 5, 2011

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

Income Tax Act, 1961 – s.115JB(2)- Explanation, Clause (i) read with proviso – Appellant-assessee had revalued its fixed assets as on 31st March, 2000 (relevant to assessment year 2000-01) – Resultant surplus stood added to the cost of the assets – Revaluation reserve of equivalent amount was created on the liability side – During assessment year 2001-02, Rs.26,11,74,000/-, being the differential depreciation, transferred out of revaluation reserve and credited to P & L Account which the A.O. disallowed and consequently said sum of Rs. 26,11,74,000/- stood added back to the net profits – Challenge to, by assessee – Held: Clause (i) of the explanation to s.115JB(2) mandates reduction from the net profits the amount(s) withdrawn from the reserves earlier created, provided such amount(s) is credited to P & L Account – Adjustment made in the P & L Account was primarily in the nature of contra adjustment in the P & L Account and not a case of effective credit in the P & L Account (as contemplated in clause (i) of Explanation) – Assessee credited amount to the extent of the additional depreciation from the revaluation reserve only to present a more healthy balance sheet to its shareholders enabling the assessee possibly to pay out a good dividend – The proviso to clause (i) of the Explanation to s.115JB(2) comes in the way of the claim for reduction made by the assessee under clause (i) to the Explanation – As the amount of revaluation reserves had not gone to

increase the book profits at the time it was created, the benefit of reduction cannot be allowed.

MAT provisions – Object of – Held: Is to bring out the real profit of the companies – The thrust is to find out the real working results of the company.

The appellant-assessee is a widely held quoted limited company engaged in the business of manufacture of yarn and polyester. The assessee had revalued its fixed assets as on 31st March, 2000 and the resultant surplus of Rs.288,58,19,000/- stood added to the cost of the assets on the asset side of the balance sheet and to equalize both sides thereof the revaluation reserve of an equivalent amount was created on the liability side of the balance sheet. The figure of profit remained untouched during the assessment year 2000-01 so far as the revaluation of assets to the tune of Rs.288,58,19,000/- was concerned. During the assessment year 2001-02, an amount of Rs.26,11,74,000/-, being the differential depreciation, was transferred out of the said revaluation reserve of Rs.288,58,19,000/- and credited to the P & L Account which the AO disallowed and consequently the said sum of Rs. 26,11,74,000/- stood added back to the net profits. The A.O., while computing the book profit under Section 115JB of the Act, did not allow reduction of the afore-stated amount of Rs.26,11,74,000/- on the ground that the revaluation reserve stood created in the assessment year 2000-01 and had not been added back while computing the book profit in that year in terms of the proviso to clause (i) of explanation to Section 115JB. This order was upheld by the C.I.T. (A) and by the ITAT and by the High Court. Hence the present appeal.

Dismissing the appeal, the Court

HELD:1. Book profit is not defined in the Income Tax Act, 1961. It is income computed under the company law.

By virtue of the MAT provisions, in the case of a company whose total income as computed under the normal provisions of the Act is less than 30% of the book profit, the total income chargeable to tax will be 30% of the book profit as computed. For the purposes of Section 115J, book profit will be the net profit as shown in the P & L Account prepared in accordance with the provisions of Schedule VI to Companies Act, 1956 after certain adjustments. The net profit will be increased by income tax paid or payable, amount carried to any reserve, provision made for liabilities etc. provided the amount(s) is debited to the P & L Account. The amount so arrived at is to be reduced by item (i) to item (vii) including amounts withdrawn from reserves, if any such amount is credited to P & L Account. Clauses (i) to (vii) of the explanation to Section 115JB(2) represent items of reduction from the net profits. Clause (i) mandates reduction for the amount(s) withdrawn from the reserves earlier created, provided such amount(s) is credited to P & L Account. Such credit is mandated so that the true working result gets reflected in the financial statement of the assessee-company. The said clause (i) contemplates only those reserves which actually affect the net profits as shown in the P & L Account (see also clause (ii) for comparison). The object of various clauses (i) to clause (vii) is to find out the true working result of the assessee-company. [Para 20] [867-D-H; 868-A]

2. In the present case, the adjustment made in the P & L Account was as per Accounting Standards 6 and 10 read with Guidance Note issued by Institute of Chartered Accountants of India which is in conformity with Section 211 of the Companies Act. The said adjustment was primarily in the nature of contra adjustment in the P & L Account and not a case of effective credit in the P & L Account (as contemplated in clause (i) of explanation). The credit in the P & L Account implies that the P & L

Account *per se* has been effectively credited by the said amount. Thus, the amount withdrawn from any reserve must in effect impact the net profit as shown in the P & L Account. As per accounting principles, the contra adjustment does not at all affect any particular account to which it has been carried. Unless an adjustment has the effect of increasing the net profit as shown in the P & L Account, that entry cannot be said to be a credit to the P & L Account and, therefore, though the amount has been literally credited to the P & L Account, however, in substance there is no credit to P & L Account. MAT provisions were introduced as number of zero tax companies had grown. It was found that companies had earned substantial book profits and had paid huge dividends but paid no tax. In the present case, had the assessee deducted the full depreciation from the profit before depreciation during the accounting year ending 31.3.2001, it would have shown a loss and in which event it could not have paid the dividends and, therefore, the assessee credited the amount to the extent of the additional depreciation from the revaluation reserve to present a more healthy balance sheet to its shareholders enabling the assessee possibly to pay out a good dividend. It is precisely to tax these kinds of companies that MAT provisions had been introduced. The object of MAT provisions is to bring out the real profit of the companies. The thrust is to find out the real working results of the company. Thus, the reduction sought by the assessee under clause (i) to the explanation to Section 115JB(2) in respect of depreciation has been rightly rejected by the AO. [Para 21] [868-B-H; 869-A]

3. The revaluation reserve of Rs.288,58,19,000/- was created during earlier assessment year 2000-01. During the accounting year ending 31.3.2001 (assessment year 2001-02), the profits of assessee stood at Rs.120,18,97,000/- whereas depreciation stood at

Rs.127,57,06,000/-. Depreciation is a no-cash charge against the profits. Thus, company had a loss of Rs.7,38,09,000/- (i.e. Rs.127,57,06,000/- of depreciation as against profit of Rs.120,18,97,000/-). However, by withdrawing '26,11,74,000/-, being the differential depreciation, from the revaluation reserve of Rs.288,58,19,000/-(which is only a notional adjustment entry to balance both sides of the balance sheet) and reducing it from the depreciation of Rs.127,57,06,000/-, the assessee artificially brings down the depreciation only to Rs.101,45,32,000/- which is then deducted from the profits before depreciation amounting to Rs.120,18,97,000/- so that there is a profit of Rs.18,73,65,000/-. This is how the loss of Rs.7,38,09,000 got converted to profit of Rs.18,73,65,000/-. Thus, the financial statement for the year ending 31.3.2001 is made to look healthy. The said reasons are in addition to the reasons given by the Authorities below while rejecting the claim of the assessee. [Paras 22, 23] [869-B-F]

4. Under the provisions, as they then existed, certain adjustments were required to be made to the net profit as shown in the P & L Account. One such adjustment stipulated that the net profit shall be reduced by the amount(s) withdrawn from any reserves, if any such amount is credited to the P & L Account. Thus, if the reserves created had gone to increase the book profits in any year when the provisions of Section 115JB were applicable, the assessee became entitled to reduce the amount withdrawn from such reserves if such withdrawal is credited to P & L Account. From the facts, it is clear that neither the said amount of Rs.288,58,19,000/- nor Rs.26,11,74,000/- had ever gone to increase the book profits in the said year ending 31.3.2000 (being the financial year). Thus, when such amount(s) has not gone to increase the book value at the time of creation of reserve(s), there is no question of reducing the amount

transferred from such revaluation reserves to the P & L Account. Thus, the proviso to clause (i) of the explanation to Section 115JB(2) comes in the way of the claim for reduction made by the assessee. The reduction under clause (i) to the explanation could have been availed only if such revaluation reserve had gone to increase the book profits. As the amount of revaluation reserves had not gone to increase the book profits at the time it was created, the benefit of reduction cannot be allowed. Further, the revaluation reserve stood created during the earlier assessment year 2000-01. As regards the argument on behalf of the assessee that creation of such reserve did not impact the profits of that year, though the facts show that though the profit was not impacted, depreciation as the head of A/c. was impacted. By inter play of the balance sheet items with Profit & Loss A/c. items the assesseehas sought to project the loss of Rs.7,38,09,000/- as profit of Rs.18,73,65,000/-. [Para 24] [870-C-H; 871-A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 33 of 2011.

From the Judgment & Order dated 22.9.2009 of the High Court of New Delhi at Delhi in ITA No. 851 of 2009.

Ajay Vohra, Kavita Jha for the Appellant.

Bishwajit Bhattacharya, ASG, Rahul Kaushik, Yatinder Chaudhary, Ajay Singh and B.V. Balaram Das for the Respondent.

The Judgment of the Court was delivered by

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

Facts

2. Assessee is a widely held quoted limited company and

is engaged in the business of manufacture of yarn and polyester.

3. During the previous year ending 31.3.2000 relevant to the assessment year 2000-01, fixed assets were revalued resulting in increase in the net book value of such assets by Rs. 288,58,19,000/-, which was credited to the revaluation reserve. Consequently, the balance sheet for the preceding assessment year, resulted in enhancement of cost of fixed assets by the said amount with corresponding credit to revaluation reserve.

4. For the previous year ending 31.3.2001, relevant to the assessment year 2001-02, the P & L Account showed the charge of depreciation at Rs. 127,57,06,000/- which was reduced by transfer from revaluation reserve to the extent of Rs. 26,11,74,000/- resulting in a net debit on account of depreciation of Rs. 101,45,32,000/-. The A.O., while computing the book profit under Section 115JB of the Act, did not allow reduction of the afore-stated amount of Rs. 26,11,74,000/- on the ground that the revaluation reserve stood created in the assessment year 2000-01 and had not been added back while computing the book profit in that year in terms of the proviso to clause (i) of explanation to Section 115JB. This order was upheld by the C.I.T. (A) and by the ITAT and by the High Court, hence, this civil appeal is filed by the assessee.

5. In the present case, the controversy is whether the amount transferred from the revaluation reserve and set off against the amount of depreciation debited to P & L Account can be excluded in terms of clause (i) of explanation to Section 115JB(2) read with the proviso.

Case of the Assessee

6. It is the case of the assessee that the main provision of clause (i) seeks to exclude from the net profit, as per P & L

Account, any amount withdrawn from any reserves and credited to P & L Account. According to the assessee, the proviso introduces a caveat by providing that such exclusion can be made only in circumstances where the book profit of the year in which the reserve is created (out of which the withdrawal has been made in the subsequent years) has been increased to the extent of such reserve. Thus, according to the assessee, the said proviso has no application to cases like the present one because in this case the revaluation reserve is created, inter alia, for revaluation of assets, which are ordinarily stated in the balance sheet at the historical cost of acquisition by debiting the value of the fixed assets to the extent of revaluation with corresponding credit to the revaluation reserve. Such creation of the revaluation reserve does not impact the P & L Account in the year of creation of such reserves. That, such revaluation reserve is not a free reserve. It is not available for distribution of profits. Unlike revenue reserves, a "revaluation reserve" is not an Appropriation of Profits and the same is not debited by way of debit entry through the P & L Account. That, a revaluation reserve is in the nature of adjustment entry to balance both sides of the balance sheet. That, the treatment of revaluation reserve is governed by the Accounting Standards 10 and 6 and the Guidance Note on Treatment of Reserves Created on Revaluation of Fixed Assets issued by the Institute of Chartered Accountants of India (ICAI). That, in the year in which the revaluation reserve is created, the amount of such reserve is not debited to P & L Account and is credited directly to a revaluation reserve as provided by ICAI and, thus, the profit as reflected in the P & L Account is not depressed by the creation of the reserve and, is, therefore, effectively increased to that extent. Thus, there is no question of increasing the amount shown in the P & L Account further by the revaluation amount as per Section 115JB, as the profit has, in any case, not been reduced by such an amount in the first place. That, since in the year of creation of reserves the book profit suffers full tax, without the same being affected by creation of such revaluation reserves, in the year of withdrawal, the amount

withdrawn would be liable to be reduced while computing the book profit. It cannot be said that even if the entire book profit has suffered tax in the year of creation of reserve, the revaluation reserve created in that year should artificially again be added back for computing such book profit. That, by the Finance Act, 2007, w.e.f. 1.4.2007, clause (iia) is inserted in Section 115JB under which the depreciation on historical cost alone would be taken into account while calculating the book profit. In other words, depreciation attributable to the revaluation of the fixed assets to be debited to the P & L Account cannot be taken into account to calculate book profit w.e.f. the assessment year 2007-08.

Relevant Provisions

7. We quote hereinbelow the relevant provisions of Section 115JB, which reads as under:

Special provision for payment of tax by certain companies.

115JB. (1) Notwithstanding anything contained in any other provision of this Act, where in the case of an assessee, being a company, the income-tax, payable on the total income as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 2001, is less than seven and one-half per cent of its book profit, such book profit shall be deemed to be the total income of the assessee and the tax payable by the assessee on such total income shall be the amount of income-tax at the rate of seven and one-half per cent.

(2) Every assessee, being a company, shall, for the purposes of this section, prepare its profit and loss account for the relevant previous year in accordance with the provisions of Parts II and III of Schedule VI to the Companies Act, 1956 (1 of 1956) :

Provided that while preparing the annual accounts including profit and loss account,—

(*i*) the accounting policies;

(*ii*) the accounting standards adopted for preparing such accounts including profit and loss account;

(*iii*) the method and rates adopted for calculating the depreciation,

shall be the same as have been adopted for the purpose of preparing such accounts including profit and loss account and laid before the company at its annual general meeting in accordance with the provisions of section 210 of the Companies Act, 1956 (1 of 1956) :

Explanation.—For the purposes of this section, "book profit" means the net profit as shown in the profit and loss account for the relevant previous year prepared under sub-section (2), as increased by—

(*b*) the amounts carried to any reserves, by whatever name called, *other than a reserve specified under section 33AC*; or

if any amount referred to in clauses (*a*) to (*f*) is debited to the profit and loss account, and as reduced by—

(*i*) the amount withdrawn from any reserve or provision (excluding a reserve created before the 1st day of April, 1997 otherwise than by way of a debit to the profit and loss account), if any such amount is credited to the profit and loss account:

Provided that where this section is applicable to an assessee in any previous year, the amount withdrawn from reserves created or provisions made in a previous year relevant to the assessment year commencing on or after

the 1st day of April, 1997 shall not be reduced from the book profit unless the book profit of such year has been increased by those reserves or provisions (out of which the said amount was withdrawn) under this Explanation or Explanation below the second proviso to section 115JA, as the case may be;

8. Before answering the submissions advanced on behalf of the assessee, we wish to explain the history of MAT provisions, which is as follows:

History of MAT Provisions

9. MAT is applicable only where the normal total income computed is less than 30% of the book profit.

10. MAT was introduced by the Finance Act of 1996 w.e.f. 1.4.1997. This was necessary due to a rise in the number of zero-tax companies paying marginal tax which situation arose in view of preferences granted in the form of exemptions, deductions and high rates of depreciation. The rate of minimum tax was kept at 30% of the book profit as deemed total income. MAT was levied under Section 115JA from assessment year 1997-98. Section 115JA is made inoperative w.e.f. 1.4.2001. In its place, the Finance Act, 2000 inserted Section 115JB. The new provision provides that all companies having book profit under the Companies Act, shall be liable to pay MAT at a specified rate of the book profit. It further provides that every MAT company shall follow same accounting policies and standards as are followed for preparing its statutory account.

11. For the purposes of the afore-stated provision, "book profit" means the net profit as shown in the P & L Account in the relevant previous year in accordance with the provisions of Part II and Part III of the Schedule VI to the Companies Act, subject to certain adjustments which increases or decreases the book profit. Thus, even under Section 115J, certain adjustments were to be made to the net profits as shown in the

P & L Account. One such adjustment stipulates that the net profit shall be decreased by the amount withdrawn from any reserves, if any such amount is credited to the P & L Account. Some companies have taken advantage of Section 115J by decreasing their net profit by the amount withdrawn from the reserve created in the same year itself, though the reserve when created had not gone to increase the book profit. Such adjustments led to lowering of profits and, consequently, the quantum of tax payable got reduced. Thus, by amending Section 115J, it was provided that "book profit" will be allowed to be decreased by the amount withdrawn from any reserves only in two cases:

(i) if such reserve has been created in the previous year relevant to the assessment year commencing w.e.f. 1.4.1998

OR

(ii) if the reserve so created in the previous year has gone to increase the book profit in any year when Section 115J was applicable.

12. The Finance Act, 2002 now specifically provides vide Section 115JB that the amounts withdrawn from any reserves, if credited to the P & L Account, shall be reduced from the book profit. It also provides that any amount withdrawn from such reserves created on or after 1.4.1997 and which is credited to P & L Account shall not be reduced from the book profit, unless the book profit in the year of creation of such reserves stood increased by the amount transferred to such reserves at that time.

Scope of Section 115JB

13. The expression "book profit" for the purposes of Section 115JB has been defined in the explanation to Section 115JB(2) to mean: –

the net profit as shown in the P & L Account for the relevant previous year prepared under Section 115JB(2), as increased by the amount(s) mentioned in clauses (a) to (f) and as reduced by the amount(s) covered by clauses (i) to (vii) of the said explanation.

14. It is, thus, clear that what is "book profit" has been defined and explained in the above explanation. Section 115JB is a self-contained code. It applies notwithstanding other provisions of the Act. There is no scope for any allowances or deductions under any other section from what is deemed to be total income of the company (assessee).

15. The first step for arriving at the "book profit" is that the net profit as shown in the P & L Account for the relevant previous year prepared under Section 115JB(2) has to be increased by the amount(s) in clauses (a) to (f) if such amount(s) is debited to the P & L Account. Clause (b) refers to amount(s) carried to any reserves by whatever name called. As stated above, such increase needs to be made only if any amount referred to in clauses (a) to (f) is debited to P & L Account.

16. The second step for arriving at the "book profit" is that the net profit as shown in the P & L Account for the relevant previous year prepared under Section 115JB(2) and as increased by any amount, as stated above, has to be reduced by the amount(s) in clauses (i) to (vii).

17. For the purposes of deciding this case it may be noted that we are concerned with clause (i) which inter alia refers to an amount(s) withdrawn from any reserves if any such amount(s) is credited to P & L Account. During the relevant assessment year, clause (i) had an exception to such exclusion. That exception was in the form of a proviso which inter alia stated that the exclusion in clause (i) to the explanation will not apply "to the amount(s) withdrawn from reserves created in a previous year relevant to the assessment year 1997-98 or any subsequent assessment year unless the book profit of such

year stood increased by those reserves (out of which the said amount(s) stood withdrawn)".

18. Thus, the book profits calculation would be as under:

Take profit as per P & L Account	xx
Add: (if debited to P & L Account)	
(a) Income tax paid/ payable & provision	xx
(b) Any transfer for reserves	xx
(c) Unascertained liabilities (contingent)	xx
(d) Provision for losses of subsidiaries	xx
(e) Dividend paid/ proposed	xx
(f) Expenses relating to exempt income under sections 10, 10A, 10B, 11, 12	xx
Less: (if credited to P & L Account)	
(i) Withdrawal from reserves or provisions subject to proviso	xx

Q.: Could Rs. 26,11,74,000/-, being the differential depreciation recouped from the revaluation reserves created during the earlier assessment year 2000-01, be said to be credited in the P & L Account during the assessment year in question in terms of clause (i) to the explanation to Section 115JB(2)?

19. The brief facts apropos this issue are that the assessee had revalued its fixed assets as on 31st March, 2000 and the resultant surplus of Rs. 288,58,19,000/- stood added to the cost of the assets on the asset side of the balance sheet and to equalize both sides thereof the revaluation reserve of

an equivalent amount was created on the liability side of the balance sheet. Thus, the said reserve was merely an adjustment entry. The figure of profit remained untouched during the assessment year 2000-01 so far as the revaluation of assets to the tune of Rs. 288,58,19,000/- was concerned. During the assessment year 2001-02, an amount of Rs. 26,11,74,000/-, being the differential depreciation, was transferred out of the said revaluation reserve of Rs. 288,58,19,000/- and credited to the P & L Account which the AO disallowed and consequently the said sum of Rs. 26,11,74,000/- stood added back to the net profits. Hence, this civil appeal is filed by the assessee.

20. Book profit is not defined in the Act. It is income computed under the company law. By virtue of the MAT provisions, in the case of a company whose total income as computed under the normal provisions of the Act is less than 30% of the book profit, the total income chargeable to tax will be 30% of the book profit as computed. For the purposes of Section 115J, book profit will be the net profit as shown in the P & L Account prepared in accordance with the provisions of Schedule VI to Companies Act, 1956 after certain adjustments. The net profit will be increased by income tax paid or payable, amount carried to any reserve, provision made for liabilities etc. provided the amount(s) is debited to the P & L Account. The amount so arrived at is to be reduced by item (i) to item (vii) including amounts withdrawn from reserves, if any such amount is credited to P & L Account. Clauses (i) to (vii) of the explanation to Section 115JB(2) represent items of reduction from the net profits. Clause (i) mandates reduction for the amount(s) withdrawn from the reserves earlier created, provided such amount(s) is credited to P & L Account. Such credit is mandated so that the true working result gets reflected in the financial statement of the assessee-company. The said clause (i) contemplates only those reserves which actually affect the net profits as shown in the P & L Account (see also clause (ii) for comparison). The object of various clauses (i) to clause

(vii) is to find out the true working result of the assessee-company.

21. In the present case, the adjustment made in the P & L Account was as per Accounting Standards 6 and 10 read with Guidance Note issued by Institute of Chartered Accountants of India which is in conformity with Section 211 of the Companies Act. The said adjustment was primarily in the nature of contra adjustment in the P & L Account and not a case of effective credit in the P & L Account (as contemplated in clause (i) of explanation). The credit in the P & L Account implies that the P & L Account per se has been effectively credited by the said amount. Thus, the amount withdrawn from any reserve must in effect impact the net profit as shown in the P & L Account. As per accounting principles, the contra adjustment does not at all affect any particular account to which it has been carried. Unless an adjustment has the effect of increasing the net profit as shown in the P & L Account, that entry cannot be said to be a credit to the P & L Account and, therefore, though the amount has been literally credited to the P & L Account, however, in substance there is no credit to P & L Account. MAT provisions were introduced as number of zero tax companies had grown. It was found that companies had earned substantial book profits and had paid huge dividends but paid no tax. In the present case, had the assessee deducted the full depreciation from the profit before depreciation during the accounting year ending 31.3.2001, it would have shown a loss and in which event it could not have paid the dividends and, therefore, the assessee credited the amount to the extent of the additional depreciation from the revaluation reserve to present a more healthy balance sheet to its shareholders enabling the assessee possibly to pay out a good dividend. It is precisely to tax these kinds of companies that MAT provisions had been introduced. The object of MAT provisions is to bring out the real profit of the companies. The thrust is to find out the real working results of the company. Thus, the reduction sought by the assessee under clause (i) to the explanation to Section

115JB(2) in respect of depreciation has been rightly rejected by the AO.

22. Take the facts of the present case. As stated above, the revaluation reserve of Rs. 288,58,19,000/- was created during earlier assessment year 2000-01. During the accounting year ending 31.3.2001 (assessment year 2001-02), the profits of assessee stood at '120,18,97,000/- whereas depreciation stood at Rs. 127,57,06,000/-. Depreciation is a no-cash charge against the profits. Thus, company had a loss of Rs. 7,38,09,000/- (i.e. Rs. 127,57,06,000/- of depreciation as against profit of Rs. 120,18,97,000/-). However, by withdrawing Rs. 26,11,74,000/-, being the differential depreciation, from the revaluation reserve of '288,58,19,000/-(which is only a notional adjustment entry to balance both sides of the balance sheet) and reducing it from the depreciation of Rs. 127,57,06,000/-, the assessee artificially brings down the depreciation only to Rs. 101,45,32,000/- which is then deducted from the profits before depreciation amounting to Rs. 120,18,97,000/- so that there is a profit of Rs. 18,73,65,000/-. This is how the loss of Rs. 7,38,09,000 got converted to profit of Rs. 18,73,65,000/-. Thus, the financial statement for the year ending 31.3.2001 is made to look healthy.

23. The reasons given hereinabove are in addition to the reasons given by the Authorities below while rejecting the claim of the assessee.

24. The matter could be examined from another angle. To recapitulate the facts, the fixed assets of the assessee were revalued in the earlier assessment year 2000-01 (i.e. financial year ending 31.3.2000) and amount of enhancement in valuation was Rs. 288,58,19,000/- which was credited to the revaluation reserve. In other words, at the time of revaluation of assets, the said figure of Rs. 288,58,19,000/- was added to the historical cost of assets on the asset side of the balance sheet and in order to equalize both sides of the balance sheet the revaluation reserve to that extent was created on the liability

side. Thus, the figure of profit remained untouched so far as the revaluation of assets to the tune of Rs. 288,58,19,000/- is concerned. The profits were not increased by the said amount when the asset was revalued. During the assessment year in question, i.e., assessment year 2001-02, an amount of Rs. 26,11,74,000/-, being the differential depreciation, was transferred out of the said revaluation reserve of Rs. 288,58,19,000/- and credited to the P & L Account which the A.O. disallowed by placing reliance on the proviso to clause (i) of the explanation to Section 115JB(2). Consequently, the A.O. added back the said amount of Rs. 26,11,74,000/- to the net profits. We agree with the A.O. Under the provisions, as they then existed, certain adjustments were required to be made to the net profit as shown in the P & L Account. One such adjustment stipulated that the net profit shall be reduced by the amount(s) withdrawn from any reserves, if any such amount is credited to the P & L Account. Thus, if the reserves created had gone to increase the book profits in any year when the provisions of Section 115JB were applicable, the assessee became entitled to reduce the amount withdrawn from such reserves if such withdrawal is credited to P & L Account. Now, from the above facts, it is clear that neither the said amount of Rs. 288,58,19,000/- nor Rs. 26,11,74,000/- had ever gone to increase the book profits in the said year ending 31.3.2000 (being the financial year). Thus, when such amount(s) has not gone to increase the book value at the time of creation of reserve(s), there is no question of reducing the amount transferred from such revaluation reserves to the P & L Account. Thus, the proviso to clause (i) of the explanation to Section 115JB(2) comes in the way of the claim for reduction made by the assessee. In our view, the reduction under clause (i) to the explanation could have been availed only if such revaluation reserve had gone to increase the book profits. As the amount of revaluation reserves had not gone to increase the book profits at the time it was created, the benefit of reduction cannot be allowed. One more fact needs to be highlighted. In this case, as indicated above, the revaluation reserve stood

created during the earlier assessment year 2000-01. It has been vehemently argued on behalf of the assessee that creation of such reserve did not impact the profits of that year. The facts enumerated hereinabove shows that though the profit was not impacted, depreciation as the head of A/c. was impacted. By inter play of the balance sheet items with Profit & Loss A/c. items the assessee, as stated above, has sought to project the loss of Rs. 7,38,09,000/- as profit of Rs. 18,73,65,000/-.

Conclusion

25. For above reasons, we see no reason to interfere, hence, the civil appeal filed by the assessee shall stand dismissed with no order as to costs.

B.B.B. Appeal dismissed.

P.C. PAULOSE, M/S. SPARKWAY ENTERPRISES
v.
COMMISSIONER OF CENTRAL EXCISE AND CUSTOMS
(Civil Appeal No. 483 of 2011)

JANUARY 13, 2011

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

Finance Act, 1994 – s.65 – Clause 105 (zzm) and 3d – Licence granted by Airport Authority of India(AAI) to appellant for collecting airport admission ticket charges on behalf of AAI for which the appellant was required to pay monthly licence fees – Liability of the appellant to pay service tax – Held: Though the appellant deposited monthly licence fees to AAI but it collected the required fees from the users of the facility and provided all facilities to such customers – Appellant being a person authorized by AAI to provide service in express terms and conditions, it became liable to pay tax as it was an authorized person to provide taxable service and collect the admission ticket charges on contract basis – The appellant stepped into the shoes of AAI for the service provided on the basis of the authorization and became liable to pay tax in terms of the operation of s.65, Clause 105 (zzm) – Service Tax.

Words and Phrases – 'Airport authority' and 'taxable service' – Meaning of – Finance Act, 1994 – s.65, Clauses (3d) and 105(zzm) – Airports Authority of India Act, 1994 – s.3.

The Airport Authority of India (AAI) entered into a licence agreement with the appellant by which the appellant was entrusted with the responsibility and the activity of collecting airport admission ticket charges on behalf of AAI Limited at Karipur Airport, Calicut. The

appellant was permitted to collect Rs. 50/- per visitor as airport admission ticket charges for which the appellant was required to pay an amount of Rs. 2,66,797/- per month as licence fee. The appellant collected the admission ticket charges for the period from 10.09.2004 to 31.03.2005.

The Central Board of Excise and Customs issued circular No. 80/10/2004 ST dated 17.09.2004 in regard to service tax on airport services stating that services provided in an airport or civil enclave to any person by AAI or by a person authorized by it or any other person having charge of management of an Airport are taxable under the aforesaid category. On the satisfaction that the appellant was required to pay service tax on airport services rendered by it as 'authorized person' of AAI at Karipur Airport, Calicut for the period from 10.09.2004 to 31.03.2005 a show cause notice was issued to the appellant demanding service tax and education cess. There was also a proposal to demand interest under Section 75 of the Finance Act, 1994 on the above service tax and education cess as well as penalty under Section 76 of the Finance Act, 1994. The appellant submitted reply pursuant to which the adjudicating authority confirmed the demand of service tax and education cess with interest under Section 75 of the Finance Act, 1994. Aggrieved, the appellant filed appeal before the Commissioner of Central Excise & Customs (Appeals) which was, however, dismissed. The appellant filed second appeal before the Customs Excise & Service Tax Appellate Tribunal [CESTAT]. The Tribunal allowed the appeal holding that the appellant was only a collecting agent and therefore the liability to pay the service tax rested on AAI which was the actual service provider. Aggrieved, the department filed appeal before the High Court. By the impugned judgment, the High Court allowed the appeal with a direction to the original

authority to verify whether AAI had paid service tax on the admission tickets during the relevant period and, if in case, AAI had paid the said service tax, the appellant would stand exonerated from the liability; otherwise, service tax would be recovered from the appellant as per the provisions of the Act.

The question which arose for consideration in the instant appeal was whether the appellant-licencee could be held liable for payment of service tax.

Dismissing the appeal, the Court

HELD:1. The licence agreement clearly stipulates that Airport Authority of India (AAI) is entitled in law to grant licence at its Calicut Airport for the purpose of airport admission so as to provide amenities and facilities to passengers and visitors at the Airport and that the licensee, i.e., appellant, has agreed under the licence agreement to render such services to AAI on the terms and conditions mentioned in the said licence agreement. One of such stipulations was that the licensee would pay all rates, assessment, out goings and other taxes as leviable on the licensee in law. [Para 13] [881-C-D]

2. Another responsibility that vested on the licensee was to maintain regular and proper account books along with other supporting documents regarding sales effected by the licensee in the said premises which could be inspected by AAI in such manner as may be prescribed. The licensee was also responsible under the licence agreement to operate the subject facility by charging the rate from users, as may be approved in advance by AAI. [Para 14] [881-E]

3. Albeit, it is true that the appellant deposits a licence fees of Rs. 2,66,797/- per month to AAI but it collects the

required fees from the users of the facility and provide all facilities to such customers. As per Clause 105 (zzm) of Section 65 of Finance Act, 1994 '*taxable service*' means any service provided to any person, by Airport Authority or any person authorized by it, in an Airport or a Civil Enclave. As per Clause (3d) of Section 65 of the Finance Act, 1994 '*Airport Authority*' means AAI constituted under Section 3 of the Airports Authority of India Act, 1994 and also includes any person having charge of management of an airport or a civil enclave. It is thus crystal clear that the appellant being a person authorized by AAI to provide service in express terms and conditions, it becomes liable to pay such tax as it was an authorized person to provide taxable service and collect the admission ticket charges on a contract basis. [Paras 6, 15] [881-F-H; 879-C]

4. Under the terms and conditions of the agreement, the appellant is authorized to provide all the services as mentioned therein and, therefore, as per the statutory definition the appellant steps into the shoes of AAI for the service provided on the basis of the authorization and becomes liable to pay such taxes in terms of the operation of Section 65 Clause 105 (zzm) of the Finance Act, 1994. [Para 16] [882-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 483 of 2011.

From the Judgment & Order dated 9.7.2009 of the High Court of Kerala at Ernakulam in CE Appeal No. 28 of 2008.

Raghenth Basant, Liz Mathew for the Appellant.

P.P. Malhotra, ASG, Harish Chandra, Aruna Gupta, B. Krishna Prasad for the Respondents.

The Judgment of the Court was delivered by

Dr. MUKUNDAKAM SHARMA, J. 1. Leave granted.

2. The issue that falls for consideration in this appeal is whether the appellant, who is a licencee, could be held liable for payment of service tax when actually the service provided by them could and should be said to be provided by the Airport Authority of India (for short "AAI"). It was contended on behalf of the assessee that the role of the licensee-appellant was the role of an agent and was therefore limited to collecting of fees for the services rendered by AAI. In order to answer the aforesaid issue it would be necessary to set out certain basic facts giving rise to the aforesaid issue.

3. The AAI entered into a licence agreement with the appellant by which the appellant was entrusted with the responsibility and the activity of collecting airport admission ticket charges on behalf of AAI Limited at Karipur Airport, Calicut. As per the said agreement the appellant was permitted to collect Rs. 50/- per visitor as airport admission ticket charges for which the appellant was required to pay an amount of Rs. 2,66,797/- per month as licence fee.

4. As per the aforesaid agreement the appellant was collecting the admission ticket charges as mentioned above for the period from 10.09.2004 to 31.03.2005. Some of the relevant terms and conditions of the said licence agreement which would have a bearing to the facts and circumstances of the present case are extracted hereinbelow: -

"*Licence Agreement*

Subject ——— AAT Contract ITB

This Agreement made the 2nd day of April of Two thousand four between the Airports Authority of India……..

……

Whereas the Authority is entitled in 'Law' to grant licence at its Calicut Airport for the purpose of Airport Admission at ITB so as to provide amenities and facilities to the passengers and visitors at Airport and is in possession of space, more fully described in the plan annexed to this agreement, even after referred to as the premises.

……

……

Now, therefore, this indenture witnesseth:

……

……

4. That the Licensee shall pay all rates, assessment, out goings and other taxes as leviable on the Licensee in 'Laws'.

……

……

9. That the Licensee shall equipped himself with all necessary permits, licenses and such other permissions as may be required under law in force at any time with regard to the operation of the Subject licence.

10. That the Licensee shall maintain such regular and proper account books along with other supporting documents regarding sales effected by the Licensee in the said premises and said accounts/ documents shall all the times be kept open for inspection by Authority in such manner as may be

prescribed. The Licensee shall provide to the Authority, if so required by the Authority, Statements of audited Accounts in such manner and within such period as the Authority may prescribe.

……

……

12. That Authority shall provide bare space for the subject services and other expenses shall be incurred by the Licensee. However, provisions of electricity, water and drainage connections, as the case may be, if so required, for the smooth operation of the services shall be provided by the Authority.

13. All the times during the currency of the licence agreement, it shall be the responsibility of the licensee to obtain proper fire insurance coverage including theft and burglary in respect of all the movable and immovable assets stored or used in the licensed premises and authority shall not be responsible for any loss or damage caused to the licensee on any accounts whatsoever.

14. That Licensee shall operate the subject facility by charging the rate from users, as may be approved in advance by the Authority. Licensee shall exhibit the said approved charges at a conspicuous pl inside the licensed premises.

……

……"

5. It is evident from the aforesaid terms and conditions of the agreement that the appellant was granted licence by AAI to collect the admission ticket charges so as to provide

amenities and facilities to the passengers and visitors at the Airport. Under the said agreement, the appellant was also required to pay all rates, assessment, out goings and other taxes as leviable on the Licensee as per law. It is also clear therefrom that AAI has only provided bare space and all expenses for providing services to passengers / visitors are to be borne by the appellant.

6. As per Clause 105 (zzm) of Section 65 of Finance Act, 1994 '*taxable service*' means any service provided to any person, by Airport Authority or any person authorized by it, in an Airport or a Civil Enclave. As per Clause (3d) of Section 65 of the Finance Act, 1994 '*Airport Authority*' means AAI constituted under Section 3 of the Airports Authority of India Act, 1994 and also includes any person having charge of management of an airport or a civil enclave.

7. The Central Board of Excise and Customs by issuing a circular No. 80/10/2004 ST dated 17.09.2004 stated by way of clarification on the scope of service tax on airport services by making it clear that services provided in an airport or civil enclave to any person by AAI or by a person authorized by it or any other person having charge of management of an Airport are taxable under the aforesaid category. On the satisfaction that the appellant was required to pay service tax on airport services rendered by it under the aforesaid provisions as 'authorized person' of AAI at Karipur Airport, Calicut for the period from 10.09.2004 to 31.03.2005 a show cause notice was issued to the appellant demanding service tax amounting to Rs. 1,80,845/- and education cess amounting to Rs. 3,617/-. There was also a proposal to demand interest under Section 75 of the Finance Act, 1994 on the above service tax and education cess as well as penalty under Section 76 of the Finance Act, 1994.

8. On receipt of the aforesaid show cause notice, the appellant submitted a reply before the original authority contending *inter alia* that the Airport Authority only is

responsible for the collection of service tax as the appellant was not permitted to collect the service tax from the public. It was also contended that the implementation of the service tax and responsibility of the collection of service tax was that of AAI as the principal service provider of the Airport and that the appellant was only authorized to collect the prescribed admission charges and remit the fixed licence fees to AAI.

9. The adjudicating authority considered the entire matter and after careful consideration of the reply of the appellant and after giving a hearing to the appellant confirmed the demand of service tax of Rs. 1,64,106/- and education cess of Rs. 3,282/- with interest under Section 75 of the Finance Act, 1994.

10. Being aggrieved by the said order, appellant filed an appeal before the Commissioner of Central Excise & Customs (Appeals), Cochin. The Commissioner (Appeals), however, dismissed the said appeal, aggrieved by which, the appellant filed second appeal before the Customs Excise & Service Tax Appellate Tribunal [for short 'CESTAT'], South Zonal Bench, Bangalore. The Tribunal, allowed the appeal filed by the appellant by holding that the appellant is only a collecting agent and therefore the liability to pay the service tax rest on AAI which is the actual service provider.

11. Being aggrieved by the said judgment and order passed by CESTAT, the department filed Central Excise Appeal No. 28/2008 before the Kerala High Court. By the impugned judgment and order the High Court allowed the appeal with a direction to the original authority to verify whether AAI has paid service tax on the admission tickets during the relevant period and, if in case, AAI had paid the said service tax, the appellant would stand exonerated from the liability; otherwise, service tax would be recovered from the appellant as per the provisions of the Act. Being aggrieved by the aforesaid impugned judgment and order of the High Court the present appeal was filed by the appellant on which we heard the counsel appearing for the parties.

12. We have already set out the issue which falls for our consideration in the present appeal. In our opinion as to whether or not the appellant is a service provider and, therefore, liable to pay the service tax rest on the interpretation of the aforementioned circular and also the aforesaid provisions which are already referred to hereinbefore.

13. The licence agreement clearly stipulates that AAI is entitled in law to grant licence at its Calicut Airport for the purpose of airport admission so as to provide amenities and facilities to passengers and visitors at the Airport and that the licensee, i.e., appellant, has agreed under the licence agreement to render such services to AAI on the terms and conditions mentioned in the said licence agreement. One of such stipulations was that the licensee would pay all rates, assessment, out goings and other taxes as leviable on the licensee in laws.

14. Another responsibility that vested on the licensee was to maintain regular and proper account books along with other supporting documents regarding sales effected by the licensee in the said premises which could be inspected by AAI in such manner as may be prescribed. The licensee was also responsible under the licence agreement to operate the subject facility by charging the rate from users, as may be approved in advance by AAI.

15. Albeit, it is true that the appellant deposits a licence fees of Rs. 2,66,797/- per month to AAI but it collects the required fees from the users of the facility and provide all facilities to such customers. Section 65 Clause 105(zzm) of Finance Act, 1994 defines '*taxable service*' to mean any person, by airports authority or any person authorised by it, in an airport or a civil enclave. It is thus crystal clear that the appellant being a person authorized by AAI to provide service in express terms and conditions, it becomes liable to pay such tax as it was an authorized person to provide taxable service and collect the admission ticket charges on a contract basis.

16. Under the terms and conditions set out hereinbefore of the agreement the appellant is authorized to provide all the services as mentioned therein and, therefore, as per the statutory definition the appellant steps into the shoes of AAI for the service provided on the basis of the authorization and becomes liable to pay such taxes in terms of the operation of Section 65 Clause 105 (zzm) of the Finance Act, 1994.

17. Consequently, we find no merit in this appeal and the same is dismissed without any order as to costs.

B.B.B. Appeal dismissed.

UNION TERRITORY ADMINISTRATION, CHANDIGARH & ORS.

v.

MRS. MANJU MATHUR & ANR.

(Civil Appeal No. 2823 of 2009)

JANUARY 14, 2011

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

Service Law – Payscale – Dietician and Senior Dietician under the Director Health Services, Chandigarh Administration – Claim of, for pay scales at par with their counterparts under the Government of Punjab – Held: Claim not justified – The nature and quantum of duties and responsibilities of the Dietician and Senior Dietician under the Director Health Services, Chandigarh Administration were not comparable or equivalent in any way with their counterparts under the Government of Punjab – Doctrine of equal pay for equal work could not be invoked since the two sets of employees were not similarly situated – Doctrines – Doctrine of equal pay for equal work – Inapplicability of.

The President of India in exercise of the powers conferred by the proviso to Article 309 of the Constitution made the Conditions of Service of Union Territory of Chandigarh Employees Rules, 1992 with retrospective effect from 01.04.1991. The proviso to Rule 2 of these Rules empowered the Administrator to revise the scales of pay of persons appointed to the services and posts under the administrative control of the Administrator, Chandigarh, so as to bring them at par with the scales of pay which may be sanctioned by the Government of Punjab from time to time to the corresponding categories of employees.

The Administrator, Union Territory, Chandigarh,

notified the revised scales for the posts carrying existing scales in all classes of service by notification dated 03.01.1992 and soon thereafter, the Finance and Planning Officer, Chandigarh Administration, issued a Circular dated 08.01.1992 to all the Heads of Departments/Officers in Chandigarh Administration informing them that the revised pay scales of various posts of their respective departments mentioned in the notification have been revised on the basis of corresponding posts which also exist in the State of Punjab.

Respondent nos. 1 and 2, who were then working as Senior Dietician and Dietician posted in the General Hospital, Chandigarh under the Union Territory Administration, Chandigarh, made a representation to the Finance Secretary of the Union Territory Administration, Chandigarh, that the pay scales of Senior Dietician and Dietician have been revised to Rs.1500 - Rs.2540 and Rs.1350 - Rs.2400 respectively which were not at par with the revised pay scales of Rs.2200-Rs.4000 and Rs.1500-Rs.2640 of the corresponding posts of Dietician and Assistant Dietician respectively under the Government of Punjab. Respondents, however, were informed that they have been allowed revised pay scales as per the conversion technique.

Aggrieved, the respondents filed O.A. before the Central Administrative Tribunal. The Tribunal dismissed the O.A. holding that the claim on the basis of equal pay for equal work is not all pervasive as distinctions have to be made on the basis of number of factors as per the law laid down by this Court and if these factors are taken into consideration, the claim of the respondents for parity in pay scales with their counterparts in the State of Punjab was not justified.

The respondents then challenged the order of the Tribunal before the High Court in a petition under Articles

226/227 of the Constitution. The High Court held in the impugned judgment that the Dietician and Senior Dietician working in the Union Territory Administration, Chandigarh, were entitled to pay scales at par with their counterparts in the State of Punjab and accordingly issued a mandamus to the appellants to grant pay scales of Dietician (Gazetted) of the Directorate of Research and Medical Education, Punjab, to the Senior Dietician in the Union Territory Administration, Chandigarh, and to give pay scales of Dietician (Non-Gazetted) of the Directorate of Research and Medical Education, Punjab, to the Dietician in the Union Territory Administration, Chandigarh.

Allowing the appeal, the Court

HELD:1.1. When the matter was listed before this Court, this Court granted leave and pending hearing and final disposal of the Civil Appeal directed the Union Territory Administration, Chandigarh, to appoint a High Level Equivalence Committee to examine the nature of duties and responsibilities of Senior Dietician working under the Union Territory Administration, Chandigarh *vis-à-vis* Dietician (Gazetted) under the State of Punjab and also to examine the nature of duties and responsibilities of Dietician working under the Union Territory Administration, Chandigarh, *vis-à-vis* the Dietician (Non-Gazetted) working under the State of Punjab and to submit a report to the Court. Pursuant to these directions, a High Level Equivalence Committee comprising the Director, Health and Family Welfare, Finance and Planning Officer, Joint Secretary (Finance) and Joint Secretary (Personnel) met and after examining the nature and quantum of duties and responsibilities of the posts of Senior Dietician and Dietician in the Health Department of the Union Territory, Chandigarh, *vis-à-vis* posts of Senior Dietician and Dietician (Non-Gazetted) in the State

of Punjab and submitted a report. [Paras 4, 5] [890-B-H; 891-A]

1.2. From the report of the High Level Equivalence Committee, it is clear that the Directorate of Research and Medical Education, Punjab, is a teaching institution in which the Dietician has to perform multifarious duties such as teaching the probationary nurses in subjects of nutrition dietaries, control and management of the kitchen, etc., whereas, the main duties of the Dietician and Senior Dietician in the Government multi specialty hospital in the Union Territory Chandigarh are only to check the quality of food being provided to the patients and to manage the kitchen. Also from the report of the High Level Equivalence Committee it is found that after considering all aspects of the matter, the High Level Equivalence Committee was of the opinion that the nature and quantum of duties and responsibilities of the post of Senior Dietician in the Health Department of Union Territory Chandigarh are not comparable or equivalent in any way with the post of Dietician (Gazetted) in the Directorate of Research and Medical Education, Punjab and similarly the nature and quantum of duties and responsibilities of the post of Dietician in the Health Department of Union Territory Chandigarh are not comparable or equivalent in any way with the post of Dietician (Non-Gazetted) in the Directorate of Research and Medical Education, Punjab. Considering this report of the Equivalence Committee, the respondents are not entitled to the same pay scale as that of Dietician (Gazetted) and Dietician (Non-Gazetted) in the Directorate of Research and Medical Education, Punjab, as held by the High Court in the impugned judgment. [Paras 6, 7] [892-C-H]

2. In a recent case, the Supreme Court has held that the doctrine of equal pay for equal work can be invoked

only when the employees are similarly situated and that similarity of the designation or nature or quantum of work is not determinative of equality in the matter of pay scales and that the Court has to consider several factors and only if there was wholesale identity between the holders of the two posts, equality clause can be invoked, not otherwise. In another case, this Court has held that normally the applicability of principle of equal pay for equal work must be left to be evaluated and determined by an expert body and these are not matters where a writ court can lightly interfere. This Court has further held in this decision that it is only when the High Court is convinced on the basis of material placed before it that there was equal work and of equal quality and that all other relevant factors were fulfilled, it may direct payment of equal pay from the date of filing of the respective writ petition. In the present case, the appellants had seriously disputed the equivalence between the posts held by the respondents and those held by the Dietician (Gazetted) and Dietician (Non-Gazetted) under the Government of Punjab and the High Court instead of referring this dispute regarding parity of posts under the Union Territory Administration, Chandigarh, with the posts under the Government of Punjab to an expert body has erroneously equated the posts under the Union Territory Administration, Chandigarh, with the posts under the Government of Punjab on the basis of the pleadings of the respondents and issued the direction to grant pay scales to the respondents equal to pay scales of Dietician (Gazetted) and Dietician (Non-Gazetted) under the Directorate of Research and Medical Education, Government of Punjab. The impugned judgment is therefore set aside and the order of the Central Administrative Tribunal is sustained. [Para 7, 8] [892-G-H; 893-A-H]

State of Madhya Pradesh & Others v. Ramesh Chandra

Bajpai **[(2009) 13 SCC 635];** *State of Haryana & Others v. Charanjit Singh* **[(2006) 9 SCC 321] – referred to.**

Case law Reference:

(2009) 13 SCC 635	**referred to**	**Para 7**
(2006) 9 SCC 321	**referred to**	**Para 7**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2823 of 2009.

From the Judgment & Order dated 16.5.2007 of the High Court of Punjab & Haryana at Chandigarh in C.W.P. No. 17144-CAT of 2001.

Kamini Jaiswal for the Appellants.

Rajinder Mathur, Nidhi Bisaria, Madhu Sikri for the Respondents.

The Judgment of the Court was delivered by

A. K. PATNAIK, J. 1. This is an appeal against the order dated 16.05.2007 of the High Court of Punjab & Haryana in C.W.P. No. 17144-CAT of 2001 holding that the respondents, who were working as Senior Dietician and Dietician under the Director Health Services, Chandigarh Administration, are entitled to pay scales at par with their counterparts under the Government of Punjab and directing the appellants to give the pay scales accordingly to the respondents.

2. The President of India in exercise of the powers conferred by the proviso to Article 309 of the Constitution made the Conditions of Service of Union Territory of Chandigarh Employees Rules, 1992 with retrospective from 01.04.1991. The proviso to Rule 2 of these Rules empowered the Administrator to revise the scales of pay of persons appointed to the services and posts under the administrative control of the

Administrator, Chandigarh, so as to bring them at par with the scales of pay which may be sanctioned by the Government of Punjab from time to time to the corresponding categories of employees. The Administrator, Union Territory, Chandigarh, notified the revised scales for the posts carrying existing scales in all classes of service by notification dated 03.01.1992 and soon thereafter, the Finance and Planning Officer, Chandigarh Administration, issued a Circular dated 08.01.1992 to all the Heads of Departments/Officers in Chandigarh Administration informing them that the revised pay scales of various posts of their respective departments mentioned in the notification have been revised on the basis of corresponding posts which also exist in the State of Punjab. Respondent nos. 1 and 2, who were then working as Senior Dietician and Dietician posted in the General Hospital, Chandigarh under the Union Territory Administration, Chandigarh, made a representation dated 18.12.1992 to the Finance Secretary of the Union Territory Administration, Chandigarh, that the pay scales of Senior Dietician and Dietician have been revised to Rs.1500 - Rs.2540 and Rs.1350 - Rs.2400 respectively which were not at par with the revised pay scales of Rs.2200-Rs.4000 and Rs.1500-Rs.2640 of the corresponding posts of Dietician and Assistant Dietician respectively under the Government of Punjab. Respondents, however, were informed that they have been allowed revised pay scales as per the conversion technique.

3. Aggrieved, the respondents filed O.A. No. 1017-CH of 1993 before the Central Administrative Tribunal, Chandigarh. By order dated 20.04.2001, however, the Central Administrative Tribunal, Chandigarh Bench, dismissed the O.A. of the respondents after holding that the claim on the basis of equal pay for equal work is not all pervasive as distinctions have to be made on the basis of number of factors as per the law laid down by this Court and if these factors are taken into consideration, the claim of the respondents for parity in pay scales with their counterparts in the State of Punjab was not justified. The respondents then challenged the order dated

20.04.2001 of the Central Administrative Tribunal, Chandigarh Bench, before the High Court of Punjab & Haryana in a petition under Articles 226/227 of the Constitution bearing no. C.W.P. 17144-CAT/2001 and the High Court held in the impugned judgment that the Dietician and Senior Dietician working in the Union Territory Administration, Chandigarh, were entitled to pay scales at par with their counterparts in the State of Punjab and accordingly issued a mandamus to the appellants to grant pay scales of Dietician (Gazetted) of the Directorate of Research and Medical Education, Punjab, to the Senior Dietician in the Union Territory Administration, Chandigarh, and to give pay scales of Dietician (Non-Gazetted) of the Directorate of Research and Medical Education, Punjab, to the Dietician in the Union Territory Administration, Chandigarh.

4. When this Special Leave Petition against the impugned judgment and order of the High Court was listed before this Court on 24.04.2009, the Court granted leave and pending hearing and final disposal of the Civil Appeal directed the Union Territory Administration, Chandigarh, to appoint a High Level Equivalence Committee to examine the nature of duties and responsibilities of Senior Dietician working under the Union Territory Administration, Chandigarh *vis-à-vis* Dietician (Gazetted) under the State of Punjab and also to examine the nature of duties and responsibilities of Dietician working under the Union Territory Administration, Chandigarh, *vis-à-vis* the Dietician (Non-Gazetted) working under the State of Punjab and to submit a report to the Court.

5. Pursuant to these directions in the order dated 24.04.2009 of this Court, a High Level Equivalence Committee comprising the Director, Health and Family Welfare, Finance and Planning Officer, Joint Secretary (Finance) and Joint Secretary (Personnel) met on 17.07.2009 and after examining the nature and quantum of duties and responsibilities of the posts of Senior Dietician and Dietician in the Health Department of the Union Territory, Chandigarh, *vis-à-vis* posts of Senior Dietician and Dietician (Non-Gazetted) in the State

of Punjab and have submitted the following report:

"The Dietician (Gazetted) and Dietician (Non-Gazetted) in Directorate of Research & Medical Education (D.R.M.E.) Punjab are working in the Rajindera Hospital (Patiala) and Sh. Guru Teg Bahadur Hospital (Amritsar) having bed strength of 1009 and 951 respectively, whereas the Senior Dietician and Dietician in the U.T. Chandigarh are working in Govt. Multi Specialty Hospital Sector – 16 which is a 500 bedded hospital. The Directorate of Research & Medical Education Punjab is a teaching institution in which the Dietician has to perform the multifarious duties such as teaching the probationary nurses in the subjects of nutrition Dietaries, control and management of kitchen etc. Whereas the main duties of Dietician and Senior Dietician in Govt. Multi Specialty Hospital Sector -16, U.T. Chandigarh are only to check the quality of food being provided to the patients and management of the kitchen. The Health Department of U.T. Chandigarh follows the rules and regulations applicable to corresponding categories of employees in the Directorate of Health and Family Welfare, Punjab and not of the Directorate of Research and Medical Education, Punjab. In the Directorate of Health and Family Welfare, Punjab there are no posts of Senior Dietician and Dietician. The workload of the posts in D.R.M.E. Punjab is definitely more as compared to the posts in the Health Department U.T. Chandigarh. Besides, the teaching work, the incumbents in Punjab are required to look after the basic work of supervision of food etc. in respect of a larger number of persons as is reflective from the number of beds in the hospitals, as compared to U.T. Chandigarh.

The High Level Equivalence Committee has considered all aspects of the matter and is of the opinion that the nature and quantum of duties and responsibilities of the post of Senior Dietician in the Health Department of U.T. Chandigarh are not comparable or equivalent in any way with the post of Dietician (Gazetted) in the Directorate of Research & Medical Education, Punjab. Similarly the nature and quantum of duties and responsibilities of the post of Dietician in the Health Department of U.T. Chandigarh are not comparable or equivalent in any way with the Post of Dietician (Non-Gazetted) in the Directorate of Research & Medical Education, Punjab."

6. We have heard learned Counsel for the parties. We find from the report of the High Level Equivalence Committee extracted above that the Directorate of Research and Medical Education, Punjab, is a teaching institution in which the Dietician has to perform multifarious duties such as teaching the probationary nurses in subjects of nutrition dietaries, control and management of the kitchen, etc., whereas, the main duties of the Dietician and Senior Dietician in the Government multi specialty hospital in the Union Territory Chandigarh are only to check the quality of food being provided to the patients and to manage the kitchen. We also find from the report of the High Level Equivalence Committee that after considering all aspects of the matter, the Committee was of the opinion that the nature and quantum of duties and responsibilities of the post of Senior Dietician in the Health Department of Union Territory Chandigarh are not comparable or equivalent in any way with the post of Dietician (Gazetted) in the Directorate of Research and Medical Education, Punjab and similarly the nature and quantum of duties and responsibilities of the post of Dietician in the Health Department of Union Territory Chandigarh are not comparable or equivalent in any way with the post of Dietician (Non-Gazetted) in the Directorate of Research and Medical Education, Punjab.

7. Considering this report of the Equivalence Committee, the respondents are not entitled to the same pay scale as that of Dietician (Gazetted) and Dietician (Non-Gazetted) in the Directorate of Research and Medical Education, Punjab, as held by the High Court in the impugned judgment and order. This Court has held in a recent case *State of Madhya Pradesh*

& Others v. Ramesh Chandra Bajpai [(2009) 13 SCC 635] that the doctrine of equal pay for equal work can be invoked only when the employees are similarly situated and that similarity of the designation or nature or quantum of work is not determinative of equality in the matter of pay scales and that the Court has to consider several factors and only if there was wholesale identity between the holders of the two posts, equality clause can be invoked, not otherwise. This Court has also held in *State of Haryana & Others v. Charanjit Singh* [(2006) 9 SCC 321] that normally the applicability of principle of equal pay for equal work must be left to be evaluated and determined by an expert body and these are not matters where a writ court can lightly interfere. This Court has further held in this decision that it is only when the High Court is convinced on the basis of material placed before it that there was equal work and of equal quality and that all other relevant factors were fulfilled, it may direct payment of equal pay from the date of filing of the respective writ petition. In the present case, the appellants had seriously disputed the equivalence between the posts held by the respondents and those held by the Dietician (Gazetted) and Dietician (Non-Gazetted) under the Government of Punjab and the High Court instead of referring this dispute regarding parity of posts under the Union Territory Administration, Chandigarh, with the posts under the Government of Punjab to an expert body has erroneously equated the posts under the Union Territory Administration, Chandigarh, with the posts under the Government of Punjab on the basis of the pleadings of the respondents and issued the direction to grant pay scales to the respondents equal to pay scales of Dietician (Gazetted) and Dietician (Non-Gazetted) under the Directorate of Research and Medical Education, Government of Punjab.

8. We, therefore, set aside the impugned judgment and order of the High Court and sustain the order of the Central Administrative Tribunal, Chandigarh Bench, and allow this appeal with no order as to costs.

B.B.B. Appeal allowed.

KALYANESHWARI

v.

UNION OF INDIA & ORS.

(Writ Petition (Civil) No. 260 of 2004)

JANUARY 21, 2011

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

Constitution of India, 1950:

Articles 32, 14 and 19 – Public interest litigation – Petition under Article 32 by a non-governmental organization – Seeking direction to Union of India and other States to immediately ban mining and manufacturing activities in asbestos or its allied products – Held: Cannot be granted – There is no law banning the use of asbestos in various manufacturing processes despite its adverse effects on human health – Supreme Court cannot legislate and ban an activity under relevant laws – Every factory using or manufacturing asbestos, obtains a licence under the Factories Act as well as permission from the competent authorities including permission under the Environmental Laws – All the laws in force have been complied with and directions of this Court in the case on similar issue have been carried out – Reply affidavits by different States as well as Union of India to the effect that such activity was carried out in accordance with specified parameters and under due supervision – More so, there is lack of specific data as also vague averments in the writ petition – Only few hundred workers were subjected to medical examination – Large number of families are dependent upon such processes – Also, the writ petition is a result of business rivalry and has been filed by the petitioner again at the behest of other industries to ultimately cause material and business gains to that or such other companies – Thus, it lacks bonafide and is complete abuse of process

of law – It has been filed as a proxy litigation for the purpose of achieving private interest and, thus, rejected – Certain directions issued – Public interest litigation.

Article 32 – Public interest litigation – Maintainability of – Held: Petitions which are bona fide and genuine, not motivated by extraneous considerations and in public interest alone, are entertained in this category – Litigant is under an obligation to disclose true facts and approach the Court with clean hands – Courts while exercising jurisdiction has to take great care that wide jurisdiction should not become a source of abuse of process of law by disgruntled litigant.

The petitioner (a registered society), is a non-governmental organization. It has filed the instant writ petition under Article 32 of the Constitution of India, 1950, praying for issuance of a writ of mandamus directing the Union of India and other respondent-States to immediately ban all use of asbestos in any manner whatsoever; constitution of a Committee of eminent specialists to frame a scheme for identification and certification of the workers/victims suffering from asbestosis or other asbestos related diseases or cancer; and issuance of direction to the States and the Union Territories to identify the workers/victims therein and provide them treatment and take measures to prevent harmful effects of asbestos in the factories or establishments.

Disposing of the writ petition and dismissing the IA, the Court.

HELD: 1. There is no merit in the instant writ petition, as far as prayer of the petitioner for banning of mining and manufacturing activities in asbestos or its allied products is concerned. While rejecting the prayer, certain directions are issued. [Para 28] [928-C]

2.1 There is no law banning the use of asbestos in various manufacturing processes despite its adverse effects on human health. It is not for this Court to legislate and ban an activity under relevant laws. Every factory using or manufacturing asbestos, obtains a licence under the Factories Act as well as permission from the competent authorities including permission under the Environmental Laws. In the case of ****Consumer Education and Research Centre* **certain directions were issued with regard to the said issue. Once all the laws in force have been complied with and directions of this Court as contained in the case of ****Consumer Education and Research Centre*** **are carried out in their true spirit, there is no reason as to why this Court, in exercise of its extra-ordinary jurisdiction under Article 32 of the Constitution, should ban such an activity when admittedly large number of families are dependent upon such processes. It has to be ensured that proper precautions are taken. The Court had already made ILO guidelines as one of the safety measures to be complied with by the industries and it is expected of each State Government and the Union Government to ensure safe and controlled use of asbestos. Better supervision and regulatory control is required than banning of the activity. The affidavits filed by the official respondents, including respondent No. 37, Asbestos Cement Product Manufacturers Association specifically point out 'safe and controlled' use of asbestos in manufacturing processes. The prayer with regard to constitution of a Committee comprising of specific persons is not a matter that falls within the realm of jurisdiction of this Court. It is for the expert bodies in the concerned Ministries which should regulate proper measures in this regard to ensure proper utilization of asbestos and raw materials in relation to various manufacturing activities, if they are being carried on in accordance with law and without endangering the life of the people. [Para 12] [914-H; 915-A-G]**

2.2 The reply affidavits filed by different States as well as Union of India clearly bring out that such activity, wherever is being carried out, is in accordance with specified parameters and under due supervision. The writ petition filed does not provide any data or detailed facts in relation to such uncontrolled or unauthorized activity of manufacture of asbestos being carried out in any State. Merely stating that a few hundred workers were subjected to medical examination and were found to be affected by inhalation of asbestos particles may not be sufficient for this Court to accept it as a general proposition that there is hazardous use of asbestos all over the country, particularly, in view of the fact that such activity is being carried out at the mining or industrial level in different parts of the country. [Para 10] [912-G-H; 913-A-B]

2.3 The petitioner has not been able to clarify as to how the instant petition came to be filed in face of the judgment of this Court in the case of ****Consumer Education and Research Centre* and, in fact, what was the need to file it. The petitioner made no effort to collect any information/data from various States as to whether the directions issued by the Court in that matter are being strictly implemented or not at all. On the contrary, it is the stand of the States as well as Union of India that the directions issued by this Court are being strictly adhered to. The parameters and norms have been specified and the industries using such raw materials are being constantly watched, in relation to all the functions of the factory, specially keeping in view the environment and health status of the workers and nearby residents. Even subsequent to the filing of the instant petition, the petitioner has not put in any effort to seriously rebut the averments made in various affidavits filed by the States. [Paras 12 and 23] [925-A-B]**

**Consumer Education and Research Centre vs. Union*

of India **(1995) 3 SCC 42;** *Jayjit Ganguly vs. Union of India* **CWP No. 412 of 2002 decided on 15th December 2004 – referred to.**

2.4 The government had introduced the White Asbestos (Ban on Use and Import) Bill, 2009 which is pending in the Upper House. Thus, there could be no doubt that it is a matter which squarely falls in the domain of the legislature and the legislature in its wisdom has taken steps in the direction of enacting necessary law. Issuance of any direction or formulation of any further policy by this Court would obviously be a futile exercise. There could hardly be any justification for banning, completely or partially, of the activity of manufacturing of asbestos and allied products. The Bill is yet to be passed but it is clearly demonstrated that the Government is required to take effective steps to prevent hazardous impact of use of asbestos. [Paras 13 and 15] [915-G-H; 916-A-B; 917-D-E]

2.5 In the matter relating to secondary exposure of workers to asbestos, though the grounds have been taken in the writ petition without any factual basis, again in the rejoinder filed to the counter affidavit of respondent No. 37, the issue has been raised by the petitioner in detail. In the earlier judgment of this Court in the case of ****Consumer Education and Research Centre,* **hazards arising out of primary use of asbestos were primarily dealt with. The Court had noticed that it would be clear that diseases occurred wherever the exposure to the toxic or carcinogenic agent occurs, regardless of the country, type of industry, job title, job assignment or location of exposure. The diseases would follow the trail of the exposure and extend the chain of the carcinogenic risk beyond the work place. The Court had also directed that a review by the Union and the States would be made after every ten years and also as and when the ILO gave directions in this behalf**

consistent with its recommendations or conventions. Admittedly, 15 years has expired since the issuance of the directions by this Court. The ILO also made certain specific directions by its resolution of 2006 adopted in the 95th session of the International Labour Conference. It introduced a ban on all mining, manufacture, recycling and use of all forms of asbestos. Serious doubts have been raised as to whether 'controlled use' can be effectively implemented even with regard to secondary exposure. [Para 14] [916-C-H; 917-A-B]

2.6 The petitioner NGO is not recognized by any Ministry and no financial assistance has been sanctioned to it. [Para 22] [924-G-H]

3. The Courts, while exercising jurisdiction and deciding a public interest litigation, has to take great care, primarily, for the reason that wide jurisdiction should not become a source of abuse of process of law by disgruntled litigant. Such careful exercise is also necessary to ensure that the litigation is genuine, not motivated by extraneous considerations and imposes an obligation upon the litigant to disclose true facts and approach the Court with clean hands. Thus, it is imperative that the petitions, which are bona fide and in public interest alone, be entertained in this category. Abuse of process of law is essentially opposed to any public interest. One, who abuses the process of law, cannot be said to serve any public interest, much less, a larger public interest. A petition which lacks bona fide and is intended to settle business rivalry or is aimed at taking over of a company or augmenting the business of another interested company at the cost of closing business of other units in the garb of PIL would be nothing but abuse of the process of law. [Paras 23 and 25] [925-C-E; 927-D-G]

Ashok Kumar Pandey Vs. State of West Bengal **(2004) 3 SCC 349;***Ranjan Singh Lalan Vs. Union of India* **(2006) 6 SCC 613 – relied on.**

4.1 From the record, it is clear that 'BK' (claiming to be working as Secretary of the petitioner and who filed petition on the same issue before the Gujarat High Court in *B.K. Sharma v Union of India* AIR 2005 Guj 203) as well as 'SS' (one of the member of the Society and has worked with the Steel Company ESCL) had professional commitment in one form or the other either on permanent or temporary basis with the Steel Company ESCL. It has been stated in the affidavit filed by 'BK' that three writ petitions were withdrawn on the advice of the Gujarat High Court which is hardly true. The court had only granted liberty, while dismissing the writ petitions as withdrawn, to approach the Central Government. The Central Government had again declined to accept the representations made by the petitioners resulting in filing of writ petitions for the second time which culminated in the final judgment by the Gujarat High Court in the case of *B.K. Sharma v Union of India*. [Para 21] [923-F-H; 924-A]

4.2 In the instant case, there is hardly any improvement in the conduct of the petitioner before this Court. Even before this Court, a judgment which has attained finality on all factual matrix and even otherwise, is attempted to be brushed aside by making irresponsible statements, *inter alia*, that the Gujarat High Court had failed to apply its mind. The judgment of the Gujarat High Court for all intent and purposes attained finality and the legality or correctness of the judgment cannot now be questioned in these proceedings. It is of no use and help to the petitioners now to claim that no proof was produced before that Court to establish the allegations that the petition was filed at the behest of ESCL. They were writ petitioners and the Court, after hearing the

parties at length and perusing the record, has recorded the said findings which in any case, do not suffer from any infirmity, much less, illegality so as to be disregarded by this Court. The findings recorded by the Gujarat High Court reflect the picture of the petitioner which certainly invites judicial chastisement and appropriate orders. [Para 21] [924-B-F]

4.3 It cannot be ignored that valuable time of this Court is consumed in dealing with such public interest litigations which are filed without proper study and data and merely on some reference to very few workmen working in an industry and without projecting any requirement at the national level demanding the attention of this Court in treating it as a national problem. The Kerala State Human Rights Commission by order dated 31.01.2009 dealt with the same problem which does not even find a mention in the instant petition and which the petitioner is expected to know as it claims to be working for the common man in this behalf. In the name of the poor let the rich litigant not achieve their end of becoming richer by instituting such set of petitions to ban such activities. Besides the fact that the instant petition lacks bona fides, it is also obvious that the petitioner though had prayed for complete ban on all mining and manufacturing activities but had hardly made any study or prepared statistical data in that regard. It only made reference to certain studies in foreign countries. The petitioner, claiming to be an organization involved in the good of the common man, ought to have taken greater pains to state essential facts supported by documents in relation to Indian environment. [Paras 23 and 25] [925-B-D; 926-G-H; 927-A-B]

4.4 Presumably the direct impact of banning of activities of mining/manufacturing relating to asbestos shall result in increase in demand of cast iron/ductile iron

production as they are some of the suitable substitutes for asbestos. The Steel Company-ESCL is one of the largest manufacturer of iron and allied products in India and there was a professional and/or other connections between ESCL and 'BK' on the one hand and 'BK' and 'SS' on the other who, admittedly at present, is involved with the activities of NGO for a considerable time. Thus, it would be a reasonable conclusion to draw that the writ petition has been hardly filed in public interest but is a private interest litigation to give rise to business opportunities in a particular field. [Para 24] [925-E-H]

4.5 The document referred to as Ex. P9 in the writ petition is probably the only document which allegedly records the conditions of a few workmen in India and contains the names of a few doctors and workers. This document is neither signed by anybody nor does it give address of any workman or the industry/factory where such workman is working. It is expected of the petitioner to have made proper efforts in collection of such material before it moved this Court to treat this problem at the national level and had spent its judicial time. All the States in the country have been issued notices of this petition and they have denied the allegations. It was incumbent upon the petitioner thus, to at least substantiate the averments in the petition by some cogent and documentary evidence actually related to the working conditions of the workmen in various factories in different States. The petitioner has miserably failed to discharge this onus. [Para 26] [927-B-E]

4.6 The conduct of the petitioner before the Gujarat High Court appears to be contemptuous and certainly is an abuse of the process of the court in terms of the finding recorded by that Court which has attained finality. The petition was instituted at the behest of ESCL, while the instant petition also does not demonstrate that

intention of the petitioner is to achieve public interest. The instant petition appears to have been moved again at the behest of the same company and, in any case, to ultimately cause material and business gains to that or such other companies. Thus, the instant petition lacks bona fide, is an abuse of the process of the Court and has been filed as a proxy litigation for the purpose of achieving private interest. This Court cannot permit such practice to prevail and it needs to be deterred at the very threshold. [Para 27] [927-F-H; 928-A-B]

Raunaq International Ltd. vs. I.V.R. Constructions ***LTD.*** **(1999) 1 SCC 492 – relied on.**

5.1. The following directions are issued while disposing of the writ petition:

a. The Ministry of Labour in the Union of India and Department of Industries and Labour in all the State Government would ensure that the directions contained in the judgment of this Court in the case of *Consumer Education and Research Centre* are strictly adhered to;

b. In terms of **Consumer Education and Research Centre* case as well as reasons stated therein, the Union of India and the States is directed to review safeguards in relation to primary as well as secondary exposure to asbestos keeping in mind the information supplied by the respective States in furtherance to the earlier judgment as well as the fresh resolution passed by the ILO. Upon such review, further directions, consistent with law, be issued within a period of six months from the date of passing of this order;

c. It is directed that if Union of India considers it proper and in public interest, after consulting the

States where there are large number of asbestos industries in existence, it should constitute a regulatory body to exercise proper control and supervision over manufacturing of asbestos activities while ensuring due regard to the aspect of health care of the workmen involved in such activity. It may even constitute a Committee of such experts as it may deem appropriate to effectively prevent and control its hazardous effects on the health of the workmen;

d. The concerned authorities under the provisions of Environment (Protection) Act, 1986 should ensure that all the appropriate and protective steps to meet the specified standards are taken by the industry before or at the time of issuance of environmental clearance. [Para 16] [917-E-H; 918-A-F]

5.2 It is imperative for the Court to issue the said directions in order to strike a balance between the health hazards caused by this activity on the one hand and ground reality that a large number of families, all over the country, are dependent for their livelihood on this activity, on the other. The Court is not entering into the arena of legislature and are passing the said directions in furtherance to the law laid down by this Court which, in terms of Article 141 of the Constitution, is binding on all concerned and to ensure effective and timely implementation of the provisions of the Environment (Protection) Act. These directions must be read and construed in comity with the proposed legislation and are in no way detrimental to the same. [Para 17] [918-F-H; 919-A]

Case Law Reference:

(1995) 3 SCC 42	**Referred to**	**Para 2**
CWP No. 412 of 2002	**Referred to**	**Para 11**

(2004) 3 SCC 349	**Relied on**	**Para 25**
(2006) 6 SCC 613	**Relied on**	**Para 25**
(1999) 1 SCC 492	**Relied on**	**Para 27**

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 260 of 2004.

Under Article 32 of the Constitution of India.

H.P. Raval ASG, A. Mariarputham, AG, Dr. Manish Singhvi, A.A.G. Manjit Singh, AAG, Harish Chandra, Rajeev K. Virmani, I. Venkatanarayana, Ashish Mohan, K.K. Mohan, Aruna Mathur, Yusuf Khan, Avneesh Arputham, Megha Gour (for Arputham, Aruna & Co.) Gopal Prasad, V.G. Pragasan, S.J. Aristotle, Prabu Ramasubramanian, Edward Belho, K. Enatoli Sema, Rituraj Biswas, Anirudh Sharma, Arvind Kumar Sharma Mukesh K. Giri, R. Ayyam Perumal, Hemantika Wahi, Nupur Kanungo, A. Subhashini, Avijit Bhattacharjee, Sarbani Kar, Debjani Das Purkayastha, Bidyabrata Acharya, Rekha Pandey, S.W.A. Qadri, C. S. Khan, Ch. Shamsuddin, D.S. Mahara, Anil Kaityar, Radha, Shyam Jena, Vibha Datta Makhija, B.S. Banthia, Khwairakpan Nobin Singh, Sapam Biswajit Meitei, Corporate Law Group, John Mathew, Sanjay R. Hedge, Pradeep Misra, Anil Shrivastav, Sanjay V. Kharde, Asha G. Nair, Ranjan Mukherjee, S. Bhowmick, S.C. Ghosh, Gopal Singh, Manish Kumar, Naresh Bakshi, D. Bharathi Reddy, Aruneshwar Gupta, Rashmi Virmani, Sandeep Bharathi Reddy, Aruneshwar Gupta, Rashmi Virmani, Sandeep Narain, Mukta Dutta, Ashish Kothari (for S. Narain and Co.), Pragyan P. Sharma, Rupesh Gupta, Siddharth Lodha, P.V. Yogeswaran, T.V. George, Atul Jha, Dharmendra Kumar Sinha, Shrish Kumar, Misra, Ajay Kumar Singh, Dipak Kumar Jena, Minakshi Ghosh Jena, Manmohan, Naresh K. Sharma, Anuvrat Sharma, T. Harish Kumar, P. Prasantha, V. Vasudevan, Devanshu Kumar Devesh, Milind Kumar, Lawyers' Knit and Co., Kuldip Singh, Ashok K. Srivastava, Sunil Fernandes, G.N. Reddy, Haripesh Singh, Kamal Mohan Gupta, R. Sathish, Pragyan P.

Sharma, P.V. Yogeswaran, D. Mahesh Babu for the appearing parties.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. This petition under Article 32 of the Constitution of India has been filed by the petitioner Kalyaneshwari (a registered Society), through its Chairman, with a prayer that a writ of mandamus be issued directing the Union of India and other respondent-States to immediately ban all uses of asbestos in any manner whatsoever; further that a committee of eminent specialists be constituted to frame a scheme for identification and certification of the workers/victims suffering from asbestosis or other asbestos related diseases or cancer. The petitioner also prayed that the respective Governments should be directed to identify the workers/victims in the respective States and Union Territories and to provide them due treatment as well as to take measures to prevent harmful effects of asbestos in the factories or establishments where such activity is being carried out and also to initiate criminal proceedings against all the responsible persons including the owners of such factories, organizations and associations for infringing the right to life of the asbestos victims.

2. The above writs/directions have been prayed for on the premise that petitioner, Kalyaneshwari, is a non-governmental organization, registered under the Societies Registration Act XXI of 1860. It is a voluntary organization allegedly promoted to serve the general public without distinction of caste or religion and working for the protection of consumers' interest. This Court in the case of *Consumer Education and Research Centre v. Union of India* [(1995) 3 SCC 42)] accepted the well established adverse effects of asbestos including the risk beyond the work place and held as under:

"17. It would thus be clear that disease occurs wherever the exposure to the toxic or carcinogenic agent occurs

regardless of the country, the type of industry, job title, job assignment or location of exposure. The disease will follow the trail of the exposure and extend the chain of carcinogenic risk beyond the workplace. It is the exposure and the nature of that exposure to asbestos that determines the risk and the diseases which subsequently result. The development of the carcinogenic risk due to asbestos or any other carcinogenic agent, does not require a continuous exposure. The cancer risk does not cease when the exposure to the carcinogenic agent ceases, but rather the individual carries the increased risk for the remaining years of life…"

3. The petitioner alleges that developed countries all over the world have drastically reduced the manufacture of asbestos and some of them have even banned different types of asbestos. In India, the use of this carcinogenic material is increasing every year approximately at the rate of 12% and the petitioner drew attention of the concerned authorities towards this issue and requested them to take stringent actions, but to no effect. The World Trade Organisation considered this aspect in the *EC-Asbestos case,* [WT/DS135/ABR] adopted on 5th April, 2001 where its appellate body observed that available scientific data reveals that a high mortality rate persists despite the so called 'safe' use of Chrysolite Asbestos. Surveys carried out more than 30 years after the introduction of controlled use policy in United Kingdom indicate a significant increase in deaths from Lung Cancer and Mesothelioma, not only among the workers but even to the families residing nearby such plants. Citing the example of some countries and the measures being taken by different organizations, request was made for banning import, manufacture and use of asbestos and it is averred that 'controlled use' is hardly workable. It is also averred by the petitioner that in most parts of the world, there was a drastic reduction in manufacture and use of asbestos. In fact, efforts are being made to ban on use of asbestos in any form. On the contrary, in India, use of asbestos was permitted

indiscriminately on the premise that its controlled use is absolutely safe. There is a large number of victims in India who are suffering from various effects of asbestos in one form or the other. The petitioner claims to have identified five hundred plus victims from five different States, namely, West Bengal, Rajasthan, Jharkhand, Andhra Pradesh and Tamil Nadu. The petitioner claims that in order to find out the exact health scenario of asbestos workers, it got 14 direct workers of an asbestos unit examined by qualified occupational health doctors and the results were shocking, inasmuch as 13 workers were suffering from asbestosis with five workers being in advanced stage. Though these workers are covered under State ESI Scheme, no proper and adequate treatment is being provided to them. Thousands of poor and ignorant people in Udaipur District in Rajasthan were engaged in asbestos mining before the Ministry of Mines decided in the year 1996 not to issue or renew any asbestos mining licenses in India. Still today, some of them are engaged in illegal mining, which they do at the instance of local asbestos products manufacturers. It is also averred by the petitioner that there is complete failure on the part of the manufacturers in providing safety equipments to workers, regular health check-up, monitoring air borne dust and maintaining health register of the workmen. The petitioner also claims to have already documented more than 500 victims suffering from asbestos related diseases from the above-noted five States and, upon examination by well-known chest specialists, they have been identified as suffering from such diseases. The cost of the treatment is quite high. First, no compensation has been paid to these victims and second, even if some compensation was paid it was too meagre to meet the expenses. All these victims are suffering for no fault of theirs but due to exposure to asbestos over which, they hardly have any control. There is no law in place which directs payment of compensation to such victims. No medical records are being maintained to regulate the treatment of victims of Asbestosis. The carcinogenic properties of asbestos including Chrysotile or White Asbestos, are well-established and the same is a

universally accepted fact. Despite overwhelming evidence, asbestos which has been banned in other countries is still being manufactured, imported and used in India and the Government has failed to take proper action which compelled the petitioner to approach this Court by filing the present Writ Petition in larger public interest as there is apparent violation of Articles 14 and 21 of the Constitution of India.

4. This petition was filed in the year 2004. Thereafter, notice has been issued to the respondents, various affidavits have been filed and the matter has been heard from time to time. One of the main objections raised by the respondents and, particularly, respondent No. 37 i.e. Asbestos Cement Product Manufacturers Association is that the present Writ Petition is an abuse of the process of the Court and has been instituted at the behest of a business rival. The petition lacks bona fide and is intended to take unnecessary advantage of the proceedings before the Court. This issue, to a large extent, has been dealt with by a Bench of the Gujarat High Court in *B.K. Sharma* v. *Union of India,* [AIR 2005 Guj 203]. Yet, the present petition has been filed with the intention of creating impediment in the establishment and running of the industrial units in various States dealing with production or manufacture of asbestos in accordance with law and without infringing any right of others whatsoever. This issue is of some significance and we shall proceed to deliberate on the same and record our conclusion at a later stage. First, we would like to deal with the merits of the case and what directions, if at all, can be issued by this Court.

5. Several States, Union Territories as well as Union of India have filed separate affidavits. In the affidavit filed on behalf of the Union of India, it is stated that the organized sector in India uses only imported variety of Chrysotile asbestos which is considered to have least harmful impact on the health of workers engaged in the manufacture of asbestos products and sufficient precautionary measures are being taken by the

industry to protect the workers from excessive exposure to the hazardous impact of asbestos fibre. Meeting the contentions raised by the petitioner as aforenoticed, it is submitted on behalf of the concerned respondents that only selective references have been made by the petitioner to unnecessary inflate the impact of asbestos fibre on public health. No recognition has been given by the petitioner to the strict emission norms prescribed for the industries manufacturing asbestos products by Ministry of Environment and Forest and other efforts undertaken by the Ministry have also not been referred to by the petitioner. Prescription of stringent emission norms is one of the main effort made by the concerned Ministry. The prescribed norms in the Environment (Protection) Act, 1986 are as follows :

> "These standards are 2.0 mg/Nm3 of total dust and 4 fb/cc of pure asbestos material, now being revised to 0.5fb/cc. Ministry of Labour has revised the permissible work place emission norms vide notification dated April 2001 bringing it down to 1 fb/cc from 2 fb/cc. The report of WHO in this regard has been quoted out of context. In the said report it has been clearly stated that further research is required to determine the adverse impact of Asbestos Fibre on human health."

6. The asbestos product only contains 8-10% asbestos fibre and the rest is cement (50%), clay (30-35%) and fly ash, wood, pulp, etc. which are not considered harmful for human health. Even here the asbestos fibres are locked with cement matrix particles and there is no scope for its disintegration/ spreading in the air in normal circumstances. Referring to the proceedings before the Calcutta High Court, the Union of India submitted that the Calcutta High Court refused to impose any ban on the manufacture and use of asbestos in Writ Petition No. 412 of 2002, copy of which has been placed on the record. It is the stand of the Union of India that the petitioner has not furnished any details of the industries which are working contrary

to law and where the workers are exposed to such hazardous health conditions. It is only then that the Government can take action in accordance with law and the petition, as such, lacks specific particulars.

7. States have taken different stands in their respective affidavits. However, all of them have stated that appropriate measures are being taken to ensure working of such units in accordance with law. In the affidavit filed on behalf of the State of Kerala, it is averred that there is only one factory carrying on manufacture of asbestos cement sheets and allied products in the entire State. This factory has obtained licence under the provisions of the Factories Act. It is further pointed out that this factory was established with fully automatic fibre handling system in the year 1986. After that, no asbestos manufacturing factory has been established in the State. While referring to the judgment of this Court in the case of *Consumer Education and Research Centre (supra)*, it is averred that strict instructions were issued to the Inspector of Factories and Boilers to take urgent steps for implementation of the directives of this Court. There is constant watch/review upon the standards of permissible exposure limit. Value of fibre/cc should be in line with the international standards and it would not exceed 0.1 fibre/cc at any time in the last three years. Some states like Himachal Pradesh, Tripura, Mizoram, Sikkim, Arunachal Pradesh and Manipur have stated that there is no asbestos factory within their territory.

8. State of Tamil Nadu in its affidavit has averred that only 13 factories which are handling Asbestos have been brought under the purview of Factories Act, 1948 out of which 3 factories are not working for the past 5 years and in the remaining 10 factories "Membrane Filter Test" is regularly being conducted and the asbestos fibre is found to be within the permissible limits. The workmen of these factories are covered under the Workmen Compensation Act/Employees State Insurance Scheme/Group Insurance of Insurance Company.

Thus, their interests are well protected. State of Bihar in its affidavit has stated that presently there is no industrial unit involved in manufacturing asbestos in the State. The use of asbestos product in the State is limited and is not to an extent that the secondary user of asbestos is likely to suffer from Mesothelioma fatalities attributed to asbestos. On the contrary, it also appears from the records that there are 22 cases of asbestosis in Gujarat and three cases of Mesothelioma in Andhra Pradesh. Out of these, persons suffering from Asbestosis or other diseases in Gujarat have not been given any compensation and their cases are pending, while the three persons suffering from Mesothelioma in Andhra Pradesh have been paid the compensation. Thus, it is a matter which essentially has to invite the attention of the Court.

9. From the above narrated factual matrix, giving rise to this Public Interest Litigation, it is clear that first, the Court has to examine whether any statutory, fundamental or other right of any person is being violated and an activity which is prohibited under law is being carried out i.e. production and manufacture of asbestos and allied products? If so, whether the Government is actively permitting such illegal activity? Second, whether in any case this Court can, in law, direct the banning of this activity, if not, what directions can be issued by the Court?

10. From the contents of the Writ Petition filed before this Court, it is clear that there is no law enacted so far which requires banning of any activity in regard to asbestos at the stage of mining, manufacture or production. Of course, there can be no doubt that uncontrolled utilization of asbestos, in any form, can be hazardous to human health. The reply affidavits filed by different States as well as Union of India clearly bring out that such activity, wherever is being carried out, is in accordance with specified parameters and under due supervision. The Writ Petition filed does not provide any data or detailed facts in relation to such uncontrolled or unauthorized activity of manufacture of asbestos being carried out in any

State. Merely stating that a few hundred workers were subjected to medical examination and were found to be affected by inhalation of asbestos particles may not be sufficient for this Court to accept it as a general proposition that there is hazardous use of asbestos all over the country, particularly, in view of the fact that such activity is being carried out at the mining or industrial level in different parts of the country. This Court had the occasion to examine this matter at great length in the case of *Consumer Education and Research Centre (supra)* wherein it issued certain directions. Once that judgment had been pronounced, there is hardly any occasion for the petitioner to institute this Writ Petition as an independent proceeding. The petitioner has made no effort to collect any information/data from various States as to whether the directions issued by the Court in that matter are being strictly implemented or not at all. On the contrary, it is the stand of the States as well as Union of India that the directions issued by this Court are being strictly adhered to. The parameters and norms have been specified and the industries using such raw materials are being constantly watched, in relation to all the functions of the factory, specially keeping in view the environment and health status of the workers and nearby residents. Even subsequent to the filing of the present petition, the petitioner has not put in any effort to seriously rebut the averments made in various affidavits filed by the States.

11. In *Jayjit Ganguly v. Union of India,* [CWP No. 412 of 2002 decided on 15th December 2004], a Division Bench of the Calcutta High Court also noticed that there is no dispute that asbestos fibre is hazardous to health and continuous exposure to certain types of such fibre can also prove to be fatal as it does not dissolve and the same is so thin that it can be inhaled and deposited in lungs. While noticing these facts, the Court referred to the judgment of this Court in the case of *Consumer Education and Research Centre (supra)* and the report of the Committee appointed by the Union of India to conduct study of asbestos fibre products. Relying upon the

Committee's report, the Court noticed that there was no data available to demonstrate as to what is the ratio of death directly attributable to asbestos fibre in relation to the products made available to the consumers in India. The Court, while dismissing the Writ Petition held as under:

> "During the course of hearing we came to learn that in 2001 yet another Committee was constituted by the Union of India through the Ministry of Environment for the purpose of devising the method of clearance for new or expansion of asbestos based products and to evolve a policy strategy to deal with use of asbestos. We are told that the suggestions given by the said Committee have implemented by providing stringent emission norms in terms of the Environment Protection Act, 1986 and work zone standards under the Factories Act, 1948. Therefore, it appears to us that the said committee too was involved with the matters pertaining to mining and manufacture of asbestos fibre and had no occasion to deal with the hazards of user of products manufactured from asbestos fibre. In such situation, we do not think that it would be appropriate for us to issue any direction as has been prayed for in the instant writ petition for we are unable to weigh the advantages of having asbestos based products and not having the same, in the absence of appropriate datas therefore. One thing, however, is clear that a large number of small scale industries which are normally labour incentive industries are depending on asbestos as their raw material for manufacture of their end product."

12. Once the matter has been dealt with and pronounced upon by this Court by giving a detailed judgment containing directions, we see no reason for filing the present petition. However, since the Petition has been pending for a considerable time before this Court, we will prefer to discuss the merits thereof. As already noticed, there is no law banning the use of asbestos in various manufacturing processes

despite its adverse effects on human health. It is not for this Court to legislate and ban an activity under relevant laws. Every factory using or manufacturing asbestos, obtains a licence under the Factories Act as well as permission from the competent authorities including permission under the Environmental Laws. Once all the laws in force have been complied with and directions of this Court as contained in the case of *Consumer Education and Research Centre (supra)* are carried out in their true spirit, we see no reason as to why this Court, in exercise of its extraordinary jurisdiction under Article 32 of the Constitution, should ban such an activity when admittedly large number of families are dependent upon such processes. What has to be ensured is that proper precautions are taken. The Court had already made ILO guidelines as one of the safety measures to be complied with by the industries and it is expected of each State Government and the Union Government to ensure safe and controlled use of asbestos. What is required is better supervision and regulatory control rather than banning of the activity. Lack of specific data as well as vague averments in the Writ Petition amongst others are the grounds on which we should decline to pass the mandamus prayed for. The affidavits filed by the official respondents, including Respondent No. 37, specifically point out 'safe and controlled' use of asbestos in manufacturing processes. The prayer with regard to constitution of a committee comprising of specific persons is, again, not a matter that falls within the realm of jurisdiction of this Court. It is for the expert bodies in the concerned Ministries which should regulate proper measures in this regard to ensure proper utilization of asbestos and raw materials in relation to various manufacturing activities, if they are being carried on in accordance with law and without endangering the life of the people.

13. It has been averred in one of the affidavits filed by the petitioner itself that the Government had introduced the White Asbestos (Ban on Use and Import) Bill, 2009 (hereinafter referred to as, 'the Bill'), which is pending in the Upper House.

Thus, there could be no doubt that it is a matter which squarely falls in the domain of the legislature and the legislature in its wisdom has taken steps in the direction of enacting necessary law. Issuance of any direction or formulation of any further policy by this Court will obviously be a futile exercise. There could hardly be any justification for banning, completely or partially, of the activity of manufacturing of asbestos and allied products in face of the above admitted position.

14. In the matter relating to secondary exposure of workers to asbestos, though the grounds have been taken in the Writ Petition without any factual basis, again in the Rejoinder filed to the counter affidavit of respondent No.37, this issue has been raised by the petitioner in detail. In the earlier judgment of this Court in the case of *Consumer Education and Research Centre (supra)*, hazards arising out of primary use of asbestos were primarily dealt with, but certainly secondary exposure also needs to be examined by the Court. In that judgment, the Court had noticed that it would, thus, be clear that diseases occurred wherever the exposure to the toxic or carcinogenic agent occurs, regardless of the country, type of industry, job title, job assignment or location of exposure. The diseases will follow the trail of the exposure and extend the chain of the carcinogenic risk beyond the work place. In that judgment, the Court had also directed that a review by the Union and the States shall be made after every ten years and also as and when the ILO gives directions in this behalf consistent with its recommendations or conventions. Admittedly, 15 years has expired since the issuance of the directions by this Court. The ILO also made certain specific directions vide its resolution of 2006 adopted in the 95th session of the International Labour Conference. It introduced a ban on all mining, manufacture, recycling and use of all forms of asbestos. As already noticed, serious doubts have been raised as to whether 'controlled use' can be effectively implemented even with regard to secondary exposure. These are circumstances which fully require the concerned quarters/authorities in the Government of India as

well as the State Governments to examine/review the matter in accordance with law, objectively, to achieve the greater health care of the poor strata of the country who are directly or indirectly engaged in mining or manufacturing activities of asbestos and/or allied products.

15. As already noticed above, the Government has already presented the Bill in Rajya Sabha. The statement of objects and reasons of this Bill specifically notices that the white asbestos is highly carcinogenic and it has been so reported by the World Health Organisation. In India, it is imported without any restriction while even its domestic use is not preferred by the exporting countries. Canada and Russia are the biggest exporters of white asbestos. In 2007, Canada exported 95% of the white asbestos, it mined out of which 43% was shipped to India. In view of these facts, there is an urgent need for a total ban on the import and use of white asbestos and promote the use of alternative materials. The Bill is yet to be passed but it is clearly demonstrated that the Government is required to take effective steps to prevent hazardous impact of use of asbestos.

16. In light of the above discussion, we do not see any reason to grant any of the prayers made in the Writ Petition except to the extent that we would issue the following directions while disposing of the Writ Petition:

a. Ministry of Labour in the Union of India and Department of Industries and Labour in all the State Government shall ensure that the directions contained in the judgment of this Court in the case of *Consumer Education and Research Centre (supra)* are strictly adhered to;

b. In terms of the above judgment of this Court as well as reasons stated in this judgment, we hereby direct the Union of India and the States to review safeguards in relation to primary as well as

secondary exposure to asbestos keeping in mind the information supplied by the respective States in furtherance to the earlier judgment as well as the fresh resolution passed by the ILO. Upon such review, further directions, consistent with law, shall be issued within a period of six months from the date of passing of this order;

c. Further we direct that if Union of India considers it proper and in public interest, after consulting the States where there are large number of asbestos industries in existence, it should constitute a regulatory body to exercise proper control and supervision over manufacturing of asbestos activities while ensuring due regard to the aspect of health care of the workmen involved in such activity. It may even constitute a Committee of such experts as it may deem appropriate to effectively prevent and control its hazardous effects on the health of the workmen;

d. The concerned authorities under the provisions of Environment (Protection) Act, 1986 should ensure that all the appropriate and protective steps to meet the specified standards are taken by the industry before or at the time of issuance of environmental clearance.

17. However, we find that it is imperative for the Court to issue the above directions in order to strike a balance between the health hazards caused by this activity on the one hand and ground reality that a large number of families, all over the country, are dependent for their livelihood on this activity, on the other. We certainly are not entering into the arena of legislature and are passing above directions in furtherance to the law laid down by this Court which, in terms of Article 141 of the Constitution, is binding on all concerned and to ensure effective and timely implementation of the provisions of the Environment

(Protection) Act. These directions must be read and construed in comity with the proposed legislation and are in no way detrimental to the same.

18. Before parting with this file we have to deal with one of the main objections raised by the respondents, as noticed above, particularly, Respondent No. 37 that the present petition is a result of business rivalry and has been filed by the petitioner at the behest of other industries and the entire Writ Petition lacks bona fide and is complete abuse of process of law. The petitioner NGO claims to be a registered body under the Societies Registration Act and non-profit organization, *inter alia*, working for protection of the environment and other public welfare activities. It also aims at protecting various interests of the common man particularly those who have no means and/or access for redressal of their grievances. It is concerned about the health hazards to workmen resulting from manufacture and use of asbestos and, thus, it prays for complete ban on such activity. As already noticed, this petition was defended by different respondents i.e. the State Government, Union of India and Association of Asbestos Cement Product Manufacturers. In light of this objection and the material placed on record, a Bench of this Court passed the following Order on 13th August, 2010 :

> "Kalyaneshwari has filed this writ petition seeking imposition of ban and payment of compensation to the industrial workers working in the manufacture, import and use of asbestos. This petition was filed as far back on 5th May, 2004. In the case of *B.K. Sharma* v. *Union of India* the Gujarat High Court vide order dated 9th December, 2004, has made the following observation :
>
> > "36. As far as preliminary objections raised against the maintainability of the petitions are concerned, we could have thrown out the first petition, being Special Civil Application No. 14460 of 2004 but for the other two petitions on the same subject matter.

> Normally, multiple petitions under Public Interest Litigation, on the same subject matter are not entertained. However, the first petition does not seem to have been filed bonafide or for real and genuine public cause and it does not inspire our confidence to treat it as Public Interest Litigation in real sense. The resolution dated 15th July, 2004 was produced at the belated stage. The relationship between some of the office-bearers and members of the Board of Trustees with the personnel of Electro Steel Castings Limited is difficult to be overlooked. It, therefore, leads us to believe that the first petition is a sponsored petition. In ASHOK KUMAR PANDEY v. STATE OF WEST BENGAL and Ors. (supra), the Hon'ble Supreme Court, in no uncertain terms, has observed that "when there is material to show that a petition styled as a public interest litigation is nothing but a camouflage to foster personal disputes, said petition is to be thrown out." Since there is business rivalry between the said ESCL and the Respondent No. 5 and since the said ESCL is in the habit of sponsoring such petitions, we do not concur with the view of the present petitioners that there is a real and genuine public interest involved in the litigation. It is difficult to believe that they have approached this court to wipe out violation of fundamental rights and genuine infraction of statutory provisions, but not for personal gain or private profit or political motive or any oblique consideration, as observed by the Hon'ble Supreme Court in that case."
>
> The above observation of the High Court indicates the relationship between the NGOs and the Steel Company, whose name is quoted hereinabove.
>
> Shri Colin Gonsalves, learned senior counsel

appearing on behalf of the petitioner herein all throughout these proceedings till today, fairly states that he has looked into the matter and it would not be possible for him to appear on behalf of the petitioner in this matter any further. He further states that Advocate-on-record has also addressed a letter stating that she would not like to represent Kalyaneshwari (NGO). In the circumstances, the Registry is directed to issue notice to the petitioner informing them of the next date of hearing. The matter is made returnable on 27th August, 2010. In the meantime, we would like to know from the Central Government as to whether petitioner-NGO is on the list of NGOs maintained by the Union of India and whether the petitioner-NGO is funded by the Central Government? We request Mr. H.P. Raval, learned Additional Solicitor General to assist u8s as amicus in the matter. The Advocate-on-Record is given discharge. We appreciate the stand taken by Shri Colin Gonsalves in taking a fair stand in the case.

The Advocate-on-Record is given discharge. We appreciate the stand taken by Shri Colin Gonsalves in taking a fair stand in the case."

19. After passing of that order the petitioner NGO was further directed to file an affidavit explaining its conduct highlighted by Gujarat High Court in the case of *B.K. Sharma (supra).* In furtherance to the direction of this Court dated 27th August, 2010, B.K. Sharma, claiming to be working as Secretary of the petitioner, filed a detailed affidavit. In this affidavit, besides reiterating some of the averments made in the Writ Petition, it has been specifically averred that 'on the advice of the High Court all the three Writ Petitions were withdrawn so as to make proper representation to the Central Government to consider the objections in the petition.' Specific

dispute has also been raised and it is denied that one member of the Society, namely, Shanti Swaroop has worked with the Steel Company ESCL and that only consultancy services were provided by him on part time basis and comparison of his services is sought to be made with that of lawyers and Chartered Accounts working for the company. In the affidavit filed by the petitioner in furtherance to the order of this Court dated 27th August, 2010, it is stated that B.K. Sharma was neither working as Advisor/Consultant of ESCL between November-December 2003 to March-April 2004 nor was he looking after the marketing activity of ESCL in Madhya Pradesh. It is stated that during this period he was working in Rajasthan on an important project. First, it is nowhere denied that B.K. Sharma had no connection of any kind with ESCL at any point of time; second, even in the affidavit, necessary particulars have not been given of the company or the project for which he was working in Rajasthan. Still attempt has been made to put the blame on the Gujarat High Court by stating that the Court had not appreciated the facts correctly. Other NGOs had also filed some writ petitions and as such the petition by the petitioner was bona fide. It is also averred, 'it is pertinent to mention that neither the Court nor the respondent felt the need for substantiating the allegations with evidence, which is contrary to the settled proposition of law that a person making an allegation needs to prove it'.

20. Three writ petitions had been filed in the Gujarat High Court, including one by B.K. Sharma acting on behalf of the petitioner NGO, which was petitioner No. 2, in that Writ Petition, seeking direction against the authorities to take appropriate preventive steps and measures against the Respondent No.5 M/s. Saw Pipes Ltd. in proceeding further with the construction activities of Respondent No.5's project comprising Blast Furnace and Ductile Iron/Cast Iron pipe, fittings casting manufacturing plant and foundry near Mundra, Kutch with further prayer that they be stopped from carrying on any activity and that the factory constructed should be demolished. These

petitions were heard at great length by a Bench of Gujarat High Court. Ultimately, the Court recorded its findings in paragraphs 7.2, 36 & 37 of the judgment. In these findings, the Court noticed that earlier a PIL had been filed in the Madras High Court, allegedly sponsored by ESCL, against a company manufacturing the same articles. Later on that company had been taken over by ESCL and the present petition is also filed as a result of business rivalry. The Court, *prima facie*, recorded the finding that there is close association of B.K. Sharma with the rival company of ESCL and one Shanti Swaroop was also appointed as consultant for the NGO, who was earlier associated with ESCL. The Court finally recorded the conclusion that the petition was mala fide and was a result of collusion between the steel company and the NGO.

21. Another aspect on which the High Court recorded its adverse finding against the petitioner is that the petitioner had submitted some official documents, including noting on Government files, which were not published documents and to which the petitioner had no access. Despite directions of the Court, the petitioner had failed to disclose the source of possession of those documents. The matter did not end there as, when the true copies of the said noting/documents were produced before the Court by the Department, it came to light that certain paragraphs/portions of the notings etc. had been omitted in the documents filed by the petitioner and certified as true copies. From the record before us, it is clear that B.K. Sharma as well as Shanti Swarup had professional commitments in one form or the other either on permanent or temporary basis with ESCL. It has been stated in the affidavit filed by B.K. Sharma that three writ petitions were withdrawn on the advice of the Gujarat High Court which is hardly true. The Court had only granted liberty, while dismissing the writ petitions as withdrawn, to approach the Central Government. The Central Government had again declined to accept the representations made by the petitioners resulting in filing of writ petitions for the second time which culminated in the final

judgment by the Gujarat High Court in the case of *B.K. Sharma* (supra).

Above was the conduct of the petitioner before the Gujarat High Court and we hardly find any improvement in its behaviour before this Court in the present litigation. Even before this Court, a judgment which has attained finality on all factual matrix and even otherwise, is attempted to be brushed aside by making irresponsible statements, *inter alia*, that the Gujarat High Court had failed to apply its mind. The judgment of the Gujarat High Court dismissing all the three writ petitions was challenged before this Court by way of filing Special Leave Petitions which came to be dismissed vide order dated 28th January, 2005. Thus, the judgment of the Gujarat High Court for all intent and purposes attained finality and we do not think that legality or correctness of the judgment can now be questioned in these proceedings. It is of no use and help to the petitioners now to claim that no proof was produced before that Court to establish the allegations that the petition was filed at the behest of ESCL. They were writ petitioners and the Court, after hearing the parties at length and perusing the record, has recorded the above findings which, in any case, do not suffer from any infirmity, much less, illegality so as to be disregarded by this Court. We are constrained to say that the findings recorded by the Gujarat High Court reflect the picture of the petitioner which certainly invites judicial chastisement and appropriate orders.

22. During the hearing of this Writ Petition, the Court had called upon the learned Addl. Solicitor General to find out from the concerned Ministries whether the petitioner NGO was a registered NGO and whether it was granted any financial assistance or grant-in-aid. However, vide letter dated 26th August, 2010, copy of which has been placed on record by the learned Addl. Solicitor General, it has been informed that the petitioner NGO is not recognized by any Ministry and no financial assistance has been sanctioned to it.

23. Another aspect, which has still not been clarified by the petitioner, is how the present petition came to be filed in face of the judgment of this Court in the case of *Consumer Education and Research Centre (supra)* and, in fact, what was the need to file it. It cannot be ignored that valuable time of this Court is consumed in dealing with such public interest litigations which are filed without proper study and data and merely on some reference to very few workmen working in an industry and without projecting any requirement at the national level demanding the attention of this Court in treating it as a national problem. The Kerala State Human Rights Commission vide order dated 31st January, 2009 has also dealt with the same problem which does not even find a mention in the present petition and which the petitioner is expected to know as it claims to be working for the common man in this behalf. Every litigant, who approaches the Court, owes a duty to approach the Court with clean hands and disclose complete facts. A petition which lacks bona fide and is intended to settle business rivalry or is aimed at taking over of a company or augmenting the business of another interested company at the cost of closing business of other units in the garb of PIL would be nothing but abuse of the process of law.

24. Presumably, and as contended, the direct impact of banning of activities of mining/manufacturing relating to asbestos shall result in increase in demand of cast iron/ductile iron production as they are some of the suitable substitutes for asbestos. It is not in dispute that ESCL is one of the largest manufacturer of iron and allied products in India and there was a professional and/or other connections between ESCL and B.K. Sharma on the one hand and B.K. Sharma and Shanti Swarup on the other who, admittedly at present, is involved with the activities of NGO for a considerable time. Thus, it would be a reasonable conclusion to draw that the Writ Petition has been hardly filed in public interest but is a private interest litigation to give rise to business opportunities in a particular field.

25. In *Ashok Kumar Pandey v. State of West Bengal* [(2004) 3 SCC 349], this Court took a cautious approach while entertaining public interest litigations and held that public interest litigation is a weapon, which has to be used with great care and circumspection. The judiciary has to be extremely careful to see that no ugly private malice, vested interest and/or seeking publicity lurks behind the beautiful veil of public interest. It is to be used as an effective weapon in the armoury of law for delivering social justice to citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. In the case of *Rajiv Ranjan Singh Lalan v. Union of India* [(2006) 6 SCC 613], this Court reiterated the principle and even held that howsoever genuine a case brought before a Court by a public interest litigant may be, the Court has to decline its examination at the behest of a person who, in fact, is not a public interest litigant and whose bona fides and credentials are in doubt; no trust can be placed by the Court on a mala fide applicant in a public interest litigation. The Courts, while exercising jurisdiction and deciding a public interest litigation, has to take great care, primarily, for the reason that wide jurisdiction should not become a source of abuse of process of law by disgruntled litigant. Such careful exercise is also necessary to ensure that the litigation is genuine, not motivated by extraneous considerations and imposes an obligation upon the litigant to disclose true facts and approach the Court with clean hands. Thus, it is imperative that the petitions, which are bona fide and in public interest alone, be entertained in this category. Abuse of process of law is essentially opposed to any public interest. One, who abuses the process of law, cannot be said to serve any public interest, much less, a larger public interest. In the name of the poor let the rich litigant not achieve their end of becoming richer by instituting such set of petitions to ban such activities. Besides the fact that the present petition lacks bona fides, it is also obvious that the petitioner though had prayed for complete ban on all mining and manufacturing activities but had hardly made any study or prepared statistical data in that regard. It only made

reference to certain studies in foreign countries. The petitioner, claiming to be an organization involved in the good of the common man, ought to have taken greater pains to state essential facts supported by documents in relation to Indian environment.

26. The document referred to as Ex.P9 in paragraph 36 of the Writ Petition is probably the only document which allegedly records the conditions of a few workmen in India and contains the names of a few doctors and workers. This document is neither signed by anybody nor does it give address of any workman or the industry/factory where such workman is working. It is expected of the petitioner to have made proper efforts in collection of such material before it moved this Court to treat this problem at the national level and had spent its judicial time. All the States in the country have been issued notices of this petition and they have denied the allegations. It was incumbent upon the petitioner thus to at least substantiate the averments in the petition by some cogent and documentary evidence actually related to the working conditions of the workmen in various factories in different States. In our view, the petitioner has miserably failed to discharge this onus.

27. The conduct of the petitioner before the Gujarat High Court appears to be contemptuous and certainly is an abuse of the process of the court in terms of the finding recorded by that Court which has attained finality. That petition was instituted at the behest of ESCL, while the present petition also does not demonstrate that intention of the petitioner is to achieve public interest. This Court in *Raunaq International Ltd.* v. *I.V.R. Constructions Ltd.* [(1999) 1 SCC 492] has clearly stated that public interest litigation should be bona fide for public good and nor merely a cloak for attaining private ends. The Court clearly enunciated the principle that previous record of public service of the litigant can also be examined by the Court. To enable the Court to strike a balance between two conflicting interests,

it is important that public mischief is prevented. It appears to have been moved again at the behest of the same company and, in any case, to ultimately cause material and business gains to that or such other companies. Thus, the present petition lacks bona fide, is an abuse of the process of the Court and has been filed as a proxy litigation for the purpose of achieving private interest. This Court cannot permit such practice to prevail and it needs to be deterred at the very threshold.

28. In view of the preceding discussion in detail and its analysis, we perceive no merit in this petition, as far as prayer of the petitioner for banning of mining and manufacturing activities in asbestos or its allied products is concerned. While rejecting that prayer, we dispose of this petition with the above directions.

29. Keeping in view the conduct of the petitioner, particularly, B.K. Sharma, we hereby issue notice to him as well as the petitioner to show cause why proceedings under the Contempt of Courts Act, 1971 be not initiated against them and/or in addition/alternative, why exemplary cost be not imposed upon them. Further, we also call upon the petitioner to show cause why the Registrar, Government of NCT, Delhi be not directed to take action against them in accordance with law.

IA No.9 of 2010 in WP (C) No.260 of 2004

We find no reason to implead the applicant as a party respondent in the present petition at this stage. The IA for impleadment is dismissed.

N.J. Matters diposed of.

RABINDRA KUMAR PAL @ DARA SINGH
v.
REPUBLIC OF INDIA
Criminal Appeal No. 1366 of 2005

JANUARY 21, 2011

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

Penal Code, 1860 – s. 302 – Rioting, arson and murder of three persons – Christian Missionary from Australia, engaged in propagating and preaching Christianity in the tribal area, burnt to death alongwith his two minor sons by 50-60 miscreants – Victims also prevented from escaping from the vehicle – Conviction and sentence of 14 accused – High Court modifying death sentence awarded to A-1 to life imprisonment and upheld life imprisonment imposed on A-3 and acquitted the others – On appeal, held: Letters addressed by A-3 to the trial judge wherein he confessed his guilt, in the course of trial lend ample corroboration to his identification before the trial court by PW-23, even though no TIP was conducted by Judicial Magistrate – A-3 also addressed a letter to his sister-in-law, inculpating himself and A-1 – A-3 though denied the letters but it amounts to confession and lend support to the evidence in identification before the trial court for the first time – Testimony of witnesses that miscreants raised slogans in the name of A-1 which corroborates the identification before the trial court for the first time – All the witnesses mentioned about the blowing of whistle by A1 – A-3 in his statement u/s. 313 Cr.P.C. admitted to have set fire to the vehicles and confessed his guilt – Abscondence of A-3 soon after the incident and avoiding of arrest, is a relevant conduct to prove his guilt – Death of the victims by setting fire by the miscreants cannot be ruled out – Even in the midst of uncertainties, witnesses specified the role of A-1 and A-3 – However, more than 12 years having elapsed since the act

was committed, life sentence awarded by the High Court not enhanced – Conviction of A-1 and A-3 and the sentence of life imprisonment imposed on them by the High Court, maintained – As regards the other accused, testimony of the eye-witnesses about their identification before the trial court for the first time without corroboration by previous Test Identification Parade, not credible – In view of absence of acceptable materials and various infirmities in the prosecution case, order of acquittal of accused other than A-1 and A-2 upheld – Sentence/Sentencing – Evidence – Test identification parade.

Identification – Photo identification and identification of the accused by the witnesses done for the first time before the trial court without being corroborated by Test Identification Parade or any other material – Evidentiary value – Held: Though such identification is permissible but cannot be given credence without further corroborative evidence – On facts, for many days, eye-witnesses never came forward before the IOs and the police personnel claiming that they had seen the occurrence – As such, their testimony about the identification of the accused other than A-1 and A-3 before the trial court for the first time without corroboration by previous TIP, not credible –As regards A-1 and A-3, they were identified which was also corroborated by the evidence of slogans given in their name and each one of the witnesses asserted the said aspect, thus, their identification can be relied upon – Test identification parade

Code of Criminal Procedure, 1963 – s. 164 – Recording of confessions and statements – Procedure to be followed by the Magistrate – Reiterated – On facts, procedural lapse on the part of the Judicial Magistrate in recording confessional statements – Accused in their confessional statements, made exculpatory statements – Thus, confessional statements with regard to accused other than A-1 and A-3, not admissible.

Appeal – Appeal against acquittal – When two views are

possible, the one in favour of the accused should be accepted – Presumption of innocence is a fundamental principle of criminal jurisprudence – On facts, absence of definite assertion from the prosecution side, about the specific role and involvement of the acquitted accused who are all poor tribals – Thus, not safe to convict them – Order of acquittal of these accused upheld – Criminal jurisprudence.

Sentence/Sentencing – Conviction u/s. 302 IPC – Award of Punishment – Held: Normal rule is to award punishment of life imprisonment – Punishment of death should be resorted to only for the rarest of rare cases which is to be examined with reference to the facts and circumstances of each case – Court to take note of the aggravating as well as mitigating circumstances – Penal Code, 1860.

Secularism – Concept of – Held: State will have no religion – It shall treat all religions and religious groups equally and with equal respect without in any manner interfering with their individual right of religion, faith and worship –There is no justification for interfering in someone's religious belief by any means – Constitution of India, 1950.

The prosecution case was that 'GS', a Christian Missionary from Australia, was engaged in propagating and preaching Christianity in the tribal area of Orissa. On the fateful day, the Missionary team conducted different programmes in the village near the church and retired for the day. 'GS' and his two minor sons slept in a vehicle. At mid-night, a mob of 60-70 people set fire to the vehicle and prevented 'GS' and his sons to escape from vehicle. As a result GS' and his two sons were burnt to death. The local police and the State Crime Branch failed to conduct the investigation satisfactorily and as such the investigation was transferred to CBI. The charge sheet was filed against 14 accused persons. The prosecution examined 55 witnesses and the defence examined 25 witnesses. The trial court convicted all the accused and

sentenced them for offences punishable under various Sections. 'DS'- A-1 was awarded death sentence and the others were awarded sentence of life imprisonment. The High Court holding that the witnesses are not trustworthy and no credence should be given to their statement and confessional statements were procured by the investigating agency under threat and coercion, modified the death sentence awarded to A-1 into life imprisonment and upheld the sentence of life imprisonment awarded to 'MH'-A-3 and acquitted the other accused. Therefore, the instant appeals were filed by A-1, A-3 and CBI.

Dismissing the appeals, the Court

HELD: 1. The analysis of entire materials clearly shows that the High Court was right in arriving at its conclusion. In the instant case, there is no material to prove conspiracy charge against any of the accused. Even in the midst of uncertainties, the witnesses have specified the role of A-1 and A-3 which is accepted and confirmed. The conviction of the appellant A-1 and A-3 and the sentence of life imprisonment imposed on them, is maintained. In the absence of acceptable materials and in view of the various infirmities in the prosecution case as pointed out by the High Court, the order of acquittal of others who are all poor tribals is concurred with. [Para 48] [995-G-H; 996-A-B]

2.1 In the absence of any independent corroboration like Test Identification Parade held by judicial Magistrate, the evidence of eye-witnesses as to the identification of the appellants/accused for the first time before the trial court generally cannot be accepted. If the case is supported by other materials, identification of the accused in the dock for the first time would be permissible subject to confirmation by other corroborative evidence, which are lacking in the instant case, except for A-1 and A-3. The High Court rightly

observed that for a long number of days, many of these eye-witnesses never came forward before the IOs and the police personnel visiting the village from time to time, claiming that they had seen the occurrence. Thus, no importance need to be attached on the testimony of these eye-witnesses about their identification of the appellants other than A1 and A-3 before the trial court for the first time without corroboration by previous TIP held by the Magistrate in accordance with the procedure established. [Para 11] [960-C-G]

2.2 Showing photographs of the miscreants and identification for the first time in the trial court without being corroborated by TIP held before a Magistrate or without any other material may not be helpful to the prosecution case. The evidence of witness given in the court as to the identification may be accepted only if he identified the same persons in a previously held TIP in jail. It is true that absence of TIP may not be fatal to the prosecution. In the instant case, A-1 and A-3 were identified and also corroborated by the evidence of slogans given in his name and each one of the witnesses asserted the said aspect insofar as they are concerned. None of these witnesses named the offenders in their statements except few recorded by IOs in the course of investigation. Though an explanation was offered that out of fear they did not name the offenders, the fact remains, on the next day of the incident, Executive Magistrate and top level police officers were camping the village for quite some time. Inasmuch as evidence of the identification of the accused during trial for the first time is inherently weak in character, as a safe rule of prudence, generally it is desirable to look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier TIP. Though some of them were identified by the photographs except A-1 and A-3, no other corroborative

material was shown by the prosecution. Thus, it is clear that identification of accused persons by witness in dock for the first time though permissible but cannot be given credence without further corroborative evidence. Though some of the witnesses identified some of the accused in the dock without corroborative evidence, the dock identification alone cannot be treated as substantial evidence, though it is permissible. [Paras 12 and 15] [960-H; 961-A-E; 966-D-E]

Manu Sharma vs. State (NCT of Delhi) **(2010) 6 SCC 1 – relied on.**

Umar Abdul Sakoor Sorathia vs. Intelligence Officer, Narcotic Control Bureau **AIR 1999 SC 2562;** *Jana Yadav vs. State of Bihar* **(2002) 7 SCC 295 – referred to.**

3. If the witnesses are seen through microscope, it is true that the contradictions would be visible and clear but by and large they explained the prosecution case though they could not identify all the accused persons with clarity except A-1 and A-3. By virtue of these minor contradictions, their testimony cannot be rejected in toto. But, by and large, there are minor contradictions in their statements. In the face of the difference in the evidence of prosecution witnesses with regard to light, clothing, number of accused persons, fog, faces covered or not, it is not acceptable in toto except certain events and incidents which are reliable and admissible in evidence. [Para 17] [967-D-F]

4.1 The following principles emerge with regard to Section 164 Cr.P.C.:-

(i) The provisions of Section 164 Cr.P.C. must be complied with not only in form, but in essence.

(ii) Before proceeding to record the confessional

statement, a searching enquiry must be made from the accused as to the custody from which he was produced and the treatment he had been receiving in such custody in order to ensure that there is no scope for doubt of any sort of extraneous influence proceeding from a source interested in the prosecution.

(iii) A Magistrate should ask the accused as to why he wants to make a statement which surely shall go against his interest in the trial.

(iv) The maker should be granted sufficient time for reflection.

(v) He should be assured of protection from any sort of apprehended torture or pressure from the police in case he declines to make a confessional statement.

(vi) A judicial confession not given voluntarily is unreliable, more so, when such a confession is retracted, the conviction cannot be based on such retracted judicial confession.

(vii) Non-compliance of Section 164 Cr.P.C. goes to the root of the Magistrate's jurisdiction to record the confession and renders the confession unworthy of credence.

(viii) During the time of reflection, the accused should be completely out of police influence. The judicial officer, who is entrusted with the duty of recording confession, must apply his judicial mind to ascertain and satisfy his conscience that the statement of the accused is not on account of any extraneous influence on him.

(ix) At the time of recording the statement of the accused, no police or police official shall be present in the open court.

(x) Confession of a co-accused is a weak type of evidence.

(xi) Usually the Court requires some corroboration from the confessional statement before convicting the accused person on such a statement. [Para 29] [980-G-H; 981-A-H; 982-A]

Bhagwan Singh and Ors. vs. State of M.P. **(2003) 3 SCC 21;** *Shivappa vs. State of Karnataka* **(1995) 2 SCC 76;** *Dagdu and Ors. vs. State of Maharashtra* **(1977) 3 SCC 68;** *Davendra Prasad Tiwari vs. State of U.P.* **(1978) 4 SCC 474;** *Kalawati and Ors. vs. State of Himachal Pradesh* **1953 SCR 546;** *State thr. Superintendent of Police, CBI/SIT vs. Nalini and Ors.* **(1999) 5 SCC 253;** *State of Maharashtra vs. Damu* **(2000) 6 SCC 269 – relied on.**

4.2 The analysis of evidence of Judicial Magistrates – PW-29 who recorded the confessional statement of 'RS' and 'TH' and PW-34 who recorded the confessional statement of 'MM', 'UK' and 'DP', shows that many of the confessional statements were recorded immediately after production of the maker after long CBI custody and in some cases after such statements were made and recorded by the Judicial Magistrate, the maker was remanded to police custody. Though the Magistrates have deposed that the procedure provided under Section 164 Cr.P.C. has been complied with, various warnings/ cautions required to be given to the accused before recording such confession, have not been fully adhered to by them. The High Court strongly observed about the procedural lapse on the part of PWs-29 and 34. Their statements and requirements in terms of Section 164 Cr.P.C. are verified. In the certificate, there is no specific reference about the nature of the custody from which

these persons were produced nor about the assurance that they would not be remanded to police custody if they declined. Section 164 Cr.P.C. requires strict and faithful compliance of sub-sections 2 to 4, the failure to observe safeguards not only impairs evidentiary value of confession but cast a doubt on nature and voluntariness of confession on which no reliance can be placed. No exceptional circumstances could be brought to the notice by the prosecution in respect of the appellants other than A-1 and A-3. [Paras 32 and 33] [983-H; 984-A-H]

4.3 Under sub-section (3) of Section 164 Cr.P.C., if any accused refuses to make any confessional statement, such Magistrate shall not authorize detention of the accused in police custody. Remanding 'RS' to police custody after his statement was recorded under Section 164 Cr.P.C. is not justified. The High Court rightly observed that the possibility of coercion, threat or inducement to the accused 'RS' to make the confession cannot be ruled out. In the same manner, confession of accused 'TH' was also recorded by the very same Magistrate. The High Court pointed out that he was not cautioned that if he made any confession, same may be used against him in evidence and on that basis he may be sentenced to death or imprisonment for life; and that if he refused to make the confessional statement, he would not be remanded to police custody. Both of these accused, in their confessional statements, made exculpatory statements. PW-34, Judicial Magistrate, recorded the confessional statement of accused 'MM' immediately after his production before him from the police custody. It was noted that he was given only 10 minutes' time for reflection after his production from police custody. The other accused who made the confessional statement is 'DP' whose statement was recorded by PW-34. The High Court, on corroboration of

the confessional statement, had found that the entire confessional statement is exculpatory and he also retracted from the confession. It was further found that this confessional statement was made long after the charge-sheet was filed. [Paras 31 and 32] [983-D-H; 984-A-C]

5. The procedure adopted by the investigating agency with regard to taking of the signature/writings of A-3 or examination by the expert was analyzed and approved by the trial court and confirmed by the High Court, and cannot be faulted with. In view of oral report of PW-4 which was reduced into writing, the evidence of PW-23, two letters dated 01.02.2002 and 02.02.2002 addressed by A-3 to the trial judge facing his guilt coupled with the other materials, the submission that there is deficiency in the prosecution case insofar as A-3, cannot be accepted and the conclusion arrived by the High Court is confirmed. [Para 35] [989-B-C]

The State of Bombay vs. Kathi Kalu Oghad and Ors. **(1962) 3 SCR 10;** *M.P. Sharma and Ors. vs. Satish Chandra, District Magistrate, Delhi and Ors.* **(1954) SCR 1077 – relied on.**

6.1 With regard to the role of A-3, the prosecution very much relied on the letters by A-3 addressed to the Sessions Judge wherein he confessed his guilt. Though a serious objection was taken about the admissibility of these two letters, the contents of these two letters in the course of trial lend ample corroboration to his identification before the trial court by PW-23 and the same could be safely relied upon. Even in his case, it is true that there was no TIP conducted by Judicial Magistrate. [Para 36] [989-E-F]

6.2 The prosecution also relied on a letter said to have been addressed by A-3 to PW-9, his sister-in-law.

The said letter is a confessional statement of accused A-3 inculpating himself and A-1. A-3 in said letter confessed that he along with A-1 burnt the 'Jisu' (Christian Missionary). All the ocular witnesses have testified that after setting fire to vehicles and burning 'GS' and his two sons alive, the miscreants raised slogans "Jai Bajrang Bali" and "Dara Singh Zindabad". The entire contents of letter were used by the trial judge which was rightly accepted by the High Court. [Paras 38 and 41] [990-F-G; 992-D]

6.3 A-3 in his statement recorded under Section 313 Cr.P.C. on 04.02.2002, admitted to have set fire to the vehicles and in his statement recorded under Section 313 Cr.P.C. on 24.03.2003 has admitted to have filed petitions pleading guilty and to have stated in his earlier examination under Section 313 Cr.P.C. that he had set fire to the vehicles. There is no impediment in relying on a portion of the statement of the accused and finding him guilty in consideration of the other evidence against him as laid by the prosecution. [Para 39] [991-B-C]

6.4 It is clear that A-3 though denied the letters written by him, the contents of the said two letters amount to confession, or in any event admission of important incriminating materials. He had been identified before the trial court by PW-23 as a participant in the crime. The High Court rightly observed that the contents of the two letters lend support to the evidence in identification before the trial court for the first time as narrated by PW-23. In this way, his identification for the first time in the trial court is an exceptional case and even in the absence of further corroboration by way of previously held TIP, his involvement in the crime is amply corroborated by the said letters written by him. [Para 40] [991-D-F]

6.5 Though an objection was raised as to the manner

in which the trial judge questioned A-3 with reference to contents of his letters dated 01.02. 2002 and 02.02.2002, addressed to the Sessions Judge wherein he confessed his guilt, it is relevant to point out that when the person facing trial insisted to look into the contents of his letters, the presiding officer concerned has to meet his requirement subject to the procedure established. The trial judge accepted the entire contents of the admission made by A-3 and affording reasonable opportunity and by following the appropriate procedure coupled with the corroborative evidence of PW-23, upheld his involvement and participation in the crime along with A-1 which resulted in rioting, arson and murder of three persons. Also A-3 absconded soon after the incident and avoided arrest and this abscondence being a conduct under Section 8 of the Evidence Act, 1872 should be taken into consideration along with other evidence to prove his guilt. The fact remains that he was not available for quite sometime till he was arrested which fact has not been disputed. Before accepting the contents of the two letters and the evidence of PW-23, the trial Judge afforded him required opportunity and followed the procedure which was rightly accepted by the High Court. [Para 41] [992-A-F]

7.1 Though several inconsistencies were noticed in the prosecution evidence and the accused persons were not specifically identified except A-1 and A-3, the fact remains that the Van in which 'GS' and his two children were sleeping were set on fire and burnt to death due to the cause of the miscreants. The death of these three persons by setting fire by the miscreants cannot be ruled out. There is no material to conclude that the fire emanated from inside of the vehicle and then spread to rest of the vehicle after the fuel tank caught fire. There is no basis for such conclusion though the prosecution

witnesses could not pin-point and identify the role of each accused. [Para 34] [985-C-E]

7.2 All the eye-witnesses examined by the prosecution consistently stated that during occurrence the miscreants raised slogans in the name of A-1 as "Dara Singh Zindabad". The story of this slogan was also mentioned in the first information report lodged soon after the occurrence. This slogan is in the name of A-1, corroborates the identification before the trial court for the first time. In addition to the same, some of the witnesses identified A-1 by photo identification. In addition to the same, all the witnesses mentioned about the blowing of whistle by A-1. [Para 42] [992-G-H; 993-A-C]

8. The submission that only after the intervention of PW-55, I.O. from CBI, several persons made a confessional statement by applying strong arm tactics that were used by the investigating agency, the entire case of the prosecution has to be rejected, cannot be accepted. Some of the witnesses did not mention anything about the incident to the local police or the District Magistrate or the higher level police officers who were camping from the next day of the incident. However, regarding the fresh steps taken by the Officer of the CBI, particularly, the efforts made by PW-55, though there are certain deficiencies in the investigation, the same cannot be under estimated. The young children were being coerced into being witness to the occurrence whereas the elder family members were never joined as witness by the prosecuting agency. The prosecution could have examined elders and avoided persons like PW-5 who was a minor on the date of the incident. [Para 44] [993-H; 994-A-E]

9. On conviction under Section 302 IPC, the normal rule is to award punishment of life imprisonment and the punishment of death should be resorted to only for the

rarest of rare cases. Whether a case falls within the rarest of rare case or not, has to be examined with reference to the facts and circumstances of each case and the court has to take note of the aggravating as well as mitigating circumstances and conclude whether there was something uncommon about the crime which renders the sentence of imprisonment for life inadequate and calls for death sentence. However, more than 12 years has elapsed since the act was committed, the life sentence awarded by the High Court need not be enhanced in view of the factual position. [Para 43] [993-E-G]

Bachan Singh vs. State of Punjab **AIR 1980 SC 898;** *Machhi Singh vs. State of Punjab* **(1983) 3 SCC 470;** *Kehar Singh vs. State (Delhi Administration)* **(1988) 3 SCC 609 – relied on.**

10.1 Insofar as the appeals filed by the CBI against the order of acquittal by the High Court in respect of certain persons, it was pointed out that when two views are possible, the one in favour of the accused should be accepted. The presumption of innocence is a fundamental principle of criminal jurisprudence. Further, presumption of innocence is further reinforced, reaffirmed and strengthened by the judgment in his favour. [Para 45] [994-E-F]

State of Uttar Pradesh vs. Nandu Vishwakarma and Ors. **(2009) 14 SCC 501;** *Sambhaji Hindurao Deshmukh & Ors. Vs. State of Maharashtra* **(2008) 11 SCC 186;** *Rahgunath vs. State of Haryana* **(2003) 1 SCC 398;** *Allarakha K. Mansuri vs. State of Gujarat* **(2002) 3 SCC 57 – relied on.**

10.2 In the absence of definite assertion from the prosecution side, about their specific role and involvement of the acquitted accused who are all poor tribals, as rightly observed by the High Court, it is not safe to convict them. The reasoning and conclusion of the

High Court insofar as the order relating to acquittal of certain accused persons, is concurred with. [Para 45] [995-A-B]

11. In a country like India where discrimination on the ground of caste or religion is a taboo, taking lives of persons belonging to another caste or religion is bound to have a dangerous and reactive effect on the society at large. It strikes at the very root of the orderly society which the founding fathers of our Constitution dreamt of. The concept of secularism is that the State will have no religion. The State shall treat all religions and religious groups equally and with equal respect without in any manner interfering with their individual right of religion, faith and worship. It is hoped that the vision of religion playing a positive role in bringing India's numerous religion and communities into an integrated prosperous nation be realized by way of equal respect for all religions. There is no justification for interfering in someone's religious belief by any means. [Paras 46 and 47] [995-C-F]

Case Law Reference:

(2010) 6 SCC 1	**Relied on**	**Para 11**
AIR 1999 SC 2562	**Referred to**	**Para 14**
(2002) 7 SCC 295	**Referred to**	**Para 15**
(2003) 3 SCC 21	**Relied on**	**Para 22**
(1995) 2 SCC 76	**Relied on**	**Para 23**
(1977) 3 SCC 68	**Relied on**	**Para 24**
(1978) 4 SCC 474	**Relied on**	**Para 25**
1953 SCR 546	**Relied on**	**Para 26**
(1999) 5 SCC 253	**Relied on**	**Para 27**
(2000) 6 SCC 269	**Relied on**	**Para 28**
(1962) 3 SCR 10	**Relied on**	**Para 35**
(1954) SCR 1077	**Relied on**	**Para 35**
AIR 1980 SC 898	**Relied on**	**Para 43**
(1983) 3 SCC 470	**Relied on**	**Para 43**
(1983) 3 SCC 609	**Relied on**	**Para 43**
(2009) 14 SCC 501	**Relied on**	**Para 45**
(2008) 11 SCC 186	**Relied on**	**Para 45**
(2003) 1 SCC 398	**Relied on**	**Para 45**
(2002) 3 SCC 57	**Relied on**	**Para 45**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1366 of 2005.

From the Judgment & Order dated 19.05.2005 of the High Court of Orissa at Cuttack in Criminal Appeal No. 239 of 2003.

WITH

Crl. Appeal Nos. 1259 of 2007 & 1357-1365 of 2005.

Vivek K. Tankha, KTS Tulsi, Katnakar Dash, A. Mariyaputham, Mrinmayee Sahu, Sibo Sankar Mishra, Raj Kumar Parashar, Priyanka Agarwal, Sumeer Sodhi, Pratul Shandilya, Vaibhav Srivastava, D. Kumanan, R. Sancheti, K. Sudhakar, S. Wasim, A. Quadri, Arvind Kumar Sharma for the appearing parties.

The judgment of the Court was delivered by

P. SATHASIVAM, J. 1. These appeals relate to a sensational case of triple murder of an Australian Christian Missionary - Graham Stuart Staines and his two minor sons,

namely, Philip Staines, aged about 10 years and Timothy Staines aged about 6 years.

2. Criminal Appeal No. 1366 of 2005 is filed by Rabindra Kumar Pal @ Dara Singh against the final judgment and order dated 19.05.2005 passed by the High Court of Orissa at Cuttack in Criminal Appeal No. 239 of 2003 whereby the High Court dismissed the appeal of the appellant upholding the conviction and commuting the death sentence passed by the trial Court into that of life imprisonment. Against the same judgment, Criminal Appeal No. 1259 of 2007 is filed by Mahendra Hembram challenging his life imprisonment awarded by the trial Court and confirmed by the High Court. Against the acquittal of rest of the accused by the High Court, the Central Bureau of Investigation (in short "the CBI") filed Criminal Appeal Nos. 1357-1365 of 2005. Since all the appeals arose from the common judgment of the High Court and relating to the very same incident that took place in the midnight of 22.01.1999/ 23.01.1999, they are being disposed of by this judgment.

3. **The case of the prosecution is as under:**

(a) Graham Stuart Staines, a Christian Missionary from Australia, was working among the tribal people especially lepers of the State of Orissa. His two minor sons, namely, Philip Staines and Timothy Staines were burnt to death along with their father in the midnight of 22.01.1999/23.01.1999. The deceased-Graham Staines was engaged in propagating and preaching Christianity in the tribal area of interior Orissa. Manoharpur is a remote tribal village under the Anandapur Police Station of the District Keonjhar of Orissa. Every year, soon after the Makar Sankranti, the said missionary used to come to the village to conduct the Jungle Camp. Accordingly, on 20.01.1999, the deceased-Staines, along with his two minor sons Philip and Timothy and several other persons came to the village Manoharpur. They conducted the camp for next two days by hosting a series of programmes.

(b) On 22.01.1999, the Missionary Team, as usual conducted different programmes in the village near the Church and retired for the day. Graham Staines and his two minor sons slept in their vehicle parked outside the Church. In the mid-night, a mob of 60-70 people came to the spot and set fire to the vehicle in which the deceased persons were sleeping. The mob prevented the deceased to get themselves out of the vehicle as a result of which all the three persons got burnt in the vehicle. The local police was informed about the incident on the next day.

(c) Since the local police was not able to proceed with the investigation satisfactorily, on 23.04.1999, the same was handed over to the State Crime Branch. Even the Crime Branch failed to conduct the investigation, ultimately, the investigation was transferred to CBI.

(d) On 03.05.1999, the investigation was taken over by the CBI. After thorough investigation, charge sheet was filed by the CBI on 22.06.1999. On the basis of charge sheet, as many as 14 accused persons were put to trial. Apart from these accused, one minor was tried by Juvenile Court.

(e) The prosecution examined as many as 55 witnesses whereas in defence 25 witnesses were examined. Series of documents were exhibited by the prosecution. By a common judgment and order dated 15.09.2003 and 22.09.2003, Sessions Judge, Khurda convicted all the accused and sentenced them for offences punishable under various sections. The death sentence was passed against Dara Singh-appellant in Criminal Appeal No. 1366 of 2005 and others were awarded sentence of life imprisonment.

(f) The death reference and the appeals filed by the convicted persons were heard together by the High Court and were disposed of by common judgment dated 19.05.2005 concluding that the witnesses are not trustworthy and no credence should be given to their statements and confessional

statements were procured by the investigating agency under threat and coercion. The High Court, by the impugned judgment, modified the death sentence awarded to Dara Singh into life imprisonment and confirmed the life imprisonment imposed on Mahendra Hembram and acquitted all the other accused persons. Questioning the conviction and sentence of life imprisonment, Dara Singh and Mahendra Hembram filed Criminal Appeal Nos. 1366 of 2005 and 1259 of 2007 respectively and against the acquittal of rest of the accused, CBI filed Criminal Appeal Nos. 1357-65 of 2005 before this Court.

4. Heard Mr. KTS Tulsi and Mr. Ratnakar Dash, learned senior counsel for the accused/appellants and Mr. Vivek K. Tankha, learned Addl. Solicitor General for the CBI.

5. Mr. K.T.S. Tulsi, learned senior counsel appearing for Rabindra Kumar Pal @ Dara Singh (A1) and other accused in the appeals against acquittal filed by the CBI, after taking us through all the relevant materials has raised the following contentions:-

(i) Confessions of various accused persons, particularly, Rabi Soren (A9), Mahadev Mahanta (A11) and Turam Ho (A12) under Section 164 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.') cannot be considered to be voluntary on account of the fact that all the co-accused persons were produced before the Magistrate from the police custody and were remanded back to police custody. Similarly, Dayanidhi Patra @ Daya (A14) was produced from the police custody for confession while Umakant Bhoi (A13) made his statement while on bail. Besides all confessions being exculpatory and made after conspiracy ceased to be operative and inadmissible.

(ii) Inasmuch as recording of confessions of various accused persons was done after the investigation was taken over by Jogendra Nayak (PW 55), I.O. of the CBI which shows

the extent to which strong arm tactics were used by the investigating agency.

(iii) The statements of eye-witnesses are contradictory to each other on all material points.

(iv) There are several circumstances which are inconsistent with the fire started by arson from outside and several circumstances consistent with the fire emanating from inside of the vehicle and then spread to rest of the vehicle after fuel tank caught fire.

(v) This Court in cases of appeals against acquittal has held that when two views are possible, one in favour of the accused should be accepted.

6. Mr. Dash, learned senior counsel appearing for the accused Mahendra Hembram (A3) reiterating the above submissions of Mr. Tulsi also pinpointed deficiency in the prosecution case insofar as (A3) is concerned.

7. Mr. Vivek Tankha, learned Addl. Solicitor General, after taking us through oral and documentary evidence, extensively refuted all the contentions of the learned senior counsel for the accused and raised the following submissions:-

(i) The High Court committed an error in altering the death sentence into life imprisonment in favour of (A1) and acquitting all other accused except (A3). He pointed out that the appreciation of the evidence by the High Court is wholly perverse and it erroneously disregarded the testimony of twelve eye-witnesses.

(ii) The High Court failed to appreciate the fact that the three accused, namely, Mahendra Hembram (A3), Ojen @ Suresh Hansda (A7) and Renta Hembram (A10) belonging to the same village were known to the eye-witnesses and, therefore, there is no requirement to conduct Test Identification Parade (in short 'TIP').

(iii) The High Court erred in acquitting 11 accused persons on the sole ground that TIP was not conducted and, therefore, identification by the eye-witnesses was doubtful.

(iv) The evidence of identification in Court is substantive evidence and that of the identification in TIP is of corroborative value.

(v) The High Court committed a serious error in law in disregarding the confessional statements made under Section 164 of the Cr.P.C. as well as the extra-judicial confessions made by Dara Singh (A1) and Mahendra Hembram (A3).

(vi) The High Court wrongly held inculpatory confessional statements as exculpatory and on that ground rejected the same. The High Court failed to appreciate that in their confessional statements (A9), (A11), (A12), (A13) and (A14) have clearly admitted their plan for committing the crime.

(vii) The adverse observations against (PW 55) the Investigating Officer of CBI, by the High Court are not warranted and in any event not supported by any material.

(viii) Inasmuch as it was Dara Singh (A1) who originated and organized the heinous act and also prevented the deceased persons from coming out of the burning vehicle, the High Court ought to have confirmed his death sentence.

(ix) The reasons given by the High Court in acquitting 11 persons are unacceptable and the judgment to that extent is liable to be set aside.

8. We have considered the rival submissions and perused all the oral and documentary evidence led by the prosecution and defence.

9. With the various materials in the form of oral and documentary evidence, reasoning of the trial Judge and the ultimate decision of the High Court, we have to find out whether

the conviction and sentence of life imprisonment imposed on Dara Singh (A1) and Mahendra Hembram (A3) is sustainable and whether prosecution has proved its case even against the accused who were acquitted by the High Court.

Eye witnesses

10. According to the learned senior counsel for the accused, the statements of eye-witnesses are contradictory to each other on all material points. It is his further claim that exaggerated and improved version of the incident makes it difficult to place implicit reliance on the statements of any of those witnesses. On the other hand, it is the claim of the prosecution that the statements of eye-witnesses are reliable and acceptable and it was rightly considered by the trial Court and erroneously rejected except insofar as against Dara Singh (A1) and Mahendra Hembram (A3) by the High Court.

(i) PW2, Basi Tudu, one of the prime eye-witness, identified in dock the previously known accused of her village Ojen Hansda. She was not examined by local police, however, examined by the CID on 04.02.1999 and by the CBI on 05.06.1999. In her evidence, she stated that she is a Christian by faith. Before the court, she deposed that her house is located near the place of occurrence. She also stated that Graham Staines along with his two sons came at Manoharpur church after Makar Sankranti and stayed there in the night. He along with his two sons slept inside the vehicle. Inside the court, during her deposition, she first wrongly identified accused Rajat Kumar Das as accused Ojen Hansda. However, when she had a better view of the accused in the court, she correctly identified Ojen Hansda as the person whom she saw among 60 persons holding torch lights and lathis going towards the church. She stated that in the midnight, on hearing barking of dogs, she woke up from sleep and came out of the house. She found about 60 persons going towards the church where the vehicles of Graham Staines were parked. Those persons did not allow her to proceed further. Therefore, she went to the thrashing floor

from where she found that people had surrounded the vehicle of Graham Staines. Thereafter, she found the vehicle on fire. The wheels of vehicle in which Graham Staines and his two sons were sleeping, bursted aloud, and they were burnt to death. The people who surrounded the vehicles raised slogans "Jai Bajarang Bali" and "Dara Singh Zindabad". It is clear that she could identify only Ojen @ Suresh Hansda by face for the first time before the trial Court. No TIP was held to enable her to identify him. It shows that her identification of Ojen @ Suresh Hansda by face during trial was not corroborated by any previously held TIP. It is also clear that though she was examined by the State Police/CID, she never disclosed the name of Ojen @ Suresh Hansda. Though she claims to have identified Ojen @ Suresh Hansda by the light of the lamp (locally called Dibri) which she had kept in the Verandah, it must be noted that it was midnight during the peak winter season and there is no explanation for keeping the lamp in the Verandah during midnight. In her cross-examination, she admitted that she could not identify any of the persons who had surrounded the vehicle of Graham Staines and set it ablaze.

(ii) The next eye-witness examined on the side of the prosecution is PW3, Paul Murmu. He admitted that he was converted to Christianity in the year 1997. He identified accused Dara Singh in dock. He was examined by the local police on 23.01.1999, by CID on 10.02.1999 and by the CBI on 20.04.1999. He used to accompany Graham Staines at different places. He last accompanied Graham Staines on his visit to Manoharpur on 20.02.1999. He stated that Graham Staines with his two sons was in a separate vehicle and the witness along with other three persons was in another vehicle. In the night of 22.01.1999, Graham Staines along with his two sons slept in his vehicle, which was parked in front of the church. The witness slept in a hut, which was raised behind the church. In the midnight, Nimai Hansda (driver of vehicle) woke him up. He heard the sound of beating of the vehicles parked in front of the church. He along with Nimai Hansda went near the

chruch and found 60-70 persons putting straw beneath the vehicle of Graham Staines and setting it on fire. Three persons broke the glass panes of the vehicle in which Graham Staines and his two sons were sleeping and gave strokes to them with sticks. They were focusing the torch into the vehicles. One of them was having a beard. The witness pointed out to the accused Dara Singh (A1) on the dock saying that the bearded man resembled like him. The witness was unable to identify the other two persons who were in the dock. However, he also asserted the hearing of slogans saying "Dara Singh Zindabad" which corroborates his identification.

(iii) The next eye-witness examined by the prosecution is PW4, Rolia Soren. It was he who lodged FIR. He was examined by the local police on 23.01.1999, by the CID on 03.02.1999 and by the CBI on 09.04.1999. He is a resident of Manohapur Village (the place of occurrence) and Graham Staines was well known to him. He stated that Graham Staines along with his two sons and other persons visited Manoharpur on 20.01.1999. In the night of 22.01.1999, Graham Staines and his two sons slept in the vehicle bearing No. 1208 which was parked in front of the church. Another vehicle No. 952 was also parked in front of the church. The house of witness was situated in the south of church, four houses apart and the vehicles parked in front of church were visible from the road in front of his house. In the night of 22.01.1999, his wife woke him up and said that she found large number of people with lathis and torches going towards the church. After walking about 100 ft. towards the vehicles, he found a large number of people delivering lathis blow on the vehicle in which Graham Staines and his two sons were sleeping and the other vehicle bearing No. 952 was already set on fire. Three-four persons belonging to the group caught hold of him by collar and restrained him from proceeding towards the vehicle. The witness could not recognize them as their heads were covered with caps and faces by mufflers. The witness went towards the village and called Christian people. When along with these persons, the witness reached near the

church, he found both the vehicles burnt. Graham Staines and his two sons were also burnt to death. The next day, at about 9 P.M., the Officer-In-Charge (OIC) Anandpur PS showed his written paper and said that was the FIR and he had to lend his signature and accordingly, he lend his signature thereon. The witness had identified his signatures during his deposition in the court. Though he mentioned large number of miscreants, but they were not chargesheeted. In the FIR itself it was stated by this witness that at the time of occurrence miscreants raised slogans saying "Bajrang Bali Zindabad" and "Dara Singh Zindabad".

(iv) Singo Marandi (PW5) was examined as next eye-witness. Though he named accused Ojen Hansda, in his deposition stated that he belonged to his village and in the dock he could not identify him with certainty. His statement was not recorded by the local police but recorded by the CID on 03.02.1999 and by the CBI on 07.06.1999. This witness is a resident of Manoharpur (the place of occurrence). He stated that on Saraswati Puja day of 1999, after witnessing the Nagin dance along with his mother, he slept in Verandah of Galu and her mother was sitting by his side. At about midnight, his mother woke him up. He saw something was burning near the church and found a vehicle moving towards the road. Ojen and Chenchu of his village carrying torch and lathis came to them and warned them not to go near the fire as some people were killing the Christians there. Thereafter, he heard sounds of blowing of whistles thrice and raising slogans saying "Dara Singh Zindabad". It is seen from his evidence that at that time he was prosecuting his studies at Cuttack and his mother was working as a labourer in Bhadrak. It is also not clear as to what was the need for him to sleep in Verandah of another person with his mother sitting beside him till midnight during peak of the winter.

(v) The next eye-witness examined by the prosecution is Nimai Hansda (PW10). He was examined by the local police

on 23.01.1999, by the CID on 11.02.1999 and by the CBI on 20.04.1999. He did not identify any of the accused.He was the driver of Graham Staines. Vehicle No. 1208 was driven by him. He along with Graham Staines and others came to the place of occurrence on 20.01.1999. Graham Staines and his two sons used to sleep in the said vehicle. He stated that in the midnight of 22.01.1999, on hearing bursting sounds, he woke up. He heard the sound of beating the vehicles parked in front of church in which Graham Staines and his two sons were sleeping. He ran towards the vehicles and found some people beating the vehicles with lathis. They first broke the glass pane of vehicle No. 952. Thereafter, a boy set the vehicle on fire. Before setting the vehicle on fire, he put bundle of straw at front right wheel of vehicle. When the witness raised a noise of protest, those people assaulted him. He went to call the people but nobody came. When he came back to the place of occurrence, he found both the vehicles on fire. The witness stated that there were about 30-40 people armed with lathis and holding torches. They raised slogan 'Jai Bajarang Bali' and 'Dara Singh Zindabad. The fire was extinguished at 3 a.m. By that time, both the vehicles were completely burnt. Graham Staines and his two sons were completely charred and burnt to death. The witness could not identify any of the miscreants who set the vehicles on fire.

(vi) PW11, Bhakta Marandi was next examined on the side of the prosecution as eye-witness. He identified accused Dara Singh and Rajat Kumar Das in dock. His statement was neither recorded by local police nor by the CID but recorded by the CBI on 05.06.1999. He belongs to Village Manoharpur (the place of occurrence). His house is situated two houses apart from the church. He stated that the deceased Graham Staines was known to him. He last visited Manoharpur on 20.01.1999 along with his two sons and others in two vehicles. Graham Staines and his two sons used to sleep in the night inside the vehicle parked in front of the church. As usual in the night of 22.01.1999, Graham Staines and his two sons had

slept in a vehicle. In the midnight, the witness was woken up by his wife on hearing bursting sounds. He came out of his house and found 4/5 persons standing in front of his house holding torches and lathis. They were threatening that they will kill the persons who will dare to come in their way. One of them threw a baton like stick at him. He retreated to his house and went to the house of another person situated one house apart from the church. A slim and tall man was holding an axe. They set on fire one of the vehicles. Some of them brought straw and put the same on the vehicle. They set fire both the vehicles and both the vehicles were burnt. They raised the slogans "Jai Bajarang Bali" and "Dara Singh Zindabad". The witness pointed accused Dara Singh (A1) and accused Rajat Kumar Das in the dock as two of those persons beating the vehicles and setting fire on the vehicles. The witness identified accused Dara Singh (A1) as slim and tall fellow holding the axe and guiding the miscreants. The witness further stated that the CBI while interrogating him showed photographs of some persons and he had identified two of the photographs as that of miscreants. He had signed on those photographs. About the admissibility of the identification of the accused persons with the photographs can be considered at a later point of time. He did not report the incident to the Collector or any other police officer camping at the site.

(vii) The next eye-witness examined was Mathai Marandi (PW15). He identified accused Uma Kant Bhoi (A 13) in the TIP. He also identified accused Dara Singh (A1), Dipu Das (A2), Ojen @ Suresh Hansda and Mahadev. Out of these accused, Ojen Hansda was previously known to him, belonging to the same street of his village. In his evidence, it is stated that he is native of Manoharpur village and the church (Place of occurrence) is located adjacent to his house. Deceased Graham Staines was well known to him as he used to visit his village for the last 15-16 years. He stated that Graham Staines last visited their village on 20.01.1999. He along with his two sons and other persons came there in two vehicles. He further

stated that in the night of 22.01.1999, on hearing bursting sound, his wife woke him up. After coming out of the house, he found 40-50 persons gathered near the vehicles parked in front of the church and beating the vehicles by lathis. Those miscreants were holding lathis, axe, torches, bows and arrows. He heard cries raised by the minor sons of Graham Staines. He went near the vehicle, but 3 to 4 persons threatened him with lathis and, therefore, he retreated to his house. Thereafter, he went to the huts raised behind the church and called the persons staying there and went to the place of occurrence and found the vehicles set on fire. The miscreants put the straw inside the vehicle and set it on fire. They first set the empty vehicle on fire and thereafter the vehicle in which Graham Staines and his sons were sleeping. Both the vehicles caught fire and were burnt. The witness identified accused Dara Singh (A1), Dipu Das (A2), Ojen @ Suresh Hansda and Mahadev as the miscreants present at the scene of occurrence and taking part in the offence. The witness further stated that Ojen Hansda and Mahendra Hembram belonged to his village. He had identified accused Uma Kanta Bhoi in the TIP conducted at Anandpur Jail as one of the persons setting fire on the vehicle. He further stated that after the vehicles were burnt, the miscreants blew whistle thrice and raised slogan "Jai Bajarang Bali" and "Dara Singh Zindabad". However, it is relevant to note that his omission to mention all important aspects in his evidence including names of the appellants and his previous statements recorded by three Investigating Officers creates a doubt about his veracity.

(viii) Joseph Marandi (PW23) was examined as another eye-witness to the occurrence. He belonged to village Manoharpur (Place of occurrence) and his house is located near the church. He identified accused Renta Hembram, Mahendra Hembram, Dara Singh and Rajat Kumar Dass @ Dipu. Out of these, two accused - Renta Hembram and Mahendra Hembram, were previously known to him as they belonged to his village. He was examined by the local police

on 02.02.1999, by the CID on 06.02.1999 and by the CBI on 03.06.1999. He stated that Graham Staines along with his two sons and other persons came to Manoharpur on 20.01.1999 on two vehicles. On 22.01.1999 deceased Graham Staines and his two sons slept in a vehicle parked in front of the church and other persons slept in the huts raised behind the church. In the mid-night, he heard the sound of beating of vehicles and woke up. When he came out of the house, 3 to 4 persons holding lathis and torches restrained and threatened him to assault if he proceeds further. Thereafter, he stood in a lane between his house and the church. He saw that about 20-22 persons had surrounded the vehicle in which deceased Graham Staines and his two sons were sleeping. Some people were setting the vehicle on fire by putting straw beneath it and igniting it by match sticks. After the vehicle caught fire and was burnt, somebody blew whistle thrice and they shouted slogan "Jai Bajarang Bali" and "Dara Singh Zindabad". The other vehicle was not visible to the witness. The witness identified accused Renta Hembram and Mahendra Hembram of his village who were among the miscreants. The witness also identified accused Dara Singh (A1) and accused Rajat Kumar Das @Dipu (A2) as the miscreants who among others had set fire to the vehicles. The witness further stated that the CBI officers had shown him 30-40 photographs out of which he identified the photographs of the accused Renta Hembram, Mahendra Hembram, Dara Singh (A1) and Rajat Kumar Das @ Dipu (A2). He is also a witness to the seizure of some articles seized from the place of occurrence and he has proved the seizure list. Admittedly, he did not disclose the names of these persons before either of the aforesaid three I.Os.

(ix) Raghunath Dohari (PW36), one of the eye-witnesses, identified accused Dara Singh, Harish Chandra, Mahadev and Turam Ho. His statement was not recorded by local police and the CID but it was recorded by the CBI on 04.12.1999. He belongs to village Manoharpur (place of occurrence). He stated that about 3 years before his deposition (1999) during

Saraswati puja, Graham Staines visited their village. In the night, he heard the sound of beating. He got up and went to the church, where there was a gathering of 60-70 persons in front of the Church and they were beating the vehicles with sticks. They brought straw and set fire to the vehicles by burning straw. The witness identified accused Dara Singh (A1), Harish Chandra, Mahadev and Turam Ho as the miscreants who were in the gatherings and set fire to the vehicles. It is relevant to point out that apart from the police party, the Collector and other Police Officers though were camping at the place of occurrence, the fact remains that this witness did not report the incident either to the concerned Investigating Officer or to the Collector for about four months. However, the fact remains that he identified some of the appellants before the trial Court for the first time. As stated earlier, the legality or otherwise of dock identification, for the first time, would be dealt with in the later part of the judgment.

(x) Another eye-witness PW39, Soleman Marandi identified accused Dara Singh, Rajat Kumar Dass, Surtha Naik, Harish Chandra, Ojen Hansda and Kartik Lohar. Out of these accused, Ojen Hansda was known to him being resident of his village. His statement was not recorded by the local police but recorded by the CID on 03.02.1999 and by the CBI on 30.05.1999. He is a resident of village Manoharpur (place of occurrence). He stated that Graham Staines visited Manhorpur last time about 3 years back i.e. in the year 1999 after Makar Sankranti. He came there with his two sons and other persons in two vehicles. In the third night of his stay, he along with his two sons slept in the vehicle during night. The vehicles were parked in front of the church. In the midnight, the witness heard the sound of beating of vehicles. He came out of the house and went near the church. He found that about 30-40 persons had surrounded the vehicles and some of them were beating the vehicles in which Graham Staines along with his two sons was sleeping. He heard the cries of two sons of Graham Staines coming from the vehicle. These people set fire to the second

vehicle parked near the vehicle of Graham Staines. When the vehicle caught fire, the vehicle moved towards the road. Three of those miscreants put a log of wood preventing the vehicle moving further. The witness identified accused Dara Singh as (A1), Rajat Kumar Das, Suratha Naik, Harish Mahanta, Ojen Hansda and Kartik Lohar amongst the accused persons in the dock as the miscreants who had set fire to the vehicles. Accused Ojen Hansda belonged to his village. The witness further stated that CBI showed him number of photographs among which he identified photographs of 5 persons who had taken part in the occurrence. He identified Dara Singh (A1) without any difficulty and it is also corroborated by the slogan he heard which miscreants raised in the name of Dara Singh.

(xi) The last eye-witness examined on the side of the prosecution is PW43, Lablal Tudu. He identified accused Dara Singh, Turam Ho, Daya Patra and Rajat Kumar Das. His statement was not recorded by local police and by the CID but recorded by the CBI on 03.06.1999. He is also a resident of Manoharpur village and his house is located near the Church (the place of occurrence). He stated that Graham Staines visited their village about three years before his deposition in the Court (January, 1999). He came there on Wednesday and stayed till Friday. On Friday night, Graham Staines and his two sons slept in a vehicle parked in front of the church. In the midnight, his mother (PW2) heard the beating sounds of vehicle and woke him up. He found 50-60 persons beating the vehicle by lathis in which Graham Staines and his two sons had slept. Three-four of them put the straw beneath the empty vehicle and lit the straw by matchsticks. After setting the empty vehicle ablaze, those persons put straw beneath the vehicle of Graham Staines and his two sons and ignited the same. Those two vehicles caught fire and began to burn. The witness identified four persons, namely, Dara Singh (A1), Turam Ho (A12), Daya Patra (A14) and Rajat Das (A2) as the persons beating the vehicle and setting on fire. The fact remains that admittedly

he did not report the incident to his mother about what he had seen during the occurrence. He also admitted that there was a police camp from the next day of the incident. However, he did not make any statement to the State Police and only for the first time his statement was recorded by the CBI i.e., five months after the occurrence.

11. It is relevant to note that the incident took place in the midnight of 22.01.1999/23.01.1999. Prior to that, number of investigating officers had visited the village of occurrence. Statements of most of the witnesses were recorded by PW 55, an officer of the CBI. In the statements recorded by various IOs, particularly, the local police and State CID these eye witnesses except few claim to have identified any of the miscreants involved in the incident. As rightly observed by the High Court, for a long number of days, many of these eye-witnesses never came forward before the IOs and the police personnel visiting the village from time to time claiming that they had seen the occurrence. In these circumstances, no importance need to be attached on the testimony of these eye-witnesses about their identification of the appellants other than Dara Singh (A1) and Mahendra Hembram (A3) before the trial Court for the first time without corroboration by previous TIP held by the Magistrate in accordance with the procedure established. It is well settled principle that in the absence of any independent corroboration like TIP held by judicial Magistrate, the evidence of eye-witnesses as to the identification of the appellants/accused for the first time before the trial Court generally cannot be accepted. As explained in *Manu Sharma vs. State (NCT of Delhi)* (2010) 6 SCC 1 case, that if the case is supported by other materials, identification of the accused in the dock for the first time would be permissible subject to confirmation by other corroborative evidence, which are lacking in the case on hand except for A1 and A3.

12. In the same manner, showing photographs of the

miscreants and identification for the first time in the trial Court without being corroborated by TIP held before a Magistrate or without any other material may not be helpful to the prosecution case. To put it clear, the evidence of witness given in the court as to the identification may be accepted only if he identified the same persons in a previously held TIP in jail. It is true that absence of TIP may not be fatal to the prosecution. In the case on hand, (A1) and (A3) were identified and also corroborated by the evidence of slogans given in his name and each one of the witnesses asserted the said aspect insofar as they are concerned. We have also adverted to the fact that none of these witnesses named the offenders in their statements except few recorded by IOs in the course of investigation. Though an explanation was offered that out of fear they did not name the offenders, the fact remains, on the next day of the incident, Executive Magistrate and top level police officers were camping the village for quite some time. Inasmuch as evidence of the identification of the accused during trial for the first time is inherently weak in character, as a safe rule of prudence, generally it is desirable to look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier TIP. Though some of them were identified by the photographs except (A1) and (A3), no other corroborative material was shown by the prosecution.

13. Now let us discuss the evidentiary value of photo identification and identifying the accused in the dock for the first time. Learned Addl. Solicitor General, in support of the prosecution case about the photo identification parade and dock identification, heavily relied on the decision of this Court in *Manu Sharma* (supra). It was argued in that case that PW 2 Shyan Munshi had left for Kolkata and thereafter, photo identification was got done when SI Sharad Kumar, PW 78 went to Kolkata to get the identification done by picking up from the photographs wherein he identified the accused Manu Sharma though he refused to sign the same. However, in the court, PW 2 Shyan Munshi refused to recognise him. In any

case, the factum of photo identification by PW 2 as witnessed by the officer concerned is a relevant and an admissible piece of evidence. In para 254, this Court held:

> "Even a TIP before a Magistrate is otherwise hit by Section 162 of the Code. Therefore to say that a photo identification is hit by Section 162 is wrong. It is not a substantive piece of evidence. It is only by virtue of Section 9 of the Evidence Act that the same i.e. the act of identification becomes admissible in court. The logic behind TIP, which will include photo identification lies in the fact that it is only an aid to investigation, where an accused is not known to the witnesses, the IO conducts a TIP to ensure that he has got the right person as an accused. The practice is not borne out of procedure, but out of prudence. At best it can be brought under Section 8 of the Evidence Act, as evidence of conduct of a witness in photo identifying the accused in the presence of an IO or the Magistrate, during the course of an investigation."

It was further held:

> It is trite to say that the substantive evidence is the evidence of identification in court. Apart from the clear provisions of Section 9 of the Evidence Act, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the accused persons, are relevant under Section 9 of the Evidence Act. As a general rule, the substantive evidence of a witness is the statement made in court. The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is, accordingly, considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification

proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. The identification parades belong to the stage of investigation, and there is no provision in the Code which obliges the investigating agency to hold or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code. Failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration.

It was further held that "the photo identification and TIP are only aides in the investigation and do not form substantive evidence. The substantive evidence is the evidence in the court on oath".

14. In *Umar Abdul Sakoor Sorathia vs. Intelligence Officer, Narcotic Control Bureau,* AIR 1999 SC 2562, the following conclusion is relevant:

"12. In the present case prosecution does not say that they would rest with the identification made by Mr. Mkhatshwa when the photograph was shown to him. Prosecution has to examine him as a witness in the court and he has to identify the accused in the court. Then alone it would become substantive evidence. But that does not mean that at this stage the court is disabled from considering the prospect of such a witness correctly identifying the appellant during trial. In so considering the court can take into account the fact that during investigation the photograph of the appellant was shown to the witness and he identified that person as the one whom he saw at the relevant time"

15. In *Jana Yadav vs. State of Bihar,* (2002) 7 SCC 295, para 38, the following conclusion is relevant:

"Failure to hold test identification parade does not make the evidence of identification in court inadmissible, rather the same is very much admissible in law, but ordinarily identification of an accused by a witness for the first time in court should not form the basis of conviction, the same being from its very nature inherently of a weak character unless it is corroborated by his previous identification in the test identification parade or any other evidence. The previous identification in the test identification parade is a check valve to the evidence of identification in court of an accused by a witness and the same is a rule of prudence and not law.

It is clear that identification of accused persons by witness in dock for the first time though permissible but cannot be given credence without further corroborative evidence. Though some of the witnesses identified some of the accused in the dock as mentioned above without corroborative evidence the dock identification alone cannot be treated as substantial evidence, though it is permissible.

16. Mr. Tulsi, learned senior counsel for the accused heavily commented on the statements of eye-witnesses which, according to him, are contradictory to each other on material points. He highlighted that exaggerated and improved version of the incident makes it difficult to place implicit reliance on the statements of any of these witnesses. He cited various instances in support of his claim.

(a) As regards the number of persons who have allegedly attacked the vehicles, it was pointed out that PW 23 - Joseph Marandi (brother of PW 15)/Christian/15 years at the time of incident) has stated that 20-22 persons surrounded the vehicle. On the other hand, PW 39 - Soleman Marandi and PW 10 - Nimai Hansda deposed that 30/40 persons surrounded the

vehicle. PW 15 - Mathai Marandi found 40/50 persons were beating with lathis. PW 43 - Lablal Tudu (son of PW 2) deposed that 50/60 persons were beating the vehicle whereas PW 2 - Basi Tudu found 60 persons going towards the church. PW 3, Paul Murmu found 60/70 persons putting straw beneath the vehicle and setting fire. PW 36 – Raghunath Dohal mentioned that about 60-70 people gathered in front of the church.

(b) As regards straw being kept on the roof of the vehicle to prevent cold, PWs 3, 10, 11, 15, 36, 39, 43, 45 and 52 mentioned different versions.

(c) With regard to whether there was a light or not which is vital for identification of miscreants prior to vehicle caught fire, PW 2 has stated that Moon had already set and he identified Chenchu and A 7 in the light of lamp (dibri) put in the verandah. On the other hand, PW 5, who was 11 years old at the time of evidence has mentioned that it was dark night. PW 11 has stated that he had not seen any lamp burning in the verandah of neighbours but saw some miscreants due to illumination of fire. PW 43 has stated that there is no electricity supply in the village and stated that they do not keep light in verandah while sleeping inside the house during night.

(d) About chilly wintry night, PW3 has stated it was chilly night with dew dropping whereas PW15 has stated that he cannot say whether there was fog at the night of occurrence and PW 36 has stated it was wintry night and PW52 has stated fog occurs during the month of December and January and he could not say if there was any fog at the night of occurrence.

(e) With regard to clothes worn by attackers, PW36 has stated that A1 was wearing a Punjabi Kurta, A3 and A12 were wearing a banian. PW19 has stated that he saw 9 persons out of which 8 were wearing trousers and shirts and one person who was addressed as Dara was wearing a lungi and Punjabi Kurta. PW39 has stated that during winter season people

usually come with their body covered. PW52 has stated that usually people wear winter clothing during December and January.

(f) With regard to the aspect whether the accused persons had covered their faces, PW 4 who is the informant has stated that the faces of the accused were covered. On the other hand, PWs 11, 15 and 36 have asserted that none covered their faces.

(g) As regard to who lit the fire, PW3 has stated that a short person lit fire. PW10 has mentioned that he did not see anyone whereas PW11 has stated that number of people set fire. PW32 has mentioned that there was no gathering near the vehicles when they caught fire. PW 36 has stated not seen any villager in between the house of the PW4 and the Church and PW39 has stated he had not seen any female near the place of occurrence.

(h) As regard to whether Nagin dance was over or not, PW 32 had deposed that when the vehicle caught fire, Nagin dance was being performed whereas PW 39 has deposed that dance continued throughout the night.

(i) Whether Nagin dance was visible from the place of occurrence, PW 3 has stated that it was not visible due to darkness. PW 4 has stated the distance between Nagin dance and Church is 200 ft. PW 5 has stated that Church was not visible from the place of Nagin dance and the distance was 200 ft. PW 6 has mentioned that Church was visible from the place of Nagin dance and distance was 200 ft and finally PW 32 has stated the church was visible from the place of Nagin dance.

(j) With regard to distance between place of occurrence and Nagin dance, PW 15 has mentioned the distance is 200 ft. PW 32 has stated that vehicles were visible from the place of Nagin dance, PW 36 has stated Nagin dance staged 10-12

houses apart from Church at front side whereas PW 39 has stated Nagin dance staged 4 houses apart from Chruch and PW 43 has stated that it was staged 5 houses apart from church and he admitted that he was not sure of the distance between church and the place of Nagin dance.

(k) With regard to their arrival at the place of occurrence, PW 11 has stated that PWs 4, 15 and 23 came to the place of occurrence an hour after the miscreants left the place whereas they deposed that they were present there from the beginning. PW 10 has stated that he woke up on hearing bursting and beating sound. PW 15 has deposed that he went to the huts behind the church and called PWs 10, 3 and others. PW 3 has stated that he was woken up by PW 10.

17. By pointing out these contradictions, Mr. Tulsi submitted that the presence of these witnesses becomes doubtful. However, if we see these witnesses through microscope, it is true that the above mentioned contradictions would be visible and clear but by and large they explained the prosecution case though they could not identify all the accused persons with clarity except Dara Singh (A1) and Mahendra Hembram (A3). By virtue of these minor contradictions, their testimony cannot be rejected in toto. But, by and large, there are minor contradictions in their statements as demonstrated by Mr. Tulsi. In the face of the above-mentioned difference in the evidence of prosecution witnesses with regard to light, clothing, number of accused persons, fog, faces covered or not, it is not acceptable in toto except certain events and incidents which are reliable and admissible in evidence.

CONFESSIONS:

18. It was submitted that confessions of various accused persons, namely, A9, A 11 and A 12 under Section 164 Cr.P.C. cannot be considered to be voluntary on account of the fact that all the co-accused persons were produced before the Magistrate from police custody and were remanded back to

police custody. It was further highlighted that accused No. 14 was produced from police custody for recording his confession while A 13 made his statement when he was on bail and in no case the Magistrate ensured the accused persons that if they decline they would not be sent to police custody. It was further highlighted that illiterate accused persons cannot be expected to have knowledge of finest nuances of procedure. It was pointed that besides all confessions being exculpatory and made after conspiracy ceases to be operative are inadmissible. Finally, it was stated that Section 164 Cr.P.C. requires faithful compliance and failure impairs their evidentiary value.

19. Section 164 Cr.P.C. speaks about recording of confessions and statements. It reads thus:

> **"164. Recording of confessions and statements.** (1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any, time afterwards before the commencement of the inquiry or trial:
>
> Provided that any confession or statement made under this sub-section may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of an offence:
>
> Provided that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.
>
> (2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is bear, made voluntarily.

(3) If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorize the detention of such person in police custody.

(4) Any such confession shall be recorded in the manner provided in section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect.

> "I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.
>
> (Signed) A.B.
>
> Magistrate

(5) Any statement (other than a confession) made under sub-section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded.

(6) The Magistrate recording a confession or statement under this section shall forward it to the Magistrate by whom the case is to be inquired into or tried. "

20. While elaborating non-compliance of mandates of

Section 164 Cr.P.C., Mr. Tulsi, learned senior counsel appearing for the accused cited various instances.

(a) Accused No. 9, Rabi Soren, was arrested by the investigating agency and remanded to police custody for 7 days i.e. from 20.05.1999. It is their claim that on 18.05.1999, Accused No.9 made a statement under Section 164 Cr.P.C. and thereafter remanded back to police custody. It was also pointed out that in his statement under Section 313 Cr.P.C. the accused person stated that he was beaten by the investigating agency.

(b) Another instance relates to Mahadev Mahanta, Accused No. 11 who was arrested on 01.07.1999 by the investigating agency and he was remanded to police custody. However, on 08.07.1999, Accused No. 11 made a statement under Section 164 Cr.P.C. PW 55, I.O. has stated that the statement of the accused was recorded under Section 164 Cr.P.C. that he was under police custody and he was remanded back to police custody. In his statement under Section 313 Cr.P.C. he also stated that he was beaten by the investigating agency.

(c) In the case of Turam Ho Accused No. 12, he was arrested on 13.05.1999 by the Investigating Agency and from 19.05.1999 to 23.05.1999 the accused person was in custody of the investigating agency. While so, on 21.05.1999, the accused No. 12 made a statement under Section 164 Cr.P.C and thereafter remanded back to police custody. It was pointed out that he also stated in his statement under Section 313 Cr.P.C. that he was beaten by the investigating agency.

(d) The next instance relates to Umakanta Bhoi, Accused No. 13 who refused to make a statement under Section 164 Cr.P.C prayed by I.O. to be put for 16.03.1999 for recording statement. It was directed to jail authority to keep the accused under calm and cool atmosphere. A 13 was produced from Judicial Custody for recording statement under Section 164

Cr.P.C. and he refused to make a statement. However, on 31.08.1999, he made a confessional statement.

(e) In the case of Dayanidhi Patra, Accused No. 14, on 21.09.1999, he was arrested by the Investigating Agency. On 24.09.1999, Learned ASJ granted police remand for 7 days i.e. on 01.10.1999 and that on that day A 14 made a statement under Section 164 Cr.P.C. It was pointed out that in his statement under Section 313 Cr.P.C. the accused person stated that he was beaten by the investigating agency.

21. Before analyzing the confessional statements of various accused persons and its applicability and the procedure followed by the Magistrate in recording the statement, let us consider various decisions touching these aspects.

22. In *Bhagwan Singh and Ors. vs. State of M.P.* (2003) 3 SCC 21, while considering these issues, it was held:

> **"27**……The first precaution that a Judicial Magistrate is required to take is to prevent forcible extraction of confession by the prosecuting agency (see State of U.P. v. Singhara Singh, AIR 1964 SC 358). It was also held by this Court in the case of Shivappa v. State of Karnataka, (1995) 2 SCC 76 that the provisions of Section 164 CrPC must be complied with not only in form, but in essence. Before proceeding to record the confessional statement, a searching enquiry must be made from the accused as to the custody from which he was produced and the treatment he had been receiving in such custody in order to ensure that there is no scope for doubt of any sort of extraneous influence proceeding from a source interested in the prosecution.
>
> **28.** It has also been held that the Magistrate in particular should ask the accused as to why he wants to make a statement which surely shall go against his interest in the trial. He should be granted sufficient time for reflection. He

> should also be assured of protection from any sort of apprehended torture or pressure from the police in case he declines to make a confessional statement. Unfortunately, in this case, the evidence of the Judicial Magistrate (PW 1) does not show that any such precaution was taken before recording the judicial confession.
>
> **29.** The confession is also not recorded in questions-and-answers form which is the manner indicated in the criminal court rules.
>
> **30.** It has been held that there was custody of the accused Pooran Singh with the police immediately preceding the making of the confession and it is sufficient to stamp the confession as involuntary and hence unreliable. A judicial confession not given voluntarily is unreliable, more so when such a confession is retracted. It is not safe to rely on such judicial confession or even treat it as a corroborative piece of evidence in the case. When a judicial confession is found to be not voluntary and more so when it is retracted, in the absence of other reliable evidence, the conviction cannot be based on such retracted judicial confession. (See *Shankaria v. State of Rajasthan,* (1978) 3 SCC 435 (para 23)"

23. In *Shivappa vs. State of Karnataka* (1995) 2 SCC 76, while reiterating the same principle it was held:-

> **"6.** From the plain language of Section 164 CrPC and the rules and guidelines framed by the High Court regarding the recording of confessional statements of an accused under Section 164 CrPC, it is manifest that the said provisions emphasise an inquiry by the Magistrate to ascertain the voluntary nature of the confession. This inquiry appears to be the most significant and an important part of the duty of the Magistrate recording the confessional statement of an accused under Section 164 CrPC. The failure of the Magistrate to put such questions from which

he could ascertain the voluntary nature of the confession detracts so materially from the evidentiary value of the confession of an accused that it would not be safe to act upon the same. Full and adequate compliance not merely in form but in essence with the provisions of Section 164 CrPC and the rules framed by the High Court is imperative and its non-compliance goes to the root of the Magistrate's jurisdiction to record the confession and renders the confession unworthy of credence. Before proceeding to record the confessional statement, a searching enquiry must be made from the accused as to the custody from which he was produced and the treatment he had been receiving in such custody in order to ensure that there is no scope for doubt of any sort of extraneous influence proceeding from a source interested in the prosecution still lurking in the mind of an accused. In case the Magistrate discovers on such enquiry that there is ground for such supposition he should give the accused sufficient time for reflection before he is asked to make his statement and should assure himself that during the time of reflection, he is completely out of police influence. An accused should particularly be asked the reason why he wants to make a statement which would surely go against his self-interest in course of the trial, even if he contrives subsequently to retract the confession. Besides administering the caution, warning specifically provided for in the first part of sub-section (2) of Section 164 namely, that the accused is not bound to make a statement and that if he makes one it may be used against him as evidence in relation to his complicity in the offence at the trial, that is to follow, he should also, in plain language, be assured of protection from any sort of apprehended torture or pressure from such extraneous agents as the police or the like in case he declines to make a statement and be given the assurance that even if he declined to make the confession, he shall not be remanded to police custody.

7. The Magistrate who is entrusted with the duty of recording confession of an accused coming from police custody or jail custody must appreciate his function in that behalf as one of a judicial officer and he must apply his judicial mind to ascertain and satisfy his conscience that the statement the accused makes is not on account of any extraneous influence on him. That indeed is the essence of a 'voluntary' statement within the meaning of the provisions of Section 164 CrPC and the rules framed by the High Court for the guidance of the subordinate courts. Moreover, the Magistrate must not only be satisfied as to the voluntary character of the statement, he should also make and leave such material on the record in proof of the compliance with the imperative requirements of the statutory provisions, as would satisfy the court that sits in judgment in the case, that the confessional statement was made by the accused voluntarily and the statutory provisions were strictly complied with.

8. From a perusal of the evidence of PW 17, Shri Shitappa, Additional Munsif Magistrate, we find that though he had administered the caution to the appellant that he was not bound to make a statement and that if he did make a statement that may be used against him as evidence but PW 17 did not disclose to the appellant that he was a Magistrate and that the confession was being recorded by him in that capacity nor made any enquiry to find out whether he had been influenced by anyone to make the confession. PW 17 stated during his deposition in court: "I have not stated to the accused that I am a Magistrate" and further admitted: "I have not asked the accused as to whether the police have induced them (Chithavani) to give the statement." The Magistrate, PW 17 also admitted that "at the time of recording the statement of the accused no police or police officials were in the open court. I cannot tell as to whether the police or police officials were present in the vicinity of the court". From the memorandum

prepared by the Munsif Magistrate, PW 17 as also from his deposition recorded in court it is further revealed that the Magistrate did not lend any assurance to the appellant that he would not be sent back to the police custody in case he did not make the confessional statement. Circle Police Inspector Shivappa Shanwar, PW 25 admitted that the sub-jail, the office of the Circle Police Inspector and the police station are situated in the same premises. No contemporaneous record has been placed on the record to show that the appellant had actually been kept in the sub-jail, as ordered by the Magistrate on 21-7-1986 and that he was out of the zone of influence by the police keeping in view the location of the sub-jail and the police station. The prosecution did not lead any evidence to show that any jail authority actually produced the appellant on 22-7-1986 before the Magistrate. That apart, neither on 21-7-1986 nor on 22-7-1986 did the Munsif Magistrate, PW 17 question the appellant as to why he wanted to make the confession or as to what had prompted him to make the confession. It appears to us quite obvious that the Munsif Magistrate, PW 17 did not make any serious attempt to ascertain the voluntary character of the confessional statement. The failure of the Magistrate to make a real endeavour to ascertain the voluntary character of the confession, impels us to hold that the evidence on the record does not establish that the confessional statement of the appellant recorded under Section 164 CrPC was voluntary. The cryptic manner of holding the enquiry to ascertain the voluntary nature of the confession has left much to be desired and has detracted materially from the evidentiary value of the confessional statement. It would, thus, neither be prudent nor safe to act upon the confessional statement of the appellant….."

24. In *Dagdu and Others vs. State of Maharashtra,* (1977) 3 SCC 68, the following paragraph is relevant:-

"51. Learned Counsel appearing for the State is right that the failure to comply with Section 164(3) of the Criminal Procedure Code, or with the High Court Circulars will not render the confessions inadmissible in evidence. Relevancy and admissibility of evidence have to be determined in accordance with the provisions of the Evidence Act. Section 29 of that Act lays down that if a confession is otherwise relevant it does not become irrelevant merely because, inter alia, the accused was not warned that he was not bound to make it and the evidence of it might be given against him. If, therefore, a confession does not violate any one of the conditions operative under Sections 24 to 28 of the Evidence Act, it will be admissible in evidence. But as in respect of any other admissible evidence, oral or documentary, so in the case of confessional statements which are otherwise admissible, the Court has still to consider whether they can be accepted as true. If the facts and circumstances surrounding the making of a confession appear to cast a doubt on the veracity or voluntariness of the confession, the Court may refuse to act upon the confession even if it is admissible in evidence. That shows how important it is for the Magistrate who records the confession to satisfy himself by appropriate questioning of the confessing accused, that the confession is true and voluntary. A strict and faithful compliance with Section 164 of the Code and with the instructions issued by the High Court affords in a large measure the guarantee that the confession is voluntary. The failure to observe the safeguards prescribed therein are in practice calculated to impair the evidentiary value of the confessional statements."

25. *Davendra Prasad Tiwari vs. State of U.P.* (1978) 4 SCC 474, the following conclusion arrived at by this Court is relevant:-

"13….. It is also true that before a confessional statement

made under Section 164 of the Code of Criminal Procedure can be acted upon, it must be shown to be voluntary and free from police influence and that the confessional statement made by the appellant in the instant case cannot be taken into account, as it suffers from serious infirmities in that (1) there is no contemporaneous record to show that the appellant was actually kept in jail as ordered on September 6, 1974 by Shri R.P. Singh, Judicial Magistrate, Gorakhpur, (2) Shri R.P. Singh who recorded the so called confessional statement of the appellant did not question him as to why he was making the confession and (3) there is also nothing in the statement of the said Magistrate to show that he told the appellant that he would not be remanded to the police lock-up even if he did not confess his guilt. It cannot also be gainsaid that the circumstantial evidence relied upon by the prosecution must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused."

26. In *Kalawati & Ors. vs. State of Himachal Pradesh,* 1953 SCR 546 at 631, this Court held:

"…In dealing with a criminal case where the prosecution relies upon the confession of one accused person against another accused person, the proper approach to adopt is to consider the other evidence against such an accused person, and if the said evidence appears to be satisfactory and the court is inclined to hold that the said evidence may sustain the charge framed against the said accused person, the court turns to the confession with a view to assure itself that the conclusion which it is inclined to draw from the other evidence is right."

27. In *State thr. Superintendent of Police, CBI/SIT vs. Nalini and Others* (1999) 5 SCC 253 at 307, the following paragraphs are relevant which read as under:-

"96. What is the evidentiary value of a confession made by one accused as against another accused apart from Section 30 of the Evidence Act? While considering that aspect we have to bear in mind that any confession, when it is sought to be used against another, has certain inherent weaknesses. First is, it is the statement of a person who claims himself to be an offender, which means, it is the version of an accomplice. Second is, the truth of it cannot be tested by cross-examination. Third is, it is not an item of evidence given on oath. Fourth is, the confession was made in the absence of the co-accused against whom it is sought to be used.

97. It is well-nigh settled, due to the aforesaid weaknesses, that confession of a co-accused is a weak type of evidence. A confession can be used as a relevant evidence against its maker because Section 21 of the Evidence Act permits it under certain conditions. But there is no provision which enables a confession to be used as a relevant evidence against another person. It is only Section 30 of the Evidence Act which at least permits the court to consider such a confession as against another person under the conditions prescribed therein. If Section 30 was absent in the Evidence Act no confession could ever have been used for any purpose as against another co-accused until it is sanctioned by another statute. So, if Section 30 of the Evidence Act is also to be excluded by virtue of the non obstante clause contained in Section 15(1) of TADA, under what provision can a confession of one accused be used against another co-accused at all? It must be remembered that Section 15(1) of TADA does not say that a confession can be used against a co-accused. It only says that a confession would be admissible in a trial of not only the maker thereof but a co-accused, abettor or conspirator tried in the same case.

98. Sir John Beaumont speaking for five Law Lords of the

Privy Council in Bhuboni Sahu v. R., AIR 1949 PC 257 had made the following observations:

"Section 30 seems to be based on the view that an admission by an accused person of his own guilt affords some sort of sanction in support of the truth of his confession against others as well as himself. But a confession of a co-accused is obviously evidence of a very weak type. It does not indeed come within the definition of 'evidence' contained in Section 3, Evidence Act. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination. It is a much weaker type of evidence than the evidence of an approver which is not subject to any of those infirmities. Section 30, however, provides that the court may take the confession into consideration and thereby, no doubt, makes it evidence on which the court may act; but the section does not say that the confession is to amount to proof. Clearly there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case; it can be put into the scale and weighed with the other evidence."

99. The above observations had since been treated as the approved and established position regarding confession vis-à-vis another co-accused. Vivian Bose, J., speaking for a three-Judge Bench in *Kashmira Singh v. State of M.P.,* AIR 1952 SC 159 had reiterated the same principle after quoting the aforesaid observations. A Constitution Bench of this Court has followed it in *Haricharan Kurmi v. State of Bihar,* AIR 1964 SC 1184."

28. In *State of Maharashtra vs. Damu* (2000) 6 SCC 269, the same principles had been reiterated which read as under:-

"19. We have considered the above reasons and the arguments addressed for and against them. We have

realised that those reasons are ex facie fragile. Even otherwise, a Magistrate who proposed to record the confession has to ensure that the confession is free from police interference. Even if he was produced from police custody, the Magistrate was not to record the confession until the lapse of such time, as he thinks necessary to extricate his mind completely from fear of the police to have the confession in his own way by telling the Magistrate the true facts.

25. We may make it clear that in Kashmira Singh this Court has rendered the ratio that confession cannot be made the foundation of conviction in the context of considering the utility of that confession as against a co-accused in view of Section 30 of the Evidence Act. Hence the observations in that decision cannot be misapplied to cases in which confession is considered as against its maker. The legal position concerning confession vis-à-vis the confessor himself has been well-nigh settled by this Court in Sarwan Singh Rattan Singh v. State of Punjab as under:

"In law it is always open to the court to convict an accused on his confession itself though he has retracted it at a later stage. Nevertheless usually courts require some corroboration to the confessional statement before convicting an accused person on such a statement. What amount of corroboration would be necessary in such a case would always be a question of fact to be determined in the light of the circumstances of each case."

This has been followed by this Court in *Kehar Singh v. State (Delhi Admn.)*"

29. The following principles emerge with regard to Section 164 Cr.P.C.:-

(i) The provisions of Section 164 Cr.P.C. must be complied with not only in form, but in essence.

(ii) Before proceeding to record the confessional statement, a searching enquiry must be made from the accused as to the custody from which he was produced and the treatment he had been receiving in such custody in order to ensure that there is no scope for doubt of any sort of extraneous influence proceeding from a source interested in the prosecution.

(iii) A Magistrate should ask the accused as to why he wants to make a statement which surely shall go against his interest in the trial.

(iv) The maker should be granted sufficient time for reflection.

(v) He should be assured of protection from any sort of apprehended torture or pressure from the police in case he declines to make a confessional statement.

(vi) A judicial confession not given voluntarily is unreliable, more so, when such a confession is retracted, the conviction cannot be based on such retracted judicial confession.

(vii) Non-compliance of Section 164 Cr.P.C. goes to the root of the Magistrate's jurisdiction to record the confession and renders the confession unworthy of credence.

(viii) During the time of reflection, the accused should be completely out of police influence. The judicial officer, who is entrusted with the duty of recording confession, must apply his judicial mind to ascertain and satisfy his conscience that the statement of the accused is not on account of any extraneous influence on him.

(ix) At the time of recording the statement of the accused, no police or police official shall be present in the open court.

(x) Confession of a co-accused is a weak type of evidence.

(xi) Usually the Court requires some corroboration from the confessional statement before convicting the accused person on such a statement.

Judicial Magistrates (PWs-29 & 34)

30. Ashok Kumar Agrawal, PW29 and Tojaka Bharti, PW34, Judicial Magistrates recorded the confessional statements of some of the accused. Judicial Magistrate, PW29 recorded the confessional statement of Rabi Soren and Turam Ho and PW34, Judicial Magistrate recorded the confessional statement of Mahadev Mahanta, Uma Kant Bhoi and Dayanidhi Patra. It is the claim of Mr. K.T.S. Tulsi, learned senior counsel for the accused, that the evidence of PW29 and PW34, Judicial Magistrates shows that they were blissfully unaware of the stringent responsibility cast on them by Section 164 Cr.P.C. According to him, their evidence create an impression that they were not aware of the difference between the police custody and judicial custody nor do they seem to understand the significance of Section 164 Cr.P.C. He pointed out that why the first four pages in case of each of the accused persons is not signed by the accused is not explained. They neither asked any searching questions regarding the nature of custody either from the accused persons or from police nor did they scrutinize the records to ascertain the same from remand orders. He also pointed out that none of the accused who have confessed had been given the assurance that if they refuse to make any confession, they would not be remanded to police custody. This assurance is required for an accused to make an informed decision being fully aware of the consequences of refusing.

31. It is seen from the evidence of PW29, who recorded the confession of Rabi Soren, that at the relevant time the accused was in the custody of CBI and from that custody he was produced before the Addl. Chief Judicial Magistrate on 18.05.1999. Though PW29 had asked the accused many things about the voluntariness, the High Court, on analysis of his entire evidence, came to a conclusion that only a routine

statutory certificate as required under Section 164 Cr.P.C. was given by him. The High Court also pointed out that he did not caution that if the accused Rabi Soren refused to make any confession, he would not be remanded to C.B.I. or Police custody. He was not informed that if he confessed, such confession may be used in evidence against him and on that basis there was possibility of his being sentenced to death or life imprisonment. It was also pointed out that his body was not checked to find out as to whether he was subjected to torture when he was in police custody. It was also pointed out by the High Court that five hours' time was given for reflection during which period he was in the custody of his Bench Clerk in his Chamber. PW29, after recording confessional statement of Rabi Soren on 18.05.1999, again remanded him to the custody of police, i.e. C.B.I. till 20.05.1999. This is clear from the evidence of PW55 (I.O.). It is relevant to point out that under sub-section (3) of Section 164 Cr.P.C. that if any accused refuses to make any confessional statement, such Magistrate shall not authorize detention of the accused in police custody. Remanding Rabi Soren to Police custody after his statement was recorded under Section 164 Cr.P.C. is not justified. As rightly observed by the High Court, possibility of coercion, threat or inducement to the accused Rabi Soren to make the confession cannot be ruled out. In the same manner, confession of another accused Turam Ho was also recorded by the very same Magistrate. Here again, the High Court pointed out that he was not cautioned that if he made any confession, same may be used against him in evidence and on that basis he may be sentenced to death or imprisonment for life. Equally he was not cautioned by PW29 that if he refused to make the confessional statement, he would not be remanded to police custody. It is further seen that both of these accused, in their confessional statements, made exculpatory statements.

32. PW34, Judicial Magistrate, recorded the confessional statement of accused Mahadev Mahanta on 08.07.1999

immediately after his production before him from the police custody. PW34 was directed by the Addl. C.J.M. to record the confessional statement of Mahadev Mahanta. It was noted that he was given only 10 minutes' time for reflection after his production from police custody. The other accused who made the confessional statement is Dayanidhi Patra whose statement was recorded by PW34. The High Court, on corroboration of the confessional statement, had found that the entire confessional statement is exculpatory and he also retracted from the confession. It was further found that this confessional statement was made long after the charge-sheet was filed i.e. on 22.06.1999. The analysis of evidence of PWs 29 & 34 – Judicial Magistrates shows that many of the confessional statements were recorded immediately after production of the maker after long CBI custody and in some cases after such statements were made and recorded by the Judicial Magistrate, the maker was remanded to police custody. Though the Magistrates have deposed that the procedure provided under Section 164 Cr.P.C. has been complied with, various warnings/ cautions required to be given to the accused before recording such confession, have not been fully adhered to by them.

33. Apart from the strong observation of the High Court about procedural lapse on the part of PWs 29 & 34, we also verified their statements and requirements in terms of Section 164 Cr.P.C. In the certificate, there is no specific reference about the nature of the custody from which these persons were produced nor about the assurance that they would not be remanded to police custody if they declined. We have already pointed out that Section 164 Cr.P.C. requires strict and faithful compliance of sub-sections 2 to 4, the failure to observe safeguards not only impairs evidentiary value of confession but cast a doubt on nature and voluntariness of confession on which no reliance can be placed. As rightly observed by the High Court, no exceptional circumstances could be brought to our notice by the prosecution in respect of the appellants other than A1 and A3.

34. It was next argued that the incident could not have been happened as suggested by the prosecution. According to the learned senior counsel for the accused the reason of possibility of the incident which took place in the dead of the night as a result of the accident from burning of the stove etc. for generating heat on cold wintry night cannot be ruled out. In support of the above contention, he pointed out several circumstances which are inconsistent with the fire starting by arson from outside. On going through the entire materials, we are unable to accept the said contention. Though we noticed several inconsistencies in the prosecution evidence and the accused persons were not specifically identified except A1 and A3, the fact remains that the Van in which Graham Staines and his two children were sleeping were set on fire and burnt to death due to the cause of the miscreants. In other words, death of these three persons by setting fire by the miscreants cannot be ruled out. There is no material to conclude that the fire emanated from inside of the vehicle and then spread to rest of the vehicle after the fuel tank caught fire. There is no basis for such conclusion though the prosecution witnesses could not pin-point and identify the role of each accused.

35. Another question which we have to consider is whether the Police (CBI) had the power under the Cr.P.C. to take specimen signature and writing of A3 for examination by the expert. It was pointed out that during investigation, even the Magistrate cannot direct the accused to give his specimen signature on the asking of the police and only in the amendment of the Cr.P.C. in 2005, power has been given to the Magistrate to direct any person including the accused to give his specimen signature for the purpose of investigation. Hence, it was pointed out that taking of his signature/writings being per se illegal, the report of the expert cannot be used as evidence against him. To meet the above claim, learned Addl. Solicitor General heavily relied on a 11-Judge Bench decision of this Court in *The State of Bombay vs. Kathi Kalu Oghad and Ors.,* (1962) 3 SCR 10 = AIR 1961 SC 1808. This larger Bench was

constituted in order to re-examine some of the propositions of law laid down by this Court in the case of *M.P. Sharma and Ors. vs. Satish Chandra, District Magistrate, Delhi and Ors.,* (1954) SCR 1077. After adverting to various factual aspects, the larger Bench formulated the following questions for consideration:

> "2. … … On these facts, the only questions of constitutional importance that this Bench has to determine are; (1) whether by the production of the specimen handwritings - Exs. 27, 28, and 29 - the accused could be said to have been 'a witness against himself' within the meaning of Article 20(3) of the Constitution; and (2) whether the mere fact that when those specimen handwritings had been given, the accused person was in police custody could, by itself, amount to compulsion, apart from any other circumstances which could be urged as vitiating the consent of the accused in giving those specimen handwritings. … …
>
> 4. … … The main question which arises for determination in this appeal is whether a direction given by a Court to an accused person present in Court to give his specimen writing and signature for the purpose of comparison under the provisions of section 73 of the Indian Evidence Act infringes the fundamental right enshrined in Article 20(3) of the Constitution.
>
> The following conclusion/answers are relevant:
>
> 10. … … Furnishing evidence" in the latter sense could not have been within the contemplation of the Constitution-makers for the simple reason that - though they may have intended to protect an accused person from the hazards of self-incrimination, in the light of the English Law on the subject - they could not have intended to put obstacles in the way of efficient and effective investigation into crime and of bringing criminals to justice. The taking of

impressions or parts of the body of an accused person very often becomes necessary to help the investigation of a crime. It is as much necessary to protect an accused person against being compelled to incriminate himself, as to arm the agents of law and the law courts with legitimate powers to bring offenders to justice. … ….

11. … … When an accused person is called upon by the Court or any other authority holding an investigation to give his finger impression or signature or a specimen of his handwriting, he is not giving any testimony of the nature of a 'personal testimony'. The giving of a 'personal testimony' must depend upon his volition. He can make any kind of statement or may refuse to make any statement. But his finger impressions or his handwriting, in spite of efforts at concealing the true nature of it by dissimulation cannot change their intrinsic character. Thus, the giving of finger impressions or of specimen writing or of signatures by an accused person, though it may amount to furnishing evidence in the larger sense, is not included within the expression 'to be a witness'.

12. … … A specimen handwriting or signature or finger impressions by themselves are no testimony at all, being wholly innocuous because they are unchangeable except in rare cases where the ridges of the fingers or the style of writing have been tampered with. They are only materials for comparison in order to lend assurance to the Court that its inference based on other pieces of evidence is reliable. They are neither oral nor documentary evidence but belong to the third category of material evidence which is outside the limit of 'testimony'.

16. In view of these considerations, we have come to the following conclusions :-

(1) An accused person cannot be said to have been compelled to be a witness against himself simply because

he made a statement while in police custody, without anything more. In other words, the mere fact of being in police custody at the time when the statement in question was made would not, by itself, as a proposition of law, lend itself to the inference that the accused was compelled to make the statement, though that fact, in conjunction with other circumstances disclosed in evidence in a particular case, would be a relevant consideration in an enquiry whether or not the accused person had been compelled to make the impugned statement.

(2) The mere questioning of an accused person by a police officer, resulting in a voluntary statement, which may ultimately turn out to be incriminatory, is not 'compulsion'.

(3) 'To be a witness' is not equivalent to 'furnishing evidence' in its widest significance; that is to say, as including not merely making of oral or written statements but also production of documents or giving materials which may be relevant at a trial to determine the guilt innocence of the accused.

(4) Giving thumb impressions or impressions of foot or palm or fingers or specimen writings or showing parts of the body by way of identification are not included in the expression 'to be a witness'.

(5) 'To be a witness' means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made or given in Court or otherwise.

(6) 'To be a witness' in its ordinary grammatical sense means giving oral testimony in Court. Case law has gone beyond this strict literal interpretation of the expression which may now bear a wider meaning, namely, bearing testimony in Court or out of Court by a person accused of an offence, orally or in writing.

(7) To bring the statement in question within the prohibition

of Article 20(3), the person accused must have stood in the character of an accused person at the time he made the statement. It is not enough that he should become an accused, any time after the statement has been made."

In view of the above principles, the procedure adopted by the investigating agency, analyzed and approved by the trial Court and confirmed by the High Court, cannot be faulted with. In view of oral report of Rolia Soren, PW 4 which was reduced into writing, the evidence of PW 23, two letters dated 01.02.2002 and 02.02.2002 addressed by Mahendra Hembram (A3) to the trial Judge facing his guilt coupled with the other materials, we are unable to accept the argument of Mr. Ratnakar Dash, learned senior counsel for Mahendra Hembram (A3) and we confirm the conclusion arrived by the High Court.

Additional factors-Mahendra Hembram (A3).

36. Coming to the role of Mahendra Hembram A3, the prosecution very much relied on his letters dated 01.02.2002 and 02.02.2002 addressed to the Sessions Judge wherein he confessed his guilt. Though a serious objection was taken about the admissibility of these two letters, the contents of these two letters addressed to the Sessions Judge in the course of trial lend ample corroboration to his identification before the trial Court by Joseph Marandi, PW 23. Even in his case, it is true that there was no TIP conducted by Judicial Magistrate. However, inasmuch as when he was facing trial, he sent the above-mentioned two letters to the Sessions Judge which lend corroboration to his identification in the trial court by PW 23 and rightly observed by the High Court, the same can be safely relied upon. The evidence reveals that Rolia Soren (PW 4) accompanied by PW 23 soon after the incident proceeded to inform the same to the police and finding the police to have already left for Manoharpur, returned back and finally on the oral report of PW 4, the Officer In-charge of Anandapur P.S. (PW 52) prepared FIR (Ext. 1/1) and registered a case under Sections 147, 148, 435, 436 and 302 read with 149 IPC against

Dara Singh (A 1) and five others. The prosecution has also relied on a letter (Ext.2 after it was translated to English marked as Ext. 49) said to have been addressed by Mahendra Hembram (A3) to Kapura Tudu (PW 9) which, according to the prosecution, contains his admission of involvement in the incident.

37. An excerpt from the letter of Mahendra Hembram may be translated into English as under:-

> "You may be knowing the Manoharpur incident. No one ever thought that such a thing will happen in the village. I had not told any of my family members that such a work will be done. Dara Singh stayed in our house and did the work. I also did the work as I had quarrel with the 'Jisu'. I had not disclosed the identity of Dara Singh even to my mother. The conspiracy to kill Manoharpur 'Jisu' was hatched at HOROHND for which I took leave during training period and stayed in our house with Dara Singh for five days and went to the forest thereafter. The villagers know that I have done this work as I have got cordial relationship with Dara Singh."

This is a confessional statement of accused Mahendra Hembram (A3) inculpating himself and Dara Singh (A1).

38. Accused Mahendra Hembram, in his letter dated 10.02.1999 (Ex. 2) addressed to his sister-in-law, Kapura Tudu (PW9), confessed that he along with Dara Singh burnt the 'Jisu' (Christian Missionary). All the ocular witnesses have testified that after setting fire to vehicles and burning Graham Staines and his two sons alive, the miscreants raised slogans "Jai Bajrang Bali" and "Dara Singh Zindabad".

39. Joseph Marandi, PW23 has testified that accused Mahendra Hembram amongst others set fire to the vehicles. Mahendra Hembram, in his statement recorded under Section 313 Cr.P.C., on 04.02.2002 has stated that he may be the

short statured person. Accused Mahendra Hembram in his letter dated 10.02.1999 (Ex. 2) addressed to his sister-in-law, Kapura Tudu (PW9) had confessed to have burnt the Christian missionary along with Dara Singh. In the course of trial, he filed petitions on 01.02.2002 and 02.02.2002 pleading guilty and confessing to have set fire to the vehicles. In his statement recorded under Section 313 Cr.P.C. on 04.02.2002, he has admitted to have set fire to the vehicles and in his statement recorded under Section 313 Cr.P.C. on 24.03.2003 has admitted to have filed petitions pleading guilty and to have stated in his earlier examination under Section 313 Cr.P.C. that he had set fire to the vehicles. There is no impediment in relying on a portion of the statement of the accused and finding him guilty in consideration of the other evidence against him as laid by the prosecution.

40. It is clear that the letters marked as (Ex. 213) were written by Mahendra Hembram though denied by him, contents of the said two letters amount to confession, or in any event admission of important incriminating materials. He had been identified before the trial Court by Joseph Marandi (PW23) as a participant in the crime. As rightly observed by the High Court, contents of these two letters lend support to the evidence in identification before the trial Court for the first time as narrated by PW23. In this way, his identification for the first time in the trial Court is an exceptional case and even in the absence of further corroboration by way of previously held TIP, his involvement in the crime is amply corroborated by the above said letters written by him.

41. Learned Addl. Solicitor General has pointed out that insofar as Mahendra Hembram is concerned, three types of evidence are available against him: a) Confession; b) testimony of eye-witnesses/identification in court/PW 23 Joseph Marandi; and c) absconding of the accused. Learned Addl. Solicitor General while advancing his argument besides referring to the evidence of PW 23 laid more emphasis on the statement of

the appellant. Though an objection was raised as to the manner in which the trial Judge questioned A3 with reference to contents of his letters dated 01.02. 2002 and 02.02.2002, it is relevant to point out that when the person facing trial insisted to look into the contents of his letters, the presiding officer concerned has to meet his requirement subject to the procedure established. The learned trial Judge accepted the entire contents of the admission made by A3 and affording reasonable opportunity and by following the appropriate procedure coupled with the corroborative evidence of PW 23, upheld his involvement and participation in the crime along with A1 which resulted in rioting, arson and murder of three persons. Though learned senior counsel appearing for A3 was critical on relying upon the letter Ex. 49 said to have been written by A3 to his Sister-in-law PW 9, it shows that A3 confessed to have participated in the incident along with A1. It is seen that the entire contents of letter were used by the trial Judge which was rightly accepted by the High Court. The other circumstance urged by the prosecution was that A3 absconded soon after the incident and avoided arrest and this abscondence being a conduct under Section 8 of the Indian Evidence Act, 1872 should be taken into consideration along with other evidence to prove his guilt. The fact remains that he was not available for quite sometime till he was arrested which fact has not been disputed by the defence counsel. We are satisfied that before accepting the contents of the two letters and the evidence of PW 23, the trial Judge afforded him required opportunity and followed the procedure which was rightly accepted by the High Court.

Additional factors – Dara Singh (A1)

42. In addition to what we have highlighted and elicited from the materials placed, it is relevant to point out that all the eye-witnesses examined by the prosecution consistently stated that during occurrence the miscreants raised slogans in the name of Dara Singh as “Dara Singh Zindabad”. The story of this

slogan was also mentioned in the first information report lodged soon after the occurrence. This slogan is in the name of Dara Singh, corroborates the identification before the trial Court for the first time. In addition to the same, some of the witnesses identified Dara Singh by photo identification. We have already highlighted the evidentiary value of photo identification and identifying the person in the dock. In other words, we have pointed out that those materials coupled with the other corroborative evidence are permissible. In addition to the same, all the witnesses mentioned about the blowing of whistle by Dara Singh.

43. Though the trial Court awarded death sentence for Dara Singh, the High Court after considering entire materials and finding that it is not a rarest of rare case, commuted the death sentence into life imprisonment. The principles with regard to awarding punishment of death have been well settled by judgments of this Court in *Bachan Singh vs. State of Punjab* AIR 1980 SC 898, *Machhi Singh vs. State of Punjab* (1983) 3 SCC 470, *Kehar Singh vs. State (Delhi Administration)* (1988) 3 SCC 609. It is clear from the above decisions that on conviction under Section 302 IPC, the normal rule is to award punishment of life imprisonment and the punishment of death should be resorted to only for the rarest of rare cases. Whether a case falls within the rarest of rare case or not, has to be examined with reference to the facts and circumstances of each case and the Court has to take note of the aggravating as well as mitigating circumstances and conclude whether there was something uncommon about the crime which renders the sentence of imprisonment for life inadequate and calls for death sentence. However, more than 12 years has elapsed since the act was committed, we are of the opinion that the life sentence awarded by the High Court need not be enhanced in view of the factual position discussed in the earlier paras.

44. Though an argument was advanced that only after the

intervention of PW 55, I.O. from CBI, several persons made a confessional statement by applying strong arm tactics that were used by the investigating agency, the entire case of the prosecution has to be rejected, we are unable to accept the same for the reasons stated by the trial Court and the High Court. We have ourselves in the earlier paras adverted to the fact that some of the witnesses did not mention anything about the incident to the local police or the District Magistrate or the higher level police officers who were camping from the next day of the incident. However, regarding the fresh steps taken by the Officer of the CBI, particularly, the efforts made by PW 55, though certain deficiencies are there in the investigation, the same cannot be under estimated. Likewise, it was pointed out that young children were being coerced into being witness to the occurrence whereas the elder family members were never joined as witness by the prosecuting agency. It is true that the prosecution could have examined elders and avoided persons like PW 5 who was a minor on the date of the incident. We have already discussed about the veracity of witnesses and found that certain aspects have been established and accepted by the trial Court as well as the High Court.

45. Finally, insofar as the appeals filed by the CBI against the order of acquittal by the High Court in respect of certain persons, it was pointed out that when two views are possible, the one in favour of the accused should be accepted. It is true that the presumption of innocence is a fundamental principle of criminal jurisprudence. Further, presumption of innocence is further reinforced, reaffirmed and strengthened by the judgment in his favour. [Vide *State of Uttar Pradesh vs. Nandu Vishwakarma & Ors.,* (2009) 14 SCC 501 (Para 23), *Sambhaji Hindurao Deshmukh & Ors. Vs. State of Maharashtra,* (2008) 11 SCC 186 (Para 13), *Rahgunath vs. State of Haryana,* (2003) 1 SCC 398 (Para 33) and *Allarakha K. Mansuri vs. State of Gujarat,* (2002) 3 SCC 57 (Paras 6 & 7)]. In the earlier paragraphs, we have highlighted the weakness and infirmities of the prosecution case insofar as acquitted accused who are

all poor tribals. In the absence of definite assertion from the prosecution side, about their specific role and involvement, as rightly observed by the High Court, it is not safe to convict them. We entirely agree with the reasoning and conclusion of the High Court insofar as the order relating to acquittal of certain accused persons.

Conclusion

46. In a country like ours where discrimination on the ground of caste or religion is a taboo, taking lives of persons belonging to another caste or religion is bound to have a dangerous and reactive effect on the society at large. It strikes at the very root of the orderly society which the founding fathers of our Constitution dreamt of. Our concept of secularism is that the State will have no religion. The State shall treat all religions and religious groups equally and with equal respect without in any manner interfering with their individual right of religion, faith and worship.

47. The then President of India, Shri K R. Narayanan once said in his address that "Indian unity was based on a tradition of tolerance, which is at once a pragmatic concept for living together and a philosophical concept of finding truth and goodness in every religion". We also conclude with the hope that Mahatma Gandhi's vision of religion playing a positive role in bringing India's numerous religion and communities into an integrated prosperous nation be realised by way of equal respect for all religions. There is no justification for interfering in someone's religious belief by any means.

48. The analysis of entire materials clearly shows that the High Court is right in arriving at its conclusion. In the case on hand, there is no material to prove conspiracy charge against any of the accused. However, as pointed out by the High Court which we also adverted to in the earlier paras even in the midst of uncertainties, the witnesses have specified the role of (A1) and (A3) which we agree with and confirm the same and we

also maintain the conviction of the appellant Dara Singh (A1), Mahendra Hembram (A3) and the sentence of life imprisonment imposed on them. In the same way, in the absence of acceptable materials and in view of the various infirmities in the prosecution case as pointed out by the High Court, we confirm the order of acquittal of others who are all poor tribals.

49. In the result, Criminal Appeal No. 1366 of 2005 filed by Rabindra Kumar Pal @ Dara Singh, Criminal Appeal No. 1259 of 2007 filed by Mahendra Hembram and Criminal Appeal Nos. 1357-1365 filed by CBI are dismissed.

N.J. Appeals dimissed.

Ed. Note: The last part of paragraph 43 (on page 993) and of paragraph 47 (on page 995) of the abovesaid Judgement dated 21.01.2011 replaced in terms of the subsequent Order dated 25.01.2011 in the same matter.

MANJIT SINGH @ MANGE

v.

CBI, THROUGH ITS S.P.

(Criminal Appeal No. 1778 of 2008 etc.)

JANUARY 25, 2011

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

TERRORIST AND DISRUPTIVE ACTIVITIES PREVENTION ACT, 1987:

s. 12 – Designated Court –Jurisdiction of –Held : By virtue of s. 12 of the Act, the Designated Court may also try any other offence with which the accused may be charged at the same trial if the offence is connected with such other offence and further if it is found that the accused has committed any other offence under any other law, the Designated Court may convict such person of such other offence and pass any sentence authorized by the Act or such other law for the punishment thereof –Interpretation of statutes.

s.15 –Confession made to police officer – Held: Confessional statement made by a person u/s 15 shall be admissible in the trial of a co-accused for offence committed and tried in the same case together with the accused who makes the confession –Confession of an accused can be used against him as well as other co-accused even if they are acquitted of offence under TADA Act.

s.20-A(1) –Cognizance of offence –Held: Expression "District SP" has been used in order to take the sanction of a senior officer of the district, when the prosecution wants to record any commission of an offence under the Act –In the instant case, investigation was entrusted to CBI, therefore, the CBI SP could authorize the police to record the information about the commission of the offence under the Act –TADA

Rules, 1987 –r. 15 –Delhi Police Establishment Act, 1946 s.3

ss. 3(1), 3(2) and 3(3) –Prosecution –Held : Section 3 gives due importance to the aspect of intent –A person can be charged with s. 3(1) only when the prosecution has established that the offence was committed with the intent to awe the Government or to achieve one or other ends mentioned in s. 3(1) –In the instant case, the prosecution has not proved that the murder was committed with the intention to cause terror –Intention of the accused in the instant case was not to cause terror but to prevent information regarding another crime from being divulged –Designated Court was, therefore, justified in dismissing the charges framed under the Act –Penal Code, 1860 –ss.302, 302/34 and 302/120-B.

PENAL CODE, 1860:

ss, 302, 302/34 and 302/120-B –Conviction based on circumstantial evidence –Out of the three prosecuted for assassination of an Additional Collector of Customs, two charged with offences punishable under Penal Code and ss. 3(2) and 3(3) r/w s. 3(1) of TADA Act – The third one was extradited from Singapore and in view of Extradition Treaty was charged only with ss. 302 and 120-B, IPC – Designated Court convicting all the three accused of the offences punishable u/ss. 302, 302/34 and 302/120-B IPC with imprisonment for life and acquitting the two accused of the offences punishable under TADA Act – Held : The evidence on record presents an unimpeachable evidence against the accused, clearly indicating the modus operandi and the motive – The Designated Court has rightly convicted and sentenced the accused u/ss 302, 302/34 and 302/120-B IPC –It also rightly acquitted the accused of the charges under TADA Act – There is no illegality in the impugned judgment – Terrorist and Disruptive Activities Prevention Act, 1987 – ss.3(2) and 3(3) read with s. 3(1) – Evidence – Circumstantial evidence.

EVIDENCE:

Circumstantial evidence –Offences punishable u/ss 302/ 120-B IPC –Evidence against 'mastermind'/'kingpin' of criminal conspiracy –Appreciation of – Penal Code, 1860 – ss. 302/120-B.

The appellants in Criminal Appeal Nos. 1778 and 1844 of 2008 were prosecuted for offences punishable u/s 302, s. 302/34 and s. 120 IPC, and ss. 3(2) and 3(3) read with 3(1) of Terrorist and Disruptive Activities (Prevention) Act, 1987 and s. 120 IPC, and the appellant in Criminal Appeal No. 1826/2008 was prosecuted for offences punishable u/ss 120B, 302 and 302/34 IPC for assassination of the Additional Collector of Customs of Allahabad, namely, 'LD' on 24-3-1993 at about 07-07.15 p.m. During the course of investigation, the Government of India with the consent of the Government of Uttar Pradesh, entrusted the investigation of the case to Central Bureau of Investigation, which registered a case for an offence punishable u/s 302 IPC. Subsequently, offences punishable u/s 120B IPC and ss. 3(2) and 3(3) read with s. 3(1) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 were added. The prosecution case was that three persons namely 'MD' 'TS' and accused 'B' (the appellant in Crl.A. No. 1826/2008) entered into a criminal conspiracy to eliminate 'LD' to strike terror among the Customs officials with a view to prevent the persons from passing on information about their smuggling activities or their involvement in the Mumbai serial blasts of 1993. Pursuant to this conspiracy hatched, accused 'B' instructed co-accused 'KKS' and 'MS' to eliminate 'LD'. 'KKS' while in police custody, made a confessional statement u/s 15 of the TADA Act, wherein he confessed his own involvement as well as involvement of others in the killing of 'LD'. The confessional statement of 'MS' was also recorded on

11.07.2001 by S.P., CBI, Delhi. Accordingly, charge sheet against 'KKS' and 'MS' was filed in the Designated Court both under the provisions of the IPC and the TADA Act on 26.11.2001. Accused 'B' was arrested in Singapore on 21.04.1995 in response to look out notice issued by Interpol, India. On the request of Government of India, he was extradited by the Government of Singapore. In view of the Extradition Treaty signed between the two countries, 'B' was tried u/s 120-B and 302 IPC and no charge under the TADA Act was framed against him. The Designated Court (TADA) convicted accused 'KKS', 'MS'and accused 'B' of offences punishable u/ss. 302, 302/34 and 302 read with s. 120B IPC and sentenced each of them to undergo imprisonment for life and to pay a fine of Rs. 10,000/- . Accused 'KKS' and 'MS' both were acquitted of the offences punishable u/ss. 3(2) and 3(3) read with s. 3(1) of TADA Act. Aggrieved, the accused filed the appeals. The State also appealed against acquittal of the accused of offences punishable under the TADA Act and for enhancement of the sentence.

The questions for consideration of the Court were : (i) Whether the confessional statement of the co-accused was admissible against 'B', who was not charged under the TADA Act; (ii) Apart from the confession of the co-accused, whether there was any other evidence against accused 'B' to sustain the conviction and sentence u/s 302 read with s. 120-B IPC; (iii) Since the TADA Act is a special statute enacted for a specific purpose and object, whether the interpretation of provisions of the TADA Act requires any specific mode of interpretation; (iv) Whether there was breach of mandatory requirements provided in s. 20A(1) of the TADA Act while recording the confession of an offence under the Act; (v) Whether the conviction of 'KKS' and 'MS' for the offences under the provisions of the IPC were sustainable with the available evidence

on record; and (vi) Whether the Designated Judge (TADA) was justified in acquitting all the accused persons of the offences charged and tried under the TADA Act.

Dismissing the appeals, the Court

HELD:

1. Case of accused 'B':

1.1 By virtue of s. 12 of the TADA Act, the Designated Court may also try any other offence with which the accused may, under the Code, be charged at the same trial if the offence is connected with such other offence. The language of s. 12 clearly states that in the course of any trial under the TADA Act of any offence, if it is found that the accused person has committed any other offence either under this Act or any other law, the Designated Court (TADA) may convict such person of such other offence and pass any sentence authorized by this Act or such other law, for the punishment thereof. Section 15 of the TADA Act, after its amendment, authorizes the Designated Court to use the confession statement of one accused against another accused only when the co-accused is charged in the same case along with the confessor and is tried together with the confessor in the same case. The language of these two Sections is clear and unambiguous. It is well settled principle of law that the jurisdiction to interpret a Statute can be invoked when the same is ambiguous. In the instant case, accuse 'B' was not charged under the TADA Act, but tried in the same trial along with 'KKS' and 'MS', who were tried under the TADA Act. [para 15, 35 and 38] [1023-E; 1036-F; 1037-D-F]

Nasiruddin and Ors. v. Sita Ram Agarwal, **2003 (1) SCR 634 = (2003) 2 SCC 577;** *Dadi Jagganadhan v. Jammulu Ramulu and Ors.*, **AIR 2001 SC 2699;** *Feroze N.*

Dotivalaz v. P.M Wadhwani and co., **(2003) 1 SCC 14;** *Union of India v. Harsoli Devi*, **2002 (2) Suppl. SCR 324 = (2002) 7 SCC 273 9 – relied on**

Standard Chartered Bank and Ors. v. Directorate of Enforcement and ors. **AIR 2005 SC 2622;** *The Assistant Commissioner, Assessment-II, Bangalore and Ors. v. Valliappa Textiles Ltd. and Ors.,* **AIR 2004 SC 86 -referred to.**

Quebec Railway, Light Heat & Power Co. v. Vandray, **AIR 1920 PC 181 - referred to.**

Union of India v. Elphinstone Company Ltd., **2001 (1) SCR 221 =(2001) 4 SCC 139,** *Whirpool of India v. ESI Corporation,* **(2000) 3 SCC 185,** *Mohd. Ali Khan v. CWI,* **1997 (2) SCR 658 = (1997) 3 SCC 511 – cited**

1.2 In the case of *Kartar Singh*,* the Constitution Bench of this Court held that s. 15 of the TADA Act was playing the role of s. 30 of the Evidence Act, which makes the confession of an accused admissible in evidence against its maker as well as other co-accused in a criminal trial. The main concern while making such confession admissible is to test the veracity of the confession, as the incriminated co-accused does not get the opportunity to cross-examine the maker. However, such evidence must be corroborated in order to determine the guilt of a person. In the event, independent evidence supports the confessional statement then there is no harm in relying upon the confession adding further to the independent incriminating evidence. [para 46] [1042-A-C]

Kartar Singh vs. State of Punjab,* **1994 (2) SCR 375 = (1994) 3 SCC 569 – relied on

1.3 The confessional statement made by a person u/s 15 of the TADA Act shall be admissible in the trial of a

co-accused for offence committed and tried in the same case together with the accused who makes the confession. It is settled law that confession of an accused can be used against him as well as other co-accused even if they are acquitted of offences under the TADA Act. [para 33 and 48] [1042-E-F; 1035-G-H]

Prakash Kumar @ Prakash Bhutto vs. State of Gujarat, **2005 (1) SCR 408 = (2005) 2 SCC 409;** *Baba Peer Paras Nath vs. State of Haryana* ***(1996) 10 SCC 500;*** *State vs. Nalini* ***(1999) 5 SCC 253;*** *S.N. Dube vs. N.B. Bhoir*, **(2000) 2 SCC 254;** *Jameel Ahmed vs. State of Rajasthan*, **AIR 2004 SC 588 and** *Esher Singh* vs. *State of A.P*. **2004 (2) SCR 1180 = (2004) 11 SCC 585 – relied on.**

1.4 In any case, it would lead to absurdity for a court to rely on confessions of the maker against himself, and not against another person, when such other person features prominently in the confessional statement, in a joint trial of offences for the same criminal act, especially in circumstances when there is independent incriminating evidence. [para 47] [1042-D-E]

2.1 Section 20A (1) of TADA Act commences with the words "notwithstanding anything", hence it is a non-obstante clause. The phrase "District SP" has been used in order to take the sanction of a senior officer of the said district, when the prosecution wants to record any commission of an offence under the Act, the reason appears to be that the Superintendent of Police of the District is fully aware of necessity to initiate the proceedings under the stringent criminal law like the TADA Act. In the instant case, the State Government, in exercise of the power conferred by s. 3 of the Delhi Police Special Establishment Act, 1946, has handed over the investigation to CBI. The Superintendent of Police, CBI, has authorized his subordinate officer to record the

confessional statements of the two accused, namely, 'KKS' and 'MS', after following the procedure prescribed under the Act and the Rules framed thereunder. Since investigation was done by CBI, the Superintendent of Police could authorize the Police to record the information about the commission of the offence under the Act. [para 52 and 54] [1044-B; 1044-F-H; 1045-A]

In Ashwini Kumar Ghosh v. Arabinda Bose and Anr. **AIR 1952 SC 369;** *Vishin N Khanchandani & Another v Vidya Laxmidas Khanchandani & Another,* **2000 (2) Suppl. SCR 415 = (2000) 6 SCC 724 – referred to**

2.2 In the instant case, the cognizance/'prior permission' was granted by the S.P. of CBI. It was at the behest of the State Government, the case was transferred to the CBI and, therefore, the distinction between District Superintendent appointed by the State concerned and the Superintendent of CBI has hardly any relevance. After a careful consideration of the submission on the question of equation of rank, in matters concerning national security, as is the case of terrorist acts, the Centre and an autonomous body functioning under it would be better equipped to handle such cases. Therefore, 'prior approval' by the SP of CBI would adequately satisfy the requirements u/s 20A(1). There is no prejudice caused to the accused as a result of the authorization being granted by the SP of the CBI. If the whole investigation process is annulled, on the basis of what at its worst, appears to be a technical flaw, it would result in the purport of the statute being ignored. Furthermore, the safeguards provided u/s 15 of the TADA and the rules made thereunder are complied with while recording the confession statement; and no prejudice is caused to the accused. [paras 56, 57 and 59] [1045-E-H; 1046-C-D; 1047-A]

Ahmad Umar Saeed v. State of U.P **1996 (9) Suppl.**

SCR 53 = (1996) 11 SCC 61; *Gurdeep Singh alias Deep v. State(Delhi Administration)*, **1999 (2) Suppl. SCR 693 = 2000(1) SCC 498;** *S.N Dube v. N.B Bhoir,* **(2002) 2 SCC 254 – relied on.**

3.1 As regards, the evidence against accused 'B' independently, the prosecution has examined PW-30, PW-87, PW-68. From the evidence, it can be established that accused 'B' was living in the house of PW-87 in Nepal. He had the phone number 410564 at his disposal. He not only knew that accused 'KKS' and 'MS' were in Allahabad, but also knew the purpose for which they were in Allahabad. This is clear from the testimony of PW-30. From the evidence of PW-68, who was Telecom Department at the relevant date, and the phone bills, it is clear that phone calls were made from the phone number 410564 to the phone number 622452, the phone of Hotel Finero. On a perusal of the phone bills, it is clear that the phone calls were made at the times which have been indicated by the confessional statements of accused 'KKS' and 'MS'. Hence, the part of the confessional statements in question have been corroborated by the other evidence. The evidence on record, without considering the confessional statements, is strong enough to create serious doubts about the conduct of accused 'B' in this matter. [para 63] [1048-C-F]

3.2 Merely because the owner of the car, which was used in the crime, is not examined by the prosecution, it does not weaken the case of the prosecution. In fact, the car was recovered on the information furnished by co-accused 'KKS'. This would clearly establish the prosecution case that the car bearing No.DNH-8440 was used in committing the offence alleged against the accused. Minor discrepancies, if any, would not be fatal to the entire case of the prosecution. [para 63] [1048-F-H; 1049-A]

3.3 The role played by accused 'B' in the instant case is that of a "king pin". The possibility of having direct evidence against a "king pin" is rather low. In most cases, it may be circumstantial. What is to be seen is the chain of events that the prosecution is expected to prove can be linked to the evidence incriminating accused 'B'. [para 65] [1049-C]

3.4 It has been consistently held by this Court that where the guilt of a person squarely rests on circumstantial evidence, then the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be in coherence of each other and incompatible with the innocence of the accused. The circumstances from which, such inference is to be drawn, must be shown to be closely connected to the facts which are sought to be proved. When the matter depends on the conclusions to be drawn from such circumstances, then the cumulative effect of the circumstances must be to negate the possibility of innocence in any manner. [para 66] [1049-D-F]

State of UP v. Satish, **2005 (2) SCR 1132 = (2005) 3 SCC 114;** *Liyakat v. State of Uttranchal,* **2008 Cri LJ 1931 (SC);** *Swamy Sharaddananda v. State of Karnataka,* **2007 (7) SCR 616 =2007 (3) SCR 507 = (2007) 12 SCC 288;** *State of Goa v. Sanjay Thekaram,* **(2007) 3 SCC 755 – *relied on***

3.5 From the evidence on record, it can safely be inferred that accused 'B' was the mastermind of the whole incident and co-accused 'KKS' and 'MS' committed the offence at the behest of accused'B'. There is independent incriminating evidence against accused 'B', even if the confessional statement of co-accused is eschewed. [para 67] [1049-G-H; 1050-A]

4. Case of accused 'KKS' and 'MS' :

4.1 Co-accused 'KKS' has, u/s 15 of the TADA Act, confessed to the crime. His confession was recorded by SP, CBI (P.W 47). He was fully made aware of the consequences of making a confessional statement. He has stated that he went to Nepal on accused 'B's behest where he met co-accused 'MS'. He further stated that he was given the task to kill 'LD'. He also mentions that he was chosen specifically to open fire as he had previously committed four murders. He stated that accused 'B' provided co-accused 'MS' with Maruti car DNH – 8440, a 9 mm pistol, several cartridges and Rs.10,000 to 12,000/- for this purpose. On the morning of 23-3-1993, co-accused 'KKS' and 'MS' checked into Hotel Finero in Allahabad under the assumed names of 'AKS' and 'HS' respectively. Subsequently, they received a phone call from accused 'B' from Nepal who told them that they would meet one 'AB' who would help them in the task. Subsequently, 'AB' met co-accused 'KKS' and 'MS' in their room. They examined the area and planned how to execute the task of killing the victim 'LD'. On the following morning, they received a phone call from accused 'B' from Nepal who asked them to finish the task as the victim was to leave for Bombay to reveal information regarding smuggling of arms and explosives used in the Bombay bomb blasts. 'AB' told them the time of arrival of victim 'LD'. They took their respective positions. 'KKS' shot three times at the victim and escaped to the place where 'MS' was waiting. Both met 'AB' and exchanged vehicles. They went back to the Hotel, checked out and left for Nepal. [para 69, 70] [1050-D-E; 1051-A-B]

4.3 The testimony of co-accused 'MS' is substantially similar to that of co-accused 'KKS'. Merely because the confessional statement of both the co-accused is more or less similar, it cannot be said they are neither normal

nor natural which would vitiate the probative value of such confessional statement. [para 71] [1051-E-F]

4.4 Subsequently, both the co-accused 'KKS' and 'MS' retracted their confessional statements before the Designated Court and have categorically denied knowing each other or accused 'B'. They have also denied ever having gone to Hotel Finero, or the Colony of the deceased etc. They have stated that the CBI has prevailed upon the witnesses produced on behalf of the prosecution to give false evidence against them. However, a confessional statement given u/s 15 shall not be discarded merely for the reason that the same has been retracted. [paras 72-73] [1052-A-C]

Ravinder Singh v. State of Maharashtra, **2002 (3) SCR 622 = (2002) 9 SCC 55;** *State of Maharashtra v. Bharat Chaganlal Raghani,* **2001 (3) SCR 840 = (2001) 9 SCC 1—relied on**

4.5 In the instant case, the accused were sent to the CMM, Delhi the very next day and they neither alleged that the confession was fabricated, nor that they had been tortured. In the light of these circumstances, due credence is to be given to the confession. [para 75] [1053-E-F]

4.6 It would be prudent to examine the authenticity of a confession on a case to case basis. Section 15 and the rules made thereunder prescribe certain guidelines – which if ensured can, to a large extent, point towards the fact that the confession is truthful and voluntary. However, it must not be overlooked that the TADA Act prescribes a deviation from the conventional criminal jurisprudence. As a court of record, this Court is bound to keep in mind situations where despite the procedure being followed, the testimony so obtained u/s 15 is coloured by suspicion and doubt regarding its veracity.

Hence, albeit the procedure is followed, it would be judicious to look into whether the testimony is corroborated by the evidence presented by the prosecution. The life and liberty of a person are at stake and no effort should be spared in such circumstances to see that justice is done. [para 77] [1053-H; 1054-A-E]

4.7 The confessional statements of 'KKS' and 'MS' are corroborated by the documentary evidence, which are marked in the evidence by the prosecution. Exhibit D-20/ Ka 2 is the notebook maintained by Hotel Finero and proves the entry of Maruti car DNH – 8440 against accused 'KKS's assumed name, 'AKS' on 23.3.1993. Exhibit D-19 is the hotel register and proves that 'KKS' and 'MS' signed in it under fictitious names. Both 'KKS' and 'MS' have been recognized by the employees of the Hotel Finaro. The testimony of PW-1, the Hotel Manager, P.W-44, the waiter, and PW 60 corroborates the fact that the accused stayed in the Hotel during the relevant time and were met by 'AB'. The hand writing of the accused in the register has also been proved by the detailed report of PW-43, Sr. Scientific Officer, produced as Exhibit-D-27. The car used for committing the crime has been recovered at the instance of accused 'KKS'. The copy of the Cash Memo seized from the petrol pump Exhibit- D 22/ Ka 27 and the Customs Receipt [D 37/28, Ka 76] corroborates the alleged journey from Krishna Nagar, Nepal to Allahabad and back. The statement issued by the Nepal police reveals that Car bearing No. DNH – 8440 entered Nepal through Krishna Nagar customs and was allowed to stay for a period of one week on payment of Rs 700 Nepal Currency as customs duty. Further, the printouts of call logs on telephone number 622452 installed in Hotel Finero (Exhibits D 38/40 and D 36/2), the report of part of investigation in Nepal (Exhibits D 37, D 37/28) read with the statements of PW 87 (land lady of accused 'B' in Nepal), PW – 68, the Deputy Fiscal Officer,

Telecom Dept, Nepal corroborate the confessional statement of accused 'KKS' and 'MS' to a substantial extent. PW 87 has recognized accused 'B' in court and stated that he was staying at the house rented out by her in Krishna Nagar, Nepal and that the telephone number from which calls were made to Room No 7 in Hotel Finero, where 'KKS' and 'MS' were staying, was installed in the same house where accused 'B' was staying. PW 21 Inspector MTNL identified co-accused 'KKS' in court and stated that he had previously been involved in the transfer of a phone in the name of one 'AKS'. He stated that 'KKS' and 'AKS'are one and the same. 'AKS'is the assumed name used by 'KKS' even at Hotel Finero. 'KKS' had, in his confession, stated that he had obtained the driving license of 'AKS' and substituted the photograph therein with his own. [para 78] [1054-F-H; 1055-A-H]

4.8 PW-30, who was declared hostile by prosecution stated on oath that he knows accused 'B' from his University days. He admits to have been involved in solving a few land disputes on accused 'B's behalf. He has visited 'B' in Nepal a couple of times. During the time when 'LD' was murdered, he was in Allahabad. He stated that he received calls from both accused 'MS' and 'B' on March 23 and 24. It was stated by the witness that in the course of conversation, 'MS' revealed that he had obtained his number from accused 'B'. 'MS' stated that he was in Allahabad and that 2-3 people had come with him. Subsequently, he has stated that accused 'B' called him in relation to a property dispute that he was assisting him with. PW-30 in his cross examination, has denied having told the investigating officer that 'MS' had told him that he had come to Allahabad to kill 'LD'. However, he admitted that he told the CBI officer that accused 'B' told him that 'MS' was there on a specific task and that is the reason why he should desist from meeting him. [para 79] [1056-A-E]

4.9 The evidence of PW-30, despite the fact that the prosecution has chosen to treat him as a hostile witness, need not be totally disregarded. Its admissibility should be tested in the light of the surrounding circumstances and other evidence. The testimony of PW-30 provides a vital link between the various participants in this crime, the fact that co-accused 'KKS' and 'MS' were in Allahabad on a 'specific task' assigned to them by accused 'B', who was in Nepal. [paras 80- 81] [1056-F-G; 1059-A-B]

In *Radha Mohan Singh vs. State of UP,* **2006 Cri LJ 1121 (1125) (SC) – relied on.**

4.10 Taken together, the evidence on record presents an unimpeachable evidence against the accused, clearly indicating the modus operandi and the motive. The Designated Judge (TADA) was justified in convicting and sentencing 'KKS' and 'MS' for the offences u/s 302/34 IPC. [para 81, 82] [1057-B-D]

5.1 Section 3 of the TADA Act gives due importance to the aspect of 'intent'. The person who is alleged to be involved in a terrorist act can be charged u/s 3(1) only when the prosecution has been successful in establishing that the same was committed with the intent to awe the government or to achieve one or the other ends mentioned u/s 3(1). The Designated Court, while dismissing the charges under the TADA Act, relied on the decision of this court in the case of *Hitendra Vishnu Thakur* *. This Court made a distinction between the incidence of terror as a consequence of a particular act and causing terror being the sole intent of the same act. It is only in case of the latter that the provisions of s. 3(1) are attracted. [para 85] [1059-C-E]

******Hitendra Vishnu Thakur vs. State of Maharashtra,* **1994 (1) Suppl. SCR 360 = (1994) 4 SCC 602;** *State of West Bengal vs. Mohammed Khalid* **1994 (6) Suppl. SCR 16 = (1995) 1 SCC 684; Corpus Juris Secundum (A Contemporary Statement of American Law, Vol 22 at pg 116) – referred to**

5.2 The instant case concerns the murder of 'LD'. The prosecution has not been successful in proving that this particular murder was committed with the intention to cause terror. Terror could have been caused as a consequence of the act. The prosecution has stated that the main intention behind the murder of 'LD' was to prevent that the names of 'MD', 'TS' and others involved in smuggling of arms and explosives would not come to light during the investigations that followed the Bombay blasts. It is, therefore, evident that the intention of the accused in the instant case was not to cause terror but to prevent information regarding another crime from being divulged. In the light of these facts, the Designated Court was justified in dismissing the charges framed under the TADA Act. There is no illegality in the judgment under appeal. [para 88 and 89] [1060-G-H; 1061-A-D]

Case Law Reference:

2003 (1) SCR 634	**relied on**	**para 38**
AIR 1952 SC 369	**referred to**	**para 52**
(2000) 2 SCC 254	**relied on**	**para 58**
2004 (2) SCR 1180	**relied on**	**para 31**
2005 (1) SCR 408	**relied on**	**para 19**
1994 (2) SCR 375	**relied on**	**para 34**
AIR 2001 SC 2699	**relied on**	**para 39**
AIR 2005 SC 2622	**referred to**	**para 43**
(2003) 1 SCC 14	**relied on**	**para 40**

2002 (2) Suppl. SCR 324	**relied on**	**para 50**
AIR 1920 PC 181	**referred to**	**para 42**
AIR 2004 SC 86	**referred to**	**para 44**
2000 (2) Suppl. SCR 415	**referred to**	**para 53**
1996 (9) Suppl. SCR 53	**relied on**	**para 55**
1999 (2) Suppl. SCR 693	**relied on**	**para 57**
2002 (4) Suppl. SCR 416	**relied on**	**para 40**
2001 (2) Suppl. SCR 60	**relied on**	**para 39**
2001 (1) SCR 221	**cited**	**para 50**
1997 (2) SCR 658	**cited**	**para 50**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1778 of 2008.

From the Judgment and Order dated 30.09.2008 of the Ld. Designated Court (TADA), Kanpur in TADA Criminal Case No. 3A of 1994.

WITH

Criminal Appeal No. 1826 of 2008.

Criminal Appeal No. 1844 of 2008.

Criminal Appeal No. 1336 of 2009.

Criminal Appeal No. 1347-1348 of 2009.

P.P. Malhotra, ASG K.T.S. Tulsi and A. Sharan, Gaurave Bhargava, Raj Kamal, Ravi Prakash, Niraj Gupta, Irshad Ahmad, Amit Anand T., A.K. Singh, Sanchit, Tulika Prakash, Sheeba Khan, M. Khairati, Ranjana Narayan, Naresh Kaushik, T.A. Khan, A.K. Sharma and B. Krishana Prasad for the appearing parties.

The Judgment of the Court was delivered by

H.L. DATTU, J. 1. These appeals are preferred against the common judgment and order passed by the learned Sessions Judge, Designated Court (TADA), Kanpur dated 30.9.2008 in TADA Crl. Case No.3 of 1994 (*State vs. K.K. Saini*), TADA Crl. Case No. 3A of 1994 (*State vs. Manjit Singh @ Mange*) and TADA Crl. Case No.1 of 1995 (*State vs. Om Prakash Shrivastava @ Babloo*). By the impugned judgment of conviction and order of sentence, K.K. Saini, Manjit Singh@ Mange (in short, "Mange") and Om Prakash Shrivastava @ Babloo (in short, "Babloo") have been convicted for offence punishable under Section 302 IPC, Section 302 read with Section 34 IPC and Section 302 read with Section 120B IPC respectively. They have been sentenced to undergo imprisonment for life and to pay fine of Rs.10,000/- each in respect of these offences and in default, undergo rigorous imprisonment for a period of six months each. K.K. Saini and Mange are both acquitted of charges under Sections 3(2) and 3(3) read with Section 3(1) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 [hereinafter referred to as, "TADA Act"]. All the sentences were directed to run concurrently.

2. The accused have filed appeals under Section 19 of the TADA Act against the impugned judgment and order passed by the Designated Court (TADA), Kanpur. State of Uttar Pradesh through CBI has also filed appeals against the judgment and order passed by the Designated Court (TADA) acquitting the accused persons for the offences under Sections 3(2) and 3(3) read with Section 3(1) of the TADA Act and further for the enhancement of sentence imposed under the provisions of IPC to death sentence in view of the seriousness of the offence and the purpose for which it was carried out.

3. The prosecution case in brief is as follows :-

Shri L.D. Arora, Additional Collector of Customs,

Allahabad was assassinated on 24.03.1993 at about 07-07.15 p.m. in the area of P.S. Cantonment, Allahabad. The nephew of the deceased Dr. Satish Arora (PW-2) had lodged the First Information Report at P.S. Cantonment, Allahabad at 20.15 p.m. According to his report, on 24.03.1993, Shri L.D. Arora (Deceased) reached his house at HIG flat No.9, ADA Colony, Circular Road, Allahabad by his car. He had gone to his uncle's house on 24.03.1993 at about 07-07.15 p.m. He saw his uncle's car parked at the same place where he used to park his car regularly. After knocking the door, he had entered his uncle's house. Soon after his arrival, the neighbour told him that something has happened to his uncle. He immediately rushed to the place where his uncle had parked his car. Upon arrival at the spot, he saw his uncle was lying unconscious on the driving seat in a pool of blood. He immediately took his uncle to Swaroop Ram Medical Hospital with the help of people from the neighborhood. At the hospital, his uncle was declared brought dead. The investigation was initially taken up by the Cantonment Police Station, Allahabad.

4. The prosecution has further stated that the post mortem of the dead body was carried out by Dr. A.K. Shrivastav of MLN Hospital on 25.03.1993, who prepared a post mortem report, which was duly countersigned by Dr. S.L. Diwan, Senior Surgeon of the hospital. The post mortem report revealed that there were three entry wounds caused by fire arm and corresponding three exit wounds on the upper parts of the body below the pinna of right ear, below and behind the tip of right mastoid procure and the last was 2 cms below it. The cause of death was ascertained to be ante-mortem head injuries caused by bullets. The time of the death was ascertained to be 7.55 p.m. on 24.03.1993.

5. When the investigation by the State Police was still going on, the Department of Personnel and Training, Ministry of Personnel, Public Grievances and Pension, Government of India vide Notification No.228/48/93-A.V.D.-JJ dated

12.07.1993 issued with the consent of the Government of Uttar Pradesh, entrusted the investigation of the case to CBI, pursuant to which R.C. (10) (S)/93-S.J.U.V/C.B.I.,1I/New Delhi dated 13.07.1993 under Section 302 of IPC was registered in SIC.II Branch of CBI. During the course of investigation, offences under Section 120-B of IPC and Sections 3(2) and 3(3) read with Section 3(1) of the TADA Act were added with the permission of Superintendent of Police, CBI, New Delhi.

6. The prosecution further states that one Mohd. Dosa, Tahir Shah @ Tappu and Babloo entered into criminal conspiracy to eliminate L.D. Arora to strike terror among the customs officials with a view from preventing anyone from passing on information about their smuggling activities or their involvement in the Bombay Blasts on March 12, 1993. Pursuant to this conspiracy hatched, Babloo instructed K.K. Saini and Mange on 20.03.1993, who were with him in Krishna Nagar, Nepal, to assassinate the deceased L.D. Arora. Mange was further informed that one Alimuddin @ Baba would be available at Hotel Finero, Allahabad. Babloo gave them '10-12,000/-, one 9 mm Pistol, 12 cartridges and a Maruti Car, bearing registration No. DNH 8440, to accomplish the task. Thereafter, K.K. Saini and Mange left Nepal with the above mentioned fire arms in the said car. They reached Allahabad and checked into the above mentioned Hotel Finero in Room No.7 and entered their names as A.K. Singh and Harjeet Singh respectively in the hotel register. Thereafter, Alimuddin also checked into Room No. 5 of the same hotel along with a lady named Smt. Arshi. On the same day, there was a meeting between K.K. Saini, Mange and Alimuddin in Room No.7 to chalk out the strategy to kill the deceased on the morning of 24.03.1993, i.e. the next day. All three of them reached the office and residence of the deceased on a scooter and conducted a thorough survey. Babloo further contacted K.K. Saini over telephone installed at the hotel in Allahabad, instructing him to kill the deceased that very day as he might leave for Bombay on the next day to disclose information he had gathered regarding the Mumbai

serial blasts of 1993. Persuant to these instructions, at around 6.45 p.m., K.K. Saini, Mange and Alimuddin waited near the ADA Colony, Circular Road, Allahabad for the arrival of the deceased in his car. As soon as the car of the deceased was spotted in the vicinity, all three of them took up positions and when the deceased entered the ADA Colony through the main gate in the eastern boundary wall and was about to park his car, K.K. Saini took out his pistol and fired three shots at the deceased, as a result of which, the deceased sustained fatal injuries and collapsed in his seat.

7. It is further case of the prosecution that during the course of the investigation, they recovered three empty cartridges and one lead from the car of the deceased and one lead from the ground, where the car was parked. The Ballistic Expert of F.S.L., Lucknow opined that the three empty cartridges were fired from the same 9 mm pistol. Investigations disclosed that Mohd. Dosa had entered into criminal conspiracy with Tahir Shah and Babloo to kill the deceased L.D. Arora so that their involvement in the Bombay Bomb Blasts were not revealed. After killing the deceased, the information was relayed to Babloo and later, Mange and K.K. Saini returned to Nepal on 25.03.1993 by crossing the Indo-Nepal border at Krishna Nagar by paying an amount of Rs. 600/- in Nepal currency towards octroi/tax for vehicle No.DNH 8440. The course of investigation further led to information that one Virendra Pant and Sanjay Khanna met Babloo in Al-Rigu Apartments in Dubai where Babloo made an extra judicial confession that he had got the deceased killed through the concerned people as he had information about the activities of Mohd. Dosa and Tahir Shah especially in the smuggling of RDX, weapons and explosives used in the Bombay Bomb Blasts. For this job, he was paid Rs. 6,0 0,000/- by Tahir Shah, out of which Rs.50,000/- was given to K.K. Saini.

8. Prosecution further states that K.K. Saini, while in police custody, during the period from 06.04.1994 to 04.05.1994

made a confessional statement under Section 15 of the TADA Act, wherein he confessed his own involvement as well as involvement of others in the killing of L.D. Arora. Based on his confession and information, the Maruti Car bearing No. DNH 8440, the vehicle used in the commission of the offence, was also recovered. Later, K.K. Saini refused to join the Test Identification Parade and his refusal was recorded by Shri Rakesh Kapoor, Metropolitan Magistrate, Delhi. The confessional statement of Mange was also recorded on 11.07.2001 by S.P., CBI, Delhi. Accordingly, charge sheet against K.K. Saini and Mange was filed in the Designated Court both under the provisions of the IPC and the TADA Act on 26.11.2001, which was registered as Criminal Case No.3 of 1994 and Criminal Case No.3A of 1994. It is also relevant to notice that Babloo was arrested in Singapore on 21.04.1995 in response to look out notice issued by Interpol, India. On the request of Govt. of India, he was extradited by the Govt. of Singapore. The Extradition Treaty signed between the two countries provided that the person being extradited could only be tried for criminal acts recognized as offences in both the countries. Since, there was no law in Singapore which corresponds to the TADA Act, though Babloo was extradited, he could only be tried under Section 120-B and 302 of the IPC and, therefore, no charge under Section 3 of the TADA Act was framed against Babloo. After completion of investigation, the investigating agency filed charge sheet before the Designated Court (TADA) for the offences under Section 302 IPC against K.K. Saini and Mange for offences under Section 302 read with Section 34 of the IPC and against Babloo under Section 302 read with Section 120B IPC. K.K. Saini and Mange were also charged under Section 3(2) and 3(3) read with Section 3(1) of the TADA Act. To prove the charges, the prosecution had examined 88 witnesses in the leading criminal case No. 3 of 1994 and 85 witnesses in criminal case No. 3A of 1994 during the trial and relied upon various documents including confessional statements recorded during investigation. All the

accused persons abjured their guilt and pleaded innocence and stated that they have been falsely implicated in this case.

9. The Designated Court (TADA) had framed nearly eleven issues for its consideration. The Court, relying on Section 12 of TADA Act, has held that Babloo was rightly charged for an offence under Section 302 read with Section 120B of the IPC and tried him jointly with the accused K.K. Saini and Mange and for technical reason, he could not be charged under the TADA Act. The Court has further held that since the investigation was handed over to Superintendent of Police, CBI, by the State of Uttar Pradesh by issuing notification, prior approval from S.P., CBI, was sufficient compliance of Section 20A of the TADA Act. On the issue of the admissibility of the confessional statement of the accused K.K. Saini and Mange against the co-accused Babloo, the learned Designated Judge, after noticing the language employed in Section 12 and Section 15 of the TADA Act, has concluded that merely due to technicality in the Extradition Treaty, Babloo was not charged under TADA Act. However, in the light of the provisions and the decisions of this Court, the confessional statements were held to be admissible against the co-accused even when he was not charged under the TADA Act, but was tried jointly for offences under other law by the Designated Court (TADA). The Designated Court (TADA) did not find any merit in the contention that the confession statements of K.K.Saini and Mange were not recorded voluntarily. The Designated Judge (TADA), after carefully considering the evidence on record, has held that the prosecution has successfully proved the recovery of Maruti Car No. DNH 8440 on the information furnished by K.K. Saini. As regards the issue of proving charges of conspiracy under Section 120B of IPC, it was held that from the facts and circumstances and prosecution evidence, it was clear that the three accused namely, K.K. Saini, Babloo and Mange hatched conspiracy to kill L.D. Arora and all the three accused were involved in the conspiracy. Hence, all the three accused were held liable for conviction for the charge under

Section 120B read with Section 302 of the IPC. As regards the last issue of proving the guilt of all the three accused and the sufficiency of the evidence other than confessional statement, it was observed that the prosecution has proved the same by producing both oral and documentary evidence. The Designated Court (TADA), after considering the material evidence on record, including the Post Mortem Report and the statements made by the accused persons under Section 313 of the Criminal Procedure Code, has concluded that the prosecution has adduced sufficient, reliable oral and documentary evidence, which corroborates the confessional statement of both the accused namely, K.K. Saini and Mange and further concluded that there is enough evidence, other than the confessional statement against Babloo, which proves the prosecution case in so far as charges framed under the provisions of the IPC.

10. We have heard Shri K.T.S. Tulsi, learned senior counsel for Mange and Babloo and Shri Amrendra Sharan, learned senior counsel for K.K. Saini and Shri P.P.Malhotra, learned Additional Solicitor General for the CBI.

11. As these appeals are preferred against the judgment and order of learned Designated Court (TADA) under Section 19 of the TADA Act, therefore, we have to consider these appeals both on facts as well as on question of law for our conclusion and decision.

12. The learned senior counsel Shri K.T.S. Tulsi and Shri Amrendra Sharan submitted that K.K. Saini and Mange were charged under the TADA Act and not Babloo. It is argued that since there was no terror caused in the society by the acts of the accused, they cannot be charged under Section 3(1) and 3(2) of the TADA Act and, therefore, they could only be tried for committing offence of murder under Section 302 of the IPC. Further, it was argued that prior approval was required to be taken from the Superintendent of Police of the District, as required under Section 20-A of the TADA Act, to try the

accused for the offences under the TADA Act and the Superintendent of Police, CBI was not the competent authority to give such permission. It is further submitted that the confessional statements of K.K. Saini and Mange were recorded in complete defiance of provisions of the TADA Act and the rules framed thereunder and that mandatory provisions have not been followed. Therefore, the confessional statement is to be completely eschewed from consideration. It is also contended that there is no sufficient and reliable evidence against Babloo except the confessional statement of K.K. Saini and Mange and the prosecution has therefore failed to prove the conspiracy between the accused tried in the present case. Shri K.T.S. Tulsi, learned senior counsel, who also appears for Babloo, submitted that the confessional statement of the co-accused K.K. Saini and Mange recorded under Section 15 of the TADA Act cannot be used against Babloo as he is not charged under the provisions of the TADA Act and also because no prior approval from the prescribed authority, as required under Section 20A of the TADA Act, had been obtained. He also submitted that the penal provisions require to be strictly construed. In support of his submission, the learned senior counsel has placed reliance on several decisions of this Court. We will make reference to the submissions and the decisions while considering the issues raised in these appeals.

13. Shri P.P. Malhotra, learned Additional Solicitor General, submitted that when the investigation is transferred to the CBI, with the consent of the State, the CBI takes over further investigation of the case. Therefore, Superintendent of Police, CBI, was competent to record the confession made by a person and the same is admissible in the trial of such person for an offence under the TADA Act. He further submits that the aforesaid officer, before recording the confession under Section 15(1) of the TADA Act, had followed the safeguards provided under sub Section (2) of Section 15 of the TADA Act. It is further submitted that the confessional statement of K.K. Saini and Mange recorded before S.P., C.B.I., was admissible in

evidence vide Section 15 of the TADA Act, which provides for the recording of the confessional statements before the police officer, not lower in the rank than Superintendent of Police, and it is made admissible even against co-accused, abettor or conspirator and the bar under the Evidence Act and Criminal Procedure Code will not come into play. It was further submitted that the confessions made by K.K. Saini and Mange are admissible as substantive evidence against Babloo. It was also submitted by the learned ASG that there was sufficient evidence adduced by the prosecution to support the correctness of the confessional statements of the two co-accused persons. He further submitted that the Section takes special care to ensure that no court shall take cognizance of any offence under the Act without the previous sanction of the Inspector General of Police or the Commissioner of Police. The safeguard so provided under the Act would protect the rights of an accused of any offence under the Act.

14. The issues that would arise in these appeals filed by appellants-accused for our consideration and decision are as under :-

(I) Whether the confessional statement of the co-accused is admissible against Babloo, who was not charged under the TADA Act.

(II) If for any reason, confession of the co-accused is eschewed against Babloo, whether there is any other evidence against him to sustain the conviction and sentence under Section 302 read with Section 120-B IPC.

(III) Since the TADA Act, being a special statute enacted for a specific purpose and object, whether the interpretation of provisions of the TADA Act requires any specific mode of interpretation.

(IV) Whether there is breach of mandatory requirements

provided in Section 20A(1) of the TADA Act while recording the commission of an offence under the Act.

(V) Whether the conviction of K.K. Saini and Mange for the offences under the provisions of the I.P.C. are sustainable with the available evidence on record.

(VI) Whether the learned Designated Judge (TADA) was justified in acquitting all the accused persons for the offences charged and tried under the TADA Act.

Case of Babloo

15. The object and purpose of the TADA Act is explained by this Court in number of decisions. Therefore, it is not necessary for us to repeat and reiterate the same. We will only notice the relevant provisions which are necessary for the purpose of this case.

16. Section 12 of the TADA Act speaks of the power of the Designated Courts with respect to other offences. By virtue of this Section, the Designated Court may also try any other offence with which the accused may, under the Code, be charged at the same trial if the offence is connected with such other offence. Sub-section (2) further empowers the Designated Court that in the course of the trial under the TADA Act of any offence, if it is found that the accused person has committed any other offence under the TADA Act or any rule made thereunder or under any other law, the Designated Court may convict such person of such other offence and pass any sentence authorized under this Act or such rule or such other law for the punishment thereof. A Designated Court constituted under Section 9 of the TADA Act or a transferee Designated under Section 11 of the TADA Act is vested with the jurisdiction to try all the offences punishable under the provisions of the TADA Act. While trying such offence, if the accused is charged

for offence punishable under the provisions of any other law connected with such offence, the Designated Court has power to try the accused in such offence also during trial, if it is found that the accused has also committed other offence punishable under any other law, the Designated Court can convict the accused for such offence also. The Designated Court can pass any sentence, on conviction of the accused, as authorized in the respective statute for punishment of such offence.

17. Section 15 of the TADA Act commences with a non obstinate clause by stating that notwithstanding anything contained in the IPC or the Evidence Act, the confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by such Police Officer in writing etc., shall be admissible in the trial of such person, co-accused, abettor or conspirator for an offence under the TADA Act or rules made thereunder. The proviso appended to the Section carves out an exception to the main Section. It says that the confession made by a person accused of an offence under the Act or the rules framed thereunder can be used against co-accused, abettor or conspirator, provided he is charged for any offence under the Act or the rules framed thereunder and tried in the same case together with the accused. It was contended by Shri K.T.S. Tulsi, that Babloo was not charged under the provisions of the TADA Act or the rules framed thereunder. Therefore, the confession statement made by co-accused i.e. K.K. Saini and Mange cannot be used against Babloo and if the confessional statement of the co-accused is eschewed, then there is no other evidence to implicate Babloo for the offence alleged to have been committed under the Indian Penal Code and, therefore, the conviction and sentence imposed by the Designated Court cannot be sustained.

18. The main question before us is whether the confessional statement made by K.K. Saini and Mange can be used against co-accused Babloo in the light of the fact that

Babloo was not charged and tried for any offence under the TADA Act or the rules framed thereunder.

19. This issue was raised before the learned Designated Judge (TADA). The learned Judge has answered the issue and in his opinion, Babloo was not tried for offences under the TADA Act, only due to the extradition terms that were agreed by Union of India with Singapore Government. He has further stated that it was only due to this technicality that Babloo was not tried for offences under the Act, though his actions fully justified a trial for offences under the Act. It is this reasoning of the learned Designated Judge that was commented and taken exception to by learned senior counsel Shri K.T.S. Tulsi. We have already noticed that the submission of the learned senior counsel is that confession made by the co-accused charged under the TADA Act cannot be used against co-accused who is not charged and tried under the TADA Act. The learned senior counsel, while relying on the observations made by this Court in the case of *Baba Peer Paras Nath vs. State of Haryana,* (1996) 10 SCC 500, in aid of his submission, would further contend that this Court in the case of *State vs. Nalini,* (1999) 5 SCC 253 and the Constitution Bench decision of this Court in the case of *Prakash Kumar@Prakash Bhutto vs. State of Gujarat,* (2005) 2 SCC 409*,* did not deal with the admissibility of a confession statement made by an accused under the TADA Act against co-accused not charged under the Act or the rules framed thereunder and therefore not applicable to the facts of the case.

20. Shri P.P. Malhotra, learned Additional Solicitor General, submits that all the three accused were being tried in the same case by the Designated Court (TADA). Therefore, the confession of the accused K.K. Saini and Mange, charged for the offence under the TADA Act, could be used against Babloo, who was charged for the offence under Section 302 read with Section 120B of the IPC. The learned ASG would further contend that Section 15 of the Act is a rule of procedure and

no one has any vested rights in the procedural provisions.

21. We are of the view that the issue raised needs to be appreciated in the light of several decisions of this Court and principles of statutory interpretation. For appreciating the contention of the learned counsel Shri K.T.S. Tulsi, firstly we need to notice the provision which empowers the police officer to record the confessional statement of the accused.

22. Section 15 of the TADA Act was amended by Act No. 43 of 1993 with effect from 22.05.1993. By this amendment, not only some changes are brought in the main Section but also the proviso is added to sub-section (1) of Section 15. The amended provision reads:

> "15. Certain confessions made to police officers to be taken into consideration – (1) Notwithstanding anything in the Code or in the Indian Evidence Act, 1872 (1 of 1872), but subject to the provisions of this section, a confession made by a person before a police officer not lower in rank than a Superintendent of Police and recorded by such police officer either in writing or on any mechanical device like cassettes, tapes or sound tracks from out of which sounds or images can be reproduced, shall be admissible in the trial of such person or co-accused, abettor or conspirator for an offence under this Act or rules made thereunder:
>
> Provided that co-accused, abettor or conspirator is charged and tried in the same case together with the accused.
>
> (2) The police officer shall, before recording any confession under sub-section (1), explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him and such police officer shall not record any such

confession unless upon questioning the person making it, he has reason to believe that it is being made voluntarily."

23. Under the amended provision of Section 15 of the TADA Act, the confession of a co-accused recorded under Section 15 of the TADA Act is made admissible subject to certain conditions. The confession recorded under Section 15 of the TADA Act by a co-accused could be made use of against that accused provided the co-accused is charged and tried in the same case together with the accused. Section 15 of the TADA Act is amended by Act No. 43 of 1993, which clearly stipulates that the confession recorded under Section 15 of the TADA Act is admissible only if the confessor is charged and tried in the same case together with the co-accused. After the amendment of 1993, the addition of the words 'co-accused, abettor or conspirator is charged or tried together with the accused' clearly shows that the confession could be considered by the Court only when the co-accused, who makes the confession, is charged and tried along with the other accused.

24. This Court in the case of *Kartar Singh vs. State of Punjab,* (1994) 3 SCC 569 considered the validity of Section 15 of the TADA Act. While considering the question whether the procedural law is oppressive and violates the principles of just and fair trial offending Article 21 of the Constitution and is discriminatory violating the equal protection of laws offending Article 14 of the Constitution, and therefore, whether Section 15 of the TADA Act needs to be struck down, this court held Section 15 of the TADA Act stands good on the test of constitutional validity as the classification of offenders and offences to be tried by the Designated Court under the TADA Act or by the Special Courts under the Act of 1984 are not left to the arbitrary and uncontrolled discretion of the Central Govt., but the Act itself has made a delineated classification of the offenders as terrorists and disruptionists in the TADA Act and the terrorists under the Special Courts Act, 1984 as well as

classification of offences under both the Acts. This Court also stated that the Act also provides for procedural safeguards to be followed by the police officers with regard to mode of recording the confession and, therefore, Section is not liable to be struck down as it does not offend either Article 14 or 21 of the Constitution of India. The Court further observed as under:-

"255. As the Act now stands after its amendment consequent upon the decision of Section 21(1)(c), a confession made by a person before a police officer can be made admissible in trial of such person not only against the person but also against the co-accused, abettor or conspirator, provided that co-accused, abettor or conspirator is charged in the same case together with the accused, namely the maker of the confession. The present position is in conformity with Section 30 of the Evidence Act."

25. The scope of Section 15 of the TADA Act was considered by a three Judge Bench of this Court in *State vs. Nalini (supra)*. The three learned Judges were pleased to deliver three separate judgments. We shall extract the relevant portion of the judgments. While answering this question, K.T. Thomas, J. opined:

"81. Section 15 of TADA enables the confessional statement of an accused made to a police officer specified therein to become admissible "in the trial of such a person". It means, if there was a trail of any offence under TADA together with any other offence under any other law, the admissibility of the confessional statement would continue to hold good even if the accused is acquitted under TADA offences."

"…The correct position is that the confessional statement duly recorded under Section 15 of TADA would continue to remain admissible as for the other offences under any

other law which too were tried along with TADA offences, no matter that the accused was acquitted of offences under TADA in that trial." (Para 82)

"…In other words, after the amendment a Designated Court could not do what it could have done before the amendment with the confession of one accused against a co-accused. Parliament has taken away such empowerment. Then what is it that Parliament did by adding the words in Section 15(1) and by inserting the proviso? After the amendment the Designated Court could use the confession of one accused against another accused only if two conditions are fulfilled:

(1) The co-accused should have been charged in the same case along with the confessor.

(2) He should have been tried together with the confessor in the same case." (Para 90)

"92. While considering the effect of the non obstante limb we can see that Section 15(1) of TADA was given protection from any contrary provision in the Evidence Act. But what is it that Parliament did through Section 15(1) regarding a confession made to a police officer? It has only made such confession "admissible" in the trial of such person or the co-accused etc."

"…It must be remembered that Section 15(1) of TADA does not say that a confession can be used against a co-accused. It only says that a confession would be admissible in a trial of not only the maker thereof but a co-accused, abettor or conspirator tried in the same case." (Para 97)

26. In other words, Thomas, J. took the view that the confession of another person is weak evidence and hence the confession made by one co accused was admissible in evidence against another, but would be conclusive only if the

same was corroborated, even if such person was acquitted of charges under the TADA Act in joint trial. It must be noted that the majority view is not in concurrence with this opinion.

27. Now we will notice the observations made by D.P. Wadhwa, J.

"415. When Section 15 TADA says that confession of an accused is admissible against a co-accused as well, it would be substantive evidence against the co-accused as well, it would be substantive evidence against the co-accused. It is a different matter as to what value is to be attached to the confession with regard to the co-accused as that would fall in the realm of appreciation of evidence."

28. The learned Judge further went on to observe that the confession made by the accused can be used as a substantive piece of evidence against another accused in the light of Section 15 of the TADA Act. This view was supported by S.S.M. Qadri, J. in a concurring opinion. In other words, this Court took the view that even if a person is acquitted of the TADA charges, the confession recorded under Section 15 of the TADA Act would be admissible.

29. The majority view in this case is that confessional statement is a substantive piece of evidence and can be used against the co-accused. The decision in *Nalini's* case was considered in *S.N. Dube vs. N.B. Bhoir*, (2000) 2 SCC 254. The Court observed that Section 15 of the TADA Act is an important departure from the ordinary law and must receive that interpretation which would achieve the object of that provision and not frustrate or truncate it and that correct legal position is that a confession recorded under Section 15 of the TADA Act is a substantive piece of evidence and can be used against a co-accused also, if held to be admissible, voluntary and believable.

30. In *Jameel Ahmed vs. State of Rajasthan*, AIR 2004

SC 588, it is observed:

> ". .....Herein it is relevant to note that S.15 of TADA Act by the use of non-obstante clause has made confession recorded under S.15 admissible notwithstanding anything contained in the Indian Evidence Act or the Code of Criminal Procedure. It also specifically provides that the confession so recorded shall be admissible in the trial of a co-accused for offence committed and tried in the same case together with the accused who makes the confession."

31. In *Esher Singh* vs. *State of A.P*. (2004) 11 SCC 585, it is stated:

> "19. Crucial words in the provision are "charged and tried". The use of the expression "charged and tried" imposes cumulative conditions. Firstly, the two persons who are the accused and the co-accused in the sense used by the legislature under Section 15, must be charged in the same trial, and secondly, they must be tried together. Kalpnath Rai case has been overruled in Nalini case making the position clear that the confession of a co-accused is substantive evidence.
>
> 20. Section 2(b) of the Code of Criminal Procedure, 1973 (in short "the Code") defines "charge" as follows:
>
> "2. (b) 'charge' includes any head of charge when the charge contains more heads than one;"
>
> The Code does not define what a charge is. It is the precise formulation of the specific accusation made against a person who is entitled to know its nature at the earliest stage. A charge is not an accusation made or information given in the abstract, but an accusation made against a person in respect of an act committed or omitted in violation of penal law forbidding or commanding it. In other words, it is an accusation made against a person in

> respect of an offence alleged to have been committed by him. A charge is formulated after inquiry as distinguished from the popular meaning of the word as implying inculpation of a person for an alleged offence as used in Section 224 IPC.
>
> 21. Chapter XVII of the Code deals with "charge". Section 211 thereof deals with content of charge. Section 273 appearing in Chapter XXIII provides that evidence is to be taken in the presence of the accused. The person becomes an accused for the purpose of trial after the charges are framed. The expression used in Section 15 of TADA is "charged and tried". The question of having a trial before charges are framed does not arise. Therefore, the only interpretation that can be given to the expression "charged and tried" is that the use of a confessional statement against a co-accused is permissible when both the accused making the confessional statement and the co-accused are facing trial after framing of charges. In State of Gujarat v. Mohd. Atik this position was highlighted. Unless a person who is charged faces trial along with the co-accused the confessional statement of the maker of the confession cannot be of any assistance and has no evidentiary value as confession when he dies before completion of trial. Merely because at some stage there was some accusation, unless charge has been framed and he has faced trial till its completion, the confessional statement, if any, is of no assistance to the prosecution so far as the co-accused is concerned. In fact, in para 10 in Mohd. Atik case it was observed that when it was impossible to try them together the confessional statement has to be kept out of consideration.
>
> 22. So far as application of Section 30 of the Evidence Act is concerned, in Nalini case this question was examined and it was held in SCC pp. 306-07, paras 90 and 91 as follows:

"90. But the amendment of 1993 has completely wiped out the said presumption against a co-accused from the statute-book. In other words, after the amendment a Designated Court could not do what it could have done before the amendment with the confession of one accused against a co-accused. Parliament has taken away such empowerment. Then what is it that Parliament did by adding the words in Section 15(1) and by inserting the proviso? After the amendment the Designated Court could use the confession of one accused against another accused only if two conditions are fulfilled:

(1) The co-accused should have been charged in the same case along with the confessor.

(2) He should have been tried together with the confessor in the same case.

Before amendment the Designated Court had no such restriction as the confession of an accused could have been used against a co-accused whether or not the latter was charged or tried together with the confessor.

91. Thus the amendment in 1993 was a clear climbing down from a draconian legislative fiat which was in the field of operation prior to the amendment insofar as the use of one confession against another accused was concerned. The contention that the amendment in 1993 was intended to make the position more rigorous as for a co-accused is, therefore, untenable."

32. A two Judge Bench of this Court, doubting the correctness of the decision in *State vs. Nalini* (supra), had referred the matter to three Judge Bench of this Court. Since *Nalini's* case (supra) was decided by three Judge Bench of this Court, the three Judge Bench had referred the matter to Constitution Bench in *Prakash Kumar @ Prakash Bhutto vs. State of Gujarat*, (2005) 2 SCC 409. The primary question

referred to the Bench, as noticed by the Constitution Bench itself is, as to whether confessional statement duly recorded under Section 15 of the TADA Act would continue to remain admissible as for the offences under any other law which were tried along with TADA offences under Section 12 of the Act, notwithstanding the fact that the accused was acquitted of offences under the TADA Act in the said trial.

"18**.** The questions posed before us for the determination are no more res integra. In our view, the same have been set at rest by the three-Judge Bench decision rendered in Nalini. The rigours of Sections 12 and 15 were considered in Nalini case and a finding rendered in paras 80, 81 and 82 (SCC p. 304) as under:

"80. Section 12 of TADA enables the Designated Court to jointly try, at the same trial, any offence under TADA together with any other offence 'with which the accused may be charged' as per the Code of Criminal Procedure. Sub-section (2) thereof empowers the Designated Court to convict the accused, in such a trial, of any offence 'under any other law' if it is found by such Designated Court in such trial that the accused is found guilty of such offence. If the accused is acquitted of the offences under TADA in such a trial, but convicted of the offence under any other law, it does not mean that there was only a trial for such other offence under any other law.

81. Section 15 of TADA enables the confessional statement of an accused made to a police officer specified therein to become admissible 'in the trial of such a person'. It means, if there was a trial of any offence under TADA together with any other offence under any other law, the admissibility of the confessional statement would continue to hold good even if the accused is acquitted under TADA offences.

82. The aforesaid implications of Section 12 vis-à-vis

Section 15 of TADA have not been adverted to in Bilal Ahmed case. Hence the observations therein (at SCC p. 434, para 5) that

'while dealing with the offences of which the appellant was convicted there is no question of looking into the confessional statement attributed to him, much less relying on it since he was acquitted of all offences under TADA'

cannot be followed by us. The correct position is that the confessional statement duly recorded under Section 15 of TADA would continue to remain admissible as for the other offences under any other law which too were tried along with TADA offences, no matter that the accused was acquitted of offences under TADA in that trial."(emphasis supplied)

We are in respectful agreement with the findings recorded by a three-Judge Bench in Nalini case.

40**.** For the reasons aforestated, we are of the view that the decision in Nalini case has laid down correct law and we hold that the confessional statement duly recorded under Section 15 of TADA and the Rules framed thereunder would continue to remain admissible for the offences under any other law which were tried along with TADA offences under Section 12 of the Act, notwithstanding that the accused was acquitted of offences under TADA in the same trial."

33. In view of the decisions rendered by this Court in the aforementioned cases, it is settled law that the confession of an accused can be used against him as well as other co-accused, even if they are acquitted for offences under the TADA Act.

34. In the present case, the question that needs to be

answered is the admissibility of such confession against the co-accused not charged under the TADA Act. Shri K.T.S. Tulsi brought to our notice the decision of this Court in the case of *Baba Peer Paras Nath (supra)*, wherein the issue that was considered was whether the confessional statement of the co-accused is admissible against co-accused if not tried for offences under TADA Act. This Court distinguished the Constitutional Bench decision of *Kartar Singh vs. State of Punjab,* (1994) 3 SCC 569 stating that the observation of this Court in that decision is not about the admissibility of the confessional statement recorded under Section 15 of the TADA Act against an accused when such accused is tried with the other co-accused, abettor or conspirator but such accused is not charged for any offence under the TADA Act. Thus, the principle in this case which was upheld was that confessional statement recorded under Section 15 of the TADA Act was admissible against co-accused, abettor or conspirator provided such accused tried with the other co-accused or abettor or conspirator in the same trial in respect of offence under the TADA Act and not otherwise.

35. In the present case, Babloo was not charged under the TADA Act, but tried in the same trial along with K.K. Saini and Mange, who were tried under the TADA Act. The question raised by Shri K.T.S. Tulsi is whether it is permissible to use the confession statement of K.K. Saini and Mange against Babloo, when he is not charged for the offence under the TADA Act to convict him, especially, when there is no other evidence available against him.

36. In the case of *Baba Peer* (*supra)*, this Court held that in view of the language employed in Section 15 of the TADA Act, the confession recorded under the aforesaid provision is admissible only if the co-accused is charged and tried in the same case together with the confessor.

37. In the case of *Nalini* (*supra*), the Court held that the

confession recorded shall be admissible in the trial of a co-accused for offence committed and tried in the same case together with the accused that makes the confession. Plain language of Section 15 of the TADA Act excludes the application of the provisions of the Evidence Act and the Criminal Procedure Code. In view of the language of Sub-Section (1) of Section 15, a confession of an accused is made admissible evidence as against all those charged and tried with him. This view of the Bench of three learned Judges in *Nalini's* case is approved by Constitution Bench of this Court in *Prakash Kumar's* case. The Constitution Bench decision is binding on us.

38. The language of Section 12 clearly states that in the course of any trial under the TADA Act of any offence, if it is found that the accused person has committed any other offence either under this Act or any other law, the Designated Court (TADA) may convict such person of such other offence and pass any sentence authorized by this Act or such other law, for the punishment thereof. Section 15 of the TADA Act, after its amendment, authorizes the Designated Court to use the confession statement of one accused against another accused only when the co-accused is charged in the same case along with the confessor and is tried together with the confessor in the same case. The language of these two Sections is clear and unambiguous. It is well settled principle of law that the jurisdiction to interpret a Statute can be invoked when the same is ambiguous. This Court in *Nasiruddin and Ors. v. Sita Ram Agarwal,* (2003) 2 SCC 577, observed that:-

> "38. The court's jurisdiction to interpret a statute can be invoked when the same is ambiguous. It is well known that in a given case the Court can iron out the fabric but it cannot change the texture of the fabric. It cannot enlarge the scope of legislation or intention when the language of provision is plain and unambiguous. It cannot add or subtract words to a statute or read something into it which

> is not there. It cannot re-write or recast legislation. It is also necessary to determine that there exists a presumption that the legislature has not used any superfluous words. It is well-settled that the real intention of the legislation must be gathered from the language used. It may be true that use of the expression 'shall or may' is not decisive for arriving at a finding as to whether statute is directory or mandatory. But the intention of the legislature must be found out from the scheme of the Act. It is also equally well-settled that when negative words are used the courts will presume that the intention of the legislature was that the provisions are mandatory in character."

39. In the case of *Dadi Jagganadhan v. Jammulu Ramulu and Ors.*, AIR 2001 SC 2699, a Constitution Bench of this court observed:-

> "13.....The settled principles of interpretation are that the Court must proceed on the assumption that the legislature did not make a mistake and that it did what it intended to do. The Court must, as far as possible, adopt a construction which will carry out the obvious intention of the legislature. Undoubtedly if there is a defect or an omission in the words used by the legislature, the Court would not go to its aid to correct or make up the deficiency. The Court could not add words to a statute or read words into it which are not there, especially when the literal reading produces an intelligible result. The Court cannot aid the legislature's defective phrasing of an Act, or add and mend, and, by construction, make up deficiencies which are there."

40. In the case of *Feroze N. Dotivalaz v. P.M Wadhwani and co.*, (2003) 1 SCC 14, this court stated:-

> "Generally, ordinary meaning is to be assigned to any word or phrase used or defined in a statute. Therefore, unless there is any vagueness or ambiguity, no occasion will arise

to interpret the term in a manner which may add something to the meaning of the word which ordinarily does not so mean by the definition itself, more particularly, where it is a restrictive definition. Unless there are compelling reasons to do so, meaning of a restrictive and exhaustive definition would not be expanded or made extensive to embrace things which are strictly not within the meaning of the word as defined."

41. In the case of *Union of India v. Harsoli Devi*, (2002) 7 SCC 273, a Constitution Bench of this court laid down:-

"4. Before we embark upon an inquiry as to what would be the correct interpretation of Section 28-A, we think it appropriate to bear in mind certain basic principles of interpretation of statute. The rule stated by Tindal, CJ in Sussex Peerage case, (1844) 11 Cl &F.85, still holds the field. The aforesaid rule is to the effect:

"If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do alone in such cases best declare the intent of the lawgiver."

It is a cardinal principle of construction of statute that when language of the statute is plain and unambiguous, then the court must give effect to the words used in the statute and it would not be open to the courts to adopt a hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act. In Kirkness v. John Hudson & Co. Ltd. 1955 (2) ALL ER 345, Lord Reid pointed out as to what is the meaning of "ambiguous" and held that - "a provision is not ambiguous merely because it contains a word which in different context is capable of different meanings and it would be hard to find anywhere a sentence of any length which does not contain such a

word. A provision is, in my judgment, ambiguous only if it contains a word or phrase which in that particular context is capable of having more than one meaning." It is no doubt true mat if on going through the plain meaning of the language of statutes, it leads to anomalies, injustices and absurdities, then the court may look into the purpose for which the statute has been brought and would try to give a meaning, which would adhere to the purpose of the statute."

42. In *Quebec Railway, Light Heat & Power Co. v. Vandray,* AIR 1920 PC 181, it had been observed that the Legislature is deemed not to waste its words or to say anything in vain and a construction which attributes redundancy to the legislature will not be accepted except for compelling reasons. Similarly, it is not permissible to add words to a statute which are not there unless on a literal construction being given a part of the statute becomes meaningless.

43. In the case of *Standard Chartered Bank and Ors. v. Directorate of Enforcement and ors.* AIR 2005 SC 2622, it was stated:-

"It is true that all penal statutes are to be strictly construed in the sense that the Court must see that the thing charged as an offence is within the plain meaning of the words used and must not strain the words on any notion that there has been a slip that the thing is so clearly within the mischief that it must have been intended to be included and would have included if thought of. All penal provisions like all other statutes are to be fairly construed according to the legislative intent as expressed in the enactment."

This court further added:-

"55. The rule of interpretation requiring strict construction of penal statutes does not warrant a narrow and pedantic construction of a provision so as to leave loopholes for the

offender to escape [See : *Murlidhar Meghraj Loya v. State of Maharashtra*:1976CriLJ1527]. A penal statute has to also be so construed as to avoid a lacuna and to suppress mischief and to advance a remedy in the light of the rule in Heydon's case. A commonsense approach for solving a question of applicability of a penal statute is not ruled out by the rule of strict construction. [See : State of Andhra Pradesh v. Bathu Prakasa Rao MANU/SC/0177/1976 : 1976CriLJ1387 and also G. P. Singh on Principles of Statutory Interpretation, 9th Edition, 2004, Chapter 11, Synopsis 3 at pgs. 754 to 756]."

44. A Three-Judge Bench of this Court in the case of *The Assistant Commissioner, Assessment-II, Bangalore and Ors. v. Valliappa Textiles Ltd. and Ors.,* AIR 2004 SC 86, laid down:-

"22. .....Though Javali (supra) also refers to the general principles of interpretation of statute the rule of interpretation of criminal statutes is altogether a different cup of tea. It is not open to the court to add something to or read something in the statute on the basis of some supposed intendment of the statute. It is not the function of this Court to supply the casus omissus, if there be one. As long as the presumption of innocence of the accused prevails in this country, the benefit of any lacuna or casus omissus must be given to the accused. The job of plugging the loopholes must strictly be left to the legislature and not assumed by the court."

45. It is pertinent to note that this Court in the case of *Nalini (supra)* had taken the view that the confessional statement of one of the accused can be used as conclusive evidence against another accused if they are both tried in the same trial. This has been so held despite the fact that in case of a confessional statement, the incriminated accused cannot cross examine the maker.

46. When the validity of Section 15 of the TADA Act was challenged in the case of *Kartar Singh (supra)*, the Constitution Bench of this Court held that Section 15 of the TADA was playing the role of Section 30 of the Evidence Act, which makes the confession of an accused admissible in evidence against its maker as well as other co-accused in a criminal trial. The main concern while making such confession admissible is to test the veracity of the confession, as the incriminated co-accused does not get the opportunity to cross examine the maker. However, such evidence must be corroborated in order to determine the guilt of a person. In the event, independent evidence supports the confessional statement then there is no harm in relying upon the confession adding further to the independent incriminating evidence.

47. In any case, it would lead to absurdity for a court to rely on confessions of the maker against himself, and not against another person, when such other person features prominently in the confessional statement, in a joint trial of offences for the same criminal act, especially in circumstances when there is independent incriminating evidence.

48. In view of the above discussion, we hold that the confessional statement made by a person under Section 15 shall be admissible in the trial of a co-accused for offence committed and tried in the same case together with the accused who makes the confession.

49. The next argument of Shri K.T.S. Tulsi and Shri Amrendra Sharan, learned senior counsel, is with regard to the procedural irregularities in the investigation conducted by the prosecution which, according to them, is not properly appreciated by the learned Designated Court. The learned counsel contends that under Section 20A of the TADA, the sanction of the District Superintendent of Police is required to be obtained before the police record any information about the commission of an offence under the TADA. Since the same has

not been obtained, the conviction of the accused cannot be sustained. In the instant case, according to the learned senior counsel, the sanction has been obtained from the S.P., C.B.I. It is urged that the Act does not envisage an officer of an equivalent rank, but requires the sanction from the authority that is envisaged in the Statute. It is further urged that the provisions of the TADA Act require to be strictly construed and interpreted, and for this reason also, an officer of S.P., C.B.I. would not mean the Superintendent of Police of the District.

50. The learned senior counsel relies on several judgments of this court in support of his submissions that penal provisions require to be strictly interpreted and we should not interpret the plain language of the statute or that words having an ordinary meaning cannot be given a different interpretation. It is also brought to our notice that the plain and simple language of a statute best describes the intention of the Legislature. The decision on which reliance was placed are: *Nasiruddin v. Sita Ram Agrawal,* (2003) 2 SCC 577*, Firoz Dotiwala v. P.M. Wadwani,* (2003) 1 SCC 433*, Union of India v. Hansoli Devi,* (2002) 7 SCC 273*, Dadi Jaganadham v. Jamulu Ramulu,* (2001) 7 SCC 71*, Union of India v. Elphinstone Company Ltd.,* (2001) 4 SCC 139*, Whirpool of India v. ESI Corporation,* (2000) 3 SCC 185*, Mohd. Ali Khan v. CWI,* (1997) 3 SCC 511*.*

51. Section 20A of the TADA Act was inserted by Act No. 43 of 1993. The relevant portion of section 20A is as under:

> "20A. Cognizance of offence. – (1) Notwithstanding anything contained in the Code, no information about the commission of an offence under this Act shall be recorded by the police without the prior approval of the District Superintendent of Police.
>
> *(2)……No court shall take cognizance of any offence under this Act without the previous sanction of the*

> *Inspector General of Police or as the case may be, the Commissioner of Police."*

52. Section 20A (1) of TADA Act commences with the words "notwithstanding anything", hence it is a non-obstante clause. As regards non-obstante clause, a Constitution Bench of this court in the case of *Ashwini Kumar Ghosh v. Arabinda Bose and Anr.* AIR 1952 SC 369 opined:-

> "It should first be ascertained what the enacting part of the section provides on a fair construction of the words used according to their natural and ordinary meaning, and the non obstante clause is to be understood as operating to set aside as no longer valid anything contained in relevant existing laws which is inconsistent with the new enactment."

53. In the case of *Vishin N Khanchandani & Another v Vidya Laxmidas Khanchandani & Another,* (2000) 6 SCC 724, this court laid down:-

> "The non obstante clause is used to avoid the operation and effect of all contrary provisions. But to attract the applicability of a non obstante clause, the whole of the Section, the scheme, the objects and reasons for the enactment of the Act must be kept in mind."

54. We are of the view that the phrase "District SP" has been used in order to take the sanction of a senior officer of the said district, when the prosecution wants to record any commission of a offence under the Act, the reason appears to be that the Superintendent of Police of the District is fully aware of necessity to initiate the proceedings under the stringent criminal law like the TADA Act. In the instant case, the State Government, in exercise of the power conferred by Section 3 of the Delhi Police Special Establishment Act, 1946, has handed over the investigation to CBI. The Superintendent of Police, CBI, has authorized his subordinate officer to record the confessional statements of K.K. Saini and Mange after

following the procedure prescribed under the Act and the Rules framed thereunder. Since investigation was done by CBI, in our view, Superintendent of Police could authorize the Police to record the information about the commission of the offence under the Act.

55. In the case of *Ahmad Umar Saeed v. State of U.P* (1996) 11 SCC 61, a similar fact situation arose. In that case, the accused contended that 'cognizance of the offence' as required under Section 20A(1) were not followed as the FIR was recorded by a Sub-Inspector of Police. The accused therein were charged for multiple offences both under the Penal Code and TADA as is the case in the present appeals. This court held that Section 20A(1) does not prohibit the officer from recording the complaint and instituting investigation as a statutory right is conferred on him under the Code with respect to non TADA offences. Hence if the charges are framed with regard to an act, which in the same transaction can be under TADA and any other criminal provisions, then the mere fact that the filing of FIR by anyone other than the District Superintendent would not vitiate the whole process.

56. In the instant case, the cognizance/'prior permission' was granted by the S.P. of CBI. The accused contended that the District Superintendent appointed by the concerned State Government cannot be equated to the post of Superintendent of the Central Investigation Bureau who is appointed directly by the Central Government. We have been apprised of the fact that it was at the behest of the State Government, the case was transferred to the CBI and, therefore, this distinction has hardly any relevance. After careful consideration of the submission on the question of equation of rank, we are inclined to hold that in matters concerning national security, as is the case of terrorist acts, the Centre and an autonomous body functioning under it would be better equipped to handle such cases. Therefore, 'prior approval' by the SP of CBI would adequately satisfy the requirements under Section 20A(1). We also note that there is

no prejudice caused to the accused as a result of the authorization being granted by the SP of the CBI.

57. In the case of *Gurdeep Singh alias Deep v. State(Delhi Administration)*, 2000(1) SCC 498, the confessional statement, after it was obtained under Section 15, was not sent to a Chief Judicial Magistrate as is required under Rule 15(5) of the TADA Rules, 1987. Instead, the confessional statement was forwarded the very next day to the Designated Court. This court refused to interfere with the investigation stating that no prejudice has been caused to the accused and that the whole investigating process could not be vitiated because of a mere technical flaw. Similarly, in the present case, with regard to non-compliance of Section 20A(1), if we are to annul the whole investigation process, on the basis of what at its worst, appears to be a technical flaw, it would result in the purport of the statute being ignored. Furthermore, we take note of the fact that the safeguards provided under Section 15 of the TADA and the rules made thereunder are complied with while recording the confession statement.

58. In *S.N Dube v. N.B Bhoir,* (2002) 2 SCC 254, the accused contended that the confession was obtained through *malafide* as the person who recorded the evidence was the Superintendent of Police [Shinde] who was investigating the case. Reversing the finding of the trial court, this court at Para 28 observed:

> "The learned trial Judge has also held that it was not fair on the part of Shinde to record the confessions as he was also supervising the investigation. Shinde has clearly stated in his evidence that he had made attempts to find out if any other Superintendent of Police was available for recording the confessions and as others had declined to oblige him he had no other option but to record them. We see no illegality or impropriety in Shinde recording the confessions even though he was supervising the investigation."

59. In our view, since no prejudice is caused to the accused, we are unable to agree with the contention of Shri. K.T.S. Tulsi and Shri Amarendra Sharan on this aspect of the matter. Having considered the legal arguments advanced in these appeals, now we will examine the evidence against Babloo independently.

60. Prosecution has examined Bharat Singh (PW-30), Smt. Indu Singh (PW-87), Bhushal Lal Shreshtha (PW-68). Bharat Singh (PW 30) has stated in his evidence that he knew Babloo and was in Allahabad on the said day in connection with a matter regarding Lochan Singh. He has further stated that he got a call from Mange saying that he was in Allahabad along with K.K. Saini, and then they discussed about meeting. Subsequently, he got a call from Babloo from Nepal. Babloo told Bharat Singh that it was he who had given the phone number of Bharat Singh to Mange, and also told him not to meet Mange because Mange was in Allahabad for important work. This is enough to establish that Babloo had the knowledge that K.K. Saini and Mange were in Allahabad for a specific purpose.

61. Smt. Indu Singh (PW-87) was the owner of the house where Babloo stayed in Nepal. She recognized Babloo when she saw him in the Court and stated that it was the same person who had stayed in her house during the said period. She has stated that she had given the house on rent to Mirza Beg and Rehman, who she came in contact with through the broker, Salim. When asked why she did not object to the sub-letting of the house to Babloo, she was frank enough to state that the only thing she cared about was the rent, which was duly paid. She stated that the telephone with number 410564 was in the name of her son, Parbhajan Singh and the same was installed in the house which was rented by Babloo. She also stated that all the bills for that phone were paid by Babloo. She stated that STD-ISD facility was not there on the number when the phone connection was obtained, but was subsequently taken on request by the tenant.

62. Bhushal Lal Shreshtha (PW-68) has stated that he was in the Telecom Department at the relevant date, and on request made by the Nepal police, in the required format, he gave the telephone bills for the number 410564. The telephone records from the telephone number 410564 (being the telephone in Nepal, from which Babloo made calls) and 622452 (being the telephone at Hotel Finero) has been annexed in evidence before us [D 38/40 and D 36/2].

63. From the above evidence, it can be established that Babloo was living in the house of Smt. Indu Singh in Nepal. He had the phone number 410564 at his disposal. He not only knew that Mange and K.K. Saini were in Allahabad, but also knew the purpose for which they were in Allahabad. This is clear from the testimony of Bharat Singh. From the phone bills, it is clear to us that phone calls were made from the phone number 410564 to the phone number 622452, the phone of Hotel Finero. On a perusal of the phone bills, it is clear that the phone calls were made at the times which have been indicated by the confessional statements of K.K. Saini and Mange. Hence, we may safely conclude that the part of the confessional statements in question have been corroborated by the other evidence. The evidence that we have on record, without considering the confessional statements, is strong enough to create serious doubts about the conduct of Babloo in this matter. The learned senior counsel Shri K.T.S. Tulsi submits that the prosecution has not examined the owner of the car bearing No.DNH 8440 Shri Ramavar, who is the resident of Delhi, nor the transferee in whose name the registration certificate had been standing at the relevant point of time. In our view, merely because the owner of the car is not examined by the prosecution, it does not weaken the case of the prosecution. In fact, car was recovered on the information furnished by K.K. Saini, one of the co-accused in the case. This would clearly establish the prosecution case that the car bearing No.DNH-8440 was used in committing the offence alleged against the accused. In our

view, minor discrepancies, if any, would not be fatal to the entire case of the prosecution.

64. In this background, the question before us is, even if we have to eschew the confessional statements of K.K. Saini and Mange, whether we can still maintain the conviction and sentence of Babloo – co-accused for the offence under Section 302 read with Section 120-B of the IPC.

65. The role played by Babloo in the present case is that of a "king pin". The possibility of having direct evidence against a "king pin" is rather low. In most cases, it may be circumstantial. What we need to see is the chain of events that the prosecution is expected to prove can be linked to the evidence incriminating Babloo.

66. It has been consistently held by this Court that where the guilt of a person squarely rests on circumstantial evidence, then the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be in coherence of each other and incompatible with the innocence of the accused. These circumstances from which, such inference is to be drawn, must be shown to be closely connected to the facts which are sought to be proved. When the matter depends on the conclusions to be drawn from such circumstances, then the cumulative effect of the circumstances must be to negate the possibility of innocence in any manner. [See *State of UP v. Satish,* (2005) 3 SCC 114*; Liyakat v. State of Uttranchal,* 2008 Cri LJ 1931 (SC)*; Swamy Sharaddananda v. State of Karnataka,* (2007) 12 SCC 288*; State of Goa v. Sanjay Thekaram,* (2007) 3 SCC 755*].*

67. From the evidence on record, it can safely be inferred that Babloo was the mastermind of the whole incident and Mange and K.K. Saini committed the offence at the behest of Babloo. In our view, there is independent incriminating evidence against Babloo, even if we have to eschew the confessional

statement of co-accused. Hence, we reject the appeal of Babloo.

Case of K.K. Saini and Mange

68. We now proceed to examine the evidence against K.K. Saini and Mange independently. It must be noted that the witnesses here shall be referred to by the numbers assigned to them under Criminal Appeal No.3 of 1995.

69. With regard to K.K. Saini, it must be first mentioned that he has confessed to the crime under Section 15 of the TADA Act. His confession was recorded by Shri. Sharad Kumar SP, CBI (P.W 47). KK Saini was fully made aware of the consequences of making a confessional statement.

70. The following are the details divulged in his confessional statement. He has stated that he went to Nepal on Babloo's behest where he met Mange. He further stated that he was given the task to kill L.D Arora by Babloo. He also mentions that he was chosen specifically to open fire as he had previously committed four murders. Thereafter, Babloo provided Mange with Maruti car DNH – 8440, a 9 mm pistol several cartridges and '10,000 to 12,000/- for this purpose. On the morning of 23rd March, 1993, K.K. Saini and Mange checked into Hotel Finero under the assumed names of A.K. Singh and Harjeet Singh respectively. Subsequently, they received a phone call from Babloo from Nepal. Babloo told them over the phone that they would meet Alimudeen @ Baba who would help them in the task. Subsequently, Baba met K.K. Saini and Mange in their room. Later in the day, Baba took him on a dark grey Bajaj scooter to show him the office and the house of L.D. Arora. They examined the area and on their return to the hotel, all three of them sat and planned how to execute the task of killing L.D. Arora. On the next day in the morning, they received a phone call from Babloo from Nepal who asked them to finish the task the very next day as L.D. Arora was to leave for Bombay to reveal information regarding smuggling of arms and

explosives used in the Bombay bomb blasts in the very same year. K.K. Saini then took Mange and showed the office and house and they marked the escape routes. On their return to the hotel, Baba came to the room and told them that they should reach the place around 5.00 PM and that he would come in Maruti car – DNH 8440. KK Saini stated that they left Hotel Finero around 5.00 PM. At around 6.45 – 7.00, Baba came and told them that L.D. Arora would arrive shortly. They waited for his arrival and on seeing Arora's vehicle approach they took their respective positions. When L.D. Arora was parking his car alongside the Southern boundary wall, K.K. Saini emerged from his position near the stair case and opened fire three times at short range. He escaped through the staircase and reached Mange who was waiting near the scooter. They met Baba at the agreed spot and exchanged vehicles. Subsequently, they went back to Hotel Finero, checked out and left for Nepal the very same evening. They crossed the Nepal border on 25th morning after paying Customs duty for the car.

71. The testimony of Mange is substantially similar with that of K.K. Saini. The learned senior counsel Shri Amrendra Sharan submits that the confessional statement of Mange was recorded nearly after eight years from the date of incident and the confessional statement of both K.K. Saini and Mange is verbatim the same. Therefore, it casts a serious doubt on the alleged confessional statement. In our view, merely because the confessional statement of both the accused is more or less similar, it cannot be said they are neither normal nor unnatural which would vitiate the probative value of such confessional statement. Therefore, we do not see any merit in this contention of the learned senior counsel.

72. Subsequently both KK Saini and Mange retracted their confessional statement before the Designated Court and have categorically denied knowing each other or Babloo. They have also denied ever having gone to hotel Finero, ADA Colony etc. They have stated that the CBI has prevailed upon the witnesses

produced on behalf of the prosecution to give false evidence against them. Keeping in view that the accused has retracted their confession statement, the learned senior counsel Shri K.T.S. Tulsi submitted that the confession of both KK. Saini and Mange, alleged to be given under Section 15 of the TADA Act cannot be used since the prosecution has failed to adduce sufficient corroborative evidence.

73. A confessional statement given under Section 15 shall not be discarded merely for the reason that the same has been retracted. In *Ravinder Singh v. State of Maharashtra,* (2002) 9 SCC 55, the accused was charged under the provisions of the TADA Act and under Section 302/34, 120B and other provisions of the Explosives Act. The accused thereafter retracted his confession. The court observed:-

> "There can be no doubt that a free and voluntary confession deserves the highest credit. It is presumed to flow from the highest sense of guilt. Having examined the record, we are satisfied that the confession made by the appellant is voluntary and truthful and was recorded, as already noticed, by due observance of all the safeguards provided under Section 15 and the appellant could be convicted solely on the basis of his confession."

The court also observed the decision in *State of Maharashtra v. Bharat Chaganlal Raghani,* (2001) 9 SCC 1, wherein the court partially overturned the acquittal of the accused by the Designated Court solely based on the confessional statement of the accused which had later been retracted. In *Bharat Chanlal's* case, the court observed that there was no denial of the fact that judicial confessions made are usually retracted but retracted confessions are held to be good confessions if they are made voluntarily and in accordance with law.

74. In the case before us, the contest on the validity of the testimony has been multi pronged. Firstly, it was contended that

since the procedure under Section 20A (1) had not been followed, the testimony is not valid in law. Secondly, it was asserted that the accused was made to sign on blank papers and that the confession has been concocted by the prosecution. Thirdly, that there is no corroborative evidence given the fact that certain witnesses including Ram Babu (PW-35) and Sanjay Kumar (PW- 36), who were to have witnessed the crime, had been declared hostile by the prosecution.

75. The argument pivoted on the requirements under Section 20A(1) not being fulfilled is, in our opinion, has no merit. The learned Additional Solicitor General Shri P.P. Malhotra contends that both K.K. Saini and Mange were produced before the CMM, Delhi to fulfill the requirements under Rule 15 and the accused did not, at that point, claim that they had been made to sign on blank papers. Keeping in mind the possibility of abuse of the process, this court in *Kartar Singh (supra)* laid down certain guidelines whereby the veracity of the confessional statement is ensured, for example, the confession given to a police officer under Section 15 is to be sent to the CMM without delay and if the accused when he is so produced before the CMM alleges torture, he is to be sent for a medical examination. Here the accused were sent to the CMM, Delhi the very next day and they neither alleged that the confession was fabricated, nor that they had been tortured. In the light of these circumstances, we have to give due credence to the confession statement and consider to what extent it has been corroborated by substantive evidence.

76. In *Ravinder Singh's* case, the Court relying on *Nalini v. State (supra)*, *S.N Dube v. N.B Bhoir* and *Devender Pal Singh v. State of NCT of Delhi,* (2002) 5 SCC 234, held that *"it is well established that a voluntary and truthful confessional statement recorded under Section 15 of TADA requires no corroboration."*

77. This apposite observation by the bench of two learned Judges in *Ravinder Singh's* case should be considered with

measured caution and we believe, taking into account ground realities, it would be prudent to examine the authenticity of a confession on a case to case basis. The problem seems to be the method we follow in ascertaining whether a specific confession is truthful and voluntary. Section 15 and the rules made thereunder prescribe certain guidelines – which if ensured can, to a large extent, point towards the fact that the confession is truthful and voluntary. However, we must not overlook the fact that the TADA prescribes a deviation from the conventional criminal jurisprudence. As a court of record, we are bound to keep in mind situations where despite the procedure being followed, the testimony so obtained under Section 15 is coloured by suspicion and doubt regarding its veracity. Hence, albeit the procedure is followed, we find it judicious to look into whether the testimony is corroborated by the evidence presented by the prosecution. The life and liberty of a person are at stake and we are of the view that no effort should be spared in such circumstances to see that justice is done. These are after all the safeguards provided in our Constitution and the people have vested their faith in this court to keep vigil and see to it that these hallowed principles are not trampled upon by the necessities of the hour and vicissitudes of time.

78. The confessional statements of K.K. Saini and Mange are corroborated by the documentary evidence, which are marked in the evidence by the prosecution. Exhibit D-20/Ka 2 is the notebook maintained by Hotel Finero and proves the entry of Maruti car DNH – 8440 against K.K. Saini's assumed name, A.K. Singh on 23/3/93. Exhibit D-19 is the hotel register at Hotel Finero and proves that K.K. Saini and Mange signed in it under fictitious names. Both K.K. Saini and Mange have been recognized by the employees of Hotel Finero. The testimony of Anant Ram Saxena (PW-1) Hotel Manager, Kalidas Jaiswal (P.W-44) waiter and Jwala Prasad (PW 60) appears to be credible and true and if the same is believed, it

corroborates the fact that the accused stayed in the Hotel Finero during the relevant time and was met by Alimudeen @ Baba. The hand writing of the accused in the register has also been proved by the detailed report of Dr. M.A Ali (PW-43), Sr. Scientific Officer produced as Exhibit-D-27. The car used for committing the crime has been recovered at the instance of KK Saini revealing its whereabouts. Recovery Memo dated 23.04.1994 [Exhibit D 16/ Ka 17] records the seizure of the car from Agra. The copy of the Cash Memo seized from the petrol pump Barabanki [Exhibit- D 22/ Ka 27] and the Customs Receipt [D 37/28, Ka 76] corroborates the alleged journey from Krishna Nagar, Nepal to Allahabad and back. The statement issued by the Nepal police reveals that Car bearing No. DNH – 8440 entered Nepal through Krishna Nagar customs and was allowed to stay for a period of one week on payment of Rs 700 Nepal Currency as customs duty. Further, the printouts of call logs on telephone number 622452 installed in Hotel Finero (Exhibits D 38/40 and D 36/2), the report of part of investigation in Nepal (Exhibits D 37, D 37/28) is read with the statements of Indu Singh (PW 87) (land lady of Babloo in Nepal), Bhushan Lal Shreshtha (PW – 68) [he was Deputy Fiscal Officer, Telecom Dept, Nepal] corroborate the confessional statement of KK. Saini and Mange to a substantial extent. Indu Singh (PW 87) has recognized Babloo in court and stated that he was staying at the house rented out by her in Krishna Nagar, Nepal and that the telephone number from which calls were made to Room No 7 in hotel Finero, where K.K. Saini and Mange were staying, was installed in the same house where Babloo was staying. Harikesh (Harbans) Batra (PW 21) (Inspector MTNL) identified K.K. Saini in court and stated that he had previously been involved in the transfer of a phone in the name of one A.K. Singh. He stated that K.K Saini and A.K. Singh are one and the same. A.K. Singh is the assumed name used by K.K. Saini even at Hotel Finero. K.K Saini had, in his confession, stated that he had obtained the driving license of A.K Singh and substituted the photograph therein with his own.

79. Bharat Singh (PW-30) [was declared hostile by prosecution] stated on oath that he knows Babloo from his University days. Later he met Babloo when he went to meet Chandraswami in connection with his reinstatement into service. He admits to have been involved in solving a few land disputes on Babloo's behalf. He has visited Babloo in Nepal a couple of times. During the time when L.D. Arora was murdered, he was in Allahabad. He stated that he received calls from both Mange and Babloo on March 23 and 24. It was stated by the witness that in the course of conversation, Mange revealed that he had obtained Bharat Singh's number from Babloo. Mange stated that he was presently in Allahabad and that 2-3 people had come with him. Subsequently, he has stated that Babloo called him in relation to a property dispute that Bharat Singh was assisting him with. When Bharat Singh mentioned talking to Mange over the phone to Babloo, the latter had said that he had given Bharat Singh's number to Mange and that he was not to meet Mange. Bharat Singh was declared hostile and cross examined by the prosecution. In the course of cross examination, he has denied having told the investigating officer that Mange had told him that he had come to Allahabad to kill L.D. Arora. However, he admitted that he told the CBI officer that Babloo told him that Mange was there on a specific task and that is the reason why he should desist from meeting him.

80. The evidence of Bharat Singh, despite the fact that the prosecution has chosen to treat him as a hostile witness, need not be totally disregarded. Its admissibility should be tested in the light of the surrounding circumstances and other evidence. In *Radha Mohan Singh vs. State of UP,* 2006 Cri LJ 1121 (1125) (SC), this Court has observed:

> "It is well settled that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution choose to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated as effaced

or washed off the record altogether but the same can be accepted to the extent his version is found to be dependable on a careful scrutiny thereof."

81. In the present case, testimony of Bharat Singh provides a vital link between the various participants in this crime, the fact that K.K. Saini and Mange were in Allahabad on a 'specific task' assigned to them by Babloo, who was in Nepal. Taken together, the evidence on record presents an unimpeachable evidence against the accused, clearly indicating the modus operandi and the motive.

82. In the light of the above discussion, we are of the opinion that the Designated Judge (TADA) was justified in convicting and sentencing K.K. Saini and Mange for the offences under Section 302/34 IPC.

Case of the State

83. The State has preferred appeals against the judgment of the Designated Court stating that the court was not justified in dismissing the charges under Section 3 of the TADA Act. They have examined numerous witnesses who have stated that the murder of L.D. Arora resulted in fear in the minds of fellow customs officers. It was also stated that the morale of these officers were affected and that a sense of gloom prevailed upon them. It was also stated that L.D. Arora was to leave the very next day for Bombay to furnish details about the smuggling of arms and explosives used in the Bombay bomb blasts.

84. It would be useful to examine the purport of Section 3 of the TADA. It is under:-

"3. **Punishment for terrorist acts**. – (1) Whoever with intent to overawe the Government as by law established or to strike terror in the people or any section of the people or to alienate any section of the people or to adversely affect the harmony amongst different sections of the people does any act or thing by using bombs, dynamite or other

explosive substances or inflammable substances or lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature in such a manner as to cause, or as is likely to cause, death of, or injuries to, any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community, or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act, commits a terrorist act.

(2) Whoever commits a terrorist act, shall, -

(i) if such act has resulted in the death of any person, be punishable with death or imprisonment for life and shall also be liable to fine;

(ii) in any other case, be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.

(3) Whoever conspires or attempts to commit, or advocates, abets, advises or incites or knowingly facilitates the commission of, a terrorist act or any act preparatory to a terrorist act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.

(4) Whoever harbours or conceals, or attempts to harbour or conceal, any terrorist shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.

(5) Any person who is a member of a terrorists gang or a

terrorist organisation, which is involved in terrorist acts, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine.

(6) Whoever holds any property derived or obtained from commission of any terrorist act or has been acquired through the terrorist funds shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life and shall also be liable to fine."

85. Section 3 of the TADA Act gives due importance to the aspect of 'intent'. The person who is alleged to be involved in a terrorist act can be charged under Section 3(1) only when the prosecution has been successful in establishing that the same was committed with the intent to awe the government or to achieve one or the other ends mentioned under Section 3(1). The Designated Court, while dismissing the charges under the TADA Act, cited with approval the decision of this court in *Hitendra Vishnu Thakur vs. State of Maharashtra,* (1994) 4 SCC 602. This Court made a distinction between the incidence of terror as a consequence of a particular act and causing terror being the sole intent of the same act. It is only in case of the latter that the provisions of Section 3(1) are attracted. It was held that:

"If it is only as a consequence of the criminal act that fear, terror or/and panic is caused but the intention of committing the particular crime cannot be said to be the one strictly envisaged by Section 3(1), it would be impermissible to try or convict and punish an accused under TADA. The commission of the crime with the intention to achieve the result as envisaged by the section and not merely where the consequence of the crime committed by the accused create that result, would attract the provisions of Section 3(1) of TADA. Thus, if for example a person goes on a shooting spree and kills a

number of persons, it is bound to create terror and panic in the locality but if it was not committed with the requisite intention as contemplated by the section, the offence would not attract Section 3(1)"

86. In *State vs. Nalini (supra)*, a three Judge Bench of this Court has quoted the dictum laid down in *Hitendra Vishnu Thakur (supra)* with approval and concluded thus: (See p.298 Para 51):

"51. Thus the legal position remains unaltered that the crucial postulate for judging whether the offence is a terrorist act falling under TADA or not is whether it was done with the intent to overawe the Government as by law established or to strike terror in the people etc."

87. In *State of West Bengal vs. Mohammed Khalid* (1995) 1 SCC 684, referring to Corpus Juris Secundum (A Contemporary Statement of American Law, Vol 22 at pg 116), the meaning of intent was quoted as under:

"Intention- (a) In general (b) Specific or general intent crimes; An actual intent to commit the particular crime towards which the act moves is a necessary element of an attempt to commit a crime. Although the intent must be one in fact, not merely in law, and may not be inferred from the overt act alone, it may be inferred from the circumstances"

88. The prosecution in this case has argued that charge under Section 3 is maintainable in the light of the Bombay bomb blasts and the fact that L.D. Arora would have been pivotal in providing information regarding the smuggling of arms and explosives. The case before us concerns the murder of L.D. Arora. The prosecution has not been successful in proving that this particular murder was committed with the intention to cause terror. As mentioned earlier, terror could have been caused as a consequence of the act. The prosecution has stated that the

main intention behind the murder of L.D. Arora was to prevent the names of Mohd. Dosa, Tahir Shah and others involved in smuggling of arms and explosives would not come to light during the investigations that followed the Bombay blast. It is therefore evident that the intention of the accused in the present case was not to cause terror but to prevent information regarding another crime from being divulged. In the light of these facts, we are of the opinion that the TADA Court was justified in dismissing the charges framed under the TADA Act. Therefore, appeals filed by the State for enhancement of sentence require to be dismissed.

89. In view of the discussion noticed above, we find no illegality in the judgment under appeals. As such, appeals stand dismissed.

R.P. Appeals dismissed.

DURBAL
v.
STATE OF U.P.
(Criminal Appeal No. 1398 of 2008)

JANUARY 25, 2011

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

Penal Code, 1860 – s.302 – Testimony of PW-1 that the accused persons assaulted his father and nephew with knives and spears (bhalas), which led to their death – Three accused – Suggested previous enmity between the accused and PW1 – Incident occurred in the dead of night during mid winter – Witnesses claimed to have identified the accused with the aid of lantern and torches – Trial court acquitted all the accused – High Court, however, relied upon the evidence of PW-1, and reversed the order of acquittal – Meanwhile A-1 and A-3 accused died – Conviction of A-2 challenged before Supreme Court – Held: When the suggested enmity, if at all, was between the accused and PW 1, there was no reason as to why the accused should attack the deceased and leave PW-1 unscratched – If PWs 1, 2 and 3 were present at the scene of offence as stated by PW 1, there was no explanation forthcoming as to why three of them put together could not resist the accused in attacking the deceased – The lantern and the torch lights though allegedly seized were not produced in the Court – The seizure memos did not contain the crime number and other recovery particulars – In the circumstances, it became highly doubtful as whether PWs 1, 2 and 3 actually had torch lights in their hands as stated by them – The evidence of PW 1 did not inspire any confidence and the presence of PWs 2 and 3 at the scene of offence was doubtful – The trial Court rightly gave the benefit of doubt to the accused – The view taken by trial Court was plausible and

could not be held perverse – High Court ought not to have interfered with the judgment of the trial Court merely because there was a possibility of taking a different view – A-2 entitled to benefit of doubt and acquitted.

According to the prosecution, pursuant to an earlier altercation between the accused and PW-1 over fishery rights in respect of the village pond, the accused persons assaulted the father and nephew of PW-1 with knives and spears (bhalas), which led to their death. The incident allegedly occurred in the dead of night during the mid winter. PW 8, the Investigating Officer, recorded statements of the witnesses and collected lantern and torches which were the alleged source of light in which the witnesses claimed to have seen the occurrence. The accused were charged of having committed offences under Sections 147, 148, 302/149, IPC.

The trial Court found the evidence of PW-1 to be highly doubtful since he was not attacked by the accused; and also doubted the presence of PW-2 at the scene of offence. The trial Court also disbelieved the evidence of PW-3 who is a close relative of PW 1. The trial Court further found that the lantern and torch lights were not produced in the Court and the seizure memos of lantern, torches did not contain the crime number and came to the conclusion that since the offence occurred in the dead of night in the last week of December, the witnesses could not have identified the assailants except with the aid of lantern and torches, whose seizure itself was doubtful and accordingly acquitted all the accused.

The High Court, however, relied upon the evidence of PW-1, and reversed the order of acquittal and sentenced the accused to life imprisonment, holding that non-production of the lantern and the torch lights in the Court was inconsequential.

During pendency of appeal filed by the State in the High Court, A-1 and A-3 died and the appeal against them was ordered to be abated. The instant appeal was preferred by A-2.

Allowing the appeal, the Court

HELD:1. Though the whole prosecution case is that on account of the dispute over fishery rights, the accused bore a grudge against PW 1 and even threatened him with dire consequences, it is highly doubtful that there was any dispute over the fishery rights itself. The only person apart from PW 1 who speaks about the dispute is PW 4 who was examined by the police after more than two months of the occurrence. It is true, motive for committing the crime pales into insignificance in a case where the prosecution story rests upon the evidence of eyewitnesses. But, for the purposes of evaluating and appreciating the evidence, the sequence of events cannot be ignored. [Para 11] [1072-C-D]

2. In any event, there was no enmity whatsoever between the deceased and the accused. When the suggested enmity, if at all, was between the accused and PW 1, there does not appear to be any reason as to why the accused should attack the deceased and leave PW 1 unscratched. Admittedly, there was not even an attempt by the accused to attack PW 1. This story somehow appears unbelievable and difficult to accept. At any rate, there is no evidence adduced by prosecution in this regard. Admittedly A-1, on reaching the scene of occurrence on that fateful night, challenged PW 1 to open the door. PW 1 woke up and reached the door with the torch and lathi in his hand raising alarm. On hearing the cries, PW 3 and PW 2 reached the spot with torch lights in their hands. PW 1 opened the door only after the said witnesses reached the scene of offence and saw all the

accused along with two or three persons assaulting his father and nephew with knives and spears. PW 1 made an omnibus allegation that all the accused attacked the deceased indiscriminately with the weapons in their hands. If PWs 1, 2 and 3 were present at the scene of offence as stated by PW 1, there is no explanation forthcoming as to why three of them put together could not resist the accused in attacking the deceased. [Para 12] [1072-E-H; 1073-A-B]

3. PW 2 in his evidence stated that two of the accused were armed with knives and two with lathis. He is alleged to have witnessed the incident with the assistance of the torch lights in his hand. He also levelled omnibus allegations against all the accused that they were inflicting knife and spear injuries on the deceased. It is in his evidence that about two or three persons were standing outside the verandah while actually the accused were inflicting knife and spear injuries over the victims. Those other individuals remained unidentified. According to him, he himself and PWs 1 and 3 were also armed with lathis but no attempts were made to resist the accused who were indulging in the acts of assault. In the circumstances, it is doubtful to believe PW 2 to have actually witnessed the incident and recognized the accused with the help of torch lights. [Para 13] [1073-C-E]

4. PW 3 stated in his evidence that he had purchased the house along with PW 1. He speaks about the presence of PW 2 and one other witness who was not examined and does not speak about presence of any other person including that of PW 1 at the scene of offence. He also made indefinite allegations against all the accused as inflicting knife and spear blows on the victims. [Para 14] [1073-E-G]

5. All the eyewitnesses had stated in their evidence

that lantern was burning in the verandah and PW 1, PW 2 and PW 3 were having torch lights in their hands and only with the help of the lantern and the torch lights they could recognize and identify the assailants. The lantern and the torch lights though were alleged to have been seized were not produced in the Court. The seizure memos did not contain the crime number and other recovery particulars. In the circumstances, it becomes highly doubtful as to whether those torch lights and lantern were actually seized during the course of investigation by the Investigating Officer. The Investigating Officer, PW 8 did not explain as to why the crime number was not noted on the seizure memos and as to why the material objects, if at all seized, were not produced in the Court. The very fact that the lantern and torch lights were pressed into service for the purpose of identifying the accused, itself suggests that it was a pitched dark night during the mid winter and it was not possible to identify the assailants without the aid of lantern and torch lights. It is highly doubtful as to whether PWs 1, 2 and 3 actually had torch lights in their hands as stated by them, in the absence of their recovery details in the seizure memo and their non-production before the Court. Moreover, PW 1 refused to state as to whether the assailants were covering their faces with chadar. His evidence does not inspire any confidence. [Para 15] [1073-G-H; 1074-A-E]

6. These all are the factors which give rise to doubt as to the presence of PWs 2 and 3 at the scene of offence. The trial Court rightly entertained the doubt and accordingly gave the benefit of doubt to the accused. It is a plausible view taken by the trial Court which could not be held to be a perverse one. Such a view has been taken by the trial Court after appreciation of the evidence. The High Court ought not to have interfered with the judgment of the trial Court merely because there is a

possibility of taking a different view other than the one taken by the trial Court. The appellant (A-2) is entitled to the benefit of doubt. It would be unsafe to convict the accused on the evidence which is not free from doubts. The appellant is thus acquitted of all the charges and his conviction and sentence is accordingly set aside. [Paras 16 and 17] [1074-F-H; 1075-A-B]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1398 of 2008.

From the Judgment and Order dated 10.10.2007 of the High Court of Judicature at Allahabad in Criminal Appeal No. 2514 of 1982.

Sandhya Goswami, M.P.S. Tomar, Jabar Singh, Vipul Maheshwari and H.C. Kharbandha for the Appellant.

Savitri Pandey, Ajay Singh and Shrish Kumar Misra for the Respondent.

The Judgment of the Court was delivered by

B. SUDERSHAN REDDY, J. 1. This appeal under Section 2(a) of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 is directed against the judgment of the High Court of Judicature at Allahabad in Criminal Appeal No. 2514 of 1982 whereby the High Court allowed the appeal preferred by the State and accordingly reversed the judgment and order of acquittal passed by the trial Court under Sections 147, 148, 302/149, IPC. The High Court having convicted the accused, sentenced them to life imprisonment.

2. During the pendency of the appeal preferred by the State in the High Court, the accused Awadhoo (A-1) and Birbal (A-3) died and the appeal against them was ordered to be abated. This appeal is preferred by Durbal, accused No. 2.

3. In order to appreciate as to whether the judgment of the High Court reversing the order of acquittal, requires any

interference at our hands, we may have to notice the prosecution case in brief:

The origin of the prosecution case lies in an altercation between the accused and one Kaldhari (PW 1) alleged to have taken place two days prior to the date of incident on 23rd December, 1979. It is the case of the prosecution that one Ramdhani (not examined) in partnership with Kaldhari (PW 1) had obtained lease of fishery rights in respect of a pond situated in Harirampur village. They had raised fish in the said pond. The accused were claiming right to collect fish from the said pond. Kaldhari (PW 1) along with his companions had gone to village Harirampur for the collection of the fish from the pond. The accused along with their associates had also assembled there to collect the fish from the pond. Their attempts were resisted by Kaldhari (PW 1) resulting in an altercation. Awadhoo (A 1), since deceased, threatened Kaldhari (PW 1) of his life. This incident had taken place in the presence of Madan (PW 4) and one Sidhu (not examined).

4. It is further the case of the prosecution that on 24th December, 1979 at about 10.30 p.m. in the night while Kaldhari (PW 1) was sleeping in his house with its door bolted from inside, his father Abhi Raj (deceased) and nephew Bal Kishun (deceased) were sleeping on a takhat in the verandah, all of a sudden, Abhi Raj and Bal Kishun (both deceased) raised alarm and in the meanwhile, someone started thumping on the door of the room where Kaldhari (PW 1) was sleeping. As he was about to open the door, he could hear Awadhoo (A 1) commanding him to open the door. Kaldhari (PW 1) identified him from his voice. Kaldhari then started raising alarm from inside the house. This attracted Sonai (PW 3), Sheo Kumar (PW 2) and Lal Mani (not examined) from the neighbourhood who reached the place of occurrence flashing torch lights. On seeing the witnesses, Kaldhari gathered courage and opened the door of his room and came into verandah. He saw that all the four accused accompanied by two or three unknown associates were assaulting his father Abhi Raj and nephew Bal

Kishun with knives and bhalas. On finding that the villagers were gathering at the scene of offence, the miscreants retreated and before turning away from the place of occurrence, they also opened fire. The police station, as per chik FIR is about 20 kilometers away from the place of occurrence. Kaldhari (PW 1) could not go to the police station in that night. In the early morning he got the information registered. At that time, Ram Awadh Chaudhary (PW 8), the Investigating Officer, was present at the police station who having registered the First Information Report, proceeded to the scene of offence and commenced the investigation. He recorded statements of the witnesses and collected lantern and torches which were the alleged source of light in which the witnesses claimed to have seen the occurrence. He also collected blood stained earth and other material including an empty cartridge shell and some pellets of the shot which was fired by the miscreants on the spot. The dead bodies were then sent for autopsy after holding inquest and due formalities.

5. Dr. P.N. Awasthi (PW 5) performed the autopsy on 26th December, 1979 and has found the following ante mortem injuries on the body of Abhi Raj who was aged about 70 years:

1. Punctured wound clean cut mrgins 1½" x pleural cavity deep, 3" from middle line on front of chest.

2. Punctured wound clean cut margins 1½" x ½" x peritoneal cavity deep, just below lower and sternum.

3. Punctured wound with clean cut margins 1¼" x ¼" x pleural cavity deep on right side front of chest in between 3rd and 4th rib 4" from middle line.

4. Punctured wound with clean cut margins 1¼" x ¼" x pleural cavity deep 1" below injury No. 3.

5. Punctured wound with clean cut margins 1½" x ½"

x pleural cavity deep, on right side chest 6" below right axilla.

Cause of death, in his opinion was shock and hemorrhage as a result of ante mortem injuries and death had occurred two days prior to the time of autopsy.

6. On the same day, post mortem examination of the body of Bal Kishun, a boy aged about 11 years revealed the following ante mortem injuries:

1. Abrasion ¼" x ¼" on front of left side chest 1" below left nipple.

2. Incised wound ¼" x 1/44 x muscle deep on front of right side chest ½" below right nipple.

3. Twelve punctured wounds with clean cut margins on back of whole of chest in an area of 8" x 8" measuring from 1½" x ½" plural cavity deep to 1" x ¼" x pleural cavity deep, pleura was cut underneath.

In the opinion of the Doctor, the death had occurred two days before on account of ante mortem injuries and the injuries could have been caused by sharp edged weapons like knife and bhala.

7. The prosecution in support of its case examined Kaldhari (Pw 1), Sheo Kumar (PW 2) and Sonai (PW 3) apart from Dr. P.N. Awasthy (PW 5) and Ram Avadh Chaudhary (PW 8), the Investigating Officer.

8. The trial Court by its well reasoned judgment acquitted all the accused of the charges. The trial Court found that there was no motive whatsoever for the accused to have attacked the deceased on that fateful night. There was no altercation whatsoever at the pond over fishery rights two days prior to the incident as alleged by the prosecution. The trial Court

disbelieved Magan (PW 4) who allegedly witnessed the altercation. He was examined by the Investigating Officer after more than two months of the incident. The trial Court also found that PW 4 (Magan) is closely related to Kaldhari (PW 1). Ramdhani, the alleged partner of Kaldhari (PW 1) was not examined. The trial Court also found the evidence of Kaldhari (PW 1) to be highly doubtful. The very fact that Kaldhari (PW 1) was not attacked by the accused is a strong circumstance, according to the trial Court, to doubt the prosecution's case. The trial Court noticed the contradictions in the statement of Kaldhari and accordingly disbelieved his evidence. The trial Court also noticed that Sonai (PW 3) stated that he came out of the house on hearing alarm raised by Abhi Raj (deceased) and found only Sheo Kumar (PW 2) and one Lal Mani (not examined). According to him, no other person was present at the scene of offence. The trial Court, in the circumstances, came to the conclusion that it was extremely doubtful as to the presence of Kaldhari (PW 1) at the scene of offence. The trial Court also doubted the presence of Sheo Kumar (PW 2) at the scene of offence. The trial Court also disbelieved the evidence of Sonai (PW 3) who is a close relative of PW 1. His statement is so vague and the same did not inspire any confidence in the trial Court to accept. The trial Court also found that the lantern and torch lights were not produced in the Court. The seizure memos of lantern (Ext. ka-2), torches (Ext. Ka-3) did not contain the crime number. The trial Court came to the conclusion that since the offence occurred in the dead of night in the last week of December, the witnesses could not have identified the assailants except with the aid of lantern and torches, whose seizure itself was doubtful.

9. The High Court, upon reappreciation of the evidence available on record, mainly relying upon the evidence of Kaldhari (PW 1), came to the conclusion that non-production of the lantern and the torch lights in the Court were of no consequence.

10. A short question that arises for our consideration in this appeal is whether the High Court committed any error in relying upon evidence of Kaldhari (PW 1) since the whole prosecution case rests upon his evidence? Whether his evidence is acceptable based on which the High Court convicted the accused?

11. The whole prosecution case is that on account of the dispute over fishery rights, the accused bore a grudge against Kaldhari (PW 1) and even threatened him with dire consequences. Whether there was any dispute over the fishery rights itself is highly doubtful. The only person apart from PW 1 who speaks about the dispute is Magan (PW 4) who was examined by the police after more than two months of the occurrence. It is true, motive for committing the crime pales into insignificance in a case where the prosecution story rests upon the evidence of eyewitnesses. But, for the purposes of evaluating and appreciating the evidence, the sequence of events cannot be ignored.

12. Be it as it may, there was no enmity whatsoever between the deceased and the accused. When the suggested enmity, if at all, was between the accused and Kaldhari (PW 1), there does not appear to be any reason as to why the accused should attack the deceased and leave Kaldhari unscratched. Admittedly, there was not even an attempt by the accused to attack Kaldhari. This story somehow appears unbelievable and difficult to accept. At any rate, there is no evidence adduced by prosecution in this regard. Admittedly Awadhoo (A-1), on reaching the scene of occurrence on that fateful night, challenged Kaldhari (PW 1) to open the door. Kaldhari woke up and reached the door with the torch and lathi in his hand raising alarm. On hearing the cries, Sonai (PW 3) and Sheo Kumar (PW 2) reached the spot with torch lights in their hands. Kaldhari opened the door only after the said witnesses reached the scene of offence and saw all the accused along with two or three persons assaulting his father

Abhi Raj and Bal Kishun with knives and spears. Kaldhari (PW 1) makes an omnibus allegation of all the accused of their attacking the deceased indiscriminately with the weapons in their hands. If PWs 1, 2 and 3 were present at the scene of offence as stated by Kaldhari (PW 1), there is no explanation forthcoming as to why three of them put together could not resist the accused in attacking the deceased.

13. Sheo Kumar (PW 2) in his evidence stated that two of the accused were armed with knives and two with lathis. He is alleged to have witnessed the incident with the assistance of the torch lights in his hand. He also levels omnibus allegations against all the accused that they were inflicting knife and spear injuries on the deceased. It is in his evidence that about two or three persons were standing outside the verandah while actually the accused were inflicting knife and spear injuries over the victims. Those other individuals remained unidentified. According to him, he himself and PWs 1 and 3 were also armed with lathis but no attempts were made to resist the accused who are indulging in the acts of assault. In the circumstances, it is doubtful to believe PW 2 to have actually witnessed the incident and recognized the accused with the help of torch lights.

14. PW 3 is one Sonai who stated in his evidence that he had purchased the house along with Kaldhari (PW 1) from one Swaminath Chaudhary. He speaks about the presence of Sheo Kumar (PW 2) and one Lal Mani (not examined) and does not speak about presence of any other person including that of PW 1 at the scene of offence. He also made indefinite allegations against all the accused as inflicting knife and spear blows on the victims.

15. It is also required to note that all the eyewitnesses had stated in their evidence that lantern was burning in the verandah and Kaldhari (PW 1), Sheo Kumar (PW 2) and Sonai (PW 3) were having torch lights in their hands and only with the help of

the lantern and the torch lights they could recognize and identify the assailants. The lantern and the torch lights though were alleged to have been seized vide seizure mahazar Exts. Ka-2 and Ka-3 respectively, were not produced in the Court. The seizure memos Ext. Ka-2 and Ka-3 did not contain the crime number and other recovery particulars. In the circumstances, it becomes highly doubtful as to whether those torch lights and lantern were actually seized during the course of investigation by the Investigating Officer. The Investigating Officer (PW 8) did not explain as to why the crime number was not noted on Ext. Ka-2 and Ka-3 and as to why the material objects if at all seized, were not produced in the Court. The very fact that the lantern and torch lights were pressed into service for the purpose of identifying the accused, itself suggests that it was a pitched dark night during the mid winter and it was not possible to identify the assailants without the aid of lantern and torch lights. It is highly doubtful as to whether PWs 1, 2 and 3 had actually torch lights in their hands as stated by them, in the absence of their recovery details in the seizure memo and their not production before the Court. Moreover, Kaldhari (PW 1) refused to state as to whether the assailants were covering their faces with chadar. His evidence does not inspire any confidence.

16. These all are the factors which give rise to doubt in our minds as to the presence of PWs 2 and 3 at the scene of offence. The trial Court rightly entertained the doubt and accordingly gave the benefit of doubt to the accused. It is a plausible view taken by the trial Court which could not be held to be a perverse one. Such a view has been taken by the trial Court after appreciation of the evidence. The High Court, in our considered opinion, ought not to have interfered with the judgment of the trial Court merely because there is a possibility of taking a different view other than the one taken by the trial Court. The appellant, in our considered opinion, is entitled to the benefit of doubt. It would be unsafe to convict the accused on the evidence which is not free from doubts.

17. For the aforesaid reasons, the impugned judgment of the High Court is set aside and judgment of the trial Court shall stand restored. The appellant is thus acquitted of all the charges and his conviction and sentence is accordingly set aside. He may be set free forthwith unless otherwise required in any other case.

18. The appeal is allowed accordingly.

B.B.B. Appeal allowed.

HARI RAM
v.
JYOTI PRASAD & ANR.
(Civil Appeal No. 1042 of 2011)

JANUARY 27, 2011

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

Limitation Act, 1963 – s.22 – Suit filed alleging that the defendants had illegally encroached on a public street – Trial court decreed the suit and issued permanent injunction – Decree challenged on the ground that the suit itself was barred by limitation – Held: The suit could not be said to be barred by limitation as encroachment on a public street is a continuing wrong and therefore, there existed a continuing cause of action – S.22 of the Limitation Act would apply – Code of Civil Procedure, 1908.

Code of Civil Procedure, 1908:

Order I Rule 8 – Suit filed alleging that the defendants had made illegal / unauthorized construction over a 10 feet wide public street by way of illegal encroachment – Trial court decreed the suit and issued permanent injunction directing removal of unauthorized construction – Decree challenged, on the ground that the suit was bad for non-compliance of the provisions of Order I Rule 8 – Held: Apart from being a representative suit, the suit was filed by an aggrieved person whose right to use public street of 10 feet width was prejudicially affected – Since the affected person himself had filed a suit, therefore, the suit cannot be dismissed on the ground of alleged non-compliance of the provisions of Order I Rule 8 – Any member of a community may successfully bring a suit to assert his right in the community property or for protecting such property by seeking removal of

encroachment therefrom and in such a suit he need not comply with the requirements of Order I Rule 8 – In that view of the matter, the suit filed was maintainable.

Suit filed by respondents alleging that the defendants had made illegal / unauthorized construction over a 10 feet wide public street by way of illegal encroachment – Trial court decreed the suit and issued permanent injunction directing removal of unauthorized construction – Decree affirmed by First Appellate Court as also High Court – Challenge to, on the ground that it was not proved that the suit land was a public street in which encroachment was made by the appellant-defendant – Held: On appreciation of the evidence, all the three courts below namely the High Court, the First Appellate Court as also the trial court held that the disputed suit land is a part of the public street where the appellant had encroached upon – The aforesaid findings are findings of fact – The evidence on record proved that there existed a public street of 10 feet width and also that the appellant had encroached upon the suit property consisting of the aforesaid street of 10 feet width – Decree passed by the trial court accordingly confirmed.

The respondents filed civil suit alleging that appellant-defendant and another defendant had made illegal / unauthorized construction over a 10 feet wide public street by way of illegal encroachment, and accordingly prayed for mandatory injunction against the defendants. The trial court decreed the suit and issued permanent injunction directing the removal of unauthorized construction. The judgment and decree passed by the trial Court was affirmed by the First Appellate Court (Additional District Judge), and further affirmed by the High Court in second appeal.

In the instant appeal, the appellant challenged the judgments and decrees passed by the courts below on three grounds, viz. 1) that the suit itself was barred by limitation; 2) that the suit was bad for non-compliance of the provisions of Order I Rule 8 of the CPC and 3) that no official document was placed and no official witness was examined to prove and establish that the suit land was a public street in which encroachment was made by the appellant.

Dismissing the appeal, the Court

HELD:1.1. The records placed disclose that the appellant in his written statement took up a plea that the suit is barred by limitation. However, despite the said fact no issue was framed nor any grievance was made by the appellant for non-framing of an issue of limitation. The appellant did not make any submission before the trial court and the first appellate court regarding the plea of limitation. The said plea was made before the High Court which held that although such a plea was not raised either before the trial court or before the appellate court, the same could be raised before the High Court in view of the provisions of Section 3 of the Limitation Act which places an obligation upon the Court to discuss and consider such a plea despite the fact that no such plea was raised and argued before the Trial Court as also before the First Appellate Court. The High Court after considering the aforesaid plea held that the suit cannot be said to be barred by limitation as an encroachment on a public street is a continuing wrong and therefore, there exists a continuing cause of action. The records disclose that initially a complaint under Section 133 of Cr.PC was filed which was pursued with all sincerity upto the High Court. But the High Court held that the dispute between the parties could be better resolved if a proper civil suit is filed and when evidence is led with regard to the disputed questions of fact. Immediately thereafter the aforesaid suit was filed seeking issuance of a mandatory injunction. In view of the aforesaid facts and also in view

of the fact that encroachment on a public street by any person is a continuing cause of action, there is no merit in the said contention. [Paras 15, 16, 17] [1086-G-H; 1087-A-E]

1.2. Any act of encroachment is a wrong committed by the doer. Such an encroachment when made to a public property like encroachment to public road would be a graver wrong, as such wrong prejudicially affects a number of people and therefore is a public wrong. So long any obstruction or obstacle is created to free and unhindered access and movement in the road, the wrongful act continues thereby preventing the persons to use the public road freely and unhindered. Therefore, that being a continuing source of wrong and injury, cause of action is created as long as such injury continues and as long as the doer is responsible for causing such injury. [Para 18] [1087-F-H; 1088-A]

1.3. Section 22 of the Limitation Act, 1963, provides that "in case of a continuing breach of contract or in case of a continuing tort, a fresh period of limitation begins to run at every moment of the time during which the breach or the tort, as the case may be, continues." In an earlier case, this court had held that when a right of way is claimed whether public or private over a certain land over which the tort-feaser has no right of possession, the breaches would be continuing, to which the provisions of Section 22 of the Limitation Act, 1963, would apply. Therefore, the plea that the suit is barred by limitation has no merit at all. [Para 19] [1088-C-E]

Sankar Dastidar v. Shrimati Banjula Dastidar and Anr., **AIR 2007 SC 514 – relied on.**

2. Apart from being a representative suit, the suit was filed by an aggrieved person whose right to use public street of 10 feet width was prejudicially affected. Since

the affected person himself has filed a suit, therefore, the suit cannot be dismissed on the ground of alleged non-compliance of the provisions of Order I Rule 8 of the CPC. Any member of a community may successfully bring a suit to assert his right in the community property or for protecting such property by seeking removal of encroachment therefrom and in such a suit he need not comply with the requirements of Order I Rule 8 CPC. In that view of the matter, the suit filed by the plaintiff/ respondent No. 1 was maintainable. [Paras 20, 22 and 23] [1088-F-G; 1089-B-D]

Kalyan Singh, London Trained Cutter, Johri Bazar, Jaipur v. Smt. Chhoti and Ors., **AIR 1990 SC 396 – referred to.**

3.1. The suit was initially instituted against two defendants. The appellant was defendant No. 2 in the said suit. So far as defendant No. 1 is concerned, the records disclose that the Panchayat of the area took a decision that both of them have encroached upon a public property and the street and therefore they should remove the encroachment. It is disclosed from the records that pursuant to the aforesaid decision of the Panchayat, the defendant No. 1 removed his encroachment after admitting that he had also encroached upon some area of the 10 feet wide street which fact he admitted before the panchayat and later on he removed the said encroachment. The aforesaid fact is established from the statements of PW-1, PW-5 and PW-6 who were present and participated in the said Panchayat and also corroborated the said admission before the Panchayat. [Paras 24] [1089-E-H; 1090-A]

3.2. In all 8 witnesses were examined by the plaintiff respondent No.1. PW-3, who was examined in the suit proved the report of the BDO who had visited the disputed property on 18.1.1995 after which he also submitted a report certifying that an encroachment has

been made by the appellant over the disputed street. PW-4, the original owner of the entire area, had specifically stated in his evidence that he had carved out a colony in the year 1981-82 and he had sold the plots to the plaintiff as well as defendants and other inhabitants of the village and towards eastern side of the plot of the defendant/ appellant he had left a street of 10 feet width. As against the aforesaid evidence adduced on behalf of the plaintiff/ respondent No. 1, the appellant examined himself as DW-1 wherein he only took a stand that disputed property is not a part of the street and that after purchasing the plot he had constructed the house and despite the said fact no objection was taken and therefore it cannot be said that he had constructed a house also on a part of the said disputed suit property. On appreciation of the aforesaid evidence, all the three courts namely the High Court, the First Appellate Court as also the trial court held that the aforesaid disputed suit land is a part of the public street where the appellant has encroached upon by constructing a part of the house. The aforesaid findings are therefore findings of fact. Public Officer namely Patwari was examined who had proved the report submitted by the BDO stating that part of the suit property is a public street. [Paras 26, 27] [1090-E-G]

3.3. The site plan (Ext. PW-7A) filed by the plaintiff/ respondent proves and establishes that there is a public street of 10 feet width. In all the sale deeds of the area as disclosed from the statement of PW-4, the aforesaid street of 10 feet width is shown and the aforesaid evidence go unrebutted. Thus there exists a street of 10 feet width. It is also proved from the evidence on record that the appellant has encroached upon the suit property consisting of the aforesaid street of 10 feet width. That being the position, there is no infirmity in the judgment and decree passed by the Trial Court and affirmed by the

First Appellate Court and by the High Court in the Second Appeal. [Para 28] [1090-H; 1091-A-B]

4. The decree passed by the trial court is confirmed. If the appellant fails to vacate and remove the unauthorized encroachment within a period of 60 days, it will be open for the plaintiff/respondent No. 1 to get the decree executed in accordance with law. [Para 29] [1091-C-D]

Case Law Reference:

AIR 2007 SC 514	**relied on**	**Para 19**
AIR 1990 SC 396	**referred to**	**Para 21**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1042 of 2011.

From the Judgment and Order dated 31.07.2009 of the High Court of Punjab and Haryana at Chandigarh in RSA No. 2698 of 2008.

Anoop G. Choudhary and J. Chaudhary, Devendra Kr. Singh, Ajay A. and Prem Sunder Jha for the Appellant.

Jasbir Singh Malik, Ekta Kadian, Devender Kumar Sharma and S.K. Sabharwal for the Respondents

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. Leave granted.

2. By this judgment and order, we propose to dispose of the aforesaid appeal which is filed by the appellant herein after being aggrieved by the judgment and order passed by the High Court in RSA No. 2698 of 2008 affirming the judgment and decree passed by the trial Court in Civil Suit No. 160 of 2003 which was affirmed by the First Appellate Court in Civil Appeal No. 92 of 2007. These facts, therefore, make it crystal clear that

the present appeal is directed against the concurrent findings of fact of the High Court, the first Appellate Court i.e. the judgment of the Additional District Judge and the trial court which was the Court of Civil Judge (Junior Division).

3. In order to appreciate the contentions raised before us by the learned counsel appearing for the appellant, it would be necessary to set out certain basic facts leading to filing of the present appeal.

4. The suit was filed by the respondent herein contending inter alia that all the six persons including respondent No. 1 have their common interest in the disputed street alongwith co-inhabitants of the same area. It was stated that the residential houses of the respondents are falling in the site plan which indicates that there is a common street for ingress and egress of the general public. It was alleged in the plaint that earlier Bal Kishan Dass who was examined as PW-4 was the original owner of the entire area out of which he curved out a colony selling plots in favour of various parties. It was also stated in the plaint that at that time itself a 10 feet wide public street was left on the ground as detailed in the site plan for the common use of all the plot holders of the colony, but further allegation was that the appellant/defendant from the time of possession of his plot had evil eye on the aforesaid disputed street and the defendant No. 1 and he namely defendant No. 2 encroached upon substantial part of the same making the street narrowed down causing inconvenience to the users of the said street. Incidentally the suit was filed invoking Order I Rule 8 of Code of Civil Procedure [called in short 'C.P.C.'].

5. In the plaint it was further stated that earlier the respondent No. 1 as complainant filed a complaint under Section 133 of the Code of Criminal Procedure, 1973 (for short "the Cr.P.C.") which was decided in favour of the plaintiff/ respondent No. 1 and the said judgment was passed by the SDM.

6. When the matter was challenged before the Punjab and Haryana High Court, the High Court held that the matter which is agitated relates to disputed facts and therefore requires evidence and that the dispute between the parties could only be effectively decided if a civil suit is filed. As the High Court had held that the dispute between the parties would be decided by filing a civil suit, consequently the aforesaid plaint was filed in the Court of Civil Judge (Junior Division) which was registered as Civil Suit No. 160 of 2003.

7. Defendant Nos. 1 and the present appellant as defendant No. 2 filed a combined written statement raising objections regarding the maintainability of the suit and also with regard to the merit of the contentions raised in the plaint. On the basis of the pleadings of the parties, four issues were framed by the trial court to the following effect:

1. Whether the defendants have made illegal / unauthorized construction over the public street by way of illegal encroachment as shown in red colour in the attached site plan shown by letters ABCD situated at village Matlauda, Distt. Panipat ? OPP.

2. In case issue No. 1 is decided in favour of plaintiff, then whether plaintiff is also entitled to injunction, as prayed for? OPP.

3. Whether suit filed by the plaintiff is not maintainable in the present form? OPD.

4. Relief.

8. To substantiate his case, the plaintiff/respondent No. 1 examined 8 witnesses and produced some documents whereas the present appellant as defendant No. 2 examined himself as DW-1 as a sole witness. After recording the evidence adduced by the parties the learned Civil Judge (Junior Division) heard the parties and thereafter by a judgment and decree dated 6.12.2007 decreed the suit and a permanent injunction was

issued directing the removal of unauthorized construction from the ground as shown in the site plan. Since, the defendant No. 1 had already removed his portion of illegal construction, the present appellant was given one month's time to remove all such constructions failing which respondent No. 1 was given their legal right to get the said construction removed on his own expenses which was allowed to be recovered from the defendants. The defendants were further restrained from raising any further construction in future on the aforesaid 10 feet Rasta as detailed in PW – 7A.

9. Being aggrieved by the aforesaid judgment and order passed by the trial court, an appeal was filed before the Additional District Judge, Panipat whereas the appeal was registered as Civil Appeal No. 92 of 2007. The aforesaid appeal was heard by the Additional District Judge who by his judgment and decree dated 25.7.2008 dismissed the appeal filed by the appellant. Thereafter, the appellant filed a second appeal before the Punjab and Haryana High Court which was registered as RSA No. 2698 of 2008.

10. By a judgment and decree dated 31.7.2009, the aforesaid appeal was also dismissed by the High Court holding that there is no specific question of law involved in the aforesaid appeal.

11. Being still aggrieved, the present appeal was filed by the appellant herein in which notice was issued and on service thereof, we heard the learned counsel appearing for the parties.

12. Mr. Anoop G. Choudhary, learned Senior Counsel appearing for the appellant very forcefully argued that none of the judgments and decrees passed by the courts below is justified. He submitted that the suit itself was barred by limitation but despite the said fact and despite the fact that a specific stand was taken in the written statement contending that the suit is barred by limitation, no such issue was framed by the trial Court and no decision was rendered by the trial court

as also by the appellate Court on the said issue and that the High Court was not justified in dismissing the plea raised by the appellant on the ground that the cause of action is a continuing cause of action and, therefore, it cannot be said that the suit is barred by limitation. His second contention was that there could and should have been no finding regarding the encroachment made by the appellant in absence of production of any official document to indicate that there was in fact a public street used by the residents of the area. He submitted that no evidence has been led to prove and establish that it was a public street on which encroachment was made by the appellant. His last submission was that the suit was said to be in representative capacity as shown in the plaint but the formalities for instituting a case i.e. representative suit was not followed and therefore the suit should have been dismissed at the very threshold itself.

13. The aforesaid submissions of the learned senior counsel appearing for the appellant were refuted by the learned counsel appearing for the respondents who placed before us the findings recorded by the three courts below and relying on the same, it was submitted that the present appeal has no merit at all.

14. In the light of the aforesaid submissions of the counsel appearing for the parties, we also perused the records very carefully. We would first deal with the plea of limitation as raised before us by the appellant.

15. The records placed before us do disclose that the appellant in his written statement took up a plea that the suit is barred by limitation. However, despite the said fact no issue was framed nor any grievance was made by the appellant for non-framing of an issue of limitation.

16. On going through the records, we do not find that the appellant has made any submission before the trial court as also before the first appellate court regarding the plea of

limitation. Such a plea is seen to have been made before the High Court. The said plea which was made before the High Court was considered at length by the High Court and the High Court held that although such a plea was not raised either before the trial court or before the appellate court, the same could be raised before the High Court in view of the provisions of Section 3 of the Limitation Act which places an obligation upon the Court to discuss and consider such a plea despite the fact that no such plea was raised and argued before the Trial Court as also before the First Appellate Court.

17. The High Court after considering the aforesaid plea held that the suit cannot be said to be barred by limitation as an encroachment on a public street is a continuing wrong and therefore, there exists a continuing cause of action. The records disclose that initially a complaint under Section 133 of Cr.PC was filed which was pursued with all sincerity upto the High Court. But the High Court held that the dispute between the parties could be better resolved if a proper civil suit is filed and when evidence is led with regard to the disputed questions of fact. We find from the records that immediately thereafter the aforesaid suit was filed seeking issuance of a mandatory injunction. In view of the aforesaid facts and also in view of the fact that encroachment on a public street by any person is a continuing cause of action, we find no merit in the said contention.

18. Any act of encroachment is a wrong committed by the doer. Such an encroachment when made to a public property like encroachment to public road would be a graver wrong, as such wrong prejudicially affects a number of people and therefore is a public wrong. So long any obstruction or obstacle is created to free and unhindered access and movement in the road, the wrongful act continues thereby preventing the persons to use the public road freely and unhindered. Therefore, that being a continuing source of wrong and injury, cause of action

is created as long as such injury continues and as long as the doer is responsible for causing such injury.

19. At this stage it would be apposite to refer to and rely upon Section 22 of the Limitation Act, 1963, which reads as follows:

> "In case of a continuing breach of contract or in case of a continuing tort, a fresh period of limitation begins to run at every moment of the time during which the breach or the tort, as the case may be, continues."

This court had the occasion to deal with Section 22 of the Limitation Act, 1963, in the case of *Sankar Dastidar v. Shrimati Banjula Dastidar and Anr* reported in AIR 2007 SC 514, in which the Supreme Court held that when a right of way is claimed whether public or private over a certain land over which the tort-feaser has no right of possession, the breaches would be continuing, to which the provisions of Section 22 of the Limitation Act, 1963, would apply. Therefore, in our considered opinion the plea that the suit is barred by limitation has no merit at all.

20. The next plea which was raised and argued vehemently by the learned senior counsel appearing for the appellant was that the suit was bad for non-compliance of the provisions of Order I Rule 8 of the CPC. The said submission is also found to be without any merit as apart from being a representative suit, the suit was filed by an aggrieved person whose right to use public street of 10 feet width was prejudicially affected. Since affected person himself has filed a suit, therefore, the suit cannot be dismissed on the ground of alleged non-compliance of the provisions of Order I Rule 8 of the CPC.

21. In this connection, we may appropriately refer to a judgment of the Supreme in *Kalyan Singh, London Trained Cutter, Johri Bazar, Jaipur Vs. Smt. Chhoti and Ors.* reported in AIR 1990 SC 396. In paragraph 13 of the said judgment,

this Court has held that suit could be instituted by representative of a particular community but that by itself was not sufficient to constitute the suit as representative suit inasmuch as for a representative suit, the permission of Court under Order I Rule 8 of the CPC is mandatory.

22. In paragraph 14 of the said judgment, it was also held that any member of a community may successfully bring a suit to assert his right in the community property or for protecting such property by seeking removal of encroachment therefrom and that in such a suit he need not comply with the requirements of Order I Rule 8 CPC. It was further held in the said case that the suit against alleged trespass even if it was not a representative suit on behalf of the community could be a suit of this category.

23. In that view of the matter and in the light of the aforesaid legal position laid down by this Court, we hold that the suit filed by the plaintiff/respondent No. 1 was maintainable.

24. According to the appellant no official document was placed and no official witness was examined to prove and establish that the suit land was a public street in which encroachment is made by the appellant. At this stage it would be appropriate to mention that the suit was initially instituted against two defendants namely defendant No. 1 and defendant No. 2. The appellant herein was defendant No. 2 in the said suit. So far as defendant No. 1 is concerned, the records disclose that the Panchayat of the area took a decision that both of them have encroached upon a public property and the street and therefore they should remove the encroachment. It is disclosed from the records that pursuant to the aforesaid decision of the Panchayat, the defendant No. 1 removed his encroachment after admitting that he had also encroached upon some area of the 10 feet wide street which fact he admitted before the panchayat and later on he removed the said encroachment. The aforesaid fact is established from the statements of PW-1. Jyoti Parshad, PW-5 - Sadhu Ram and

PW-6 - Ram Pal who were present and participated in the said Panchayat also corroborated the said admission before the Panchayat.

25. Besides, in all 8 witnesses were examined by the plaintiff respondent No. 1. PW-3, Dharam Singh Patwari who was examined in the suit proved the report of the BDO who had visited the disputed property on 18.1.1995 after which he also submitted a report certifying that an encroachment has been made by the appellant over the disputed street. Bal Kishan Dass who was also examined as PW-4 had specifically stated in his evidence that he had carved out a colony in the year 1981-82 and he had sold the plots to the plaintiff as well as defendants and other inhabitants of the village and towards eastern side of the plot of the defendant/appellant he had left a street of 10 feet width.

26. As against the aforesaid evidence adduced on behalf of the plaintiff/respondent No. 1, the appellant examined himself as DW-1 wherein he only took a stand that disputed property is not a part of the street and that after purchasing the plot he had constructed the house and despite the said fact no objection was taken and therefore it cannot be said that he had constructed a house also on a part of the said disputed suit property.

27. On appreciation of the aforesaid evidence, all the three courts namely the High Court, the First Appellate Court as also the trial court held that the aforesaid disputed suit land is a part of the public street where the appellant has encroached upon by constructing a part of the house. The aforesaid findings are therefore findings of fact. Public Officer namely Patwari was examined who had proved the report submitted by the BDO stating that part of the suit property is a public street.

28. Ext. PW-7A filed by the plaintiff/respondent is a site plan which proves and establishes that there is a public street of 10 feet width. In all the sale deeds of the area as disclosed

from the statement of PW-4 Bal Kishan Dass, the aforesaid street of 10 feet width is shown and the aforesaid evidence go unrebutted. Thus there exists a street of 10 feet width. It is also proved from the evidence on record that the appellant has encroached upon the suit property consisting of the aforesaid street of 10 feet width. That being the position, we find no infirmity in the judgment and decree passed by the Trial Court and affirmed by the First Appellate Court and by the High Court in the Second Appeal.

29. We, therefore, find no merit in this appeal which is dismissed with costs, which is assessed by us at Rs. 10,000/-. The decree passed by the trial court is confirmed. If the appellant fails to vacate and remove the unauthorized encroachment within a period of 60 days from today, it will be open for the plaintiff/respondent No. 1 to get the decree executed in accordance with law.

30. In terms of the aforesaid observations and directions, the appeal is dismissed.

B.B.B. Appeal dismissed.

DAULAT RAM & ANR.
v.
CBN MANDSAUR, M.P.
(Criminal Appeal No. 259 of 2006)

JANUARY 27, 2011

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

Narcotic Drugs and Psychotropic Substances Act, 1985 – s. 8 read with s. 18 – Appellants cultivating opium under a licence – Recovery of undeclared opium from the field of the appellants – Confession by the appellants that they had withheld the opium to sell it in the market in an unauthorized manner – Conviction u/s. 8 read with s. 18 by courts below – On appeal, held: Justified – Rule 13 makes it obligatory for an opium producer to make a declaration to the lambardar as to the quantity of opium produced everyday – No evidence to show that the opium which had been recovered had been declared or accounted for before the Lambardar – However, the fact that opium was buried three feet underground and far away from the residence of the appellants clearly shows that the intention was to stash away the opium for sale in an unauthorized way – Even though no independent witness supported the prosecution story, the evidence of the official witness is supported by the recovery of the opium and also by the confessions made by the appellants that they had withheld the opium to sell it in the market – Narcotic Drugs and Psychotropic Substances Rule, 1985 – r. 13

Bheru lal v. State of Rajasthan **RLW 2003 (2) Raj 1056 – referred to.**

Case Law Reference:

RLW 2003 (2) Raj 1056	**Referred to**	**Para 5**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 259 of 2006.

From the Judgment & Order dated 20.09.2004 of the High Court of Madhya Pradesh Indore Bench, Indore in Criminal Appeal No. 259 of 2001.

Ashok Kumar Sharma, Avinash Kumar Jain for the Appellants.

J.S. Attri, Sadhana Sandhu, Rashmi, Sushma Suri for the Respondent.

The following order of the Court was delivered

O R D E R

1. This appeal arises out of the following facts:

1.1 The appellants herein, both brothers, Daulat Ram and Mangilal, sons of Hurdabai, were living with their mother at village Dorana. Hurdabai had been issued a licence to grow opium in her land and the appellants were looking after the cultivation on her behalf. On the 5th April, 1997, reports were received in the Narcotics Office that Hurdabai was not depositing the entire yield of opium with the Lambardar. The ASI CBN, Balaram PW 2, and the District Opium officer, Satyaveer Singh Choudhary PW 6, along with other members of a raiding party reached the village Dorana at 2:00p.m., and on inquiry it was ascertained that the allegations appeared to be correct. The appellants were, accordingly, apprehended and interrogated by the ASI and during interrogation Daulat Ram admitted that some of the undeclared opium had been hidden in his field. Thereafter Mangilal appellant was also interrogated and he made a similar statement. The raiding party then visited the field of Daulat Ram and after digging the pit at the place pointed out by him, took out a polythene bag which when weighed was found to contain 3kg of opium. Similarly, Mangilal took the officers to the place which he had identified and

another 3 kg of opium was recovered from another pit. The appellants also gave their confessions Exhibits P 16 and P17 respectively, stating therein that they had withheld the opium to sell it in the market in an unauthorised manner.

1.2 On the completion of the investigation, the appellants were charged under Section 8 read with Section 18 of the Narcotic Drugs and Psychotropic Substances Act, (hereinafter referred to as 'the Act'). The trial court relying on the evidence of P.W. 1 Bhanwarilal Patwari who had identified the fields as belonging to Hurdabai and in particular the evidence of P.W. 2, P.W. 5 and P.W. 6 and also on the confessions made by the accused held that the case against them had been proved beyond doubt. The appellants were each sentenced to 10 years rigorous imprisonment and a fine of Rs.1 lakh with a default sentence. An appeal taken to the High Court too was dismissed.

2. Before us, today, Mr. Ashok Kumar Sharma the learned Amicus Curiae for the appellants, has raised one basic argument. He has submitted that as per the Act and Rule 13 of the Narcotics Drugs & Psychotropic Substances Rule, 1985, framed thereunder the opium which was produced had to be reported to the Lambardar and it was only after the final notification had been issued and the production had been quantified that the final accounting had to be made and not at any stage prior thereto. It has also been pointed out that the two independent witnesses having not supported the prosecution there was no independent evidence against the appellants.

3. Mr. J.S. Attri, the learned senior counsel for the respondents has, however, supported the judgment of the courts below.

4. We have considered the arguments advanced by the learned counsel. It is true, as contended by Mr. Sharma, that an over all accounting of the opium has to be made after the

notification has been issued identifying the percentage of opium that should be in the hands of a producer. However, there is an obligation under Rule 13 of the Rules, 1985 to make a declaration to the Lambardar as to the quantity of opium produced everyday. There is no evidence or suggestion to show that the opium which had been recovered had been declared or accounted for before the Lambardar. On the contrary the fact that it had been buried three feet underground and far away from the residence of the appellants clearly shows that the intention was to stash away the opium for sale in an authorised way.

5. Mr. Sharma has, however, cited *Bheru lal v. State of Rajasthan* RLW 2003 (2) Raj 1056 to contend that till the final quantification had been made the opium could not be said to be contraband. We find that some of the conclusions drawn in the cited judgment are too far reaching and basically ignore Rule 13 which requires a day to day accountability before the Lambardar. On facts, it is also apparent that the opium in Bheru Lal's case had been recovered from the residential house of the accused. In the case before us, as per the prosecution story, the opium had been recovered from 3 feet underground.

6. It is equally true that no independent witness has supported the prosecution story. The evidence of the official witnesses is, however, supported by the recovery of the opium and also by the confessions made by the appellants.

7. The appeal is, accordingly, dismissed.

N.J. Appeal dismissed.

PARMESHWARI
v.
AMIR CHAND & ORS.
(Civil Appeal No. 1082 of 2011)

JANUARY 28, 2011

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

Motor Vehicles Act, 1988 – s.166 – Motor Accident – Right leg of appellant-claimant fractured – Appellant suffered 32% permanent disability – Her leg was shortened by two inch – PW1, one of the witnesses to the accident, took the appellant to the doctor's clinic from where she was referred to a Nursing Home in Hisar – Appellant filed complaint in the office of SSP Hisar which was sent in original by SSP Hisar to SSP Hanumangarh – Compensation claim – Tribunal awarded to the appellant, compensation of Rs.1,36,547/- along with 9% interest – High Court set aside the award of the Tribunal, inter alia, on the ground that none from the office of SSP, Hanumangarh came to prove the complaint; that the testimony of PW.1 was not reliable and further that the claim petition was filed four months after the accident –Held: Filing of complaint by the appellant is not disputed as it appears from the evidence of PW.3, the Assistant Complaint Clerk in the office of Superintendent of Police, Hisar – Consequently, the decision of the Tribunal cannot be reversed on the ground that nobody came from the office of SSP to prove the complaint – PW1 is not related to the appellant but as a good citizen, he extended his help to her to ensure that she got medical treatment – His evidence cannot be disbelieved just because he did not file a complaint himself – Finding of the High Court that as the claim petition was filed after four months of the accident, the same was "a device to grab money from the insurance company" was perverse in the absence of any material – In a road accident claim, strict principles of proof

in a criminal case are not attracted – Judgment of High Court quashed and that of the Tribunal is restored.

The appellant was going on a Motor Cycle sitting on the pillion seat, when respondent no.2, came from the other direction in a scooter and hit her right leg as a result of which she fell down and her right leg was fractured and she received multiple injuries. The appellant suffered 32% permanent disability and in view of the combined fracture of both bones of her right leg, her leg was shortened by two inch.

The accident was witnessed by certain persons and one of them, PW1, took the appellant to the doctor's clinic from where she was referred to a Nursing Home in Hisar. The appellant filed a complaint in the office of SSP Hisar which was sent in original by SSP Hisar to SSP Hanumangarh. Subsequently, the appellant filed a compensation claim petition. On consideration of the materials on record, the Motor Accident Claims Tribunal awarded to the appellant, compensation of Rs.1,36,547/- along with 9% interest.

The High Court set aside the award of the Tribunal on grounds that even though complaint was forwarded to SSP Hisar and was further forwarded to SSP Hanumangarh but none from the office of SSP, Hanumangarh came to prove the complaint; that the testimony of PW.1 was not reliable and further that the claim petition was filed four months after the accident. The instant appeal was filed challenging the order of the High Court.

Allowing the appeal, the Court

HELD:1. In the instant case, the compensation was certainly not an excessive one. Rather the computation had been made modestly. [Para 9] [1101-E]

2. The well considered decision of the Tribunal was set aside by the High Court, inter alia, on the ground that even though complaint was forwarded to SSP Hisar and was further forwarded to SSP Hanumangarh but none from the office of SSP, Hanumangarh came to prove the complaint. The filing of the complaint by the appellant is not disputed as it appears from the evidence of PW.3, who is the Assistant Complaint Clerk in the office of Superintendent of Police, Hisar. If the filing of the complaint is not disputed, the decision of the Tribunal cannot be reversed on the ground that nobody came from the office of SSP to prove the complaint. The official procedure in matters of proceeding with the complaint is not within the control of the appellant, who is an ordinary village woman. She is not from the upper echelon of society. The general apathy of the administration in dealing with complaints lodged by ordinary citizens is far too well known to be overlooked by High Court. In this regard the perception of the High Court in disbelieving the complaint betrays a lack of sensitized approach to the plight of a victim in a motor accident claim case. [Para 10] [1101-F-H; 1102-A-B]

3. The other ground on which the High Court dismissed the case was by way of disbelieving the testimony of PW.1. Such disbelief of the High Court is totally conjectural. PW1 is not related to the appellant but as a good citizen, he extended his help to the appellant by helping her to reach the Doctor's chamber in order to ensure that an injured woman gets medical treatment. The evidence of PW1 cannot be disbelieved just because he did not file a complaint himself. [Para 11] [1102-C-D]

4. The total approach of the High Court was not sensitized enough to appreciate the plight of the victim. The other so-called reason in the High Court's order was that as the claim petition was filed after four months of the accident, the same is "a device to grab money from

the insurance company". This finding in the absence of any material is certainly perverse. The High Court appears to be not cognizant of the principle that in a road accident claim, the strict principles of proof in a criminal case are not attracted. [Para 12] [1102-E-F]

Bimla Devi and others vs. Himachal Road Transport Corporation and others **[(2009) 13 SCC 530] – relied on.**

5. The judgment given by the High Court is not sustainable and is therefore quashed while that of the Tribunal is restored. [Para 13] [1103-B]

Case Law Reference:

(2009) 13 SCC 530	**relied on**	**Para 12**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1082 of 2011.

From the Judgment & Order dated 08.10.2009 of the High Court of Punjab and Hayana at Chandigarh in F.A.O. No. 2484 of 2009.

Kanwar Udai Bhan, Dr. Kailash Chand for the Appellant.

The Judgment of the Court was delivered by

GANGULY, J. 1. Heard learned counsel for the appellant.

2. Despite service of notice on the respondent Nos.2 and 3, nobody appeared.

3. The appellant is impugning herein the judgment and order of the High Court of Punjab and Haryana dated 8th October, 2009 in FAO No.2484 of 2009. An appeal was filed before the High Court by the owner of the scooter, Amir Chand, against an award dated 12.2.2009 passed by the Motor Accident Claims Tribunal, Fast Track Court, Hisar, awarding to

the appellant, compensation of Rs.1,36,547/- along with 9% interest.

4. The contention of the owner of the scooter, before the High Court, was that the accident and his involvement in it was not proved and the claim petition should have been dismissed. The High Court ultimately upheld the appeal of the owner and set aside the findings of the Tribunal.

5. The material facts are that on 22.01.2003 at about 12.00 noon the appellant herein, the claimant before the Tribunal, respondent No.1 before the High Court, was going from Baganwala to Tosham on a Motor Cycle (No.HR 16C-8379), driven by Balwan with the claimant on the pillion seat. When the Motor Cycle was half a kilometer away from Baganwala, Suresh – respondent No.2 herein, came from the other direction in another scooter (No.HR 20-5793) from the wrong side and hit the right leg of the appellant as a result of which she fell down and her right leg was fractured and she received multiple injuries. The accident was witnessed by certain persons and one of them, Umed Singh, took the appellant to Dr. Punia's clinic from where she was referred to Chawla Nursing Home, Hisar, where she remained admitted till 6.2.2003. The matter was also reported to SSP, Hisar. Ultimately, the claim petition was filed by her on account of her serious injuries.

6. The Tribunal in its judgment considered the evidence of PW.1-Umed Singh as also the evidence of Dr. Parveen Chawla-PW.2, Dr. R.S. Dalal as PW.5 apart from examining the appellant-PW.4 and also one Satbir Singh as PW.3. It has come on evidence of PW.2-Dr. Parveen Chawla that on 22.1.2003 the appellant was admitted with diagnosis of fracture of tibia. Plating and bone grafting was done by P.W.2-Dr. Parveen Chawla and the appellant was discharged on 6.2.2003. The discharge card was also proved. PW.3-Satbir Singh deposed that the appellant moved a complaint in the office of SSP Hisar on 11.3.2003 and the same was sent in

original on 2.4.2003 by SSP Hisar to SSP Hanumangarh. PW.5-Dr. R.S. Dalal also deposed that the appellant was examined on 17.12.2003 by a Medical Board comprising of Civil Surgeon Dr. O.P. Phogat, Orthopedic Surgeon Dr. T.S. Bagri and Dr. Dayal himself and on examination the appellant was found to have 32% permanent disability. In view of combined fracture of both bones of her right leg, her leg was shortened by two inch. The disability certificate was also proved.

7. The Tribunal also considered the evidence of RW.1-Amit Chand and RW2-Suresh Kumar. Apart from the aforesaid evidence, the Tribunal also considered the detailed account of the accident given by the appellant as PW.4.

8. This Court finds that on consideration of the aforesaid materials on record, the Tribunal granted compensation to the appellant to the extent of Rs.1,36,547/- with interest at 9% per annum from the date of filing of the petition till its realization.

9. This Court finds that the compensation is certainly not an excessive one. Rather the computation has been made modestly.

10. Unfortunately, this Court finds that the said well considered decision of the Tribunal was set aside by the High Court, inter alia, on the ground that even though complaint was forwarded to SSP Hisar and was further forwarded to SSP Hanumangarh but none from the office of SSP, Hanumangarh came to prove the complaint. The filing of the complaint by the appellant is not disputed as it appears from the evidence of PW.3-Satbir Singh, who is the Assistant Complaint Clerk in the office of Superintendent of Police, Hisar. If the filing of the complaint is not disputed, the decision of the Tribunal cannot be reversed on the ground that nobody came from the office of SSP to prove the complaint. The official procedure in matters of proceeding with the complaint is not within the control of the appellant, who is an ordinary village woman. She is not

coming from the upper echelon of society. The general apathy of the administration in dealing with complaints lodged by ordinary citizens is far too well known to be overlooked by High Court. In this regard the perception of the High Court in disbelieving the complaint betrays a lack of sensitized approach to the plight of a victim in a motor accident claim case.

11. The other ground on which the High Court dismissed the case was by way of disbelieving the testimony of Umed Singh-PW.1. Such disbelief of the High Court is totally conjectural. Umed Singh is not related to the appellant but as a good citizen, Umed Singh extended his help to the appellant by helping her to reach the Doctor's chamber in order to ensure that an injured woman gets medical treatment. The evidence of Umed Singh cannot be disbelieved just because he did not file a complaint himself.

12. We are constrained to repeat our observation that the total approach of the High Court, unfortunately, was not sensitized enough to appreciate the plight of the victim. The other so-called reason in the High Court's order was that as the claim petition was filed after four months of the accident, the same is "a device to grab money from the insurance company". This finding in the absence of any material is certainly perverse. The High Court appears to be not cognizant of the principle that in a road accident claim, the strict principles of proof in a criminal case are not attracted. The following observations of this Court in *Bimla Devi and others vs. Himachal Road Transport Corporation and others* [(2009) 13 SCC 530] are very pertinent.

> "In a situation of this nature, the Tribunal has rightly taken a holistic view of the matter. It was necessary to be borne in mind that strict proof of an accident caused by a particular bus in a particular manner may not be possible to be done by the claimants. The claimants were merely to establish their case on the touchstone of preponderance

of probability. The standard of proof beyond reasonable doubt could not have been applied."

13. This Court, therefore, is unable to sustain the judgment given by the High Court and quashes the same and restores that of the Tribunal.

14. The entire payment of the compensation amount must be deposited with the Tribunal in terms of its award within a period of six weeks from today by a demand draft and thereupon the Tribunal will immediately send notice to the appellant and handover the demand draft to the appellant only within two weeks thereafter. The copy of the order may immediately be transmitted to the Tribunal.

15. The appeal is, thus, allowed with the aforesaid directions and observations.

B.B.B. Appeal allowed.

STATE THROUGH C.B.I.
v.
MAHENDER SINGH DAHIYA
(Criminal Appeal No. 1360 of 2003)

JANUARY 28, 2011

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

Penal Code, 1860: s.302 and s.201 – Diabolic murder – Strangulation to death and dismemberment and mutilation of body parts – Respondent an Indian orthopedic doctor got engaged with deceased and shifted to London to stay with in-laws – Marriage took place subsequently – Honeymoon trip was arranged for 5 days – Respondent returned from trip after 2 days without deceased and stated that the deceased abandoned him – Thereafter he absconded and remained underground until arrest – Body parts found in the rubbish bin and lake near the hotel where the couple stayed and identified to be that of deceased – Allegation against respondent that he strangulated his wife to death on the first night of honeymoon and thereafter dismembered and mutilated parts of her body and disposed them of – Trial court held that circumstances pointed out towards the guilt of the respondent and convicted him u/s.302 and s.201 – Acquittal by High Court on the ground that the prosecution failed to connect the respondent with the alleged murder – On appeal, held: Prosecution had miserably failed to connect the respondent with the alleged murder of his wife – Resentment of the respondent to the friendly behaviour of the deceased towards the other men would not be sufficient to hold that he had the necessary motive to kill the deceased – There was nothing to suggest that the deceased or her family members had apprehended any harm or threat to life of deceased at any stage till the couple left for the honeymoon – Given the

previous attitude of the deceased, it was possible that she had walked out on her husband – Explanation given by respondent consistently from beginning was that the deceased had left him voluntarily – As regards the circumstances relating to the state of affairs that existed in the hotel room, the evidence of the hotel staff was inconsistent – Finger print expert was not able to connect the palm prints of body parts recovered with the palm prints of the deceased – The reports submitted by the doctors contained numerous discrepancies – That apart the identification marks given by the witnesses did not coincide with the reports and therefore, no reliance could be placed upon them for establishing the identity of these body parts as that of the deceased – Articles and clothes taken on trip by deceased not produced for identification by witnesses at the time of trial – There was no reliable evidence to indicate that the blood that was recovered from the bathroom of hotel room definitely belonged to the deceased – An adverse inference against the respondent cannot be drawn merely because he remained in hiding till he was arrested – Prosecution also did not produce any evidence with regard to the recovery of any weapon of offence – Order of acquittal was justified.

Criminal law: Motive – Held: In cases based on circumstantial evidence, motive for committing the crime assumes great importance – Absence of motive would put the court on its guard to scrutinize the evidence very closely to ensure that suspicion, emotion or conjecture do not take the place of proof – In a case where there is motive, it affords added support to the finding of the court that the accused was guilty for the offence charged with.

Evidence: Suspicion no matter how strong cannot, and should not be permitted to take the place of proof – Therefore, courts are to ensure a cautious and balanced appraisal of the intrinsic value of the evidence produced in Court.

The prosecution case was that the respondent was guilty of murdering his wife. The respondent was an Orthopedic surgeon. He belonged to a village called Turkpur, District Sonepat. PW-48, a native of Punjab had migrated to England in 1962. He was settled there with his wife (PWUK-1) and children. The victim-deceased was his daughter. In 1978, PW-48 visited India to find suitable Indian boy for marriage with the deceased. They found the respondent to be a suitable match for her. The engagement ceremony was held between the respondent and the deceased on 31st August 1978 at village Turkpur followed by a marriage ceremony. However, as per the understanding of the parents of the deceased, the said marriage was to be treated as engagement. A registered marriage was to take place in London subsequently. Therefore, the marriage was not consummated and the deceased along with her parents returned to London on the same night. As arranged, the respondent reached London on 27th February, 1979 and started living with his in-laws. At the same time, he pursued his medical studies and got himself registered as a post graduate student. PW-48 purchased a house in the joint name of the deceased and the respondent for 20,000 UK Pounds. A joint bank account was also opened in the name of the deceased and the respondent.

On 5th April, 1979, on the occasion of the birthday party of younger daughter of PW-48, all friends (boys and girls) of the three daughters of PW-48 were invited in the party. After the party, the respondent started abusing the whole family. He was aggressive and alleged the deceased to be characterless as she had been dancing and mixing up with boys. The deceased was upset with the behaviour of the respondent. She told her mother that it did not seem possible for her to spend the rest of her life with the respondent. The next morning the family discussed about the previous day incident. When the

respondent was told that the deceased wanted to cancel the engagement, he apologized for his conduct. During the night of 10th April, 1979, the deceased wrote a letter to the respondent suggesting that wedding should be cancelled in the month of May, until both of them were ready for the same. In reply, the respondent also wrote a letter to the deceased.

On 26th May, 1979, the marriage between the respondent and the deceased was registered in London. A honeymoon trip was arranged for five days. On 27th May, 1979, they left for the honeymoon trip. They carried two suit cases, one of red colour belonging to the deceased and the other of brown colour belonging to the respondent containing their cloths and other articles. All the tourists in the group stayed in a Hotel. The deceased and the respondent checked into room no.415. After sometime they went for a short sight seeing tour "Brussels by Night". They returned to the hotel at about 11 A.M. and retired to their room. Thereafter, the prosecution version was that the respondent strangulated the deceased to death in the hotel room and then dismembered and mutilated parts of her body and disposed them of in the different part of city of Brussels. Thereafter, the respondent entered UK on the same day and withdrew 200 UK Pounds from the joint account he had with the deceased and then went to the house of his in-laws. He was carrying two suitcases. He did not give satisfactory explanation to his in-laws about the whereabouts of the deceased. He stated that she had abandoned him at Brussels on the morning of 28th May, carrying away her clothes and money. The respondent wanted to get away from the house, but he was restrained by the family members with the assistance of neighbour. Thereafter, PW-48 took the respondent to lodge a missing person's report about the disappearance of the deceased. On the way back from the police station

alongwith his father-in-law, the respondent escaped by jumping onto a running bus. Thereafter, he stayed in YMCA, London without disclosing his identity. He left for India via Germany and reached Delhi on 6th June, 1979. He afterwards remained underground and absconding and could not be traced until 9th May, 1983. He was hiding in a village in District Lalitpur, UP where he had taken up the practice of general medicine.

The trial court held that all the circumstances were proved in favour of the prosecution and convicted the respondent under Section 302 IPC and 201 IPC and sentenced him to imprisonment for life.

The High Court acquitted the respondent of both the charges. The High Court held that the finding of trial court that the resentment of the respondent to the friendly behaviour of the deceased towards the other men provided strong motive to the respondent for committing murder of his wife was not plausible; that the respondent had not disputed that the deceased was with him in the room throughout the night, however, she left him in the morning of 28th May, 1979; that the evidence of witnesses to project a certain state of affairs in the hotel room to prove that the respondent had a guilty mind was inconsistent; that although the custody of all the clothes which the deceased had taken on the honeymoon trip was taken, but they were not produced for identification by the witnesses; that no reliance could be placed on the reports presented by the prosecution for the purpose of establishing the identity of the body parts as that of the deceased; that the reports of Stomatologist (PWBG-20) were inconsistent and, therefore, not reliable; that the prosecution failed to place on record any cogent evidence with regard to the blood group of the deceased; that there was no reliable evidence to indicate that blood that was recovered from the bathroom of room no.415

belonged to the deceased; that there was no recovery of weapon and, therefore, the prosecution failed to connect the respondent with the alleged murder. The instant appeal was filed challenging the order of the High Court.

Dismissing the appeal, the court

Held: 1.1. Undoubtedly, the instant case demonstrated the actions of a depraved soul. The manner in which the crime was committed in the instant case, demonstrated the depths to which the human spirit/ soul can sink. But no matter how diabolical the crime, the burden remains on the prosecution to prove the guilt of the accused. Given the tendency of human beings to become emotional and subjective when faced with crimes of depravity, the courts have to be extra cautious not to be swayed by strong sentiments of repulsion and disgust. It is in such cases that the court has to be on its guard and to ensure that the conclusion reached by it are not influenced by emotion, but are based on the evidence produced in the court. Suspicion no matter how strong cannot, and should not be permitted to take the place of proof. Therefore, in such cases, the courts are to ensure a cautious and balanced appraisal of the intrinsic value of the evidence produced in Court. [Para 19] [1135-A-D]

1.2. The High Court has examined the entire evidence dispassionately and with circumspection. The High Court systematically and chronologically examined the series of incidents/circumstances relied upon by the prosecution to establish the guilt of the respondent. In cases based on circumstantial evidence, motive for committing the crime assumes great importance. In such circumstances, absence of motive would put the court on its guard to scrutinize the evidence very closely to ensure that suspicion, emotion or conjecture do not take the place of proof. A motive is something which prompts a person to form an opinion or intention to do certain

illegal act or even a legal act with illegal means with a view to achieve that intention. In a case where there is motive, it affords added support to the finding of the court that the accused was guilty for the offence charged with. But the evidence bearing on the guilt of the accused nonetheless becomes untrustworthy or unreliable because most often it is only the perpetrator of the crime alone who knows as to what circumstances prompted him to adopt a certain course of action leading to the commission of the crime. In the instant case, the conclusion recorded by the High Court was in accordance with the said principles. Merely because the respondent objected to the behaviour of the deceased towards her male friends at the birthday party of her sister would not be sufficient to hold that the appellant had the necessary motive to kill her. It is inconceivable that the respondent would have married the deceased only for the purpose of committing her murder and that too on the very first night of their honeymoon. It was in fact in the interest of the respondent that the deceased had remained alive. The success of his very objective to remain permanently in England was dependent on the continuance of his marriage for at least another year. [Paras 20, 21, 23] [1135-E-F; 1137-A-B; 1137-F; 1138-D-G; 1139-A-B]

Hanumant Govind Nargundkar v. State of M.P. **1952 SCR 1091 ;** *Naseem Ahmed v. Delhi Admn* **(1974) 3 SCC 668;** *Surinder Pal Jain v. Delhi Administration* **1993 Supp (3) SCC 681;** *Tarseem Kumar v. Delhi Administration* **1994 Supp (3) SCC 367;** *Subedar Tewari v. State of U.P.* **1989 Supp (1) SCC 91;** *Suresh Chandra Bahari v.. State of Bihar* **1995 Supp (1) SCC 80 – relied on.**

1.3. The High Court correctly concluded that the two letters Ext.CW-13 and Ex.CW-14 exchanged between the deceased and the respondent on 10th April, 1979 would tend to show that respondent was in fact trying to make

amends after the birthday party on 5th /6th April, 1979. There was no untoward incident thereafter. The marriage was duly registered on 26th May, 1979 and that the couple voluntarily left for the honeymoon. The High Court correctly concluded that it was highly improbable to comprehend that respondent had a pre-determined mind or motive to cause the death of the deceased on the honeymoon night itself at the first available opportunity of being in the company of the deceased in a closed room as suggested by the prosecution. Had the attitude of the parties been as suggested by the prosecution, they would not have agreed to a marriage followed by a honeymoon trip outside London. There was nothing to suggest that the deceased or her family members had apprehended any harm or threat to life of the deceased at any stage till the couple left for the honeymoon on morning of 27th May, 1979. [Paras 24, 25] [1139-C-D; 1140-F-H; 1140-A]

2. The explanation given by the respondent consistently from the beginning was that the deceased had left him voluntarily early in the morning of 28th May, 1979. It was also his case that she married him only under pressure from her parents. She had purchased a new suitcase in which she packed most of her clothes immediately upon returned from the "Brussels by Night" tour. The red suitcase with which she had traveled from London to Belgium was left with the respondent containing some of her clothes. This suitcase even though had a blood stain was carried back to the house of the deceased's parents by the respondent himself. It is inconceivable that a person who has committed the murder of his wife and has used the said suit case for storing and carrying the body parts would bring it back to England risking his own safety. The respondent also narrated before the police that his wife had left him voluntarily on the morning of 28th May, 1979. This fact

was further reiterated by him in the letter to the Prime Minister of India. Given the previous attitude of the deceased, it was possible that she had walked out on her husband. The last seen evidence would not necessarily mean that the respondent had killed his wife. [Paras 27, 28] [1140-E-H; 1141-A-E]

3.1. The most important circumstance relied upon by the prosecution related to the state of affairs which existed in Room No.415 of Hotel Arenberg and the behaviour pattern exhibited by the respondent on the morning of 28th May, 1979. This was sought to be proved by the evidence given by three witnesses, namely, PWUK-12, PWBG-22 and PWBG-2. The High Court rejected the evidence of the tour guide (PWUK-12) as being inconsistent. The High Court noticed that this witness had gone up to room no.415 to inform the couple that the tour party was ready to leave. He knocked on the door. It was half open. He found the respondent perspiring but at the same time assumed his behaviour to be quite normal or non-exceptional. The High Court also noticed that this witness had prepared two reports after the termination of the tour. None of the two reports mentioned about the abnormal behaviour of the respondent. In fact, in one of the reports, this witness mentioned the fact that the father-in-law of the respondent had told him that the deceased had abandoned the respondent on the morning of 28th May, 1979. The High Court was justified in concluding that this statement supported the defence plea. [Paras 29, 30] [1141-F-G; 1142-A-D]

3.2. In rejecting the evidence of the chamber maid of the hotel, PWBG-22, the High Court noticed that this witness was examined by the police on a number of occasions, but she could not even give the correct room number. She actually stated that she visited room no.410.

The High Court also concluded that from her evidence it became apparent that the respondent did not even put a latch on the door nor did he take any extra precaution to keep the room closed. This witness was able to enter the room without knocking. The High Court, however, noticed that this witness did not find any incriminating article like the body or body parts either in the room or in the bathroom, nor she found even a trace of blood on the carpet or on the wall. This witness had herself stated that the respondent had left the room unattended knowing perfectly well that this witness could enter the room in his absence. The High Court correctly assessed the evidentiary value of the statement of this witness. [Paras 32, 33] [1143-A-H; 1144-A]

3.3. It was only after very careful consideration of the evidence of all the witnesses that the High Court concluded that the behaviour of the respondent could not be said to be consistent with the guilt of the respondent. The High Court correctly noticed that no explanation was forth coming as to where the body or dismembered body parts could have been concealed by the respondent throughout the night of 27th/28th May, 1979 as well as the morning and the afternoon of 28th May, 1979. The suggestion of the prosecution that the body might have been kept either in the cupboard or under the bed was correctly held to be conjectural. [Para 34] [1144-B-D]

4.1. The High Court noticed that police had already collected and seized various articles and things from the house of PW-48. The High Court reached the appropriate conclusion that the possibility of the garments and articles having been planted by the police by obtaining the same from the house of the deceased with the object of fixing the identity of the body parts belonging to the deceased by means of the clothes cannot be ruled out. No contemporaneous recovery memo was prepared by

the police on 29th May, 1979 itself. There was omission of the details of the allegedly recovered clothes in the statement of the witnesses. The prosecution had allegedly recovered the clothes the deceased had taken on the trip. The deceased's wedding dress was stated to have been recovered as part of the clothings. The High Court correctly observed that ordinarily a woman would not carry her wedding dress on her honeymoon trip. The High Court also noticed that though the prosecution had taken custody of all the clothes which the deceased had taken with her on the honeymoon trip, they were not produced at the trial for identification by the witnesses. Only photographs of the clothings, which had been allegedly taken on 12th June, 1979 i.e. after 16 days, were produced. [Paras 36, 37] [1146-B-F]

4.2. The High Court correctly took view that the prosecution was duty bound to produce the clothings at the trial. It was through these clothings and articles that the prosecution had sought to establish the identity of the deceased. The High Court correctly recorded the conclusion that on consideration of the relevant evidence of the witnesses and various documents on record, the prosecution had miserably failed to establish the recovery of clothes or shoes by means of any cogent and reliable evidence. The identification of the clothings and shoes as belonging to the deceased through the testimony of the parents of the deceased (PW-48 and PWUK-2) was also not sufficient to discharge the burden of proof which lay on the prosecution. The identification of the shoes by PW-48 was not made in the presence of any police officer. He was unable to remember if any police officer was present or not at the time of the identification. The High Court drew the only logical conclusion from the said that this witness was not consistent so far as the identification of the clothes were concerned. [Para 38] [1146-G-H; 1147-A-F]

5. A perusal of provisional and the final report of Stomatologist showed that initially the report stated that the individual was at-least 30 years old and of North-African type. At the end of the report, it was stated that the individual should be between 29-30 years only. This opinion underwent a change by the time the final report was prepared. It was then stated that the "Individual belonging to the female sex whose age is presumed between 20 and 30 years, and belonging to North-African Indian type." The difference between the two reports was so glaring, understandably, the High Court was compelled to hold that the second report was clearly an afterthought and deliberate improvement over the earlier report. The High Court appropriately concluded that this must have been made to cover up the first report which did not connect the body parts with that of the deceased in as much as age of the deceased was stated to be around 25 years. In fact, it is a matter of record that the deceased was born in 1956, that would make her only 24 years at the relevant time. [Para 45] [1152-A-E]

6.1. The mother of the deceased, PWUK-1, had stated that the deceased had a scar mark on her left knee. She also stated that the deceased had three inoculation marks on her shoulder. The High Court noticed that this witness was, however, not able to give details of any identification marks on her other children. This would be sufficient to justify the conclusion reached by the High Court that PWUK-1 and PW-48 were not aware/sure of any identification marks of the deceased. The High Court, therefore, observed that a possibility cannot be ruled out that these witnesses may have given these marks after the disclosure of such marks in the postmortem examination's report. [Para 46] [1153-A-E]

6.2. The finger print expert was not able to conclude that the evidence produced connected the palm prints

with the palm prints of the deceased. The reports submitted by the doctors contained numerous discrepancies. That apart the identification marks given by the witnesses did not coincide with the reports. Therefore, the High Court rightly concluded that no implicit reliance could be placed upon them for the purpose of establishing the identity of these body parts as that of the deceased. [Para 47] [1153-F-H]

7.1. PW-48 only stated that the blood group of the deceased was 'O', but even he was not able to say whether it was 'O+' or 'O-'. The High Court quite appropriately observed, on the basis of the opinion of the examining experts, that more than fifty per cent population of Belgium has 'O' blood group. In such state of affairs, the High Court was constrained to conclude that the prosecution was not able to establish even this limb by means of cogent and reliable evidence. [Para 48] [1154-D-F]

7.2. There was no reliable evidence to indicate that the blood that was recovered from the bathroom of room no. 415 definitely belonged to the deceased. The only drop of blood that was found was at the base of the bidet, in the bathroom. The bathroom was used successively by different tourists occupying the room. This apart, the very recovery of the blood stains from the bidet seemed highly doubtful. The evidence of the Manager of the hotel in whose presence the blood stains were allegedly lifted was that many tourists had occupied room no. 415 between 29th May, 1979 and 12th June, 1979. According to him, no tourists/guests ever complained of any blood spot on the bidet. The first ever discovery of blood was stated to be on 12th/13th June, 1979, i.e., about 14 days of the alleged incident. If the blood stains lifted from the bidet were of a person who was killed on 28th May, 1979, the same could not be of red or red brown colour. The

colour of the stain would have been blackish brown. The High Court was wholly justified in rejecting the evidence with regard to the recovery of blood from the bidet. [Para 50] [1155-F-H; 1156-A-B]

8. An adverse inference against the respondent cannot be drawn merely because he remained in hiding till he was arrested by the CBI. The subsequent conduct of the respondent was not consistent with the expected conduct of a guilty person. If the respondent had any intention of absconding, he could have done so initially after the alleged murder of his wife. There was no need for him to come back to England. Having come back, he need not have gone directly to the house of his in-laws. Not only did he come back to England, he carried with him the red suitcase containing some of the deceased's clothes. According to the prosecution, this suitcase had contained blood stains which had belonged to the deceased. It is inconceivable that a person having a guilty mind would have been carrying such an incriminating article back to the house of his in-laws. He went back to India apprehending danger from his father-in-law and family. This apprehension of danger to his life at the instance of his father-in-law continued even in India. The fact that an attempt was made on his life had been duly recorded by the trial court. The respondent had been petitioning the police authorities as well as the Home Minister and the Prime Minister of India seeking protection. Evading arrest would certainly be an illegal act but it does not lead to the only conclusion that the respondent was hiding due to a guilty conscience. The respondent did not come out of hiding due to fear as also to avoid arrest by the police but it certainly cannot be concluded that he was hiding because of a guilty conscience. [Paras 51, 52] [1156-C-H; 1157-E]

Matru Alias Girish Chandra v. The State of Uttar Pradesh **(1971) 2 SCC 75 – relied on.**

9. At the trial, the prosecution did not produce any evidence with regard to the recovery of any weapon of offence. Nor any weapon was produced in court, at the trial. Even according to the sequence given by the prosecution, it would have been impossible for the respondent to procure the surgical instruments in the city of Brussels during the night intervening 27th/28th May, 1979. It is a matter of record that the entire group of tourists did not return back to the hotel till after 11 O' clock during the tour "Brussels by Night". The deceased was with him throughout the tour. The respondent could not have carried the surgical instruments with him without the same being noticed at the customs barriers. This apart, prosecution miserably failed to establish that the respondent had any intention of committing the murder of his wife at the commencement of the honeymoon trip. Even the deceased's parents did not entertain any such apprehensions. It was also the prosecution case that something went amiss in room no. 415 during the night of 27th/28th May, 1979. Therefore, it made the possession of surgical instruments by the respondent on the fateful night in Brussels virtually impossible. Such severance of the body parts could also not possibly be achieved by use of a simple butter knife. It is simply too farfetched a notion to be taken seriously. The conclusions reached by the High Court would clearly show that the prosecution had miserably failed to connect the respondent with the alleged murder of his wife. The conclusions recorded by the High Court were fully justified by the evidence on record. [Paras 53, 54] [1157-F-H; 1158-A-H]

Case Law Reference:

1952 SCR 1091	**relied on**	**Para 20**
(1974) 3 SCC 668	**relied on**	**Para 20**

1993 Supp (3) SCC 681	**relied on**	**Para 23**
1994 Supp (3) SCC 367	**relied on**	**Para 23**
1989 Supp (1) SCC 91	**relied on**	**Para 23**
1995 Supp (1) SCC 80	**relied on**	**Para 23**
(1971) 2 SCC 75	**relied on**	**Para 51**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1360 of 2003.

From the Judgment & Order dated 19.12.2002 of the High Court of Delhi at New Delhi in Criminal Appeal No. 169 of 1999.

P.P. Malhotra, ASG, P.K. Dey, Chetan Chawla, Madhurima Mridul, Shweta Verma, Arvind Kumar Sharma for the Appellant.

Siddharth Aggarwal (for Nikhil Nayyar) for the Respondent.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. This appeal is directed against the final order of the High Court of Delhi dated 19th December, 2002 passed in Criminal Appeal No. 169 of 1999, whereby the accused Dr. Mahender Singh Dahiya has been acquitted of the charges under Sections 302 and 201, Indian Penal Code (for short 'IPC') by setting aside the judgment of the trial court whereby he had been convicted under Sections 302 and 201 IPC and sentenced to imprisonment for life and fine of Rs.5,000/- for the offence under Section 302 IPC and also imprisonment for seven years and fine of Rs.5,000/- for offence under Section 201 IPC.

2. Before the trial court, the prosecution had succeeded in proving that Dr. Mahender Singh Dahiya (hereinafter referred to as 'the respondent') had committed the murder of his wife Namita, a British national of Indian origin, on the intervening

night of 27th/28th May, 1979. The murder was allegedly committed on the very first night of the honeymoon in room No. 415, Hotel Arenberg, Brussels, Belgium. It is further the case of the prosecution that after committing the murder, the respondent had dismembered and extensively mutilated the body of the victim. He subsequently disposed of the body parts at different places in the city of Brussels. This was done with the intention of destroying the evidence of the murder.

3. The aforesaid conviction and sentence were challenged before the Delhi High Court by way of an appeal. The High Court upon re-appraisal of the entire evidence accepted the appeal and acquitted the respondent of both the charges. Aggrieved by the aforesaid judgment of the High Court, the State through CBI, New Delhi is in appeal before this Court.

4. The High Court notices at the very outset of the impugned judgment that this is an unusual case and perhaps the first of its kind. We are of the opinion that the High Court had good reasons for making such a statement. The peculiarity which makes this murder case rather rare is not only the ghastly and the brutal manner in which the offence is alleged to have been committed but also the complexities created by a number of unique factors. The accused respondent herein is an Indian. He is an Orthopedic Surgeon. The alleged victim of the crime Namita, though of Indian origin was a British citizen. She had grown up in England since she was 5 or 6 years old. The offence was allegedly committed in a third country, i.e., Belgium. Consequently, the investigation of the case was conducted in three different countries. Initially, the Belgium authorities investigated the crime. Thereafter, the Scotland Yard in London also participated in the investigation. It was concluded in India. The investigation in Belgium and U.K. had been conducted according to the law and procedure of those countries. This led to its own difficulties. Initially, the Belgium authorities had requested for extradition of the respondent for his trial in Belgium. Later, the request was abandoned by the Belgium

authorities. The case was ultimately investigated by the CBI and the charge sheet was presented on 30th July, 1985. At the trial, a large number of witnesses being foreign nationals were examined on commission either in Belgium or in England. This further complicated the issues. Ultimately, the trial court convicted the respondent on 1st March, 1999, i.e., twenty years after the alleged commission of the crime.

5. We may now notice some of the undisputed facts, which are necessary for appreciation of a peculiar situation in which the alleged offence is said to have been committed. The respondent belongs to a village called Turkpur, District Sonepat, Haryana. He obtained his MBBS degree from Punjab University, Rohtak in 1973 and M.S. Degree in (Orthopedic) from A.I.I.M.S., New Delhi in December, 1978. He got himself registered with the Punjab Medical Council.

6. Jagdish Singh Lochab (PW-48) a native of Punjab had migrated to England in 1962. He was settled there with his family viz. wife Smt. Chandermukhi (PWUK-1), three daughters namely Namita, Amita Lochab (PWUK-2) and Shiela (PWUK-3) and two sons. Namita born in India in May, 1956 had acquired British citizenship. During 1978, Namita was working as accounts trainee with the British Broadcasting Corporation (BBC), London. In July-August, 1978, Jagdish Singh Lochab (PW-48) visited India to find suitable boy for marriage with his daughter Namita. They found the respondent to be a suitable match for their daughter. After making the selection of the proposed groom, Namita was called from London. The engagement ceremony was held between the respondent and Namita on 31st August, 1978 at village Turkpur followed by a marriage ceremony according to Hindu rites and customs at Delhi on 5th September, 1978. However, as per the understanding of the parents of Namita, the said marriage was to be treated as engagement only as there would have to be a registered marriage in London subsequently. Therefore, the marriage was not consummated and Namita along with her

parents returned to London on the night of 5th September, 1978.

7. As arranged, the respondent reached London on 27th February, 1979. He started living with his in-laws at 22, Friars Way, Action, W3, London. At the same time, he pursued his medical studies. He got himself registered as a post graduate student at Royal National Institute of Orthopedics, London on 12th March, 1979. Jagdish Singh Lochab (PW-48) purchased a house (No. 312, Horn Lane Act, London) in the joint name of Namita and respondent valued 20,000 UK Pounds. He paid 10,000 UK Pounds, the remaining price was to be paid in installments. A joint bank account No.91053728 was also opened in the name of Namita and the respondent at Midland Bank, Acton High Street, London and two cheque books, one each in the name of Namita and the respondent were issued by the bank.

8. On 5th or 6th April, 1979, 18th birthday party of Sheila, younger sister of Namita was celebrated where all the friends (boys & girls) of the three daughters of PW-48 including UK-23 Philips David Abbey, a colleague of Namita were invited in the party. Mr. and Mrs. Lochab left the house at about 7.30 pm and returned at about 1.30 a.m. in the morning. On their return the accused started abusing the whole family, he was aggressive and alleged Namita to be characterless, as she had been dancing and mixing with boys. Namita was upset with the behaviour of the accused and was crying. She told her mother that it did not seem possible for her to spend the rest of her life with the accused. The next morning the whole family sat together along with the accused and discussed about the incident of the previous night. When the accused was told that Namita wants to cancel the engagement, he apologized for his conduct in the previous night. During the night of 10th April,1979 at 1.30 a.m. Namita wrote a letter (exhibit CW-13, Volume-9, page 286) to the accused addressing him as Mahendra, suggesting that wedding should be cancelled in the

month of May, until both of them were ready for the same. She advised him to get some self confidence to prove himself responsible enough to look after a wife and a home. In reply, the accused wrote a letter, to Namita addressing her as Nita, which is exhibit CW-14 (Vol.9, page 290).

9. On 26th May. 1979, the marriage between Mahender and Namita was registered at the Office of the Registrar of Marriages, London. It was followed by a reception the same evening at the Phoenix Restaurant, London. A honeymoon trip for the newly wedded couple was arranged for five days commencing from 27th May, 1979 to certain European countries through Cosmos Tours, London. In the morning of 27th May, 1979, Mahender and Namita left for the honeymoon trip. They were seen off by her family at Victoria Railway Station, London. They carried two suit cases, one of red colour belonging to Namita and the other of brown colour belonging to Mahender containing their clothes and other articles. The group of tourists including Namita and the respondent reached Brussels at about 6.30 p.m. the same evening. All the tourists in the group stayed at the fourth floor of Hotel Arenberg, Brussels. Mahender and Namita checked into room no. 415. After some time they went for a short sight seeing tour 'Brussels by Night'. They returned to the hotel at about 11.00 p.m. and retired to their room.

10. Hereafter, there are two versions, one according to the appellant and another according to the respondent. The prosecution version is that the respondent had strangled his wife Namita to death in their hotel room. He had then proceeded to dismember and mutilate parts of her body which were subsequently disposed of in the rubbish container and the lake. The respondent entered UK on the same day, i.e., 29th May, 1979 and withdrew an amount of 200 UK Pounds from the joint account he had with his wife bearing Account No. 91053728 from the Midland Bank, London. In the afternoon of 30th May, 1979, after withdrawing the money from the bank, he went to

the house of his in-laws. He was carrying two suitcases. He, however, could not give any satisfactory explanation to his in-laws about the whereabouts of his wife Namita. He rather falsely stated to them that she had abandoned him at Brussels on the morning of 28th May, 1979, carrying away her clothes and money. The respondent wanted to get away from the house as soon as possible without giving any explanation as to what happened in Brussels. He was, however, restrained by the family members with the assistance of a neighbour. Thereafter, Namita's father Jagdish Singh Lochab (PW-48) took the respondent to Acton police station to lodge a missing person's report about the disappearance of Namita. On the way back from the police station along with his father-in-law, the respondent escaped by jumping onto a running bus. Thereafter, he stayed in the YMCA, London without disclosing his identity/ particulars. He left for India via Frankfurt, West Germany and reached Delhi on 6th June, 1979. He afterwards, remained underground and absconding and could not be traced in spite of various efforts until 9th May, 1983. He was hiding in a village in District Lalitpur, U.P., where he had taken up the practice of general medicine under the fake name of Dr. M. Singh.

11. We have heard the learned counsel for the parties. Very elaborate submissions have been made by Mr. P.P. Malhotra, learned Additional Solicitor General for the appellants and Mr. Siddharth Aggarwal for the respondent.

12. Mr. Malhotra has submitted on behalf of the appellant that the High Court has committed a grave error in reversing the well reasoned judgment recorded by the trial court. He further submits that the trial court had meticulously examined the entire sequence of events. The evidence of the witnesses relating to various facts and circumstances was discussed under various heads in order to see if the chain of circumstances for bringing home guilt for offences with which the accused had been charged was complete or not. The trial court discussed the facts

which were sought to be proved by the prosecution under the following heads :-

"A. Native place of the accused and his educational qualifications.

B. Marriage of the accused, his departure for U.K. his stay at the house of his in-laws and registration of the marriage there;

C. Birthday party at the house of his in-laws; his conduct at and after the birthday party; his relations with Namita before and after the Birthday party, letters exchanged between the accused and Namita and the apology, if any, tendered by the accused with regard to his conduct;

D. Arrangement for conducted tour to Brussels; departure from London on the morning of 27.5.79 and reaching Brussels in the evening; sight-seeing tour of Brussels by the accused and Namita on the evening of 27.5.79 and return to the Hotel;

E. Visit of the tour guide, Richard Anthony Cushnie (PWUK-12) in the morning of 28.5.79 when the accused told him about his decision to stay back; the manner in which the accused dealt with the Pantry clerk, Benselin Myriam (PWBG-24) who wanted to enter his room to check the refrigerator; visit of the chamber maid, Ms. Mujinga Maudi (PWBG-22) for the purpose of cleaning the room and her observations about the condition of the accused at that time; the condition in which the room of the Hotel was found and request of the accused for his stay in the hotel for extra night; and what these point out to ?

F. The arrival of the accused in London without

Namita; his explanation given to the parents of Namita regarding Namita's disappearance from Belgium; his conduct at the time accompanying father of Namita to Acton P.S. to report about Namita's disappearance and his alleged escape by jumping into a running bus; and if these circumstances are of any effect ?

G. Recovery of parts of human body on the morning of 29.5.79 and subsequent recovery of torso from the lake on 2.8.79.

H. Collection of evidence pertaining to the crime from room No. 415 of Hotel Arenberg, Brussels and reports of the forensic tests connecting the recovery of the murder.

I. Report of the post mortem in respect of the parts of the human body recovered on 29.5.79 and other evidence showing that the dismembered parts were that of Namita.

J. Evidence connecting the torso to be of Namita.

K. Evidence collected from the suitcase allegedly brought by the accused to London establishing that the blood in the suitcase was of Namita.

L. Other evidence in the form of recovery of clothes and shoes of Namita along with dismembered human body.

M. Absconding of the accused and the efforts made by the police in apprehending him vis-à-vis explanation given by the accused in that regard.

N. Reference received from Belgium Government for extradition of the accused and subsequent abandonment of the request and sanction granted

by Central Government for prosecution of the accused in India.

O. Other facts referred to on behalf of the accused breaking the chain in circumstantial evidence."

13. The learned Additional Solicitor General then drew our attention to the findings of the trial court on each point. He drew our particular attention to Point 'C' relating to the resentment of the respondent to the friendly behaviour of Namita towards the other men in particular PWUK-23 at the birthday party. These facts, according to Mr. Malhotra, were found to be proved by the trial court which provided strong motive to the respondent for committing the murder of his wife. According to Mr. Malhotra, this finding has been wrongly reversed by the High Court. Point 'D' related to the behaviour of respondent and his wife Namita in the coach. Mr. Malhotra laid special emphasis on Point 'E' which related to the respondent's behaviour as observed by PWUK-12, PWBG-22, and PWBG-24. He submitted that the trial court had elaborately considered the evidence of these witnesses and rightly concluded that the respondent had murdered his wife by strangulation and thereafter he had mutilated her body by disjointing the limbs from the joints. The conclusion of the High Court, according to him, is improbable.

14. In summing up Mr. Malhotra submitted that there is conclusive evidence to prove that it was the respondent who committed the murder of his wife. Having committed the murder he discarded the body parts as narrated above. Mr. Malhotra had placed strong reliance on the cumulative effect of the circumstances established on the record. He relied on the following facts: –

(1) Namita was last seen alive in the company of the respondent on the night intervening 27/28th May,1979

(2) The respondent floated the false defence about the Namita having left him in the morning of 28th May, 1979.

(3) He did not make any complaint to the Belgium Police.

(4) He did not inform either the tour guide or any staff member of the hotel about his wife having voluntarily left.

(5) He made no efforts to trace his wife for two days.

(6) He deliberately stayed in the hotel on 28th and left for U.K. on the 29th May, 1979. At the same time the body parts were discovered in the rubbish container which is only two hundred meters away from the hotel.

(7) The body parts recovered from the rubbish bin have been identified to be those of Namita by reliable expert evidence.

(8) The cloth recovered in the rubbish bin had been identified to be those of Namita.

(9) The blood group of the body stains found in the bathroom matches the blood group of Namita.

(10) The palm prints of the palm recovered from the rubbish bin match the palm print of Namita.

(11) The torso recovered has been identified to be that of Namita from Vergote lake which is only seventeen minutes walking from the hotel.

(12) Therefore, there is scientific evidence to establish the identity of the victim to be that of Namita.

(13) He ran away from the father of the deceased at the first opportunity that he got.

(14) He remained absconding and hiding for a period of four years till he was discovered.

15. On the basis of the aforesaid, learned Additional Solicitor General submitted that the judgment of the High Court deserves to be set aside and judgment of the trial court ought to be restored.

16. Mr. Aggarwal, on the other hand submitted that -

(i) The prosecution has miserably failed to establish any motive for the alleged crime. There is no material even to indicate what weapon was used by the respondent in the commission of the crime. He emphasised that no weapon of offence was either recovered or produced during the trial.

(ii) The prosecution case is based only on hypothesis. First such hypothesis is based on the opinion of the doctor, who conducted the postmortem examination. This doctor had stated that it was evident that the dismemberment of the body parts of the victim was committed by a professional doctor or a butcher, who knows the anatomy of the human body. This could be done with the aid of certain surgical instruments which could have been carried by the respondent with him as he was an Orthopedic Surgeon.

(iii) The other possibility floated on behalf of the prosecution was that as the body parts had been simply disjointed at the various joints, it could be done by using a fork and a butter knife, which would be available to the respondent in the hotel room.

(iv) Mr. Aggarwal had pointed out that it would have

been virtually impossible for the respondent to have carried surgical instruments with him through international borders without the same coming to the notice of the customs authorities. Giving the sequence of events, as projected by the prosecution, it would have been impossible for the respondent to have procured the surgical instruments within the city of Brussels.

(v) Learned counsel had also pointed out the impossibility of mutilation of the body simply by using a butter knife and a fork.

(vi) Mr. Aggarwal had next pointed out that if the murder had been committed during the intervening night of 27th/28th May, 1979 in room no. 415, i.e., fourth floor of the hotel, where many other guests of the tour group were staying, at-least, someone or the other of the guests should have heard the screams of the victim. The dismemberment of the body must have caused some tangible noise which could easily have been heard by any passer by.

(vii) He had next submitted that the prosecution has not given any clear version as to how the body parts were removed from the hotel to the different locations where they were discovered. The prosecution has failed to produce any material objects to demonstrate how the body parts were shifted from the hotel room to the rubbish container. The prosecution had suggested that the body parts had been removed in the red suitcase (Ex.CW/26).

(viii) Mr. Aggarwal had pointed out that not a single witness was produced by the prosecution who might have seen the respondent carrying the red suitcase from the hotel to the container lying at a

distance of about two hundred meters from the hotel or to Vergote canal/lake.

(ix) Even otherwise, he had pointed out that the body parts would not have fitted in the suit case. The length of the suitcase was measured 67.5 cms. while the torso measured 69 cms. He had also pointed out that the torso was recovered more than two months after the incident which would indicate that it was thrown into the lake by someone much later than 28th May, 1979 or a few days prior to 2nd August, 1979. If the torso had been thrown in the lake on or around 28th May, 1979, it could not have remained submerged for two months and would have appeared on the water surface within a few days of its disposal.

(x) It was further pointed out by Mr. Aggarwal that other parts of the body remained untraced even till the time of trial.

(xi) With regard to the respondent's return to England, the learned counsel had pointed out that if the intention of the respondent was to escape, he would not have drawn only 200 pounds from the joint account, which in fact had a balance of over 800 pounds. The amount withdrawn by the respondent would not have been sufficient even to buy a ticket back to India. He had pointed out that Namita's air ticket from London to Delhi (Ex.CW/3) had been purchased for 350 pounds.

(xii) Learned counsel then pointed out that the prosecution theory about the respondent's return to his in-laws' home to collect his certificates is quite implausible in as much as duplicate certificates are easily available (and were in fact obtained by the respondent).

(xiii) Making a reference to the material on the record, the counsel had pointed out that the certificates were in fact not found inside the respondent's suitcase at all in the inventory of the contents of suitcases drawn up in Belgium.

(xiv) It was the case of the defence that even according to the parents of Namita, respondent had returned to their home to pick up his belongings. This, according to the learned counsel, would not be the rationale behaviour of a guilty individual, who would not have risked returning to their house for the sake of his clothes. In fact according to Mr. Aggarwal, respondent had no need for any clothes. He had a suitcase full of clothes with him in Belgium. He in fact returned to his in-laws home for discussion/confrontation with the parents of Namita and to decide his future course of action.

(xv) On his return, he found the behaviour of his mother in law very hostile. This is clear from the evidence of PWUK-2 which indicates that the family tried to search him. He was in the house for more than three hours having arrived at 2 p.m. The missing persons report lodged by PW-48 is timed at 5.30 p.m.

(xvi) The respondent had no intention according to Mr. Aggarwal, to escape. He submits that the entire incident within the in-laws' house has been fabricated to suit the prosecution version, which is belied by the inconsistencies in the narration of events by the family members. He made references to relevant portions of the statement recorded by PWUK-1, PWUK-2, PWUK-3 (on commission) and PW-48, in the trial court. Similarly, according to Mr. Aggarwal, the prosecution version is belied by the conduct of the respondent at the Acton Police Station where the missing person's report was

lodged. The respondent had duly informed the police officer of the fact that Namita had walked out on him at 6.00 a.m. on 28th May, 1979. On this basis, the missing person's report was lodged by PW-48. The respondent's explanation regarding the circumstances in which Namita left him was made known to PWUK-17, Nicolas Linfoot, Sergeant Officer, Police Station, Acton. He had also given the evidence on commission which was available at the trial. In his statement on commission, PWUK-17 disclosed that the respondent was nervous and agitated during the interview. He specifically returned to the police station after they had walked out of the station to complain that he felt threatened by his in-laws and expecting trouble from them.

(xvii) Mr. Aggarwal then pointed out various events to show that the respondent was never intending to either hide or abscond. Undoubtedly on 28th May, 1979, he jumped on a running bus to get away from his father-in-law as he was apprehensive of an altercation with him. It is also pointed out by Mr. Aggarwal that respondent had already informed PW-48 that he would prefer to stay at the YMCA, where he actually stayed till 30th May, 1979. If the respondent had a guilt conscience and wanted to abscond, there was no reason to return to England. He could have let to a safe place directly from Belgium.

(xviii) With regard to the letter written to the Prime Minister, he points out that these letters and telegrams to authorities were sent as he apprehended threat to his life and false implications. He, therefore, sought protection of the authorities. Respondent had even produced witnesses from the village where he was practicing

medicine, who stated that he had clearly disclosed his full name. He stayed in the village Bansi for three-four years.

(xix) Mr. Aggarwal, therefore, submits that the appellant did not want to reside at Turkpur to avoid the social stigma. He feared of retribution and false implication. His fears were not without any basis. The trial court record shows that on 14th October, 1992, two years after his second marriage, an attempt was made on his life while he was in his clinic at Kharkhoda.

(xx) Mr. Aggarwal then pointed out that while recording evidence on commission, the Belgium authorities did not comply with the provisions of the Criminal Procedure Code (Cr.P.C.), 1973 and the Indian Evidence Act, 1872. This was in spite of the specific directions given by the trial court to both the parties to carry the relevant provisions of law with them to ensure compliance with the Indian law. In fact the requisition for commission sent to the Belgium Court specifically requested that the procedure prescribed under Sections 135-159 of the Indian Evidence Act and that of Section 162 of Cr.P.C. be followed.

17. Learned counsel also pointed out to numerous inconsistencies and contradictions in the evidence of the prosecution witnesses and submitted that the High Court has rightly concluded that the prosecution has failed to establish the guilt of the respondent beyond reasonable doubt.

18. We have examined the submissions made by the learned counsel for the parties, particularly keeping in view the gruesome nature of the crime and the complexities presented in the investigation, as also at the trial of this particular case.

19. Undoubtedly, this case demonstrates the actions of a depraved soul. The manner in which the crime has been committed in this case, demonstrates the depths to which the human spirit/soul can sink. But no matter how diabolical the crime, the burden remains on the prosecution to prove the guilt of the accused. Given the tendency of human beings to become emotional and subjective when faced with crimes of depravity, the Courts have to be extra cautious not to be swayed by strong sentiments of repulsion and disgust. It is in such cases that the Court has to be on its guard and to ensure that the conclusion reached by it are not influenced by emotion, but are based on the evidence produced in the Court. Suspicion no matter how strong can not, and should not be permitted to, take the place of proof. Therefore, in such cases, the Courts are to ensure a cautious and balanced appraisal of the intrinsic value of the evidence produced in Court.

20. In our opinion, the High Court has examined the entire evidence dispassionately and with circumspection. It has noticed that the evidence produced by the prosecution in this case is purely circumstantial. The principles on which the circumstantial evidence is to be evaluated have been stated and reiterated by this Court in numerous judgments. We may notice here the observations made by this Court, in the case of *Hanumant Govind Nargundkar Vs. State of M.P.*[1] on the manner in which circumstantial evidence needs to be evaluated. In the aforesaid judgment, Mahajan, J. speaking for the Court stated the principle which reads thus:-

> "It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should

1. 1952 SCR 1091.

> be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

The aforesaid proposition of law was restated in the case of *Naseem Ahmed Vs. Delhi Admn*[2], by Chandrachud J. as follows**:**

> "This is a case of circumstantial evidence and it is therefore necessary to find whether the circumstances on which prosecution relies are capable of supporting the sole inference that the appellant is guilty of the crime of which he is charged. The circumstances, in the first place, have to be established by the prosecution by clear and cogent evidence and those circumstances must not be consistent with the innocence of the accused. For determining whether the circumstances established on the evidence raise but one inference consistent with the guilt of the accused, regard must be had to the totality of the circumstances. Individual circumstances considered in isolation and divorced from the context of the over-all picture emerging from a consideration of the diverse circumstances and their conjoint effect may by themselves appear innocuous. It is only when the various circumstances are considered conjointly that it becomes possible to understand and appreciate their true effect."

21. We are of the opinion that the High Court was fully alive to the aforesaid principles and has assessed the evidence in the correct perspective. Upon consideration of the factual and the legal position, the High Court summed up the final conclusion. We are unable to accept the submission of Mr.

2. (1974) 3 SCC 668.

Malhotra that the conclusions reached by the High Court are not plausible conclusions. Thereafter, the High Court systematically and chronologically examined the series of incidents/circumstances relied upon by the prosecution to establish the guilt of the respondent.

22. It would be appropriate to discuss these incidents/ circumstances under different headings.

Motive

23. Upon consideration of the evidence on record, the High Court concluded as follows:-

> "Bearing in mind the legal position emerging out of the said authorities and having regard to the totality of the facts and circumstances which can be said to have been established on record, it is not possible to infer any motive on the part of the appellant what to talk of a motive so strong to commit the crime."

In assessing the evidence, the High Court was aware of the legal principles that absence of motive may not necessarily be fatal to the prosecution. Where the case of the prosecution has been proved beyond reasonable doubt on the basis of the material produced before the Court, the motive loses its significance. But in cases based on circumstantial evidence, motive for committing the crime assumes great importance. In such circumstances, absence of motive would put the Court on its guard to scrutinize the evidence very closely to ensure that suspicion, emotion or conjecture do not take the place of proof (See *Surinder Pal Jain Vs. Delhi Administration*[3] and *Tarseem Kumar Vs. Delhi Administration*[4]).

We may also notice here the observations in *Subedar*

3. 1993 Supp (3) SCC 681.

4. 1994 Supp (3) SCC 367.

Tewari Vs. State of U.P.[5] wherein it has been observed that -

> "The evidence regarding existence of motive which operates in the mind of an assassin is very often than (sic) not within the reach of others. The motive may not even be known to the victim of the crime. The motive may be known to the assassin and no one else may know what gave birth to the evil thought in the mind of the assassin."

Again reiterating the role played by motive in deciding as to whether the prosecution has proved the case beyond reasonable doubt against an accused, this Court in the case of *Suresh Chandra Bahari Vs. State of Bihar*[6] held as under:-

> "Sometimes motive plays an important role and become a compelling force to commit a crime and therefore motive behind the crime is a relevant factor for which evidence may be adduced. A motive is something which prompts a person to form an opinion or intention to do certain illegal act or even a legal act with illegal means with a view to achieve that intention. In a case where there is motive, it affords added support to the finding of the Court that the accused was guilty for the offence charged with. But the evidence bearing on the guilt of the accused nonetheless becomes untrustworthy or unreliable because most often it is only the perpetrator of the crime alone who knows as to what circumstances prompted him to adopt a certain course of action leading to the commission of the crime."

In our opinion, the conclusion recorded by the High Court is in accordance with the aforesaid principles. Merely because the respondent objected to the behaviour of Namita towards her male friends at the birthday party of her sister Shiela would not be sufficient to hold that the appellant had the necessary motive to kill her. It is inconceivable that the respondent would have

5. 1989 Supp (1) SCC 91.

6. 1995 Supp (1) SCC 80.

married Namita only for the purpose of committing her murder, that too on the very first night of their honeymoon. Both the trial court and the High Court, in our opinion, have correctly recorded the conclusion that it was in fact in the interest of the respondent that Namita had remained alive. The success of his very objective to remain permanently in England was dependent on the continuance of his marriage for at least another year.

24. We are also not much impressed by the submission of Mr. Malhotra that the simmering resentment which was caused by Namita's refusal to consummate the marriage would be sufficient to impel the respondent to commit her murder. In our opinion, the High Court has correctly concluded that the two letters Ext.CW-13 and Ex.CW-14 exchanged between Namita and Mahender would tend to show that respondent was in fact trying to make amends after the birthday party on 5th /6th April, 1979. There was no untoward incident thereafter. It is accepted by all that the marriage was duly registered on 26th May, 1979 and that the couple voluntarily left for the honeymoon.

25. The trial court upon examination of the entire evidence had in fact concluded that something had gone amiss in the hotel room occupied by Mahender and Namita on the night of 27th/28th May, 1979. If that be so, the High Court rightly concludes, that this fact alone would contradict the theory of respondent having any pre-meditated strategy or design for committing the murder of his wife. The High Court correctly concluded that "it is highly improbable to comprehend that respondent had a predetermined mind or motive to cause the death of Namita on the honeymoon night itself at the first available opportunity of being in the company of the deceased in a closed room as suggested by the prosecution. Had the attitude of the parties been as suggested by the prosecution, they would not have agreed to a marriage followed by a honeymoon trip outside London." The High Court also noticed that there was nothing to suggest that Namita or her family

members had apprehended any harm or threat to life of Namita at any stage till the couple left for the honeymoon on morning of 27th May, 1979. The High Court found it impossible to accept the prosecution theory that the respondent had married the deceased only with a view to do way with her to take revenge for her appalling behaviour at Shiela's birthday party. Had the respondent been so resentful, there was no question of the marriage being solemanised.

LAST SEEN CIRCUMSTANCE/EVIDENCE -

26. On this issue, the High Court has merely recorded that the respondent has not disputed that Namita was with him in the room throughout the night. This position is also maintained by Mr. Aggarwal before us. The respondent had, however, claimed that Namita had left him at 6.35 a.m., in the morning of 28th May, 1979. The High Court upon examination of the evidence of the Manager of the Hotel concluded that it was not possible to hold that Namita was seen alive by anyone in the morning of 28th May, 1979. The High Court, therefore, observed that it was for the respondent to explain about her disappearance.

27. The explanation given by the respondent consistently from the beginning is that Namita had left him voluntarily early in the morning of 28th May, 1979. It is also his case that she married him only under pressure from her parents. She had purchased a new suitcase in which she packed most of her clothes immediately upon returned from the "Brussels by Night" tour. The red suitcase with which she had traveled from London to Belgium was left with the respondent containing some of her clothes. This suitcase even though had a blood stain was carried back to the house of Namita's parents by the respondent himself. It seems inconceivable that a person who has committed the murder of his wife and has used the aforesaid suit case for storing and carrying the body parts would bring it back to England risking his own safety. The respondent also narrated before the police that his wife had left him

voluntarily on the morning of 28th May, 1979. This fact was further reiterated by him in the letter to the Prime Minister of India which runs as follows :-

> "…..After seeing these historical places we reached to our room. We took our bath and she gave me half currency my passport and ticket to me. She asked me to go out for a while and then came with new suitcase. She accommodated the maximum articles possible in that and left the rest in the suitcase which she took with her from her house. Then she told me that dear Mahendra I want to tell you something very important and that is "I have married you just for the sake of my parents for which they were pressing me. Now I will think about my future and you also should think about your own future. Do not object me for anything" saying this she went out and asked me not to follow her. I waited till morning when the Cosmos Coach guide came to room and asked to get ready for the further tour but I told him that I am waiting for my wife because she has gone out."

28. In our opinion, the last seen evidence would not necessarily mean that the respondent had killed his wife. Given the previous attitude of Namita, it is quite possible that she had walked out on her husband.

EVENTS ON THE MORNING OF 28th May, 1979 -

29. The most important circumstance relied upon by the prosecution relates to the state of affairs which existed in Room No.415 of Hotel Arenberg and the behaviour pattern exhibited by the respondent on the morning of 28th May, 1979. This was sought to be proved by the evidence given by three witnesses, namely, PWUK-12 Richard Anthony Cushnie, PWBG-22 Mujinga Maudi and PWBG-24 – Benselin Myriam. The High Court notices that the prosecution had sought to project through these witnesses a certain state of affairs to prove that the respondent had a guilty mind.

30. The High Court rejected the evidence of the tour guide (PWUL-12) as being inconsistent. The High Court notices that this witness had gone up to room no.415 to inform the couple that the tour party was ready to leave. He knocked on the door. It was half opened by the respondent. He found the respondent was perspiring but at the same time assumed his behaviour to be quite normal or non exceptional. The High Court also notices that this witness had prepared two reports Ext.CW42/A and CW42/B after the termination of the tour. None of the two reports make any mention about the abnormal behaviour of the respondent. These reports rather indicate that the witnesses must have been in a hurry when they visited room no.415 and could not have talked to the respondent for more than a couple of minutes. In fact, in one of the reports, this witness mentions the fact that the father-in-law of the respondent had told him that Namita had abandoned the respondent on the morning of 28th May, 1979. In our opinion, the High Court was justified in concluding that this statement would support the defence plea.

31. We may also notice that this witness in his cross examination clearly stated that 1979 was his first year as a tour courier. He accepted that portion of the report (marked 8) was written by him. The aforesaid portion contained the words "It could be that the wife left very early and the arranged marriage giving her the opportunity. It is conceivable that the girl left early in the morning. The arranged marriage having given her opportunity to leave home and make a life on her own and therefore satisfy the desires of both parties." He also stated in the cross examination that on his visit to room no. 415, he could not have remained with the respondent much more than 2 minutes. He goes on to say that "at the time the coach was waiting, we were anxious to be away. I did not enter the room at any stage during that period of 2 minutes. I did not try and peep inside the room." Such being the state of affairs, we are unable to accept the submission of Mr. Malhotra that the High Court wrongly discarded the evidence of this witness.

32. In rejecting the evidence of PWBG-22 Majinga Maudi, the High Court noticed that this witness was examined by the police on a number of occasions, but she could not even give the correct room number. She actually stated that she visited room no.410. The High Court also concluded that from her evidence it becomes apparent that the respondent did not even put a latch on the door nor did he take any extra precaution to keep the room closed. This witness was able to enter the room without knocking. Mr. Malhotra, however, laid considerable emphasis on the part of the statement that when she entered the room she saw the respondent sitting on the bed with hands on his face and she thought him to be sick. This witness also stated that she wanted to open the curtains of the window but the respondent did not allow her to do so. According to Mr. Malhotra, this would clearly indicate that the respondent was deeply distressed and disturbed. Mr. Malhotra also emphatically reiterated that this witness proved that the bathroom was totally soaked with water and there were wet towels on the floor of the bathroom. When she was cleaning the room, the respondent did not leave her for a second. The High Court, however, notices that this witness did not find any incriminating article like the body or body parts either in the room or in the bathroom, nor she found even a trace of blood on the carpet or on the wall. This witness had herself stated that the respondent had left the room unattended knowing perfectly well that this witness could enter the room in his absence. We do not accept the submission of Mr. Malhotra that the cause of respondent's distress was the murder that he had committed. It could equally be the distress of a husband whose wife deserted him on the honeymoon. In our opinion, the High Court has correctly assessed the evidentiary value of the statement of this witness.

33. The other witness relied upon by the prosecution was PWBG-24 who wanted to enter the room in order to take the inventory of the mini bar. He was, however, not permitted to do so by the respondent. The High Court notices that the earlier

witness had actually stated that he had come inside the room and he had talked to her.

34. From the above, it becomes apparent that it was only on a very careful consideration of the evidence of all the witnesses, the High Court concluded that the behaviour of the respondent cannot be said to be consistent only with the guilt of the respondent. In our opinion, the High Court correctly notices that no explanation was forth coming as to where the body or dismembered body parts could have been concealed by the respondent throughout the night of 27th/28th May,1979 as well as the morning and the afternoon of 28th May, 1979. The High Court notices that it is the case of the prosecution that the body parts were disposed of after the evening of 28th May, 1979. The suggestion of the prosecution that the body might have been kept either in the cupboard or under the bed was correctly held to be conjectural.

RECOVERY OF BODY PARTS FROM THE RUBBISH CONTAINER AND THE IDENTIFICATION THEREOF -

35. The next circumstance relied upon by the prosecution to connect the respondent with crime is the recovery of body parts allegedly of Namita viz. head, severed upper and lower limbs minus thigh portion from a refuge container lying at Rue De Loxum in the morning of 29th May, 1979 and that of torso from Vergote Lake, Brussels on 2nd August, 1979. Certain pieces of clothings and a shoe were also recovered form the rubbish container which according to the prosecution had also belonged to Namita. The body parts were recovered by a rag picker namely Verbeleen Marcel, PWBG-6. He had been looking for some lead or copper in the rubbish container for selling. Instead, he found a packet which was wrapped with a black pullover containing an arm in the shape of a hand without fingers, two arms cut into four pieces. On seeing such a sight, he became nervous and called the police. Responding to his call, two policemen arrived. PWBG-13, Van Eesbeek Pierre,

a police officer of Brussels on reaching the site looked into the waste container and found a pair of legs and the feet. These remnants were wrapped in chiffon and inside a plastic bag. The other witness of the recovery is PWBG-21, Vindevogel Rene. He has stated that he had accompanied PWBG-13, Van Eesbeek Pierre. They had found in the container, inside a cardboard box, two pieces of arms and on further search found a red cloth wrapped packet with plastic and when he opened it, a head rolled down. According to him, his colleague found one of the two legs and the feet in other side of the container, also packed in a red fabric. The High Court, therefore, concluded that only one piece of clothing found near the body parts was a black pullover and some red fabric, which might have been used for wrapping the body parts. These witnesses did not speak about the recovery of any other clothing or shoes as is sought to be proved through PWBG-8 Nelissen Urbain, PWBG-14 Etienne Martin, PWBG-25, Lecerf Jacques, PWBG-27 Pissoort Jean and PWBG-28 Dooms Jeanean. It is noticed by the High Court that none of these witnesses except PWBG-28 Dooms Jeanean speaks about the recovery of any clothing or shoe from the site of recovery. In fact PWBG-28 Dooms Jeanean could not speak with certainty as to what garments or shoes were discovered from the container. The High Court further notices that the details of clothing and shoes do not find mention in the report of the police dated 30th May, 1979. The report simply mentions that there were several pieces of ladies' clothing which were seized and would be described in a special report. It appears that no contemporaneous report of recovery of these clothings was prepared. The report was subsequently prepared on 8th June, 1979 in the form of an inventory of items found on 29th May, 1979. These for the first time specified a pink brown cardigan covering the legs, a black pullover and red fabric which are described by the witnesses. The High Court also notices that the police had already collected and seized various articles and things from the house of PW-48, Mr. Lochab in London on 5th June, 1979, 6th June, 1979 and 7th

June, 1979.

36. In our opinion, the High Court has reached the appropriate conclusion that the possibility of these garments and articles having been planted by the police by obtaining the same from the house of Namita with the object of fixing the identity of the body parts belonging to Namita by means of the clothes can not be ruled out. It is noteworthy that no contemporaneous recovery memo was prepared by the police on 29th May, 1979 itself. There was omission of the details of the allegedly recovered clothes in the statement of the witnesses. Articles had already been seized from the house of Namita on three consecutive days 5th, 6th and 7th June, 1979. The Special Report containing the inventory of the clothes is dated 8th June, 1979. It is in this report that clothes are mentioned for the first time. We are unable to accept that even in the face of such material, the conclusion reached by the High Court is not plausible.

37. We may also notice that prosecution had allegedly recovered the clothes Namita had taken on the trip. Namita's wedding dress was stated to have been recovered as part of the clothings. The High Court, in our opinion, correctly observed that ordinarily a woman would not carry her wedding dress on her honeymoon trip. The High Court also notices that though the prosecution had taken custody of all the clothes which Namita had taken with her on the honeymoon trip, they were not produced at the trial for identification by the witnesses. Only photographs of the clothings, which had been allegedly taken on 12th June, 1979 i.e. after 16 days, were produced.

38. Mr. Malhotra had, however, submitted that these clothes were torn, lacerated in blood stains and, therefore, must have withered away into waste beyond recognition. In our opinion, the High Court has correctly taken view that the prosecution was duty bound to produce the clothings at the trial. It was through these clothings and articles that the prosecution

had sought to establish the identity of the deceased. The High Court, in our opinion, correctly recorded the conclusion that on consideration of the relevant evidence of the witnesses and various documents on record, the prosecution had miserably failed to establish the recovery of clothes or shoes by means of any cogent and reliable evidence. The High Court also held that the identification of the clothings and shoes as belonging to Namita through the testimony of PW-48 Jagdish Singh Lochab and PWUK-2 Amita Lochab was not sufficient to discharge the burden of proof which lay on the prosecution. The High Court notices that the identification of the shoes by Mr. Lochab could not be definitely said to have made in the presence of any police officer. Mr. Lochab was unable to remember if any police officer was present or not at the time of the identification. In the first instance, he had stated that the officer had recorded his statement and he had signed the same with regard to the identification of the clothes. However, in the same breath, when confronted with the previous statement made to the Belgium Investigation Authorities, he denied it. The High Court also notices that there was no mention of any identification test of clothings having been made by these witnesses. In our view, the High Court had drawn the only logical conclusion from the aforesaid that this witness was not consistent so far as the identification of the clothes are concerned. The prosecution did try to prove that the shoes recovered were only purchased in Britain and that it had been purchased from Top Shop. The High Court observed that the test identification of the property has not been done in accordance with certain well settled legal parameters. Certain safeguards had to be observed to rule out the possibility of any doubt or confusion. Apart from the technical objections with regard to the test identification, the High Court adversely commented that only photographs of the clothes were produced. We, therefore, find no merit in the submission of Mr. Malhotra that the clothes had been definitely identified as belonging to Namita.

IDENTITY OF THE BODY PARTS

39. This now brings us to a vital segment of the case which had to be proved by the prosecution i.e. identity of the body parts recovered on 29th May, 1979 and 2nd August, 1979 as that of Namita. To link the body parts to Namita, the prosecution had examined a number of witnesses. Heavy reliance was placed by the prosecution on the report of the postmortem examination conducted by Dr. Rilleret (since dead) and PWBG-4 G. Voordecker, Forensic Pathologist. The prosecution also relied on the evidence of PWBG-5 Lambert Claudine and Stomatologist PWBG-20 Wackens Georges, who had examined the dental specifics of the body and the report of finger/palm prints experts. The other witnesses relied upon by the prosecution were PWUK-1 Smt. Chandermukhi Lochab and PW-48 Jagdish Singh Lochab, i.e. mother and father of Namita. They gave description of certain identification/special marks which Namita had on her person. According to Jagdish Singh Lochab (PW-48), Namita was about 5'-4" of height, the hair of her head were black, she had 31 teeth instead of 32 as one tooth had been extracted at young age; she had a scar on her right knee, had a fracture of her left wrist and had a smallpox inoculation mark on her left upper arm. PWBG-4 Voordecker Guy has concluded its report as under:-

(i) The victim had been strangulated.

(ii) The hair of the victim were black.

(iii) *The victim was a young woman of non-white race of a height of 1 meter 60 cms. (Emphasis supplied)*

(iv) The victim had a special feature at the teeth level i.e. the existence of a single upper central incisor tooth.

(v) An old Coutaneous triangular cicatricies mark of

three centimeters was there on the surface of right knee cap.

(vi) There were burns on the chin at the left retro articular region and also on the limbs, on the left and right arms and left forearm. These burns appeared to be caused after death.

(vii) The dislocation of the body was work of a doctor/ surgeon or a butcher.

(viii) The autopsy was done on 29th May, 1979 and the death took place within 48 hrs.

(ix) *The autopsy was carried out on 29th May, 1979 but report submitted on 11th December, 1979.*

(x) The examining doctor could not say if there were vaccination marks on left arm and callosities in the front side of the feet. (Emphasis supplied)

40. The Stomatologist PWBG-20 Wackens Georges concluded his opinion as follows:-

(i) That the body belonged to a person having feminine sex.

(ii) *It was of a person between 20 and 30 years of age who was of African or Indian origin. (Emphasis supplied)*

(iii) Left upper incisor was not there which might have been lost since long time.

(iv) The teeth were of a person who lived in an affluent social status.

41. Mr. Aggarwal has criticised the veracity of the aforesaid findings on a number of grounds which have also been considered by the High Court. Mr. Aggarwal has

reiterated the submissions which were made before the High Court. He submits that the postmortem examination on the body parts recovered in the morning of 29th May, 1979 was conducted by Dr. Rilleret and Voordecker Guy on 29th May, 1979 itself. The report is given about seven months later on 11th December, 1979. In this report, the conclusions are as under:-

" From all the findings we are entitled to admit that the (sick) considered human remains are of a *young woman of about 160 cms, of coloured race. (Emphasis supplied)*

The cuts were made after death by an individual who is apparently experienced in disjoining and who respected the anatomic characteristics.

The presence of bloodstains in the eyes makes us think a murder by constriction.

The remains were burned superficially."

42. According to Mr. Aggarwal, the postmortem report was prepared after consultation with the father and sister of Namita. This fact is apparently mentioned on page 24 of the report of Dr. Rilleret. We may also notice that the postmortem examination of the torso/trunk portion recovered on 2nd August, 1979 was performed by Dr. Rilleret (since dead) and PWBG-4 Voordecker Guy on 3rd August, 1979. On a comparison of the evidence gathered respectively on 29th May, 1979 and 2nd August, 1979, these witnesses have recorded the conclusion that "the human remains examined at the later date do correspond to the same body namely to the corpse of Namita Lochab."

43. The High Court upon considering the entire evidence relating to this issue, however, concluded that no reliance could be placed on the reports presented by the prosecution for the purpose of establishing the identity of the body parts as that of

Namita. The High Court highlighted that P'WBG-20 Wackens Georges, Stomatologist had in the first instance stated on examination of the dental specificities of the body parts on 30th May, 1979, he recorded the report "X". However, subsequently he stated that he had given another report marked "A". He then tried to explain that the provisional report was marked "X" and the final report was marked "A". Upon comparison of the two reports, the High Court concluded that the two reports are wholly inconsistent. In the alleged provisional report, on the basis of the stomatological examination PWBG-28 Dooms Jeanean had concluded as under:-

> "*Female individual, at least thirty years old and of North African type.* Lived for a long time in a civilized, upper middle-class environment. Good education. Taking much care for her teeth. Regularly visited her dentist, who looks tidy, experienced and serious.
>
> The individual lacks one upper left central incisor and her left canine should have been rather conspicuous.
>
> The individual had probably a tic, such as biting her fingernails.
>
> This, and the other mentioned facts, suggest that the individual should be between 29 and 30 years old." (Emphasis supplied)

44. However, in the final report, the conclusions recorded were as under:-

> "*Individual belonging to the female sex whose age is presumed between 20 and 30 years and belonging to the North-African, Indian type. (Emphasis supplied)*
>
> Lived since long in a civilized society in a well off category. Had good education. Taking very good care of teeth and used to visit regularly her dentist. The later used to take good care of them regularly and seriously.
>
> The individual did not have a left upper central incisive and had a prominently visible left canine.
>
> It may not be overlooked that the individual have had a habit, such as nibbling her fingers."

45. A perusal of the aforesaid clearly shows that in the report which was prepared contemporaneously, the experts had put the age of the deceased between 29 to 30 years. A perusal of the same shows that initially the report states that the individual was at-least 30 years old and of North-African type. At the end of the report, it is stated that the individual should be between 29-30 years only. This opinion undergoes a change by the time a final report is prepared. It is now stated that the "Individual belonging to the female sex whose age is presumed between 20 and 30 years, and belonging to North-African Indian type." The differences between the two reports are so glaring, understandably, the High Court was compelled to hold that the second report was clearly an afterthought and deliberate improvement over the earlier report. The High Court, in our opinion, appropriately concluded that this must have been made to cover up the first report which did not connect the body parts with that of Namita in as much as age of Namita was stated to be around 25 years. In fact, it is a matter of record that Namita was born in 1956, that would make her only 24 years at the relevant time.

46. The High Court thereafter took up the issue with regard to the missing incisor tooth. We have noticed earlier that PW-48 Mr. Lochab had stated that Namita had 31 teeth instead of 32 as one tooth had been extracted when she was of a very young age. The High Court notices that in his earlier statement, he had stated that another tooth had been fixed at the place of the tooth so extracted. This was done so that no anomaly existed in her denture. This witness was also not able to speak with certainty about the Namita having a scar on her right knee. The High Court also took note of the fact that this witness did

not mention any of these identification marks at the time when he had lodged the missing report. He had rather stated that he was not aware of any visible marks or scars or other peculiarities of Namita. He was not even sure about the colour of Namita's hair as he had stated that her hair were dark brown. Contrasted with this, the evidence of the mother PWUK-1 was that one of the Namita's front tooth was missing. However, there was no gap in between the incisors. She had stated that Namita had a scar mark on her left knee. She also stated that Namita had three inoculation marks on her shoulder. The High Court notices that this witness was, however, not able to give details of any identification marks on her other children. This, in our opinion, would be sufficient to justify the conclusion reached by the High Court that neither the mother PWUK-1 nor the father PW-48 of Namita were exactly aware/sure of any identification marks of Namita. The High Court, therefore, observed that a possibility can not be ruled out that these witnesses may have given these marks after the disclosure of such marks in the postmortem examination's report. In fact, it may be noteworthy that no vaccination/inoculation marks have been found by the doctors, who conducted the postmortem examination.

47. Mr. Malhotra had, however, emphasised that the identity of Namita had been established from the comparison of palm prints found in the house of her parents and the palm prints of the body parts found in the rubbish container. The High Court examined this issue with due care and caution. It is noticed that PWUK-18 Christopher John Coombs, the finger print expert was not able to conclude that the evidence produced would connect the palm prints with the palm prints of Namita. The reports submitted by the doctors contained numerous discrepancies. This apart the identification marks given by the witnesses did not coincide with the reports. Therefore, the High Court concluded that no implicit reliance could be placed upon them for the purpose of establishing the identity of these body parts as that of Namita.

RECOVERY OF THE BLOOD FROM THE BATHROOM

48. Mr. Malhotra had emphasised that the examination of the blood recovered form the bathroom and the blood group of Namita, both being identical, the High Court wrongly failed to rely upon the same. The High Court rejected the blood report on the grounds that report in many columns used the term "Nihil" meaning "No". The report also contained question marks, blank spaces at various places. The report suggests that it is merely a comparison of favorable characteristics. The experts did not provide any explanation in regard to the terms that had been used in the report. In fact, the High Court records a conclusion that the report used different methods i.e. ABO method and Gm method without giving any justification as to why the two different methods were used. Therefore, the High Court concluded that unfavorable characteristics/factors detected during the course of examination had been suppressed. The High Court also took note of the fact that the prosecution failed to place on record any cogent evidence with regard to the blood group of Namita. PW-48 only stated her blood group was 'O', but even he was not able to say whether it was 'O+' or 'O-'. The High Court quite appropriately observed, on the basis of the opinion of the examining experts, that more than fifty per cent population of Belgium has 'O' blood group. In such state of affairs, the High Court was constrained to conclude that the prosecution has not been able to establish even this limb by means of cogent and reliable evidence.

49. Mr. Aggarwal had also pointed out a number of other infirmities with regard to the non-comparison of a blood sample taken from the body parts recovered. He had pointed out that no reliance could have been placed on the analysis of the blood by PWBG-17. According to Mr. Aggarwal this witness had examined "crusts"/"lumps" of "dark red" blood. This, according to Mr. Aggarwal, would indicate that the blood belonged to a living person since it was coagulated and that the blood was fairly new. This in turn would lead to a reasonable

inference that the blood did not belong to Namita Lochab, in as much, as her blood should been "powdery" i.e. non-coagulated (belonging to a dead person). It should have been brownish black / black in colour as it would have been old blood, since it was recovered more than two weeks after the alleged dismemberment of her body in the bathroom. In support of the submission, Mr. Aggarwal had relied on Parikh's Textbook of Medical Jurisprudence Forensic Medicine and Toxicology, in particular on page 7.11 and 7.23. In the aforesaid textbook, it is stated as under:-

> "Character: Sometimes, it is possible to determine if blood came from (a) living or dead body (b) artery or vein (c) victim or assailant (d) infant or adult, and (e) male or female.
>
> Living or dead body: Blood which has effused during life can be peeled off in scales on drying due to the presence of fibrin. Blood which has flowed after death tends to break up into powder on drying."

The issue was raised before the High Court. The High Court, however, rejected the reports for the reason stated as not being intrinsically reliable.

50. We are of the considered opinion that there is no reliable evidence to indicate that the blood that was recovered from the bathroom of room no. 415 definitely belonged to Namita. It must be remembered that the only drop of blood that was found was at the base of the bidet, in the bathroom. The bathroom would be used successively by different tourists occupying the room. This apart, the very recovery of the blood stains from the bidet seems highly doubtful. It has come into the evidence of PWBG-19 Salomone Levy, the Manager of the hotel in whose presence the blood stains were allegedly lifted, that many tourists had occupied room no. 415 between 29th May, 1979 and 12th June, 1979. According to him, no tourists/ guests ever complained of any blood spot on the bidet. The first ever discovery of blood was stated to be on 12th/13th June,

1979, i.e., about 14 days of the alleged incident. If the blood stains lifted from the bidet were of a person who was killed on 28th May, 1979, the same could not be of red or red brown colour. The colour of the stain would have been blackish brown. It appears to us that the High Court was wholly justified in rejecting the evidence with regard to the recovery of blood from the bidet.

51. We now come to the final circumstances relied upon by the prosecution with regard to the conduct of the respondent after returning to England. We are of the considered opinion that the High Court was not correct in drawing an adverse inference against the respondent because he remained in hiding till he was arrested by the CBI. In this case, the subsequent conduct of the appellant is not consistent with the expected conduct of a guilty person. If the respondent had any intention of absconding, he could have done so initially after the alleged murder of his wife. He had no need to come back to England. Having come back he need not have gone directly to the house of his in-laws. Not only did he come back to England, he carried with him the red suitcase containing some of Namita's clothes. According to the prosecution, this suitcase had contained blood stains which had belonged to Namita. It is inconceivable that a person having a guilty mind would have been carrying such an incriminating article back to the house of his in-laws. As noticed above, he went back to India apprehending danger from his father-in-law and family. This apprehension of danger to his life at the instance of his father-in-law continued even in India. The fact that an attempt was made on his life had been duly recorded by the trial court. The respondent had been petitioning the police authorities as well as the Home Minister and the Prime Minister of India seeking protection. Evading arrest would certainly be an illegal act but it does not lead to the only conclusion that the respondent was hiding due to a guilty conscience. We may also notice here the observations made by this Court in the case of *Matru Alias*

Girish Chandra Vs. The State of Uttar Pradesh[7] which are as follows:-

> "The appellant's conduct in absconding was also relied upon. Now, mere absconding by itself does not necessarily lead to a firm conclusion of guilty mind. Even an innocent man may feel panicky and try to evade arrest when wrongly suspected of a grave crime such is the instinct of self-preservation. The act of absconding is no doubt relevant piece of evidence to be considered along with other evidence but its value would always depend on the circumstances of each case. Normally the courts are disinclined to attach much importance to the act of absconding, treating it as a very small item in the evidence for sustaining conviction. It can scarcely be held as a determining link in completing the chain of circumstantial evidence which must admit of no other reasonable hypothesis than that of the guilt of the accused."

52. We are of the considered opinion that the respondent did not come out of hiding due to fear as also to avoid arrest by the police but it certainly can not be concluded that he was hiding because of a guilty conscience.

53. We may also notice here that according to the prosecution, dismemberment of the body parts was performed either with surgical instruments or with the aid of a butter knife and a fork. However, at the trial, the prosecution did not produce any evidence with regard to the recovery of any weapon of offence. Nor any weapon was produced in court, at the trial. Even according to the sequence given by the prosecution, it would have been impossible for the respondent to procure the surgical instruments in the city of Brussels during the night intervening 27th/28th May, 1979. It is a matter of record that the entire group of tourists did not return back to the hotel till after 11 O' clock during the tour "Brussels by Night". Namita

7. (1971) 2 SCC 75.

was with him throughout the tour. Equally he could not have carried the surgical instruments with him without the same being noticed at the customs barriers. This apart, prosecution has miserably failed to establish that the respondent had any intention of committing the murder of his wife at the commencement of the honeymoon trip. Even Namita's parents did not entertain any such apprehensions. It is also the prosecution case that something went amiss in room no. 415 during the night of 27th/28th May, 1979. Therefore, it makes the possession of surgical instruments by the respondent on the fateful night in Brussels virtually impossible. We are also unable to accept that such severance of the body parts could possibly be achieved by use of a simple butter knife. It is simply too farfetched a notion to be taken seriously.

54. We are of the considered opinion that the conclusions reached by the High Court would clearly show that the prosecution had miserably failed to connect the respondent with the alleged murder of his wife. The conclusions recorded by the High Court are fully justified by the evidence on record. We are, therefore, unable to agree with Mr. Malhotra that there has been any miscarriage of justice in the facts and circumstances of this case.

55. Before we part with this judgment, we must place on record our appreciation of the very valuable assistance rendered by Mr. P.P. Malhotra, the learned Additional Solicitor General and Mr. Siddharth Aggarwal, who appeared for the respondent.

56. We, therefore, find no merit in the appeal. The appeal is accordingly dismissed.

D.G. Appeal dismissed.