NATIONAL COUNCIL FOR TEACHER EDUCATION AND OTHERS

v.

SHRI SHYAM SHIKSHA PRASHIKSHAN SANSTHAN AND OTHERS ETC. ETC.

(Civil Appeal Nos.1125-1128 of 2011)

JANUARY 31, 2011

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

National Council for Teacher Education (Recognition, Norms and Procedure) Regulations, 2007 (as amended by Notification dated 1.7.2008): Regulation 5, clause (4) and (5) – Cut off dates for submission of application to Regional Committee, processing thereof and communication of the final decision on the issue of recognition – Validity of – Held: The cut off dates are neither arbitrary/irrational nor violative of Article 14 of the Constitution – Constitution of India, 1950 – Article 14 – Notification F.No.48-3/(1)/2008/NCTE/N&S dated 1.7.2008.

National council for Teacher Education Act, 1993: s.14 – Role of State Government in granting recognition to the institution offering course in teacher training – Requirement of recommendation/suggestion by State Government/UT Administration – Held: Provisions contained in s.14 and the Regulations framed for grant of recognition including the requirement of recommendation of the State Government/ Union Territory Administration are mandatory – Consultation with the State Government/UT Administration and consideration of the recommendations/ suggestions made by them are of considerable importance – State Government/UT Administration sanctions the posts keeping in view the requirement of trained teachers and budgetary provisions made for that purpose – By incorporating the provision for

sending the applications to the State Government/UT Administration and consideration of the recommendations/ suggestions, if any made by them, the Council made an attempt to ensure that as a result of grant of recognition to unlimited number of institutions to start B.Ed. and like courses, candidates far in excess of the requirement of trained teachers do not become available – The Council is directed to ensure that in future no institution is granted recognition unless it fulfils the conditions laid down in the Act and the Regulations and the time schedule fixed for processing the application by the Regional Committees and communication of the decision on the issue of recognition is strictly adhered to – National Council for Teacher Education (Recognition, Norms and Procedure) Regulations, 2007.

The private respondents submitted their applications on 28.12.2007, 31.3.2008, 10.4.2008 and 17.4.2008 respectively for grant of recognition for starting B.Ed. course for the academic year 2008-2009. They also applied to the State Government for grant of 'no objection certificates'. After considering their applications, the Northern Regional Committee of the Council informed the private respondents about the deficiencies in their applications. After removal of the deficiencies, the premises of the private respondents were inspected by the teams constituted by the Northern Regional Committee. The inspection reports were considered in the meeting of the Committee held on 21.9.2008 but recognition was not granted to them on the ground that the cut off date specified in the regulations was already over.

Aggrieved, the private respondents filed writ petitions alleging that they were discriminated vis-a-vis other applicants and, in this manner, their right to equality guaranteed under Article 14 of the Constitution was violated. By an interim order dated 24.10.2008, the High

Court directed that the applications made by the private respondents for grant of recognition should be considered by the Committee. By another interim order dated 27.11.2008, the High Court directed the Council to issue approval letters and allot students to the private respondents. The High Court finally held that the cut off date i.e. 31.8.2008 fixed by notification dated 1.7.2008 was discriminatory, arbitrary and violative of Article 14 of the Constitution and dismissed the writ petitions. The instant appeals were filed challenging the order of the High Court.

Disposing of the appeals, the Court

HELD : 1.1. Article 14 of the Constitution of India forbids class legislation but permits reasonable classification provided that it is founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group and the differentia has a rational nexus to the object sought to be achieved by the legislation in question. In the light of this proposition, it is not possible to find any fault with the decision of the Council to prescribe 31st October of the year preceding the academic session for which recognition is sought as the last date for submission of application to the Regional Committee and 15th May of the succeeding year as the date for communication of the decision about grant of recognition or refusal thereof. The scheme of the 2007 Regulations envisages the manner of making the application and the time limit. The applications received for recognition are required to be scrutinized by the office of the Regional Committee to find out the deficiency, if any. In case any deficiency is found, the same is required to be brought to the notice of the concerned applicant within 30 days of the receipt of application and the latter is under an obligation to remove the deficiency within next 90 days.

Simultaneously, a written communication is required to be sent to the State Government/Union Territory Administration. Within 60 days of the receipt of communication from the Regional Committee, the concerned State Government/Union Territory Administration has to send its recommendations/ suggestions. After removal of the deficiency, if any, and receipt of the recommendations/suggestions of the State Government/Union Territory Administration, the Regional Committee is required to constitute a team to inspect infrastructure, equipments and instructional facilities made available by the applicant with a view to assess the level of preparedness for commencement of the course. Thereafter, the inspection is to be carried out by associating the representative(s) of the concerned institution. Upon receipt of the inspection report and after satisfying itself that the requirements enumerated in clauses (10) and (11) of Regulation 7 have been fulfilled, the Regional Committee has to take final decision on the issue of grant of recognition to the applicant. This entire exercise is time consuming. Therefore, some date had to be fixed for submission of application and some time schedule had to be prescribed for taking final decision on the issue of recognition. By fixing 31st October of the preceding year, the Council has ensured that the Regional Committee gets at least 7 months for scrutiny of the application, processing thereof, receipt of recommendation/suggestion from the State Government/ Union Territory Administration, inspection of the infrastructure, etc. made available by the applicant before an objective decision is taken to grant or not to grant recognition. Likewise, by fixing 15th May of the year succeeding the cut off date fixed for submission of application, the Council has ensured that adequate time is available to the institution to complete the course, teaching as well as training and the students get an opportunity to comply with the requirement of minimum

attendance. For academic session 2008-2009, the cut off date was amended because the 2007 Regulations were notified on 27.12.2007 and going by the cut off dates specified in clauses (4) and (5) of Regulation 5, no application could have been entertained and no institution could have been recognized for B.Ed. course. [Paras 16, 21, 22] [320-G-H; 325-A; 337-G-H; 328-A-H; 329-A-F]

In re the Special Courts Bill, **1978 (1979) 1 SCC 380;** *Union of India v. Parameswaran Match Works* **(1975) 1 SCC 305;** *Louisville Gas Co. v. Alabama Power Co.* **(1927) 240 US 30;** *D.G. Gose and Co. (Agents) (P) Ltd. v. State of Kerala* **(1980) 2 SCC 410;** *State of Bihar v. Ramjee Prasad* **(1990) 3 SCC 368;** *Uttar Pradesh Mahavidyalaya Tadarth Shikshak Niyamitikaran Abhiyan Samiti, Varanasi v. State of U.P.* **(1987) 2 SCC 453;** *Dr. Sushma Sharma v. State of Rajasthan* **(1985) Supp. SCC 45;** *University Grants Commission v. Sadhana Chaudhary* **(1996) 10 SCC 536;** *Ramrao v. All India Backward Class Bank Employees Welfare Association* **(2004) 2 SCC 76 and** *State of Punjab v. Amar Nath Goyal* **(2005) 6 SCC 754. – Relied on**

1.2. The cut off dates specified in the two clauses of Regulation 5 of the 2007 Regulations and notification dated 1.7.2008 are neither arbitrary nor irrational so as to warrant a conclusion that the same are violative of Article 14 of the Constitution. The conclusion of the High Court that 31.8.2008 fixed by notification dated 1.7.2008 is discriminatory and violative of Article 14 appears to have been influenced by the fact that some of the applicants, whose applications were considered in the meeting of the Regional Committee held after the cut off date were granted recognition while others like the writ petitioners were denied similar treatment on the pretext that decision in their case could not be taken before the cut off date. [Para 23] [329-G-H; 330-A-B]

1.3. The consultation with the State Government/ Union Territory Administration and consideration of the recommendations/suggestions made by them are of considerable importance. The Court can take judicial notice of the fact that majority of the candidates who complete B.Ed. and similar courses aspire for appointment as teachers in the government and government aided educational institutions. Some of them do get appointment against the available vacant posts, but large number of them do not succeed in this venture because of non-availability of posts. The State Government/Union Territory Administration sanctions the posts keeping in view the requirement of trained teachers and budgetary provisions made for that purpose. They cannot appoint all those who successfully pass B.Ed. and like courses every year. Therefore, by incorporating the provision for sending the applications to the State Government/Union Territory Administration and consideration of the recommendations/suggestions, if any made by them, the Council has made an attempt to ensure that as a result of grant of recognition to unlimited number of institutions to start B.Ed. and like courses, candidates far in excess of the requirement of trained teachers do not become available and they cannot be appointed as teachers. If, in a given year, it is found that adequate numbers of suitable candidates possessing the requisite qualifications are already available to meet the requirement of trained teachers, the State Government/ Union Territory Administration can suggest to the concerned Regional Committee not to grant recognition to new institutions or increase intake in the existing institutions. If the Regional Committee finds that the recommendation made by the State Government/Union Territory Administration is based on valid grounds, it can refuse to grant recognition to any new institution or entertain an application made by an existing institution for increase of intake and it cannot be said that such

decision is ultra vires the provisions of the Act or the Rules. The provisions contained in Section 14 and the Regulations framed for grant of recognition including the requirement of recommendation of the State Government/Union Territory Administration are mandatory and an institution is not entitled to recognition unless it fulfils the conditions specified in various clauses of the Regulations. The Council is directed to ensure that in future no institution is granted recognition unless it fulfils the conditions laid down in the Act and the Regulations and the time schedule fixed for processing the application by the Regional Committees and communication of the decision on the issue of recognition is strictly adhered to. [Paras 24, 29] [330-C-H; 331-A; 337-B-E]

St. Johns Teachers Training Institute v. Regional Director, National Council For Teacher Education and another **(2003) 3 SCC 321;** *State of Tamil Nadu and another v. S.V. Bratheep and others* **(2004) 4 SCC 513;** *Govt. of A.P. and another v. J.B. Educational Society and another* **(2005) 3 SCC 212;** *State of Maharashtra v. Sant Dnyaneshwar Shikshan Shastra Mahavidyalaya and others* **(2006) 9 SCC 1 – relied on.**

Case Law Reference:

(1979) 1 SCC 380	**Relied on**	**Para 16**
(1975) 1 SCC 305	**Relied on**	**Para 17**
(1927) 240 US 30	**Relied on**	**Para 17**
(1980) 2 SCC 410	**Relied on**	**Para 18**
(1990) 3 SCC 368	**Relied on**	**Para 19**
(1987) 2 SCC 453	**Relied on**	**Para 19**
(1985) Supp. SCC 45	**Relied on**	**Para 20**
(1996) 10 SCC 536	**Relied on**	**Para 20**

(2004) 2 SCC 76	**Relied on**	**Para 20**
(2005) 6 SCC 754	**Relied on**	**Para 20**
(2003) 3 SCC 321	**Relied on**	**Para 25**
(2004) 4 SCC 513	**Relied on**	**Para 26**
(2005) 3 SCC 212	**Relied on**	**Para 27**
(2006) 9 SCC 1	**Relied on**	**Para 28**

CIVIL APPELLATE JURISDICTION **:** Civil Appeal No. 1125-1128 of 2011.

From the Judgment and Order dated 13.05.2009 of the High Court of Judicature of Rajasthan at Jaipur in D.B. Civil Special Appeal (Writ) No. 182, 183, 184 and 186 of 2009.

Raju Ramachandran, Amitesh Kumar, Prgati Neekhra, Suryanaryana Singh and Karan Dewan for the appearing parties.

The Judgment of the Court was delviered by

G.S. SINGHVI, J. 1. Leave granted.

2. Whether the cut off dates specified in clauses (4) and (5) of Regulation 5 of the National Council for Teacher Education (Recognition, Norms and Procedure) Regulations, 2007 (for short, "the 2007 Regulations") as amended by Notification F. No.48-3/(1)/2008/NCTE/N&S. dated 1.7.2008 for submission of application for recognition and disposal thereof are mandatory and whether the learned Single Judge of the Rajasthan High Court, Jaipur Bench was justified in issuing directions, which have the effect of obliterating the cut off dates are the questions which arise for consideration in these appeals filed by the National Council for Teacher Education and its functionaries (hereinafter described as "the appellants") against judgment dated 13.5.2009 of the Division

Bench of the High Court affirming the order of the learned Single Judge.

Scheme of the Act and the Regulations:

3. With a view to achieve the object of planned and coordinated development for the teacher education system throughout the country and for regulation and proper maintenance of norms and standards in the teacher education system and for matters connected therewith, Parliament enacted the National Council for Teacher Education Act, 1993 (for short, "the Act"), which provides for the establishment of a Council to be called the National Council for Teacher Education (for short, "the NCTE") with multifarious functions, powers and duties. Section 2(c) of the Act defines the term "Council" to mean a Council established under sub-section (1) of Section 3. Section 2(i) defines the term "recognised institution" to mean an institution recognised under Section 14. Section 2(j) defines the term "Regional Committee" to mean a Committee established under Section 20. Section 3 provides for establishment of the Council which comprises of a Chairperson, a Vice-Chairperson, a Member-Secretary, various functionaries of the Government, thirteen persons possessing experience and knowledge in the field of education or teaching, nine members representing the States and Union Territories Administration, three members of Parliament, three members to be appointed from amongst teachers of primary and secondary education and teachers of recognised institutions. Section 12 of the Act enumerates functions of the Council. Section 14 provides for recognition of institutions offering course or training in teacher education. Section 15 lays down the procedure for obtaining permission by an existing institution for starting a new course or training. Section 16 contains a *non obstante* clause and lays down that an examining body shall not grant affiliation to any institution or hold examination for a course or training conducted by a recognised institution unless it has obtained recognition from the concerned Regional

Committee under Section 14 or permission for starting a new course or training under Section 15. The mechanism for dealing with the cases involving violation of the provisions of the Act or the rules, regulations orders made or issued thereunder or the conditions of recognition by a recognised institution finds place in Section 17. By an amendment made in July, 2006, Section 17-A was added to the Act. It lays down that no institution shall admit any student to a course or training in teacher education unless it has obtained recognition under Section 14 or permission under Section 15. Section 31(1) empowers the Central Government to make rules for carrying out the provisions of the Act. Section 31(2) specifies the matters in respect of which the Central Government can make rules. Under Section 32(1) the Council can make regulations for implementation of the provisions of the Act subject to the rider that the regulations shall not be inconsistent with the provisions of the Act and the rules made thereunder. Section 32(2) specifies the matters on which the Council can frame regulations. In terms of Section 33, the rules framed under Section 31 and the regulations framed under Section 32 are required to be laid before the Parliament. By virtue of Section 34(1), the Central Government has been clothed with the power to issue an order to remove any difficulty arising in the implementation of the provisions of the Act. Sections 12, 14 to 16 and 17-A of the Act, which have bearing on the decision of these appeals read as under:

> "**12. Functions of the Council.–** It shall be the duty of the Council to take all such steps as it may think fit for ensuring planned and coordinated development of teacher education and for the determination and maintenance of standards for teacher education and for the purposes of performing its functions under this Act, the Council may–
>
> (a) undertake surveys and studies relating to various aspects of teacher education and publish the result thereof;

(b) make recommendations to the Central and State Governments, Universities, University Grants Commission and recognised institutions in the matter of preparation of suitable plans and programmes in the field of teacher education;

(c) coordinate and monitor teacher education and its development in the country;

(d) lay down guidelines in respect of minimum qualifications for a person to be employed as a teacher in schools or in recognised institutions;

(e) lay down norms for any specified category of courses or training in teacher education, including the minimum eligibility criteria for admission thereof, and the method of selection of candidates, duration of the course, course contents and mode of curriculum;

(f) lay down guidelines for compliance by recognised institutions, for starting new courses or training and for providing physical and instructional facilities, staffing pattern and staff qualifications;

(g) xxx xxx xxx

(h) xxx xxx xxx

(i) xxx xxx xxx

(j) examine and review periodically the implementation of the norms, guidelines and standards laid down by the Council and to suitably advise the recognised institutions;

(k) xxx xxx xxx

(l) xxx xxx xxx

(m) xxx xxx xxx

(n) perform such other functions as may be entrusted to it by the Central Government.

14. Recognition of institutions offering course or training in teacher education.–(1) Every institution offering or intending to offer a course or training in teacher education on or after the appointed day, may, for grant of recognition under this Act, make an application to the Regional Committee concerned in such form and in such manner as may be determined by regulations:

Provided that an institution offering a course or training in teacher education immediately before the appointed day, shall be entitled to continue such course or training for a period of six months, if it has made an application for recognition within the said period and until the disposal of the application by the Regional Committee.

(2) The fee to be paid along with the application under sub-section (1) shall be such as may be prescribed.

(3) On receipt of an application by the Regional Committee from any institution under sub-section (1), and after obtaining from the institution concerned such other particulars as it may consider necessary, it shall,–

(a) if it is satisfied that such institution has adequate financial resources, accommodation, library, qualified staff, laboratory and that if fulfils such other conditions required for proper functioning of the institution for a course or training in teacher education, as may be determined by regulations, pass an order granting recognition to such institution, subject to such conditions as may be determined by regulations; or

(b) if it is of the opinion that such institution does not fulfil the requirements laid down in sub-clause

(a), pass an order refusing recognition to such institution for reasons to be recorded in writing:

Provided that before passing an order under sub-clause (b), the Regional Committee shall provide a reasonable opportunity to the concerned institution for making a written representation.

(4) xxx xxx xxx

(5) Every institution, in respect of which recognition has been refused shall discontinue the course or training in teacher education from the end of the academic session next following the date of receipt of the order refusing recognition passed under clause (b) of sub-section (3).

(6) Every examining body shall, on receipt of the order under sub-section (4),–

(a) grant affiliation to the institution, where recognition has been granted; or

(b) cancel the affiliation of the institution, where recognition has been refused.

15. Permission for a new course or training by recognised institution.– (1) Where any recognised institution intends to start any new course or training in teacher education, it may make an application to seek permission therefor to the Regional Committee concerned in such form and in such manner as may be determined by regulations.

(2) The fees to be paid along with the application under sub-section (1) shall be such as may be prescribed.

(3) On receipt of an application from an institution under sub-section (1), and after obtaining from the

recognised institution such other particulars as may be considered necessary, the Regional Committee shall,–

(a) if it is satisfied that such recognised institution has adequate financial resources, accommodation, library, qualified staff, laboratory, and that it fulfils such other conditions required for proper conduct of the new course or training in teacher education, as may be determined by regulations, pass an order granting permission, subject to such conditions as may be determined by regulation; or

(b) if it is of the opinion that such institution does not fulfil the requirements laid down in sub-clause (a), pass an order refusing permission to such institution, for reasons to be recorded in writing:

Provided that before passing an order refusing permission under sub-clause (b), the Regional Committee shall provide a reasonable opportunity to the institution concerned for making a written representation.

(4) xxx xxx xxx

16. Affiliating body to grant affiliation after recognition or permission by the Council.– Notwithstanding anything contained in any other law for the time being in force, no examining body shall, on or after the appointed day,–

(a) grant affiliation, whether provisional or otherwise, to any institution; or

(b) hold examination, whether provisional or otherwise, for a course or training conducted by a recognised institution,

unless the institution concerned has obtained recognition from the Regional Committee

concerned, under section 14 or permission for a course or training under section 15.

17-A. No admission without recognition.– No institution shall admit any student to a course or training in teacher education, unless the institution concerned has obtained recognition under section 14 or permission under section 15, as the case may be."

4. In exercise of the power vested in it under Section 32, the Council has, from time to time, framed Regulations. In the first place, such Regulations were framed in 1995 with the title "the National Council for Teacher Education (Application for recognition, the manner for submission, determination of conditions for recognition of institutions and permissions to start new course or training) Regulations, 1995". In 2002, the Council framed "the National Council for Teacher Education (Form of application for recognition, the time limit of submission of application, determination of norms and standards for recognition of teacher education programmes and permission to start new course or training) Regulations, 2002". These regulations were amended six times between 2003 and 2005 and were finally repealed by "the National Council for Teacher Education (Recognition, Norms and Procedure) Regulations, 2005". The 2005 Regulations were repealed by the 2007 Regulations. The relevant provisions of the 2007 Regulations are reproduced below:

"**4. Eligibility**

The following categories of institutions are eligible for consideration of their applications under these regulations:

(1) Institutions established by or under the authority of Central/State Government/UT Administration;

(2) Institutions financed by Central/State Government/ UT Administration;

(3) All universities, including institutions deemed to be universities, so recognized under UGC Act, 1956.

(4) Self financed educational institutions established and operated by 'not for profit', Societies and Trusts registered under the appropriate law.

5. Manner of making application and Time Limit

(1) An institution eligible under Regulation 4, desirous of running a teacher education programme may apply to the concerned Regional Committee of NCTE for recognition in the prescribed form in triplicate along with processing fee and requisite documents.

(2) The form can be downloaded from the Council's website www.ncte-in.org, free of cost. The said form can also be obtained from the office of the Regional Committee concerned by payment of Rs.1000 (Rs. One thousand only) by way of a demand draft of a Nationalized Bank drawn in favour of the Member Secretary, NCTE payable at the city where the office of the Regional Committee is located.

(3) An application can be submitted conventionally or electronically on-line. In the latter case, the requisite documents in triplicate along with the processing fee shall be submitted separately to the office of the Regional Committee concerned. Those who apply on-line shall have the benefit of not to pay for the form.

(4) The cut-off date for submission of application to the Regional Committee concerned shall be *31st October* of the preceding year to the academic session for which recognition has been sought.

(5) All complete applications received on or before 31st October of the year shall be processed for the next academic session and final decision, either recognition granted or refused, shall be communicated by *15th May* of the succeeding year.

7. Processing of Applications

(1) The applicant institutions shall ensure submission of applications complete in all respects. However, in order to cover the inadvertent omissions or deficiencies in documents, the office of the Regional Committee shall point out the deficiencies within 30 days of receipt of the applications, which the applicants shall remove within 90 days. No application shall be processed if the processing fees of Rs.40,000/- is not submitted and such applications would be returned to the applicant institutions.

(2) Simultaneously, on receipt of application, a written communication alongwith a copy of the application form submitted by the institution(s) shall be sent by the office of Regional Committees to the State Government/U.T. Administration concerned.

(3) On receipt of the communication, the State Government/UT Administration concerned shall furnish its recommendations on the applications to the office of the Regional Committee concerned of the National Council for Teacher Education within 60 days from receipt. If the recommendation is negative, the State Government/UT Administration shall provide detailed reasons/grounds thereof with necessary statistics, which shall be taken into consideration by the Regional Committee concerned while deciding the application. If no communication is received from the State

Government/UT Administration within the stipulated 60 days, it shall be presumed that the State Government/UT Administration concerned has no recommendation to make.

(4) After removal of all the deficiencies and to the satisfaction of the Regional Committee concerned, the inspection of infrastructure, equipments, instructional facilities etc, of an institution shall be conducted by a team of experts called Visiting Team (VT) with a view to assessing the level of preparedness of the institution to commence the course. Inspection would be subject to the consent of the institution and submission of the self-attested copy of the completion certificate of the building. Such inspection, as far as administratively and logistically possible, shall be in the chronological order of the date of receipt of the consent of the institution. In case the consent from more than one institution is received on the same day, alphabetical order may be followed. The inspection shall be conducted within 30 days of receipt of the consent of the institution.

(5) xxx xxx xxx

(6) xxx xxx xxx

(7) xxx xxx xxx

(8) xxx xxx xxx

(9) The institution concerned shall be informed, through a letter, of the decision for grant of recognition or permission subject to appointment of qualified faculty members before the commencement of the academic session. The letter issued under this clause shall not be notified in the Gazette. The

faculty shall be appointed on the recommendations of the Selection Committee duly constituted as per the policy of the State Govt/Central Govt/University/ UGC or the concerned affiliating body, as the case may be. The applicant institution shall submit an affidavit in the prescribed form that the Selection Committee has been constituted as stated above. A separate staff list with the details would be submitted in the prescribed form. The Regional Committee would rely on the above affidavit and the staff list before processing the case for grant of formal recognition.

(10) All the applicant institutions shall launch their own website soon after the receipt of the letter from the Regional Committee under Regulation 7(9) covering, *inter alia*, the details of the institution, its location, name of the course applied for with intake, availability of physical infrastructure (land, building, office, classrooms, and other facilities/amenities), instructional facilities (laboratory, library etc.) and the particulars of their proposed teaching and non-teaching staff etc. with photographs, for information of all concerned.

(11) The institution concerned, after appointing the requisite faculty/staff as per Regulation 7(9) above and fulfilling the conditions under Regulation 7(10) above shall formally inform the Regional Committee concerned alongwith the requisite affidavit and staff list. The Regional Committee concerned shall then issue a formal recognition order that shall be notified as per provision of the NCTE Act.

(12) xxx xxx xxx

(13) xxx xxx xxx

8. Conditions for grant of recognition

(1) An institution must fulfill all the prescribed conditions related to norms and standards as prescribed by the NCTE for conducting the course or training in teacher education. These norms, inter alia, cover conditions relating to financial resources, accommodation, library, laboratory, other physical infrastructure, qualified staff including teaching and non-teaching personnel, etc.

(2) In the first instance, an institution shall be considered for grant of recognition for only one course for the basic unit as prescribed in the norms & standards for the particular teacher education programme. An institution can apply for one basic unit of an additional course from the subsequent academic session. However, application for not more than one additional course can be made in a year.

(3) An institution shall be permitted to apply for enhancement of course wise intake in teacher education courses already approved, after completion of three academic sessions of running the respective courses.

(4) An institution shall be permitted to apply for enhancement of intake in Secondary Teacher Education Programme – B.Ed. & B.P. Ed. Programme, if it has accredited itself with the National Assessment and Accreditation Council (NAAC) with a *Letter Grade* B developed by NAAC.

(5) An institution that has been granted additional intake in B.Ed. and B.P. Ed. teacher training courses after promulgation of the Regulations, 2005

i.e. 13.1.2006 shall have to be accredited itself with the National Assessment and Accreditation Council (NAAC) with a *Letter Grade* B under the new grading system developed by NAAC before 1st April, 2010 failing which the additional intake granted shall stand withdrawn w.e.f. the academic session 2010-2011.

(6) xxx xxx xxx

(7) No institution shall be granted recognition under these regulations unless it is in possession of required land on the date of application. The land free from all encumbrances could be either on ownership basis or on lease from Government/Govt institutions for a period of not less than 30 years. In cases where under relevant State/UT laws the maximum permissible lease period is less than 30 years, the State Government/UT Administration law shall prevail. However, no building could be taken on lease for running any teacher training course.

(8) xxx xxx xxx

(9) xxx xxx xxx

(10) At the time of inspection, the building of the institution shall be complete in the form of a permanent structure on the land possessed by the institution in terms of Regulation 8(7), equipped with all necessary amenities and fulfilling all such requirements as prescribed in the norms and standards. The applicant institution shall produce the original completion certificate, approved building plan in proof of the completion of building and built up area and other documents to the Visiting Team for verification. No temporary structure/asbestos roofing shall be allowed.

(11) xxx xxx xxx

(12) An institution shall make admission only after it obtains order of recognition from the Regional Committee concerned under Regulation 7(11), and affiliation from the examining body.

(13) to (16) xxx xxx xxx"

5. Since the 2007 Regulations were notified on 10.12.2007 i.e. after the cut off date specified in Regulation 5(4) for submission of application for academic session 2008-2009 was over, the Council issued Notification F. No.48-3/(1)/2008/NCTE/N&S dated 1.7.2008 and fixed 31.8.2008 as the cut off date for processing and disposal of all the pending applications. Paragraph 4 of that notification reads as under:

"**4. Extent of Amendment.–** Clause 5(5) of the NCTE (Recognition Norms and Procedure) Regulations, 2007, is modified as under only for grant of recognition/permission for starting various teacher training courses for current academic session i.e. 2008-2009.

All complete applications pending with the Regional Committees shall be processed for the current academic session i.e. 2008-2009 in accordance with the provisions of relevant Regulations and maintaining the chronological sequence and final decision, either recognition granted or refused, shall be communicated by 31st August, 2008."

6. By Notification No.F.51-1/2009-NCTE (N&S) dated 31.8.2009, the 2007 Regulations were also repealed by the National Council for Teacher Education (Recognition, Norms and Procedure) Regulations, 2009 (for short, "the 2009 Regulations"). The provisions contained in these Regulations including the cut off dates specified in clauses (4) and (5) of Regulation 5 are similar to the corresponding provisions of the 2007 Regulations.

7. At this stage it will be apposite to notice the guidelines issued by NCTE vide letter dated 2.2.1996 for ensuring that the teacher training institutions are established keeping in view the requirement of trained teachers in the particular State or the Union Territory. The same read as under:

"1. The establishment of teacher training institutions by the Government, private managements or any other agencies should largely be determined by assessed need for trained teachers. This need should take into consideration the supply of trained teachers from existing institutions, the requirement of such teachers in relation to enrolment projections at various stages, the attrition rates among trained teachers due to superannuation, change of occupation, death, etc. and the number of trained teachers on the live register of the employment exchanges seeking employment and the possibility of their deployment. The States having more than the required number of trained teachers may not encourage opening of new institutions for teacher education or to increase the intake.

2. The States having shortage of trained teachers may encourage establishment of new institutions for teacher education and to increase intake capacity for various levels of teacher education institutions keeping in view the requirements of teachers estimated for the next 10-15 years.

3. Preference might be given to institutions which tend to emphasise the preparation of teachers for subjects (such as Science, Mathematics, English, etc.) for which trained teachers have been in short supply in relation to requirement of schools.

4. Apart from the usual courses for teacher preparation, institutions which propose to concern themselves with new emerging specialities (e.g. computer education, use of electronic media, guidance and counselling, etc.) should

receive priority. Provisions for these should, however, be made only after ensuring that requisite manpower, equipment and infrastructure are available. These considerations will also be kept in view by the institution intending to provide for optional subjects to be chosen by students such as guidance and counselling, special education, etc.

5. With a view to ensuring supply of qualified and trained teachers for such specialities such as education of the disabled, non-formal education, education of adults, pre-school education, vocational education, etc. special efforts and incentives may be provided to motivate private managements/voluntary organisations for establishment of institutions, which lay emphasis on these areas.

6. With a view to promoting professional commitment among prospective teachers, institutions which can ensure adequate residential facilities for the Principal and staff of the institutions as well as hostel facilities for substantial proportion of its enrolment should be encouraged.

7. Considering that certain areas (tribal, hilly regions, etc.) have found it difficult to attain qualified and trained teachers, it would be desirable to encourage establishment of training institutions in those areas.

8. Institutions should be allowed to come into existence only if the sponsors are able to ensure that they have adequate material and manpower resources in terms, for instance, of qualified teachers and other staff, adequate buildings and other infrastructure (laboratory, library, etc.), a reserve fund and operating funds to meet the day-to-day requirements of the institutions, including payment of salaries, provision of equipment, etc. Laboratories, teaching science methodologies and practicals should have adequate gas plants, proper fittings and regular supply of water, electricity, etc. They should also have

adequate arrangements. Capabilities of the institution for fulfilling norms prepared by NCTE may be kept in view.

9. In the establishment of an institution preference needs to be given to locations which have a large catchment area in terms of schools of different levels where student teachers can be exposed to demonstration lessons and undertake practice teaching. A training institution which has a demonstration school where innovative and experimental approaches can be demonstrated could be given preference."

8. The private respondents, namely, Shri Shyam Shiksha Prashikshan Sansthan, Bhadra and Shri Shyam Sewa Samiti (respondent Nos.1 and 2 in the appeal arising out of SLP(C) No.17165 of 2009), Neelkanth Education Society (respondent No.1 in the appeal arising out of SLP(C) No.17166 of 2009), Bhanwar Kanwar Sujan Shiksha Mahavidyalaya, Inderpura, Udaipurwati and Dhamana Shekha Sewa Trust (respondent Nos.1 and 2 in the appeal arising out of SLP(C) No.17167 of 2009) and Varsha Education Society (respondent No.1 in the appeal arising out of SLP(C) No.17168 of 2009) submitted their applications on 28.12.2007, 31.3.2008, 10.4.2008 and 17.4.2008 respectively for grant of recognition for starting B.Ed. course for the academic year 2008-2009. They also applied to the State Government for grant of 'no objection certificates'. After considering their applications, the Northern Regional Committee of the Council informed the private respondents about the deficiencies in their applications. After the deficiencies were removed, the premises of the private respondents were inspected by the teams constituted by the Northern Regional Committee. The inspection reports were considered in the meeting of the Northern Regional Committee held on 21.9.2008 but recognition was not granted to them apparently on the ground that the cut off date specified in the regulations was already over.

9. Feeling aggrieved by the alleged failure of the Northern

Regional Committee to grant recognition, the private respondents filed writ petitions in the Rajasthan High Court, Jaipur Bench, with the allegation that they have been discriminated vis-a-vis other applicants and, in this manner, their right to equality guaranteed under Article 14 of the Constitution has been violated. By an interim order dated 24.10.2008, the learned Single Judge of the High Court directed that the applications made by the private respondents for grant of recognition be considered by the Northern Regional Committee. By another interim order dated 27.11.2008, the learned Single Judge directed the Council to issue approval letters and allot students to the private respondents.

10. The appellants contested the writ petitions by relying upon clauses (4) and (5) of Regulation 5 and notification dated 1.7.2008 and pleaded that recognition could not be given to the writ petitioners because their establishments were inspected after 31.8.2008. The learned Single Judge then directed the Council to file affidavit to show whether 80 similarly situated institutions were granted recognition on the basis of decision taken in the meeting of the Northern Regional Committee held on 20-21.9.2008. In compliance of that order, affidavit dated 25.2.2009 was filed on behalf of the Council, wherein it was claimed that recognition was granted to some institutions after 31.8.2008 in compliance of the orders passed by the Delhi High Court.

11. After considering the pleadings of the parties and taking cognizance of order dated 12.12.2008 passed in S.B. Civil Writ Petition No.13038 of 2008 – Bright Future Teacher Training Institute v. State of Rajasthan, the learned Single Judge framed the following questions:

"(i) Whether once the respondents have granted recognition to the thirteen Institutions whose inspection has been carried out after 31.8.2008 then, it is permissible for the respondents to justify denial of the recognition to other Institutions on the

ground that their inspections were carried out after 31.8.2008 i.e. the cut off date?

(ii) Whether the respondents are justified in making lame submission in the last additional affidavit dated 25.2.2009 that the NRC Jaipur has committed serious irregularities and therefore, the NRC has been terminated vide notification dated 13.2.2009 and new Committee has been constituted vide notification dated 17.2.2009 but no action has been taken/proposed in the affidavit against the 13 institutions in whose cases inspection was carried out after 31.8.2008 and recognition was granted in the 132nd meeting dated 20-21/9/2008?

(iii) Whether the respondents who have not withdrawn recognition order in respect of the thirteen institutions and allowed them to continue with the result that the students have been admitted and the studies are going on and discrimination is continuing against the petitioners and for removal of discrimination, they are entitled for extension of the date i.e. 31.8.2008 till the meeting dated 20-21/9/2008?

(iv) Whether fixing of the cut off date of inspection i.e. 31.8.2008 by the N.C.T.E. by Annexure R-7 dated 1.7.2008 has no reasonable nexus with the aims and object of granting recognition in the meeting dated 20-21.9.2008 or the same is a fortuitous circumstance?

(v) When the concerned University has admitted students up to 15.1.09 and submitted that 180 teaching days can be completed before the start of next academic session, then the petitioners who are not at fault, be allowed to suffer?"

12. While dealing with the question of discrimination, the learned Single Judge noted that large number of similarly situated institutions were granted recognition despite the fact that their cases were considered in the meeting of the Northern Regional Committee held on 20-21.9.2008 and observed:

> "It is true that two wrong cannot make one right. Here, in the instant case, the present writ petitions have been defended on the ground that since the inspection has been carried out after 31.8.2008 i.e. the cut off date fixed by Annexure R-7 dated 1.7.2008 the petitioners are not entitled for recognition. The respondents have granted recognition to 13 Institutions in whose cases inspection was carried out after 31.8.2008, therefore, they cannot be permitted to say that although they have committed illegality but the same cannot be allowed to be perpetuated by granting recognition to the petitioner Institutions. In my view, the entire issue is to be examined with reference to the decision dated 31.10.2008 when the recognition order was issued in favour of petitioner Institutions in compliance to the interim direction of this Court dated 24.10.2008 as in the meeting dated 20-21.9.2008 minor defects were pointed out in case of recognition order passed in favour of 80 colleges. The fixation of date – 31.8.2008 without considering the applications and completion of formalities is fortuitous and arbitrary. In view of the above, withholding recognition in the meeting dated 20-21/9/2008 and 31.10.2008 is not only discriminatory but arbitrary also and the said action is violative of Article 14 of the Constitution of India. I am of the further view that the respondents who have not acted fairly cannot be allowed to contend that the petitioners are not entitled to recognition on account of inspection being carried out after 31.8.2008 in the aforesaid facts and circumstances."

13. On the issue of completion of minimum 180 teaching days, the learned Single Judge adverted to the order passed

in the case of *Bright Future Teacher Training Institute* (supra) wherein it was held that the deficiency of teaching days could be completed by holding extra classes on holidays and overtime classes and held that similar mechanism could be adopted in the case of the private respondents. The learned Single Judge further held that the cut off date i.e. 31.8.2008 fixed vide notification dated 1.7.2008 is discriminatory, arbitrary and violative of Article 14 of the Constitution. The appeals filed against the order of the learned Single Judge were dismissed by the Division Bench of the High Court.

14. Shri Raju Ramachandran, learned senior counsel appearing for the appellants fairly stated that this Court may not interfere with the direction given by the learned Single Judge of the High Court, which has been confirmed by the Division Bench, because in compliance thereof the Northern Regional Committee has already granted recognition to the private respondents and by now they must have admitted students against the sanctioned intake. He, however, argued that the reasons assigned by the learned Single Judge for striking down the cut off date specified in clause (5) of Regulation 5 are legally untenable and to that extent the order of the learned Single Judge and the judgment of the Division Bench are liable to be set aside. Learned senior counsel emphasized that the cut off dates have been prescribed for submission of application to the Regional Committee and communication of the decision regarding grant or refusal of recognition with a view to ensure that decision on the issue of recognition of the colleges is not unduly delayed and the students admitted in the recognized institutions are able to fulfil the requirement of attending at least 180 teaching days during the academic session. Learned senior counsel further submitted that the cut off dates specified in clauses (4) and (5) of Regulation 5 have direct nexus with the object of ensuring time bound decision of the applications submitted for grant of recognition so that the teaching and training courses are completed by every institution well before commencement of the examination and the candidates who

fulfill the requirement of attending minimum classes and training courses are able to take examinations. Shri Ramachandran then submitted that the 2007 Regulations contain a comprehensive mechanism for grant of recognition to eligible applicants for starting courses and for increasing the intake and provision for consultation with the concerned State Government/ Union Territory Administration has been made with a view to ensure that unduly large number of institutions are not granted permission to start the courses and the State may find it impossible to provide employment to the students successfully completing the courses every year. Learned senior counsel made a pointed reference to letter dated 27.1.2009 sent by Principal Secretary of the Council to the Regional Director, Northern Regional Committee on the question of grant of recognition for B.Ed., STC, Shiksha Shastri Courses in the State of Rajasthan for academic session 2009-2010 to show that decision was taken by the Council not to grant recognition keeping in view the fact that there was virtually no requirement of trained teachers in the State.

15. We have given serious thought to the arguments of the learned counsel. We shall first deal with the question whether the cut off dates specified in clauses (4) and (5) of Regulation 5 for submission of application to the Regional Committee, processing thereof and communication of the final decision on the issue of recognition are arbitrary, discriminatory, irrational and violative of Article 14 of the Constitution.

16. Article 14 forbids class legislation but permits reasonable classification provided that it is founded on an intelligible differentia which distinguishes persons or things that are grouped together from those that are left out of the group and the differentia has a rational nexus to the object sought to be achieved by the legislation in question. In *re the Special Courts Bill,* 1978 (1979) 1 SCC 380, Chandrachud, C.J., speaking for majority of the Court adverted to large number of

judicial precedents involving interpretation of Article 14 and culled out several propositions including the following:

> "(2) The State, in the exercise of its governmental power, has of necessity to make laws operating differently on different groups or classes of persons within its territory to attain particular ends in giving effect to its policies, and it must possess for that purpose large powers of distinguishing and classifying persons or things to be subjected to such laws.
>
> (3) The constitutional command to the State to afford equal protection of its laws sets a goal not attainable by the invention and application of a precise formula. Therefore, classification need not be constituted by an exact or scientific exclusion or inclusion of persons or things. The courts should not insist on delusive exactness or apply doctrinaire tests for determining the validity of classification in any given case. Classification is justified if it is not palpably arbitrary.
>
> (4) The principle underlying the guarantee of Article 14 is not that the same rules of law should be applicable to all persons within the Indian territory or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is substantially the same.
>
> (5) By the process of classification, the State has the power of determining who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject. This power, no doubt, in some degree is likely to produce some inequality; but if a law

> deals with the liberties of a number of well defined classes, it is not open to the charge of denial of equal protection on the ground that it has no application to other persons. Classification thus means segregation in classes which have a systematic relation, usually found in common properties and characteristics. It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily.
>
> (6) The law can make and set apart the classes according to the needs and exigencies of the society and as suggested by experience. It can recognise even degree of evil, but the classification should never be arbitrary, artificial or evasive.
>
> (7) The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that that differentia must have a rational relation to the object sought to be achieved by the Act."

17. In *Union of India v. Parameswaran Match Works* (1975) 1 SCC 305, this Court was called upon to examine whether clause (b) of notification No.205/67-CE dated 4.9.1967 issued by the Government of India, Ministry of Finance prescribing concessional rate of duty in respect of units engaged in manufacture of match boxes, which were certified as such by the Khadi and Village Industries Commission or units set up in the cooperative sector was discriminatory and violative of Article 14 on the ground that the cut off date i.e.

21.7.1967 specified in the notification was arbitrary. The High Court of Madras allowed the writ petition filed by the respondents and struck down the cut off date by observing that the classification of the units engaged in the manufacturing of match boxes was irrational and arbitrary. While reversing the order of the High Court, this Court referred to the judgment in *Louisville Gas Co. v. Alabama Power Co.* (1927) 240 US 30 and held:

> "We do not think that the reasoning of the High Court is correct. It may be noted that it was by the proviso in the notification dated July 21, 1967 that it was made necessary that a declaration should be filed by a manufacturer that the total clearance from the factory during a financial year is not estimated to exceed 75 million matches in order to earn the concessional rate of Rs 3.75 per gross boxes of 50 matches each. The proviso, however, did not say, when the declaration should be filed. The purpose behind that proviso was to enable only bona fide small manufacturers of matches to earn the concessional rate of duty by filing the declaration. All small manufacturers whose estimated clearance was less than 75 million matches would have availed themselves of the opportunity by making the declaration as early as possible as they would become entitled to the concessional rate of duty on their clearance from time to time. It is difficult to imagine that any manufacturer whose estimated total clearance during the financial year did not exceed 75 million matches would have failed to avail of the concessional rate on their clearances by filing the declaration at the earliest possible date. As already stated, the respondent filed its application for licence on September 5, 1967 and made the declaration on that date. The concessional rate of duty was intended for small bona fide units who were in the field when the notification dated September 4, 1967 was issued; the concessional rate was not intended to benefit the large units which had

split up into smaller units to earn the concession. The tendency towards fragmentation of the bigger units into smaller ones in order to earn the concessional rate of duty has been noted by the Tariff Commission in its report [see the extract from the report given at p. 500 (SCC, p. 431) in M. Match Works v. Assistant Collector, Central Excise]. *The whole object of the notification dated September 4, 1967 was to prevent further fragmentation of the bigger units into smaller ones in order to get the concessional rate of duty intended for the smaller units and thus defeat the purpose which the Government had in view. In other words, the purpose of the notification was to prevent the larger units who were producing and clearing more than 100 million matches in the financial year 1967-68 and who could not have made the declaration, from splitting up into smaller units in order to avail of the concessional rate of duty by making the declaration subsequently. To achieve that purpose, the Government chose September 4, 1967, as the date before which the declaration should be filed. There can be no doubt that any date chosen for the purpose would, to a certain extent, be arbitrary. That is inevitable*.

The concessional rate of duty can be availed of only by those who satisfy the conditions which have been laid down under the notification. The respondent was not a manufacturer before September 4, 1967 as it had applied for licence only on September 5, 1967 and it could not have made a declaration before September 4, 1967 that its total clearance for the financial year 1967-68 is not estimated to exceed 75 million matches. In the matter of granting concession or exemption from tax, the Government has a wide latitude of discretion. It need not give exemption or concession to everyone in order that it may grant the same to some. *As we said, the object of granting the concessional rate of duty was to protect the smaller units in the industry from the competition by the*

larger ones and that object would have been frustrated, if, by adopting the device of fragmentation, the larger units could become the ultimate beneficiaries of the bounty. That a classification can be founded on a particular date and yet be reasonable, has been held by this Court in several decisions. The choice of a date as a basis for classification cannot always be dubbed as arbitrary even if no particular reason is forthcoming for the choice unless it is shown to be capricious or whimsical in the circumstances. When it is seen that a line or a point there must be and there is no mathematical or logical way of fixing it precisely, the decision of the legislature or its delegate must be accepted unless we can say that it is very wide off the reasonable mark."

(emphasis supplied)

18. The ratio of the aforementioned judgment was reiterated by the Constitution Bench in *D.G. Gose and Co. (Agents) (P) Ltd. v. State of Kerala* (1980) 2 SCC 410. One of the several issues considered in that case was whether the tax imposed under Kerala Building Tax Act, 1975 with retrospective effect from 1.4.1973 was discriminatory and violative of Article 14. The Constitution Bench referred to the judgment in *Union of India v. Parameswaran Match Works* (supra) and observed:

"It has not been shown in this case how it could be said that the date (April 1, 1973) for the levy of the tax was wide of the reasonable mark. On the other hand it would appear from the brief narration of the historical background of the Act that the State legislature had imposed the building tax under the Kerala Building Tax Act, 1961, which came into force on March 2, 1961, and when that Act was finally struck down as unconstitutional by this Court's decision dated August 13, 1968, the intention to introduce a fresh Bill for the levy was made clear in the budget speech of 1970-71. It will be recalled that the Bill was published in June 1973 and it was stated there that the Act would be

brought into force from April 1, 1970. The Bill was introduced in the Assembly on July 5, 1973. The Select Committee however recommended that it may be brought into force from April 1, 1973. Two Ordinances were promulgated to give effect to the provisions of the Bill. The Bill was passed soon after and received the Governor's assent on April 2, 1975. It cannot therefore be said with any justification that in choosing April 1, 1973 as the date for the levy of the tax, the legislature acted unreasonably, or that it was "wide of the reasonable mark."

19. In *State of Bihar v. Ramjee Prasad* (1990) 3 SCC 368, this Court reversed the judgment of the Patna High Court which had struck down the cut off date fixed for receipt of the application. After adverting to the judgments in *Union of India v. Parameswaran Match Works* (supra) and *Uttar Pradesh Mahavidyalaya Tadarth Shikshak Niyamitikaran Abhiyan Samiti, Varanasi v. State of U.P.* (1987) 2 SCC 453, the Court observed:

"In the present case as pointed out earlier the past practice was to fix the last date for receipt of applications a month or one and a half months after the date of actual publication of the advertisement. Following the past practice the State Government fixed the last date for receipt of applications as January 31, 1988. Those who had completed the required experience of three years by that date were, therefore, eligible to apply for the posts in question. The respondents and some of the intervenors who were not completing the required experience by that date, therefore, challenged the fixation of the last date as arbitrary and violative of Article 14 of the Constitution. It is obvious that in fixing the last date as January 31, 1988 the State Government had only followed the past practice and if the High Court's attention had been invited to this fact it would perhaps have refused to interfere since its interference is based on the erroneous belief that the past

practice was to fix June 30 of the relevant year as the last date for receipt of applications. Except for leaning on a past practice the High Court has not assigned any reasons for its choice of the date. *As pointed out by this Court the choice of date cannot be dubbed as arbitrary even if no particular reason is forthcoming for the same unless it is shown to be capricious or whimsical or wide off the reasonable mark. The choice of the date for advertising the posts had to depend on several factors, e.g. the number of vacancies in different disciplines, the need to fill up the posts, the availability of candidates, etc. It is not the case of anyone that experienced candidates were not available in sufficient numbers on the cut-off date. Merely because the respondents and some others would qualify for appointment if the last date for receipt of applications is shifted from January 31, 1988 to June 30, 1988 is no reason for dubbing the earlier date as arbitrary or irrational.*"

(emphasis supplied)

20. The same view was reiterated in *Dr. Sushma Sharma v. State of Rajasthan* (1985) Supp. SCC 45, *University Grants Commission v. Sadhana Chaudhary* (1996) 10 SCC 536, *Ramrao v. All India Backward Class Bank Employees Welfare Association* (2004) 2 SCC 76 and *State of Punjab v. Amar Nath Goyal* (2005) 6 SCC 754.

21. If challenge to the cut off dates specified in clauses (4) and (5) of Regulation 5 is examined in the light of the propositions laid down in the above noted judgments, it is not possible to find any fault with the decision of the Council to prescribe 31st October of the year preceding the academic session for which recognition is sought as the last date for submission of application to the Regional Committee and 15th May of the succeeding year as the date for communication of the decision about grant of recognition or refusal thereof. The

scheme of the 2007 Regulations envisages the following steps:

(1) The applications received for recognition are scrutinized by the office of the Regional Committee to find out the deficiency, if any.

(2) In case any deficiency is found, the same is required to be brought to the notice of the concerned applicant within 30 days of the receipt of application and the latter is under an obligation to remove the deficiency within next 90 days.

(3) Simultaneously, a written communication is required to be sent to the State Government/Union Territory Administration. Within 60 days of the receipt of communication from the Regional Committee, the concerned State Government/Union Territory Administration has to send its recommendations/ suggestions.

(4) After removal of the deficiency, if any, and receipt of the recommendations/suggestions of the State Government/Union Territory Administration, the Regional Committee is required to constitute a team to inspect infrastructure, equipments and instructional facilities made available by the applicant with a view to assess the level of preparedness for commencement of the course.

(5) The inspection is to be carried out by associating the representative(s) of the concerned institution.

(6) Upon receipt of the inspection report and after satisfying itself that the requirements enumerated in clauses (10) and (11) of Regulation 7 have been fulfilled, the Regional Committee has to take final decision on the issue of grant of recognition to the applicant.

22. This entire exercise is time consuming. Therefore, some date had to be fixed for submission of application and

some time schedule had to be prescribed for taking final decision on the issue of recognition, which necessarily involves scrutiny of the application, removal of deficiency, if any, receipt of recommendations/suggestions of the State Government/ Union Territory Administration, inspection of infrastructure, equipments and other facilities in the institution and consideration of the entire material including report of the inspection committee. By fixing 31st October of the preceding year, the Council has ensured that the Regional Committee gets at least 7 months for scrutiny of the application, processing thereof, receipt of recommendation/suggestion from the State Government/Union Territory Administration, inspection of the infrastructure, etc. made available by the applicant before an objective decision is taken to grant or not to grant recognition. Likewise, by fixing 15th May of the year succeeding the cut off date fixed for submission of application, the Council has ensured that adequate time is available to the institution to complete the course, teaching as well as training and the students get an opportunity to comply with the requirement of minimum attendance. For academic session 2008-2009, the cut off date was amended because the 2007 Regulations were notified on 27.12.2007 and going by the cut off dates specified in clauses (4) and (5) of Regulation 5, no application could have been entertained and no institution could have been recognized for B.Ed. course.

23. In our view, the cut off dates specified in the two clauses of Regulation 5 of the 2007 Regulations and notification dated 1.7.2008 are neither arbitrary nor irrational so as to warrant a conclusion that the same are violative of Article 14 of the Constitution. The conclusion of the learned Single Judge that 31.8.2008 fixed vide notification dated 1.7.2008 is discriminatory and violative of Article 14 appears to have been influenced by the fact that some of the applicants, whose applications were considered in the meeting of the Regional Committee held after the cut off date were granted recognition while others like the writ petitioners were denied similar

treatment on the pretext that decision in their case could not be taken before the cut off date. Unfortunately, the Division Bench of the High Court mechanically adopted the reasoning of the learned Single Judge for holding that the said date was unconstitutional.

24. The consultation with the State Government/Union Territory Administration and consideration of the recommendations/suggestions made by them are of considerable importance. The Court can take judicial notice of the fact that majority of the candidates who complete B.Ed. and similar courses aspire for appointment as teachers in the government and government aided educational institutions. Some of them do get appointment against the available vacant posts, but large number of them do not succeed in this venture because of non-availability of posts. The State Government/ Union Territory Administration sanctions the posts keeping in view the requirement of trained teachers and budgetary provisions made for that purpose. They cannot appoint all those who successfully pass B.Ed. and like courses every year. Therefore, by incorporating the provision for sending the applications to the State Government/Union Territory Administration and consideration of the recommendations/ suggestions, if any made by them, the Council has made an attempt to ensure that as a result of grant of recognition to unlimited number of institutions to start B.Ed. and like courses, candidates far in excess of the requirement of trained teachers do not become available and they cannot be appointed as teachers. If, in a given year, it is found that adequate numbers of suitable candidates possessing the requisite qualifications are already available to meet the requirement of trained teachers, the State Government/Union Territory Administration can suggest to the concerned Regional Committee not to grant recognition to new institutions or increase intake in the existing institutions. If the Regional Committee finds that the recommendation made by the State Government/Union Territory Administration is based on valid grounds, it can refuse

to grant recognition to any new institution or entertain an application made by an existing institution for increase of intake and it cannot be said that such decision is *ultra vires* the provisions of the Act or the Rules.

25. The importance of the role of the State Government in such matters was recognized in *St. Johns Teachers Training Institute v. Regional Director, National Council For Teacher Education and another* (2003) 3 SCC 321. In that case, *vires* of Regulation 5(e) and (f) of the 1995 Regulations was challenged insofar as they incorporated the requirement of obtaining NOC from the State Government. A learned Single Judge of the Karnataka High Court held that Regulation 5(e) and (f) were *ultra vires* the provisions of the Act. The order of the learned Single Judge was reversed by the Division Bench of the High Court. This Court referred to Section 14 of the Act and two clauses of Regulation 5, which were impugned in the writ petition filed by the appellant and observed:

> "Sub-section (3) of Section 14 casts a duty upon the Regional Committee to be satisfied with regard to a large number of matters before passing an order granting recognition to an institution which has moved an application for the said purpose. The factors mentioned in sub-section (3) are that the institution has adequate financial resources, accommodation, library, qualified staff, laboratory and that it fulfils such other conditions required for proper functioning of the institution for a course or training in teacher education as may be laid down in the Regulations. As mentioned earlier, there are only four Regional Committees in the whole country and, therefore, each Regional Committee has to deal with applications for grant of recognition from several States. It is therefore obvious that it will not only be difficult but almost impossible for the Regional Committee to itself obtain complete particulars and details of financial resources, accommodation, library, qualified staff, laboratory and other

> conditions of the institution which has moved an application for grant of recognition. The institution may be located in the interior of the district in a faraway State. The Regional Committee cannot perform such Herculean task and it has to necessarily depend upon some other agency or body for obtaining necessary information. It is for this reason that the assistance of the State Government or Union Territory in which that institution is located is taken by the Regional Committee and this is achieved by making a provision in Regulations 5(e) and (f) that the application made by the institution for grant of recognition has to be accompanied with an NOC from the State or Union Territory concerned. The impugned Regulations in fact facilitate the job of the Regional Committees in discharging their responsibilities.

After adverting to the guidelines issued by the Council on 2.2.1996, the Court observed:

> "A perusal of the guidelines would show that while considering an application for grant of an NOC the State Government or the Union Territory has to confine itself to the matters enumerated therein like assessed need for trained teachers, preference to such institutions which lay emphasis on preparation of teachers for subjects like Science, Mathematics, English etc. for which trained teachers are in short supply and institutions which propose to concern themselves with new and emerging specialities like computer education, use of electronic media etc. and also for speciality education for the disabled and vocational education etc. It also lays emphasis on establishment of institutions in tribal and hilly regions which find it difficult to get qualified and trained teachers and locations which have catchment area in terms of schools of different levels where student teachers can be exposed to demonstration lessons and can undertake practice teaching. Para 8 of the guidelines deals with financial resources, accommodation, library and other infrastructure of the

institution which is desirous of starting a course of training and teacher education. The guidelines clearly pertain to the matters enumerated in sub-section (3) of Section 14 of the Act which have to be taken into consideration by the Regional Committee while considering the application for granting recognition to an institution which wants to start a course for training in teacher education. The guidelines have also direct nexus to the object of the Act, namely, planned and coordinated development of teacher education system and proper maintenance of norms and standards. It cannot, therefore, be urged that the power conferred on the State Government or Union Territory, while considering an application for grant of an NOC, is an arbitrary or unchannelled power. The State Government or the Union Territory has to necessarily confine itself to the guidelines issued by the Council while considering the application for grant of an NOC. In case the State Government does not take into consideration the relevant factors enumerated in sub-section (3) of Section 14 of the Act and the guidelines issued by the Council or takes into consideration factors which are not relevant and rejects the application for grant of an NOC, it will be open to the institution concerned to challenge the same in accordance with law. But, that by itself, cannot be a ground to hold that the Regulations which require an NOC from the State Government or the Union Territory are ultra vires or invalid."

While dealing with the argument of the learned counsel for the appellant that the impugned Regulations have the effect of conferring the power of considering the application for grant of recognition under Section 14 upon the State Government, the Court referred to Regulation 6(ii) of the 2002 Regulations and observed:

"Regulation 6(ii) of these Regulations provides that the endorsement of the State Government/Union Territory Administration in regard to issue of NOC will be

considered by the Regional Committee while taking a decision on the application for recognition. This provision shows that even if the NOC is not granted by the State Government or Union Territory concerned and the same is refused, the entire matter will be examined by the Regional Committee while taking a decision on the application for recognition. Therefore, the grant or refusal of an NOC by the State Government or Union Territory is not conclusive or binding and the views expressed by the State Government will be considered by the Regional Committee while taking the decision on the application for grant of recognition. In view of these new Regulations the challenge raised to the validity of Regulations 5(e) and (f) has been further whittled down. *The role of the State Government is certainly important for supplying the requisite data which is essential for formation of opinion by the Regional Committee while taking a decision under sub-section (3) of Section 14 of the Act. Therefore no exception can be taken to such a course of action*."

(emphasis supplied)

26. In *State of Tamil Nadu and another v. S.V. Bratheep and others* (2004) 4 SCC 513, the Court interpreted the provisions of the All India Council for Technical Education Act, 1987, referred to the Constitution Bench judgment in *Dr. Preeti Srivastava's* case and observed that the State Government can prescribe additional qualification to what has been prescribed by AICTE for admission to engineering courses and no fault can be found with such a provision.

27. In *Govt. of A.P. and another v. J.B. Educational Society and another* (2005) 3 SCC 212, this Court considered the question whether the provision contained in Section 20(3)(a)(i) of the Andhra Pradesh Education Act, 1982 under which obtaining of permission of the State Government was made *sine qua non* for starting an institution for Teacher Training Course was *ultra vires* the provisions of the All India Council

for Technical Education Act, 1987 and the Regulations framed thereunder. While rejecting the challenge, the Court referred to Articles 245, 246 and 254(2) and Entries 66 of List-I and 25 of List-III of Seventh Schedule to the Constitution and observed:

> "The provisions of the AICTE Act are intended to improve technical education and the various authorities under the Act have been given exclusive responsibility to coordinate and determine the standards of higher education. It is a general power given to evaluate, harmonise and secure proper relationship to any project of national importance. Such a coordinate action in higher education with proper standard is of paramount importance to national progress. Section 20 of the A.P. Act does not in any way encroach upon the powers of the authorities under the Central Act. Section 20 says that the competent authority shall, from time to time, conduct a survey to identify the educational needs of the locality under its jurisdiction notified through the local newspapers calling for applications from the educational agencies. Section 20(3)(*a*)(*i*) says that before permission is granted, the authority concerned must be satisfied that there is need for providing educational facilities to the people in the locality. *The State authorities alone can decide about the educational facilities and needs of the locality. If there are more colleges in a particular area, the State would not be justified in granting permission to one more college in that locality.* Entry 25 of the Concurrent List gives power to the State Legislature to make laws regarding education, including technical education. Of course, this is subject to the provisions of Entries 63, 64, 65 and 66 of List I. Entry 66 of List I to which the legislative source is traced for the AICTE Act, deals with the general power of Parliament for coordination, determination of standards in institutions for higher education or research and scientific and technical educational institutions and Entry 65 deals with the union agencies and institutions for professional, vocational and technical training, including the training of police officers, etc. The State has certainly the legislative competence to pass the legislation in respect of education including technical education and Section 20 of the Act is intended for general welfare of the citizens of the State and also in discharge of the constitutional duty enumerated under Article 41 of the Constitution.
>
> The general survey in various fields of technical education contemplated under Section 10(1)(*a*) of the AICTE Act is not pertaining to the educational needs of any particular area in a State. It is a general supervisory survey to be conducted by the AICTE Council, for example, if any IIT is to be established in a particular region, a general survey could be conducted and the Council can very much conduct a survey regarding the location of that institution and collect data of all related matters. But as regards whether a particular educational institution is to be established in a particular area in a State, the State alone would be competent to say as to where that institution should be established. Section 20 of the A.P. Act and Section 10 of the Central Act operate in different fields and we do not see any repugnancy between the two provisions."
>
> (emphasis supplied)

28. In *State of Maharashtra v. Sant Dnyaneshwar Shikshan Shastra Mahavidyalaya and others* (2006) 9 SCC 1, this Court considered the question whether, after grant of recognition by NCTE, the State Government can refuse to issue no objection certificate for starting B.Ed. colleges on the premise that a policy decision in that regard had been taken. After adverting to the relevant provisions of the Constitution, the Act and the Regulations and the judgment in *St. John Teachers Training Institute v. Regional Director, NCTE* (supra), the Court held that final authority to take decision on the issue of grant of recognition vests with the NCTE and it cannot be denuded of that authority on the ground that the State Government/Union

Territory Administration has refused to issue NOC.

29. In the light of the above discussion, we hold that the cut off dates specified in clauses (4) and (5) of Regulation 5 of the 2007 Regulations as also the amendment made in Regulation 5(5) vide notification dated 1.7.2008 are not violative of Article 14 of the Constitution and the learned Single Judge and the Division Bench of the High Court were not right in recording a contrary finding qua the date specified in notification dated 1.7.2008. We further hold that the provisions contained in Section 14 and the Regulations framed for grant of recognition including the requirement of recommendation of the State Government/Union Territory Administration are mandatory and an institution is not entitled to recognition unless it fulfils the conditions specified in various clauses of the Regulations. The Council is directed to ensure that in future no institution is granted recognition unless it fulfils the conditions laid down in the Act and the Regulations and the time schedule fixed for processing the application by the Regional Committees and communication of the decision on the issue of recognition is strictly adhered to.

30. The appeals are disposed of in the manner indicated above.

D.G. Appeals disposed of.

R.S. MISHRA

v.

STATE OF ORISSA & ORS.
(Criminal Appeal No. 232 of 2005)

FEBRUARY 1, 2011

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

Code of Criminal Procedure, 1973:

ss. 227 and 228 – Role of the Judge at the stage of framing of charge – Inter-connection between ss.227 and 228 – Held: When the charge under a particular section is dropped or diluted, (although the accused is not discharged), some minimum reasons in nutshell are expected to be recorded disclosing the consideration of the material on record – On the analogy of a discharge order, the Judge must give his reasons atleast in a nutshell, if he is dropping or diluting any charge, particularly a serious one – It is also necessary for the reason that the order should inform the prosecution as to what went wrong with the investigation – Besides, if the matter is carried to the higher Court, it will be able to know as to why a charge was dropped or diluted.

s.228 – Dereliction of duty by Sessions Judge in framing of correct charge against accused in a criminal case involving death of a young person – Judicial order passed by appellant-Sessions Judge diluting the charge against the accused – Suo-moto Criminal revision pursuant to note by the Inspecting Judge – Revisional Court made observations against the appellant for not framing charge under s.302 IPC against the accused and also made suggestion to High Court Administration to take corrective steps with respect to the appellant – High Court Administration examined the record of the appellant and denied him selection grade – Challenge to observations/suggestions of Revisional Court which led to the denial of selection grade – Held: Not tenable – A Judge

is expected to look into the material placed before him and if he is of the view that no case is made out for framing of a charge, his order ought to be clear and self-explanatory with respect to the material placed before him – In the present case, all that the appellant stated in his judicial order was, that on consideration of the material available in the case diary, he found no sufficient material to frame the charge under s.302 IPC – He also did not state in his order as to why he was of the opinion that the material available in the case diary was insufficient – Appellant did not even refer to the statement of the injured eye witness, and the supporting medical papers on record – Such a bald order raises a serious doubt about the bona fides of the decision rendered – It was not a case of grave and sudden provocation, thus, there was a prima facie case to frame charge under s.302 IPC – The reason given for dropping the charge under s.302 was totally inadequate and untenable, and showed non-application of mind by the appellant to the statements in the charge-sheet and the medical record – No explanation was given as to why a charge under s.304 IPC was preferred to one under s.302 IPC – It cannot be said that the appellant did not have requisite experience to pass a correct legal order under s.228 CrPC – That apart, the impugned order in Revision contained only a correctional suggestion to the High Court Administration which the Administration accepted – It was not a case of making any adverse or disparaging remarks – The appellant was responsible for unjustified dilution of the charge and, therefore, thorough checking of his service record was necessary which is, what was directed in the impugned order of the Revisional Court – Penal Code, 1860 – ss. 302 and 304.

The appellant is a retired Additional Sessions Judge of the State of Orissa. He challenged the judgment rendered by a Single Judge of the Orissa High Court in *suo-moto* Criminal Revision, arising out of Session Trial Case, to the extent the Judge made certain observations

against the appellant who had decided that Sessions case. These remarks were made on account of the appellant not framing the charge under Section 302 IPC against the accused in that case. The Single Judge held that the appellant had committed a blunder in not framing the charge under Section 302 IPC and made certain observations about the manner in which the appellant had passed the order, and also gave some correctional suggestions about the appellant. The Single Judge, however, did not deem it fit to be a fit case for ordering retrial under Section 300(2) CrPC on the ground that the accused had already served the sentence of five years rigorous imprisonment. Subsequent to the observations of the Revisional Court, the High Court Administration examined the record of the appellant and denied him the Selection grade. The appellant's representation in that behalf was rejected by the High Court Administration. Aggrieved, the appellant took Voluntary Retirement, and subsequently filed the present appeal.

The appellant challenged the observations of the Revisional Court which led to denial of his selection grade stating that the judicial order passed by him may be erroneous, but merely for that reason, it was not proper for the Inspecting Judge to direct that a *suo-moto* Revision be filed against the same; and that in any case, it was wrong on the part of the Single Judge who heard the *suo-moto* Revision, to make the observations which he made in his order and which caused incalculable harm to the career of the appellant.

Dismissing the appeal, the Court

HELD:1.1. The provision concerning the framing of a charge is to be found in Section 228 of Cr.P.C. This Section is however, connected with the previous section, i.e. Section 227 which is concerning 'Discharge'. From

Section 227 it is clear that while discharging an accused, the Judge concerned has to consider the record of the case and the documents placed therewith, and if he is so convinced after hearing both the parties that there is no sufficient ground to proceed against the accused, he shall discharge the accused, but he has to record his reasons for doing the same. Section 228 which deals with framing of the charge, begins with the words "If after such consideration". Thus, these words in Section 228 refer to the 'consideration' under Section 227 which has to be after taking into account the record of the case and the documents submitted therewith. These words provide an inter-connection between Sections 227 and 228. That being so, while Section 227 provides for recording the reasons for discharging an accused, although it is not so specifically stated in Section 228, it can certainly be said that when the charge under a particular section is dropped or diluted, (although the accused is not discharged), some minimum reasons in nutshell are expected to be recorded disclosing the consideration of the material on record. This is because the charge is to be framed 'after such consideration' and therefore, that consideration must be reflected in the order. [Paras 17, 18] [357-F-G; 358-G-H; 359-A-C]

1.2. A discharge order is passed on an application by the accused on which the accused and the prosecution are heard. At the stage of discharging an accused or framing of the charge, the victim does not participate in the proceeding. While framing the charge, the rights of the victim are also to be taken care of as also that of the accused. That responsibility lies on the shoulders of the Judge. Therefore, on the analogy of a discharge order, the Judge must give his reasons atleast in a nutshell, if he is dropping or diluting any charge, particularly a serious one as in the present case. It is also necessary

for the reason that the order should inform the prosecution as to what went wrong with the investigation. Besides, if the matter is carried to the higher Court, it will be able to know as to why a charge was dropped or diluted. [Para 19] [359-D-F]

1.3. At the initial stage of the framing of a charge, if there is a strong suspicion/evidence which leads the Court to think that there is ground for presuming that the accused has committed an offence, then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. Further, at the stage of the framing of the charge, the Judge is expected to sift the evidence for the limited purpose to decide if the facts emerging from the record and documents constitute the offence with which the accused is charged. This must be reflected in the order of the judge. Thus it cannot be disputed that in this process the minimum that is expected from the Judge is to look into the material placed before him and if he is of the view that no case was made out for framing of a charge, the order ought to be clear and self-explanatory with respect to the material placed before him. In the present case, all that the appellant stated in his judicial order was, that on consideration of the material available in the case diary, he had found that there was no sufficient material to frame the charge under Section 302 of IPC. This is nothing but a bald statement and was clearly against the statement of the injured eye witness, and supporting medical papers on record. The appellant has not even referred to the same. He has also not stated in his order as to why he was of the opinion that the material available in the case diary was insufficient. Such a bald order raises a serious doubt about the bona fides of the decision rendered by the Judge concerned. A young person had been killed. It was not a case of grave and

sudden provocation. The material on record showed that there was an injured eye witness and there was the supporting medical report. The material on record could not be said to be self-contradictory or intrinsically unreliable. Thus, there was a prima facie case to proceed to frame the charge under Section 302 IPC. The reason given for dropping the charge under Section 302 was totally inadequate and untenable, and showed a non-application of mind by the appellant to the statements in the charge-sheet and the medical record. The order does not explain as to why a charge under Section 304 was being preferred to one under Section 302 IPC. In fact, since the material on record revealed a higher offence, it was expected of the appellant to frame the charge for more grievous offence and not to dilute the same. [Paras 20, 21 and 22] [359-G-H; 360-G-H; 361-A-G]

1.4. The impugned order of the High Court deciding Revision notes that the appellant had been functioning in the rank of the District Judge from August 1991 onwards, i.e. for nearly 5 years prior to his judicial order and further states that a Judicial Officer, before being posted as an Additional Session Judge, gets experience of taking the sessions cases as Assistant Session Judge. It cannot, therefore, be said that the appellant did not have requisite experience to pass a correct legal order under Section 228 of Cr.P.C. That apart, all that the impugned order in Revision did was to suggest to the High Court Administration, that if the appellant was not yet confirmed, his probation should wait and if he was already confirmed, his performance be verified before giving him the higher scale. Since the appellant, was already confirmed in service, all that the High Court did on the administrative side was to check his record, and thereafter to deny him the selection grade. The above observation in the impugned order in Revision was a suggestion to the Administration of the High Court. It was

not a case of making any adverse or disparaging remarks. Having noted that the appellant had failed in discharging his duty in framing the correct charge, and having also noted that his record was not good, the High Court could not have granted him the selection grade. The selection grade is not to be conferred as a matter of right. The record of the concerned Judge has to seen, and that having been done in the present case (in pursuance to the observations of the High Court), and having noted the serious deficiencies, the High Court had denied the selection grade to the appellant. The impugned order contained nothing but a correctional suggestion to the High Court Administration which the Administration has accepted. [Para 24] [362-C-H; 363-A]

1.5. It is only because of the note made by inspecting Judge that the cursory order passed by the appellant in the Sessions case diluting the charge against the accused came to the notice of the High Court Administration. By the time the *suo-moto* Revision was decided, the accused had already undergone the punishment of rigorous imprisonment of 5 years and, therefore, the Revisional Court did not deem it fit to reopen the case. The appellant cannot take advantage of this part of the judgment of the Revisional Court, to challenge the observations of the Revisional Judge making a suggestion to the High Court to scrutinize appellant's record for the dereliction of duty on his part. The appellant was responsible for an unjustified dilution of the charge and, therefore, thorough checking of his service record was necessary which is, what was directed in the impugned order of the Revisional Court/ High Court. There is no reason to interfere in the said order making certain observations and suggestions which were necessary in the facts and circumstances of the case. [Paras 25, 26] [363-B-F]

In the matter of 'K' A Judicial Officer, **2001 (3) SCC 54;** *V.K. Jain v. High Court of Delhi through Registrar General and Others,* **2008 (17) SCC 538 and** *Prakash Singh Teji v. Northern India Goods Transport Company Private Limited and Anr,* **2009 (12) SCC 577 – distinguished.**

State of Bihar v. Ramesh Singh **AIR 1977 SC 2018;** *Nirmaljit Singh Hoon v. State of West Bengal* **1973 (3) SCC 753;** *Chandra Deo Singh v. Prokash Chandra Bose* **AIR 1963 SC 1430;** *Niranjan Singh v. Jitendra Bhimraj* **1990 (4) SCC 76 – relied on.**

Case Law Reference:

2001 (3) SCC 54	**distinguished**	**Para 12**
2008 (17) SCC 538	**distinguished**	**Para 13**
2009 (12) SCC 577	**distinguished**	**Para 14**
AIR 1977 SC 2018	**relied on**	**Para 20**
1973 (3) SCC 753	**relied on**	**Para 20**
AIR 1963 SC 1430	**relied on**	**Para 20**
1990 (4) SCC 76	**relied on**	**Para 20**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 232 of 2005.

From the Judgment & Order dated 28.10.2002 of the High Court of Orissa in Suo Motu Criminal Revision Petition No. 367 of 1997.

Uday Gupta, D.K. Mishra, Manoj Swarup for the Appellant.

Suresh Chandra Tripathy, Janaranjan Das, Swetaketu Mishra for the Respondents.

The Judgment of the Court was delivered by

GOKHALE J. 1. The appellant in this appeal is a retired Additional Sessions Judge of the State of Orissa. In this appeal by Special Leave, he seeks to challenge the judgment and order dated 20.10.2002, rendered by a learned Judge of the Orissa High Court in *suo-moto* Criminal Revision No. 367 of 1997, arising out of Session Trial Case No. 187/55 of 1995, to the extent the learned Judge has made certain observations against the appellant who had decided that session case. These remarks were made on account of the appellant not framing the charge under Section 302 of the Indian Penal Code (IPC) against the accused in that case, when the material on record warranted framing of that charge.

2. The facts leading to this appeal are as follows:

Appellant not framing the charge under Section 302 IPC, when warranted.

The appellant joined the Orissa judicial service in November 1971. In August 1991, he was promoted to the cadre of District Judges. During the period of his service, the appellant was transferred from place to place, and at the relevant time in March 1996, was posted as the Additional District and Sessions Judge, Rourkela, when the above referred case bearing S.T. No. 187/55 of 1995 was assigned to him.

3. The case of the prosecution in that session case was as follows. There was a land dispute between one Megha Tirkey (the accused) and one Samara Tirkey, who was alleged to have been murdered by the accused. Jayaram Tirkey is the younger brother of accused. On 25.06.1995, at about 11:00 a.m., Samara Tirkey (the deceased) is said to have abused Smt. Mangi the wife of Jayaram Tirkey (PW-1) on account of the alleged encroachment of Samara's land by the uncle of Jayaram, one Shri Daharu Kujur. On the next day, i.e. on 26.6.1995, Jayaram Tirkey alongwith his brother Megha Tirkey, the accused went to the house of Samara Tirkey, the deceased. Initially, Samara Tirkey was not available and Jayaram and

Megha Tirkey enquired about his whereabouts with his wife Hauri (PW-3). In the meanwhile, Samara Tirkey reached over there. Jayaram Tirkey asked Samara as to why he had scolded Jayaram's wife in his absence. Samara Tirkey is said to have raised his hand towards Jayaram when accused Megha Tirkey dealt a lathi blow on the head of Samara Tirkey whereby he fell down. Thereafter, the accused Megha Tirkey gave two more lathi blows on his chest. When Hauri caught hold of the accused, he gave a lathi blow to her also and she received a lacerated wound on her forehead. Samara Tirkey was taken to the Raurkela Govt. Hospital, where he died on 27.6.1995 at about 2:00 p.m.

4. Megha Tirkey was charged under Section 302 and 323 IPC. The matter reached before the appellant on 21.03.1996 when he passed the following order:-

"**Order No.8 dt. 21.03.1996**

The accused is produced in custody by the escort party. Learned Associate Lawyer who represents the State is present. Learned Defence counsel is also present.

Learned Associate Lawyer opens the prosecution case by describing the charges brought against the accused and stating by what evidence he proposes to prove the guilt of the accused. The learned Defence counsel submits that there is complete absence of evidence to frame charge u/s 302 IPC and that the available evidence may bring at-best an offence u/s 304 IPC.

After hearing submissions of both sides in this behalf and on consideration of the materials available in the case diary, I find there is no sufficient material to frame charge u/s 302 IPC but there are sufficient materials against the accused for presuming that he has committed the offence u/s 304 IPC and 323 IPC.

Hence, charge u/s 304 IPC and u/s 323 IPC are framed against the accused. The charges being read-over and explained, the accused pleads not guilty and claimed to be tried.

The Defence does not admit the genuineness of the documents filed by the prosecution.

Put up on 25.4.96 for fixing a date of hearing of the Sessions trial

Sd/-
Addl. Sessions Judge,
Rourkela,
21.3.96"

5. Subsequently, the appellant was transferred from Rourkela, and the matter proceeded before one Shri S.K. Mishra, the subsequent Additional Sessions Judge at Rourkela. It so happened that during the trial, some of the prosecution witnesses, viz. PW Nos. 2, 4, 5, 6, 7 were declared hostile by the prosecution since they did not support the case. The Judge, however, found the evidence of Hauri (PW No. 3) wife of Samara Tirkey, the deceased, as acceptable and reliable. Her testimony was supported by the medical evidence. The Doctor found a lacerated injury on her forehead. She stated that the accused had given a lathi blow on the head of the deceased and then on his chest, in her presence. She also stated about the lathi blow given to her. The post-mortem examination revealed that amongst other injuries, the left side mandible of the deceased was fractured and there was subdural haematoma over the left parietal region of the scalp. The other vital organs like lungs, liver, kidney were all congested. Due to these injuries, the deceased went into coma and then died. The learned Judge held that the prosecution had established the charges beyond reasonable doubt and found the accused guilty of offences under Section 304 and 323 of IPC, and convicted him accordingly. He sentenced him to undergo Rigorous

Imprisonment for five years under Section 304 (1) of IPC and for one month for offence under Section 323 IPC, with both the punishments running concurrently.

6. *Note by the Inspecting Judge*

It so transpired that later the inspection of the Court of Additional & District Sessions Judge, Rourkela was carried out by Hon'ble Mr. Justice P.K. Mishra, then a Senior Judge of the High Court of Orissa. At that stage, while going through the file of S.T. No.187/55 of 1995, Mr. Justice P.K. Mishra came across the above referred Order No.8 dated 21.3.1996 passed by the appellant herein. Thereupon Mr. Justice P.K. Mishra made the following note on that file:-

> "In this case, the only accused Megha Tirkey was charge-sheeted under sections-302/323 IPC for clubbing the victim (Samra Tirkey) to death on 26.06.1995 at 3.30 P.M.
>
> The additional Sessions Judge, Rourkela while discharging the accused from the offence under Section – 302 framed charges under sections 304/323 of the Indian Penal Code without recording any reason for discharging the accused from the offence under Section 302 IPC. The order of the Additional Sessions Judge only states that material available in the case diary is insufficient to frame a charge under Section 302 IPC.
>
> It is the settled principle of law that while framing charge the Sessions Judge under Section -228 Cr.P.C. need not assign reasons, but he is bound to record reasons while recording a discharge under Section 227 Cr.P.C.
>
> In the present case, the widow of the deceased (P.W.3) has testified that the accused dealt a forceful lathi blow on the head of the deceased and two more blows on his chest. The post-mortem examination reveals that ramus of the left side mandible of the deceased was

> fractured on the chin besides left parietal region of the scalp.
>
> Relying on the ocular testimony of widow of the deceased and the post-mortem examination report that lends support to her evidence, the Additional Sessions Judge recorded a conviction under Section 304 (1)/323 of the Indian Penal Code and sentenced the accused to undergo R.I. for five years on the first count and one month R.I. on the second count with a direction for concurrent running of sentences.
>
> It is no body's case that the offence was committed on grave and sudden provocation. The Addl. Sessions Judge should not have nipped the case U/s 302 IPC at the bud by discharging the accused thereof by a non speaking order. This is a fit case for suo-moto revision U/s 401 Cr.P.C."

7. *Suo-moto* Criminal Revision

In view of the note of Hon'ble Justice Mr. P.K. Mishra, the High Court took up a *suo-moto* Criminal Revision against the order dated 21.3.1996, which was numbered as No.187/55 of 1995. The learned Single Judge, who heard the matter, went through the judgment rendered at the end of the trial in Case No.187/55 of 1995, as well as the order of framing charge dated 21.3.1996. He examined the material on record and noted that P.W. No. 3 had come to the rescue of her husband when he received lathi blows. She had also received a lathi blow. Her evidence was, therefore, a credible evidence. He referred to the post-mortem report which stated that out of the four external injuries, injury No. 4, i.e., fracture of ramus of left side mandible, was grievous. On dissection, it had been found by the Doctor that the brain membrane was congested. There was a subdural haematoma over the left parietal lobe and brain was congested. The other vital internal organs like lungs, liver, spleen, kidney were all congested. The Doctor (P.W. No.8)

opined that death was due to coma resulting from injury to brain and scalp bones and the injuries were ante-mortem in nature. On this factual aspect, the learned Single Judge held as follows:-

> *"If the materials in the case diary reveal two distinct offences of the same nature then it is appropriate to frame charge for more grievous offence or to frame charge for both the offences distinctly and separately. That being the settled position of law and the prosecution case stands in the manner indicated above, therefore, there is no hesitation to record a finding that learned Additional Sessions Judge, Rourkela went wrong in framing charge for the offence under Section 304, IPC by declining to frame charge under Section 302 IPC for no reason explained in the order passed under Section 228 Cr.P.C."*

8. *Impugned observation by the Single Judge*

The learned Single Judge, however, noted that by the time he was deciding the Criminal Revision, the accused had already served the sentence of five years of Rigorous Imprisonment. Therefore, he did not deem it to be a fit case for ordering a retrial under Section 300 (2) of Code of Criminal procedure, 1973 ('Cr.P.C.' for short). He disposed of the *suo-moto* Criminal Revision accordingly by his order dated 28.10.2002.

9. The learned Single Judge, however, made certain observations in para 5 of his order which are material for our purpose. This para reads as follows: -

> "5. A Judicial Officer before being posted as Addl. Sessions Judge gets the experience of conducting sessions cases as Assistant Sessions Judge. Therefore, in this case, it cannot be said that the concerned Presiding Officer had no requisite experience to deal with a matter relating to consideration of charge and to pass appropriate legal order under Sections 227 and 228 Cr. P.C correctly. When the accused was not charged for the offence under Section 302, IPC and instead he was charged for the offence u/s 304 IPC, it was incumbent on the trial court to explain the circumstances and to reflect the same in the order as to what was the reason or lack of evidence not to frame charge for the offence under Section 302 IPC. This Court finds no reasonable excuse for the concerned Presiding Officer to commit a blunder in the above indicated manner……**.** If the said Judicial officer has not yet been confirmed in the cadre of O.S.J.S (S.B.), then before confirming him in that cadre his performance be thoroughly verified and in the event of finding glaring deficiency in his performance, as in this case, then he may be kept on probation for a further period as would be deemed just and proper by the High court. If he has already been confirmed in that cadre, then his performance be thoroughly verified before giving him promotion to the higher scale."

Thus, in first part of this para, the learned Judge has held that the appellant had committed a blunder in not framing the charge under Section 302 IPC. In the latter part of the para, he has made certain observations about the manner in which the appellant had passed the order dated 21.3.1996, and also some correctional suggestions about the appellant.

10. Subsequent to these observations in this order dated 28.10.2002, the High Court Administration examined the record of the appellant and denied him the Selection grade. The appellant's representation dated 24.09.2003 in that behalf was also rejected by the High Court Administration as per the communication dated 20.11.2003 to the appellant from the Special Officer (Administration). Being aggrieved therewith the appellant took Voluntary Retirement on 30.11.2003, and subsequently filed the present Appeal by special leave on

13.02.2004 to challenge the above order dated 28.10.2002 and the observations made therein.

11. *Submissions on behalf of the Appellant*

Mr. Uday Gupta, learned Counsel for the appellant, submitted that the order passed by the appellant on 21.3.1996 was a judicial order. It is possible to say that this order was an erroneous one, but merely for that reason, it was not proper for the inspecting judge to direct that a *suo-moto* Revision be filed against the same. In any case, it was wrong on the part of the learned Single Judge who heard the *suo-moto* Revision, to make the observations which he has made in the above quoted paragraph 5 of his order which has affected appellant's career. Mr. Gupta submitted that the appellant had otherwise a good service record after his promotion in District Judge's Cadre in August 1991. He had worked initially as an Additional Special Judge (Vigilance) at Bhubaneshwar, thereafter for two years as the Presiding Officer of the E.S.I Court at Rourkela, then as Additional Sessions Judge at Rourkela in 1996 and then for three years as the Presiding Officer of the Central Govt. Industrial Tribunal at Asansol, West Bengal. Subsequently, he became the Additional District Judge and Presiding Officer of the Motor Accidents Claims Tribunal in Cuttack, Orissa from July 1999 to November 1999. From November 1999 to September 2002, he was the Director (Law Studies), Gopabandhu Academy of Administration, Bhubaneshwar, and subsequently the Additional District Judge, Talcher, Orissa, from October 2002 to 30.11.2003. He pointed out that the appellant had participated in various seminars and conferences and presented his papers. His record was otherwise quite good.

12. Mr. Gupta relied upon the judgment *'In the matter of 'K' A Judicial Officer* [2001 (3) SCC 54]'. The concerned judicial officer in that matter was assigned a courtroom which had great infrastructural difficulties. Complaints in that behalf were not being attended in spite of a number of representations to the PWD officials. Being dissatisfied by this inaction, the learned

Judge issued a notice to the concerned authorities as to why action in contempt should not be taken against them. The PWD acted promptly thereafter, and carried out the necessary repairs. Learned Judge therefore dropped the contempt proceedings but still held that there was a case to take cognizance under Sections 380, 201 and 120-B of IPC and issued process against the concerned officers. Being aggrieved by that order, the matter was carried to the High Court where the High Court observed that the learned Magistrate had exceeded her jurisdiction defying all judicial norms to pressurize the officers, and her order was a gross abuse of the process of Court since there was no occasion to invoke the particular sections of IPC. When the Judicial Officer carried the matter to this Court, this Court observed in paragraph 15 of the above judgment that by the observations of the High Court, the Judicial Officer was being condemned unheard. This Court observed in paragraph 15 that such observations give a sense of victory to the litigant not only over his opponent but also over the Judge who had decided the case against him and the same should be avoided. The counsel for the appellant relied upon the report of the First National Judicial Pay Commission to submit that at times the Trial Judges are really on trial as observed in the report.

13. The learned Counsel for the appellant then relied upon the observations in para 13 of the judgment of this Court in *V.K. Jain Vs. High Court of Delhi through Registrar General and Others* [2008 (17) SCC 538] and the principles of law laid down in para 58 thereof. In that matter, the appellant while working as a Judicial Officer in the Higher Judicial Services of Delhi, vide his order dated 4.3.2002, permitted an accused in a criminal case to go abroad subject to the conditions that the accused would file Fixed Deposit Receipts (FDR) of Rs. one lakh and also surrender passports of his mother and wife. When the said order dated 4.3.2002, was challenged, the High Court found those conditions unacceptable. In its order, the High Court made certain observations against the petitioner and in

paragraph 15 held that:-

> "5.....This is nothing but a medieval way of administering justice when family members used to be kept as hostages in lieu of either release of their detained kith and kin or procure the surrender of the wanted man."

Being aggrieved by that order the Judicial Officer carried the matter to the Supreme Court, where this Court cautioned against making such strong observations, it expunged those remarks from the order of Delhi High Court. In sub-paragraph IX of para 58, this Court laid down the following principle:-

> "*IX. The superior courts should always keep in mind that disparaging and derogatory remarks against the judicial officer would cause incalculable harm of a permanent character having the potentiality of spoiling the judicial career of the officer concerned. Even if those remarks are expunged, it would not completely restitute and restore the harmed Judge from the loss of dignity and honour suffered by him."*

Mr. Gupta emphasized these observations and submitted that the High Court should not have made the above observations in para 5 of the impugned order which have caused an incalculable harm to the career of the appellant.

14. He then relied upon paragraphs 16 to 20 of the judgment in *Prakash Singh Teji Vs. Northern India Goods Transport Company Private Limited and Anr.* [2009 (12) SCC 577]. In that matter, in the facts of the case the High Court had described the approach of the Judicial Officer concerned as hasty, slipshod and perfunctory. The adverse remarks against the appellant were removed in paragraph 20 of the judgment in the light of the principles laid down in *'K' A Judicial Officer* (Supra). This Court held that harsh or disparaging remarks are not to be made against persons and authorities whose conduct comes into consideration before courts of law, unless it is really

necessary for the decision of the case as an integral part thereof.

15. *Reply by the Respondents*

The arguments of the appellant were countered by Mr. Janaranjan Das and Mr. Suresh Chandra Tripathy appearing for the respondents. Affidavits in reply have been filed by the State Government and also on behalf of Respondent Nos. 3 and 4 to the appeal, i.e. Registrar (Administration) and Registrar (Judicial) of High Court of Orissa. It is pointed out in the affidavit on behalf of the High Court that this was not a solitary incident concerning the appellant. Adverse remarks were entered into his confidential record for the years 1973-79 continuously, and again for 1981, 1983, 1987 to 1989, and 1991. It was also pointed out that in a case under Narcotic Drugs and Psychotropic Substances Act, 1985 (N.D.P.S. Act), the appellant had granted bail in the teeth of the prohibition under Section 37 of that Act. He was, therefore, placed under suspension from 19.12.1992. An inquiry was initiated, though after considering the report of the inquiry, the proceeding was dropped and the appellant was allowed to resume from 15.8.1994. He was then posted as Additional District Judge, Rourkela where he heard the matter concerning the murder of Samara Tirkey. With respect to this submission of the respondents, the counsel for the appellant pointed out that after the revocation of suspension, his service record was good, and in fact thereafter the remark of being 'outstanding' was recorded in his service book for a few years. The counsel for the respondents countered this submission by pointing out that subsequent to the revocation of suspension also there were representations against appellant's honesty and integrity, particularly while working as the Industrial Tribunal cum Labour Court in Asansol, West Bengal. In fact because of that, he was transferred back to Malkanagiri, Orissa where he opted for voluntary retirement.

16. It was submitted on behalf of the respondents that the case No. 187/55 of 1955 was a serious one concerning the

death of a young person aged about 40 years. The deceased was given a lathi blow on his head because of which he fell down, whereafter also two lathi blows were given on his chest. His wife also received a lathi blow and she was an eye witness. Medical Evidence showed that because of these blows the deceased had died. None of these aspects has been considered by the appellant in his order dated 21.03.1996, extracted above. All that the appellant has stated in this order is that he had heard the submissions of both sides, and on the consideration of the material available in the case diary, he found that there was no sufficient material to frame the charge under Section 302 IPC. As against that, according to the respondents there was sufficient material on record to justify the framing of the charge under Section 302 IPC, and in any case while declining to frame the charge under Section 302 IPC, the appellant ought to have discussed as to why according to him the material on record was not sufficient. Absence of reasons in such a case amounts to a dereliction of duty. The order in such a matter has to be a self-explanatory one. Since it is not so, all that the learned Single Judge deciding the Revision has done, is to suggest to the High Court Administration to take corrective steps with respect to the appellant, and the same was justified.

17. *Consideration*

We have noted the submissions of both the counsel. We are concerned with the role of the Judge at the stage of framing of a charge. The provision concerning the framing of a charge is to be found in Section 228 of Cr.P.C. This Section is however, connected with the previous section, i.e. Section 227 which is concerning 'Discharge'. These two sections read as follows:-

> *Section 227 - Discharge* - If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.
>
> *Section 228 - Framing of charge* (1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which-
>
> (a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate3[or any other Judicial Magistrate of the first class and direct the accused to appear before the Chief Judicial Magistrate, or, as the case may be, the Judicial Magistrate of the first class, on such date as he deems fit, and thereupon such Magistrate] shall try the offence in accordance with the procedure for the trial of warrant-cases instituted on a police report;
>
> (b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.
>
> *(2) Where the Judge frames any charge under clause (b) of sub-section (1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried.*

18. As seen from Section 227 above, while discharging an accused, the Judge concerned has to consider the record of the case and the documents placed therewith, and if he is so convinced after hearing both the parties that there is no sufficient ground to proceed against the accused, he shall discharge the accused, but he has to record his reasons for doing the same. Section 228 which deals with framing of the charge, begins with the words "If after such consideration". Thus, these words in Section 228 refer to the 'consideration' under Section 227 which has to be after taking into account the record

of the case and the documents submitted therewith. These words provide an inter-connection between Sections 227 and 228. That being so, while Section 227 provides for recording the reasons for discharging an accused, although it is not so specifically stated in Section 228, it can certainly be said that when the charge under a particular section is dropped or diluted, (although the accused is not discharged), some minimum reasons in nutshell are expected to be recorded disclosing the consideration of the material on record. This is because the charge is to be framed 'after such consideration' and therefore, that consideration must be reflected in the order.

19. It is also to be noted that a discharge order is passed on an application by the accused on which the accused and the prosecution are heard. At the stage of discharging an accused or framing of the charge, the victim does not participate in the proceeding. While framing the charge, the rights of the victim are also to be taken care of as also that of the accused. That responsibility lies on the shoulders of the Judge. Therefore, on the analogy of a discharge order, the Judge must give his reasons atleast in a nutshell, if he is dropping or diluting any charge, particularly a serious one as in the present case. It is also necessary for the reason that the order should inform the prosecution as to what went wrong with the investigation. Besides, if the matter is carried to the higher Court, it will be able to know as to why a charge was dropped or diluted.

20. The observations of this Court in the case of *State of Bihar Vs. Ramesh Singh* [AIR 1977 SC 2018] / [1977 (4) SCC 39] are very apt in this behalf. A bench of two Judges of this Court has observed in that matter that at the initial stage of the framing of a charge, if there is a strong suspicion/evidence which leads the Court to think that there is ground for presuming that the accused has committed an offence, then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. The Court referred to the

judgment of a bench of three Judges in *Nirmaljit Singh Hoon Vs. State of West Bengal* [1973 (3) SCC 753], which in turn referred to an earlier judgment of a bench of four Judges in *Chandra Deo Singh Vs. Prokash Chandra Bose* [AIR 1963 SC 1430], and observed as follows in para 5:-

> "5. In Nirmaljit Singh Hoon v. State of West Bengal – Shelat, J. delivering the judgment on behalf of the majority of the Court referred at page 79 of the report to the earlier decisions of this Court in Chandra Deo Singh v. Prokash Chandra Bose – where this Court was held to have laid down with reference to the similar provisions contained in Sections 202 and 203 of the Code of Criminal Procedure, 1898 "that the *test was whether there was sufficient ground for proceeding and not whether there was sufficient ground for conviction,* and observed that where there was prima facie evidence, even though the person charged of an offence in the complaint might have a defence, the matter had to be left to be decided by the appropriate forum at the appropriate stage and issue of a process could not be refused". Illustratively, Shelat, J., further added "Unless, therefore, the Magistrate finds that the evidence led before him is self-contradictory, or intrinsically untrustworthy, process cannot be refused if that evidence makes out a prima facie case".(emphasis supplied)

Further, as observed later in paragraph 6 of a subsequent judgment of this Court in *Niranjan Singh Vs. Jitendra Bhimraj* [1990 (4) SCC 76], at the stage of the framing of the charge, the Judge is expected to sift the evidence for the limited purpose to decide if the facts emerging from the record and documents constitute the offence with which the accused is charged. This must be reflected in the order of the judge.

21. Thus it cannot be disputed that in this process the minimum that is expected from the Judge is to look into the material placed before him and if he is of the view that no case

was made out for framing of a charge, the order ought to be clear and self-explanatory with respect to the material placed before him. In the present case, all that the appellant stated in his order dated 21.03.1996 was, that on consideration of the material available in the case diary, he had found that there was no sufficient material to frame the charge under Section 302 of IPC. This is nothing but a bald statement and was clearly against the statement of the injured eye witness, and supporting medical papers on record. The appellant has not even referred to the same. He has also not stated in his order as to why he was of the opinion that the material available in the case diary was insuffcient. Such a bald order raises a serious doubt about the bona fides of the decision rendered by the Judge concerned.

22. In the instant case, a young person had been killed. It was not a case of grave and sudden provocation. The material on record showed that there was an injured eye witness and there was the supporting medical report. The material on record could not be said to be self-contradictory or intrinsically unreliable. Thus, there was a prima facie case to proceed to frame the charge under Section 302 IPC. The reason given for dropping the charge under Section 302 was totally inadequate and untenable, and showed a non-application of mind by the appellant to the statements in the charge-sheet and the medical record. The order does not explain as to why a charge under Section 304 was being preferred to one under Section 302 IPC. In fact, since the material on record revealed a higher offence, it was expected of the appellant to frame the charge for more grievous offence and not to dilute the same.

23. The impugned order of the learned Single Judge deciding Revision notes that the appellant had been functioning in the rank of the District Judge from August 1991 onwards, i.e. for nearly 5 years prior to his order dated 21.3.1996. The impugned order further states in para 5, that a Judicial Officer, before being posted as an Additional Session Judge, gets an

experience of taking the sessions cases as Assistant Session Judge. It cannot, therefore, be said that the appellant did not have requisite experience to pass a correct legal order under Section 228 of Cr.P.C.

24. That apart, all that the impugned order in Revision has done is to suggest to the High Court Administration, that if the appellant is not yet confirmed, his probation should wait and if he has already been confirmed, his performance be verified before giving him the higher scale. Since the appellant, was already confirmed in service, all that the High Court has done on the administrative side is to check his record, and thereafter to deny him the selection grade. The above observation in the impugned order in Revision is a suggestion to the Administration of the High Court. It is not a case of making any adverse or disparaging remarks as in the three cases cited on behalf of the appellant. In fact, in the first judgment cited by the appellant, in the case of V.K. Jain (supra), the observation of this Court in clause No. I of para 58 is very significant, namely that the erosion of the credibility of the judiciary in the public mind, for whatever reason, is the greatest threat to the independence of judiciary. Having noted that the appellant had failed in discharging his duty in framing the correct charge, and having also noted that his record was not good, the High Court could not have granted him the selection grade. The selection grade is not to be conferred as a matter of right. The record of the concerned Judge has to seen, and that having been done in the present case (in pursuance to the observations of the learned Single Judge), and having noted the serious deficiencies, the High Court has denied the selection grade to the appellant. Interestingly enough, in this Appeal by Special leave, the appellant is not directly seeking to challenge the denial of selection grade. He is challenging the observations in the impugned order which led to denial of the selection grade. In our view, the impugned order contained nothing but a correctional suggestion to the High Court Administration which the Administration has accepted.

25. It is only because of the note made by inspecting Judge that the cursory order passed by the appellant in the Sessions case diluting the charge against the accused came to the notice of the High Court Administration. It is contended on behalf of the appellant that in any case the *suo-moto* Revision has not led to the reopening of the case under Section 401 of the Code of Criminal Procedure. In this connection, we must note that by the time the *suo-moto* Revision was decided, the accused had already undergone the punishment of rigorous imprisonment of 5 years. Therefore, the Revisional Court did not deem it fit to reopen it. The appellant cannot take advantage of this part of the judgment of the Revisional Court, to challenge the observations of the learned Revisional Judge making a suggestion to the High Court to scrutinize appellant's record for the dereliction of duty on his part. The appellant was responsible for an unjustified dilution of the charge and, therefore, the thorough checking of his service record was necessary which is, what is directed in the impugned order.

26. For the reasons stated above, we find no reason to interfere in the impugned order making certain observations and suggestions which were necessary in the facts and circumstances of the case. The appeal is therefore, dismissed, though there will be no order as to the costs.

B.B.B. Appeal dismissed.

KOLLA VEERA RAGHAV RAO
v.
GORANTALA VENKATESWARA RAO AND ANR.

(Criminal Appeal No. 1160 OF 2006)

FEBRUARY 1, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Code of Criminal Procedure, 1973: s.300(1) – Scope of – Held: s.300(1) is wider than Article 20(2) of the Constitution – While, Article 20(2) only states that 'no one can be prosecuted and punished for the same offence more than once', s.300 (1) states that no one can be tried and convicted for the same offence or even for a different offence but on the same facts – In the instant case, accused was already convicted u/s.138 of Negotiable Instruments Act, 1881 – He cannot be again tried or punished on the same facts under s.420 or any other provision of IPC or any other statute – Constitution of India, 1950 – Article 20(2) – Negotiable Instruments Act, 1881 – s.138 – Penal Code, 1860 – s.420.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1160 of 2006.

From the Judgment & Order dated 7.10.2005 of the High Court of Judicature of Andhra Pradesh at Hyderabad in Criminal Appeal No. 1581 of 1999 and Criminal Revision Case No. 312 of 1999.

Bina Madhavan, Vinita Sasidharan (for Lawyer's Knit & Co.) for the Appellant.

Ramesh Allanki (for D. Mahesh Babu) for the Respondents.

The following Order of the Court was delivered

O R D E R

Heard learned counsel for the parties.

This Appeal has been filed against the impugned judgment and order dated 07th October, 2005 passed by the High Court of Andhra Pradesh in Criminal Appeal No. 1581 of 1999 and Criminal Revision Case No. 312 of 1999.

The facts have been set out in the impugned judgment and hence we are not repeating the same here except wherever necessary.

Learned counsel for the appellant submitted that the appellant was already convicted under Section 138 of the Negotiable Instruments Act, 1881 and hence he could not be again tried or punished on the same facts under Section 420 or any other provision of IPC or any other statute. We find force in this submission.

It may be noticed that there is a difference between the language used in Article 20(2) of the Constitution of India and Section 300(1) of Cr.P.C.. Article 20(2) states:

> "no person shall be prosecuted and punished for the same offence more than once." On the other hand, Section 300(1) of Cr.P.C. States:
>
> "300. Person once convicted or acquitted not to be tried for same office—
>
> (1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under sub- section (1) of section 221 or for which he might have been convicted under sub-section (2) thereof."

Thus, it can be seen that Section 300(1) of Cr.P.C. is wider than Article 20(2) of the Constitution. While, Article 20(2) of the Constitution only states that 'no one can be prosecuted and punished for the same offence more than once', Section 300(1) of Cr.P.C. states that no one can be tried and convicted for the same offence or even for a different offence but on the same facts.

In the present case, although the offences are different but the facts are the same. Hence, Section 300(1) of Cr.P.C. applies. Consequently, the prosecution under Section 420, IPC was barred by Section 300(1) of Cr.P.C.

The appeal is allowed and the impugned judgment of the High Court is set aside.

D.G. Appeal allowed.

B.A. UMESH

v.

REGR.GEN.HIGH COURT OF KARNATAKA

(Criminal Appeal Nos.285-286 of 2011)

FEBRUARY 1, 2011

[ALTAMAS KABIR AND A.K. PATNAIK, JJ.]

PENAL CODE, 1860 :

ss. 302, 376 and 392 – Conviction and sentence of death awarded by trial court finding the chain of circumstantial evidence complete – Conviction upheld and death sentence confirmed by High Court – Held :On the basis of oral evidence, the post mortem report, the evidence of the doctor who conducted the autopsy, the medical examination of injuries on the person of the accused, his extra judicial confession made to the doctor who examined him, the forensic report, the report of the Finger-Print Expert and the recoveries made from the house in occupation of the accused, the courts below rightly held that the accused, and none else, committed the offences –All the witnesses who claimed to be present at or near the place of occurrence remained unshaken in cross-examination, thereby completing the chain of circumstantial evidence in a manner that clearly indicates that no one other than the accused committed the offences with which he was charged –His conviction, therefore, upheld –Keeping in view the antecedents of the accused, the stolen/robbed articles recovered from the rented accommodation in his occupation, his remorseless attitude indicated by the fact that two days after the incident in question he was apprehended by public for attempting similar offences, the manner in which the offences of rape and murder were committed by him, it has rightly been held by the courts below that the accused is a menace to society and incapable of rehabilitation –The sentence of death is, therefore, confirmed –Sentence/ sentencing –Evidence –Circumstantial Evidence –Test Identification Parade –Extra-judicial confession –Identification

of Prisoners Act, 1920 –s.5 –Karnataka Police Manual.

The appellant-accused was convicted by the trial court of offences punishable u/ss 376, 302 and 392 IPC and was sentenced to death. The High Court upheld the conviction and confirmed the death sentence.

In the instant appeals, it was contended for the appellant-accused that his conviction was based entirely on circumstantial evidence which itself was based on inference which was of no evidentiary value; that the prosecution had almost entirely relied on the evidence of P.W.2, the son of the deceased, who was a minor of 7 years at the time of the incident, P.W.s 10 and 11, being chance witnesses, who claimed to have seen the appellant coming out of the house of the deceased, and P.W. 17, the landlady of the appellant who identified him in the Test Identification Parade. It was submitted that a photograph of the appellant had been published in the newspapers throwing doubt on such identification. It was further submitted that even if conviction of the appellant u/ss 302, 392 and 376 I.P.C. was to be accepted, the case did not fall within the category of "rarest of rare cases". It was submitted that the judges of the Division Bench of the High Court differed on the question of sentence and the matter was referred to another Judge who confirmed the death penalty imposed by the trial court.

Dismissing the appeals, the Court

HELD: 1.1 Since the conviction of the appellant is based on circumstantial evidence leading to the awarding of the death sentence to him along with his conviction u/ss 376 and 392 I.P.C., the Court has looked into the evidence adduced by the prosecution, with care and caution. [para 41] [401-F]

1.2 That, one 'J', the mother of P.W.2, was murdered inside her house on 28.2.1998 between 4.30 and 5.00 p.m. is not disputed, nor is it disputed that P.W.2 the son of the deceased, came back to the house after playing with his friends at about 5.00 p.m. and discovered the body of his mother lying on the ground stained with blood, with both her hands tied with a sari at one end, while the other end of the sari was tied to a window. It has also been established that P.W. 2, thereafter went to C.W.7, a neighbour, and told her what he had seen. On receiving the said information, C.W. 7 called C.W.6 and P.W. 8 and together they went to J's house with P.W.2 and through the window they saw 'J' lying on the ground. P.W.8 then called P.W.7, a Police Constable, living in the same locality, who telephoned P.W.9, the Inspecting Officer, who then came to the place of occurrence with Police Constable P.W.6. It also transpires from the evidence that on receiving information, P.W.14, a Police Constable working in the Dogs Squad, P.W.16, a Police Photographer and P.W.13, a Police Inspector and Finger-Prints Expert, arrived at the scene of occurrence. Thereafter, P.W.29, the Investigating Officer of the case, along with P.W.9, who was a Mazahar witness, went inside the room and found the deceased lying naked on the ground with abrasions on her body and both her hands tied in the manner indicated by PW-2. In addition, it was found, as was also indicated in the Inquest Report, that the tongue of the deceased protruded a little. There were scratch marks on her breasts and blood oozing out of her genitals. There were also strangulation marks on her neck. [para 41] [401-F-H; 402-A-E]

1.3 That the death of the victim was homicidal has been amply proved by the Post-mortem report of the Doctor (P.W.26), who was of the opinion that the death was due to asphyxia as a result of smothering and evidence of violent sexual intercourse and attempted

strangulation. In addition, the appellant was also examined by P.W.26 for evidence of sexual intercourse and during such examination the appellant confessed that he had pushed the victim and removed her clothes, tied her hands and committed theft. Thus, the victim's death has been established to be homicidal in nature. [paras 41-42] [402-F-H]

1.4 The evidence of P.W.2, the minor son of the deceased, is of great importance, notwithstanding the fact that he was about 7 years old when the incident had occurred. He has very clearly depicted the manner in which after returning from playing with his friends he found the appellant, who described himself as 'Venkatesh' uncle, coming out of the room in which he and his mother lived. He has also narrated, without any ambiguity, the statement made by the appellant that his mother being possessed by the devil, the appellant had to tie her hands and was going to call a doctor. He also disclosed that while leaving the house, the accused was carrying several things in a bag, including a VCR that was in the house. He also identified the accused in a T.I. Parade conducted at the Central Jail by the Tehsildar (P.W.24) and also in the court room while deposing. In addition, P.W.2 also identified a VCR, gold case watch, clock and anklets, saris and other things as belonging to his mother. His evidence has remained unshaken on cross-examination. [para 42] [403-B-E]

1.5 The evidence of P.W.2 was corroborated by the evidence of P.W.10, who lived in a rented house almost opposite to the rented house of the deceased. He has stated that the deceased being a tenant in the opposite house was familiar to him and that the distance separating the two premises would be about 30 feet. Although, described as a chance witness by the defence, he has explained his presence in his house at 2.00 p.m. on 28-2-1998, having completed his work in the first shift.

His explanation is quite plausible and he has stated without hesitation that he had seen the accused coming out of the house of the deceased with a bag and proceeding towards the pipe line. He also identified the accused in court as being the person whom he had seen coming out of the house of the deceased on the day of the incident at about 4.30 p.m. The said witness also identified the accused in the T.I. Parade conducted by the Tehsildar (P.W.24). [para 42] [403-E-H; 404-A]

1.6 The evidence of P.W.11 further corroborated the evidence of P.W.2 regarding the presence of the accused in the house of the deceased at the time of the incident. He too lives in a house opposite to the house of the deceased at a distance of about 50 feet. He too has been described as a chance witness by the defence, but he has explained his presence in the premises at the relevant time. In his evidence he has stated that at about 4.30-5.00 p.m. he saw a person coming out of the house of the deceased and proceeding towards the pipe line. He too identified the appellant in Court as being the person who had come out of the house of the deceased on the said date. He was also one of the witnesses, who identified the appellant in the T.I. Parade conducted by P.W.24. [para 43] [404-A-D]

1.7 The evidence of P.Ws 2, 10 and 11 as to the presence of the appellant at the place of occurrence on 28.2.1998 at the relevant time has been duly accepted by the trial court as well as the High Court and nothing has been shown on behalf of the appellant to disbelieve the same. In fact, the identification of the appellant by P.Ws 2, 10 and 11 is further strengthened by his identification by P.W.17, who has also deposed regarding the seizure of various items from the rented premises of the appellant, such as gold ornaments, suitcases, a television set and clothes. [paras 43-44] [404-D-F]

1.8 P.W.22, the elder sister of the deceased, also identified some of the articles seized by the Investigating Officer from the house of the appellant, as belonging to her deceased sister. Such items included a VCR, a pair of gold beads, 4 gold bangles, one pair of silver anklets and 15 to 20 silk and ordinary saris. [para 45] [404-E-F]

1.9 P.W.4, who had been approached by the appellant for a rented premises and who introduced the appellant to P.W.5, identified the accused to be the same person who had approached him for a rented accommodation stating that his name was Venkatesh. He was also one of the witnesses to the seizure of various items by the Investigating Officer. He has stated that after arresting the appellant, the Peenya Police had brought him to the rented accommodation in which he was staying and on the instructions of the police inspector, the appellant opened the door of the house with his own key, and, thereafter, upon entering the house, the police seized various items such as suitcases, saris, panties, VCR, TV and antenna, pants, shirts, ornaments and cash. Much the same statements were made by P.W.5, the owner of the house which had been rented out to the appellant. He corroborated the evidence of P.W.4 that the said witness had brought the appellant to him for the purpose of renting a house. P.W.5 was also a witness to the seizure. [para 46] [404-H; 405-A-D]

1.10 P.W.8, who was the landlady of the deceased, corroborated the prosecution story that P.W.2, on seeing the body of his mother lying on the ground in the room rushed to C.W.8, who has not, however, been examined by the prosecution, who rushed to P.W.8 and told her of the incident. All of them went to the house of the deceased and saw her lying on the ground on her back through the window and thereafter they went to the house of P.W.7 and informed him about the incident. [para

47] [405-D-E]

1.11 All the witnesses who claimed to be present at or near the place of occurrence remained unshaken in cross-examination, thereby completing the chain of circumstantial evidence in a manner that clearly indicates that no one other than the appellant committed the offences with which he was charged. The trial court has also relied upon the extra-judicial confession made by the appellant to the doctor, P.W.26, who examined him as to his sexual capacity, to the effect that he had pushed down the victim, removed her clothes, tied her hands and committed theft in the house. [para 48] [405-F-H]

1.12 The prosecution case is further strengthened by the Forensic Report and that of the Finger-Print Expert to establish that the finger prints which had been lifted by P.W.13 from the handle of the steel almirah in the room, matched the finger print of the appellant which clearly established his presence inside the house of the deceased. In a way, it is the said evidence which scientifically establishes beyond doubt that the appellant was present in the room in which the deceased was found after her death and was identified as such not only by P.W.2, who actually saw him in the house immediately after 'J' was murdered, but also by P.Ws 10 and 11, who saw him coming out of the house at the relevant point of time with the bag in his hand. The finger print of the appellant found on the handle of the almirah in the room of the deceased proves his presence in the house of the deceased and that he and no other caused J's death. [para 49] [406-A-D]

2.1 Apart from causing the death of the victim, the evidence also points to the commission of rape of the deceased by the appellant. That the deceased was lying naked with blood oozing out of her genitals and both her hands tied by a sari at one end clearly indicates violent

sexual intercourse with the deceased which has been established and confirmed by the medical evidence i.e. the post-mortem report and the evidence of the doctor PW-26. Besides, the examination of the accused by P.W.26, the doctor, who conducted the post-mortem examination, discloses laceration on the inner aspect of the upper lip and inner abrasions in both lips, scratch abrasions over the right side of the face. Abrasions over the front of right shoulder and over the right side at the back of the neck of the appellant indicated that the same could have been caused due to resistance and strengthens the case of the prosecution of forced sexual intercourse with the victim against her wishes. [para 50] [406-E-H; 407-A-B]

2.2 Even after committing the offences of rape and murder, the appellant robbed various articles, including jewellery and a VCR set from the house of the deceased. [paras 51] [407-C]

3.1 As regards the questions raised to the identification of the appellant by P.Ws 2, 10, 11 and 17 on the ground that the picture of the appellant had been published in the newspapers after the incident, it is significant to note that P.Ws 10 and 11 being the immediate neighbours of the appellant, had occasion to see him earlier. As far as P.W.17 is concerned, she was the appellant's landlady at the relevant point of time. [para 52] [407-E-F]

Musheer Khan alias Badshah Khan & Anr. Vs. State of Madhya Pradesh- 2010 (2) SCR 119 = (2010) 2 SCC 748- held inapplicable

3.2 On the question of recovery of M.Os.2 to 23 from the rented premises of the appellant, though an attempt has been made to discredit the role of P.W.5 as a panch witness, there is no reason to disbelieve the same since

such recovery was also witnessed by P.W.22, the sister of the deceased, who also identified the recovered articles. [para 53] [407-G-H]

3.3 As to the procedure adopted by the Investigating Officer for obtaining the finger-print of the appellant through P.W. 25 who was serving as Constable in Peenya Police Station at the relevant time, the same has been considered and dealt with by the High Court in its impugned judgment. It has been stated that such a procedure was available under the Karnataka Police Manual read with s. 5 of the Identification of Prisoners Act, 1920, and that it had been duly proved that the finger-print recovered from the handle of the almirah in the room of the deceased matched the right finger print of the appellant. [para 54] [408-A-C]

4. Therefore, conviction of the appellant u/ss 376, 392 and 302 IPC is confirmed. [para 55] [408-C-D]

5. On the question of sentence, the Court is satisfied that the extreme depravity with which the offences were committed and the merciless manner in which death was inflicted on the victim, brings it within the category of rarest of rare cases which merits the death penalty, as awarded by the trial court and confirmed by the High Court. None of the mitigating factors as were indicated by this Court in *Bachan Singh's case or in *Machhi Singh's*** case are present in the facts of the instant case. The appellant even made up a story as to his presence in the house on seeing P.W.2, who had come there in the meantime. Besides, it is clear from the recoveries made from the house of the accused that this was not his first crime but he had committed crimes in other premises also. The offences committed by the appellant were neither under duress nor on provocation and an innocent life was snuffed out by him after committing violent rape**

on the victim. He did not feel any remorse in regard to his actions, The remorseless attitude of the appellant is further evident from the fact that after having committed such heinous offences on 28.2.1998, within two days on 2.3.1998 he attempted a similar crime in the house of one 'S' and was caught by the public while trying to escape, as evidenced by P.Ws 18 and 20. As has been indicated by the courts below, the antecedents of the appellant and his subsequent conduct indicates that he is a menace to society and is incapable of rehabilitation. In such circumstances, it cannot be said that this is a fit case which merits any interference. The death sentence awarded to the appellant is confirmed. [paras 51, 56 and 57] [408-E-H; 407-C-D; 409-C]

******Bachan Singh Vs. State of Punjab* **(1980) 2 SCC 684] and *****Machhi Singh Vs. State of Punjab* **(1983) 2 SCC 470 - referred to**

Holiram Bordoloi Vs. State of Assam **(2005) 3 SCC 793;** *Dilip Premnarayan Tiwari & Anr. Vs. State of Maharashtra* **(2010) 1 SCC 775;** *Ronny alias Ronald James Alwaris & Ors. Vs. State of Maharashtra* **(1998) 3 SCC 625;** Om Prakash Vs. State of Haryana **(1999) 3 SCC 19] (1)** *Akhtar Vs. State of U.P.* **(1999) 6 SCC 60; (2)** *Bantu alias Naresh Giri Vs. State of M.P.* **(2001) 9 SCC 615; (3)** *Surendra Pal Shivbalakpal Vs. State of Gujarat* **(2005) 3 SCC 127; (4)** *Kulwinder Singh Vs. State of Punjab* **(2007) 10 SCC 455; and (5)** *Sebastian alias Chevithiyan Vs. State of Kerala* **(2010) 1 SCC 58;** *M.A. Antony v. State of Kerala* **(2009) 6 SCC 220,** *Ram Singh v. Sonia & Ors.* **(2007) 3 SCC 1 and** *Gura Singh v. State of Rajasthan* **(2001) 2 SCC 205,** *Mohd. Aman & Anr. Vs. State of Rajasthan* **(1997) 10 SCC 44 *and*** *State of Uttar Pradesh Vs. Ram Babu Misra* **(1980) 2 SCC 343 -cited**

Case Law Reference:

2010 (2) SCR 119	**held inapplicable**	**para 11**
(1997) 10 SCC 44	**cited**	**para 15**
(1980) 2 SCC 343	**cited**	**para 15**
(1998) 3 SCC 625	**cited**	**para 21**
(1999) 3 SCC 19	**cited**	**para 21**
(1999) 6 SCC 60	**cited**	**para 22**
(2001) 9 SCC 615	**cited**	**para 22**
(2005) 3 SCC 127	**cited**	**para 22**
(2007) 10 SCC 455	**cited**	**para 22**
(2010) 1 SCC 58	**cited**	**para 22**
(2009) 6 SCC 220	**cited**	**para 27**
(2007) 3 SCC 1	**cited**	**para 28**
(2001) 2 SCC 205	**cited**	**para 28**
(1980) 2 SCC 684	**referred to**	**para 33**
(1983) 2 SCC 470	**referred to**	**para 33**
(2005) 3 SCC 793	**cited**	**para 39**
(2010) 1 SCC 775	**cited**	**para 39**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 285-286 of 2011.

From the Judgment & Order dated 4.10.2007 and 18.2.2009 of the High Court of Karnataka at Bangalore in Criminal Referred Case No. 3 of 2006 C/w. Criminal Appeal No. 2408 of 2006.

Kiran Suri, S.J. Amith, Ankolekar Gurudatta, Vijay Kumar Aparna Bhat for the Appellant.

Anitha Shenoy, Rashmi Nandakumar, B.S. Gautham for the Respondent.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Leave granted.

2. These Appeals have been filed by the Appellant questioning the judgment and order dated 4th October, 2007, passed by the Karnataka High Court in Criminal Referred Case No.3 of 2006 and Criminal Appeal No.2408 of 2006 rejecting the Appellant's appeal and confirming the death sentence awarded to him by the Sessions Judge, Fast Track Court VII, Bangalore City, in S.C.No.725 of 1999, by judgment and order dated 26th October, 2006.

3. According to the prosecution, Jayashri, mother of Suresh (P.W.2) and sister of Manjula (P.W.22), was married to one Dr. Maradi Subbaiah who died about two years prior to 28.02.1998 on which date the incident which resulted in S.C.No.725 of 1999 is alleged to have occurred. After the death of her husband, Jayashri and her son Suresh, were staying in premises No.14/8 situated at Dasarahalli, Bhuvaneshwarinagar, Bangalore, as a tenant of one Lalitha Jaya (P.W.8). Suresh was studying in Upper K.G. in Blossom English School. His mother would drop him to school at Bagalkunte at 8.30 a.m. and would bring him back at 1.00 p.m. after classes were over.

4. On 28.2.1998, Jayashri took Suresh to school as usual at 8.30 a.m. and brought him back at 1.00 p.m. and they had lunch together in the house. After lunch, Suresh went out to play with his friends and apart from Jayashri there was no one else in the house. Suresh returned to the house at about 5.00 p.m. and saw the accused, B.A. Umesh, in the hall of the house who introduced himself as "Uncle Venkatesh" and told Suresh that his mother, Jayashri, was possessed by the devil and that he had, therefore, tied her hands and was going to bring a Doctor. The accused then left the house with a bag filled with articles.

According to the prosecution, Basvaraju (P.W.10) and Natesh (P.W.11) saw the accused going out of Jayashri's house with the bag on 28.2.1998 at about 4.30 p.m. Suresh then went into the room and saw his mother lying flat on the ground with blood on the floor and her hands tied together with a sari at one end and the other end of the sari was tied to a window. As she did not respond to his voice, Suresh went to Kusuma Shetty (C.W.7), a neighbour, and told her what he had seen. Kusuma Shetty called Geetha Hegde (C.W.6) and Lalitha Jaya (P.W.8) and together they went near Jayashri's house with Suresh and through the window they saw Jayashri lying on the ground. Lalitha Jaya then called Bylappa (P.W.7), a Police Constable, living in the same locality who telephoned Papanna (P.W.9), the Inspecting Officer, who came to the place of occurrence with Police Constable Garudappa (P.W.6). In the meantime, on being informed, A. Kumar (P.W.14) a Police Constable working in the Dogs Squad, Jagannath (P.W.16), a Police Photographer and R. Narayanappa (P.W.13) a Police Inspector and finger-print expert arrived at the place of occurrence. B.N. Nyamaagowda (P.W.29), the Investigating Officer, found that Jayashri was lying dead on the floor with her genitals exposed and blood oozing from her vagina. The doors of an almirah in the house were open and articles in the house were lying scattered. He prepared a report and sent the same through P.W.6 to the Police Station to register a crime. P.W.6 took the said report to Peenya Police Station and the same was registered as Crime No.108 of 1998. He then prepared a First Information Report and sent the same to Court. A copy of the F.I.R. was also sent to P.W.29, the Investigating Officer. P.W.14 had come from the Dogs Squad with Dhrona, a sniffer dog, who having sniffed the dead body and Jayashri's clothes went towards the pipeline and returned. P.W.16, the Police Photographer, took photographs of the dead body and the scene of offence. P.W.13, the finger-print expert, found finger-prints on a wall clock and also on the handle of the almirah (Exts. P.14 and P.15). P.W.29, thereafter, conducted inquest over the dead body in the presence of Panch witnesses,

P.Ws.2, 3 and 4, and sent the dead body for Post- mortem examination to Dr. Somashekar (P.W.26) who after conducting the Post-mortem on Jayashri's dead body opined that death had occurred due to smothering after commission of sexual assault.

5. On 2.3.1998 at about 2.30 p.m., on receipt of an information in the Central Room that the public had apprehended a thief, P.W.18 went to the spot and came to learn that the person who had been apprehended had tried to commit a robbery in the house of Smt. Seeba and had caused bleeding injuries to her person. On enquiry it transpired that the name of the apprehended person was Umesh Reddy and that he had committed many crimes at various places, including the house of the deceased. Umesh Reddy volunteered to show the place where he had kept the robbed articles. He, thereafter, revealed that his name was Venkatesh and that he had taken the premises belonging to P.Ws.5 and 17 on lease. According to the prosecution, the appellant approached Maare Gowda (P.W.4) to get him a place on rent and P.W.4 took him to his relative M.R. Ravi (P.W.5) who along with Jayamma (P.W.17) was the owner of a tenement in which he agreed to rent a premises to the appellant on a monthly rental of Rs.350/-. On the agreed terms the appellant occupied the premises belonging to P.Ws.5 and 17.

6. It is the further case of the prosecution that the appellant voluntarily led the Police and the Panchas P.Ws.12 and 29 to the premises under his occupation as a tenant under P.Ws.5 and 17 and showed them 191 articles, including 23 items said to have been recovered from the house of the deceased, which were seized under mahazar (Ex.P.11). The remaining articles were seized in connection with other cases registered against the appellant. The body of the deceased was sent for Post-mortem on 3.3.1998 and on the same day the sample finger prints of the appellant was taken by Mallaraja Urs (C.W.25) in the presence of P.W.29. The appellant was sent for medical

examination and was examined by P.W.26 who issued the wound certificate regarding the injuries found on the body of the appellant. P.W.22, Manjula, the sister of the deceased, identified the articles (M.Os.1 to 22) seized under mahazar (Ex.P.11) as articles belonging to Jayashri and also stated that Jayashri had been married to Dr. Maradi Subbaiah. Thereafter, on the requisition of P.W.29 the Taluka Executive Magistrate (P.W.24) conducted Test Identification Parade on 30.3.1998 and P.Ws.2, 10, 11 and 17 identified the appellant at the said T.I. Parade. The articles seized in the case were sent by P.W.29 to the Forensic Science Laboratory and after receiving the serology report, P.W.29 completed the investigation and filed Charge Sheet against the appellant of having committed offences punishable under Sections 376, 302 and 392 I.P.C. The case was committed to the Court of Sessions and charge was framed against the appellant under Sections 376, 302 and 392 I.P.C. The appellant pleaded not guilty to the charges and claimed to be tried.

7. The prosecution examined 29 witnesses who proved Exts. P1 to P48(a). During cross-examination of P.Ws.5, 16, 17 and 18, the defence proved Exts.D1 to D4 through the said witnesses. M.Os. 1 to 32 were marked on behalf of the prosecution. The statement of the appellant under Section 313 Cr.P.C. was recorded. The defence of the appellant was one of denial. No witness was examined on behalf of the appellant. After considering the submissions of the learned Public Prosecutor and the learned counsel for the appellant and after appraising the oral and documentary evidence, the trial Court held that the prosecution had proved beyond all reasonable doubt that the appellant had committed the offences with which he had been charged and found him guilty of the offences punishable under Sections 376, 302 and 392 I.P.C. After hearing the appellant and the learned counsel for the appellant on the question of sentence, the trial Court sentenced the appellant to suffer 7 years rigorous imprisonment and to pay a fine of Rs.25,000/- and in default of payment of the fine to suffer

further rigorous imprisonment of 2 years for the offence punishable under Section 376 I.P.C. The appellant was also sentenced to undergo 10 years rigorous imprisonment and to pay a fine of Rs.25,000/- and in default of payment of the fine to suffer further rigorous imprisonment of 2 years for the offence punishable under Section 392 I.P.C. The appellant was lastly sentenced to death by hanging for the offence punishable under Section 302 by the trial Court which also made a reference to the High Court under Section 366 Cr.P.C. for confirmation of the death sentence, and the same was renumbered as Criminal Reference Case No.3 of 2006. Being aggrieved by the judgment of conviction and sentence passed against him by the trial Court, the appellant also preferred Criminal Appeal No.2408 of 2006.

8. The Reference and the Appeal were heard together and upon a fresh look at the evidence on record, and in particular the oral evidence of P.W.2 (son of the deceased), P.W.3 (neighbour), P.W.8 (landlady of the appellant), P.W.9 (Mazahar witness), P.W.26 (doctor who conducted the Post-mortem examination on the body of the deceased), P.W.27 (Forensic Expert) and the Post-Mortem, FSL and Serology Reports, dismissed the Appellant's Criminal Appeal No.2408 of 2006 and confirmed the judgment of conviction dated 26.10.2006 passed by the Sessions Judge, Fast Track Court-VII, Bangalore City, in S.C.No.725 of 1999. Consequently, on the finding that there was no possibility of the appellant's reformation in view of his conduct despite his earlier convictions and punishment in earlier cases of robbery, dacoity and rape, the High Court held the present case to be one of the rarest of rate cases which warranted confirmation of the death penalty awarded by the trial Court, and answered Criminal Reference Case No.3 of 2006 made by the Sessions Judge, Fast Track Court-VII, Bangalore, by confirming the death sentence.

9. Appearing for the appellant, Ms. Kiran Suri, learned advocate submitted that the appellant's conviction was based entirely on circumstantial evidence which was itself based on

inference which was of no evidentiary value. Ms. Suri urged that the prosecution had almost entirely relied on the evidence of P.W.2, Suresh, the son of the deceased, who was a minor of 7 years at the time of the incident, and P.W.s 10 and 11, Basavaraju and Natesh, who claimed to have seen the appellant coming out of the house of the deceased and P.W. 17, Jayamma, the landlady of the appellant who identified the appellant in the Test Identification Parade.

10. Ms. Suri submitted that the other prosecution witnesses were those who had been associated with the investigation in one way or the other, such as P.W. 13, Narayanappa, the finger-print expert who found the finger-print of the appellant on the handle of the almirah in the victim's room, P.W.26, the doctor who conducted the Post-mortem examination on the body of the victim, P.W.27, D. Siddaramaiah, Forensic Expert and P.W. 29, the Investigating Officer in the case.

11. Ms. Suri contended that as far as P.W.2 is concerned, he being a minor of 7 years when the incident had taken place, his testimony would have to be treated with caution. Ms. Suri also contended that from an analysis of the evidence on record it is extremely doubtful as to whether P.W.2 was at all present when the deceased was killed. Ms. Suri urged that had P.W.2 seen the appellant in the house at the time of the incident, as stated in his evidence, he would certainly have reacted in a manner different from what has been indicated. More importantly, if the appellant had been in the house when P.W.2 is said to have seen him at the time of the incident, nothing prevented him from eliminating P.W.2, who was a minor child of seven, in order to remove the only witness who could link him with the murder, in the absence of any other person in the house. Ms. Suri pointed out that not only was P.W.2 7 years old when the incident had occurred, but his evidence was taken 7 years thereafter which raised doubts as to its correctness and accuracy. Ms. Suri urged that even the state in which he found

his mother after the appellant is said to have left the house, indicated that he had come on the scene after the other witnesses had come in and covered her body with a sari. Even in respect of identification of the appellant by P.W.2 at the Central Jail, Bangalore, it was submitted that a photograph of the appellant had been published in the newspapers throwing doubt on such identification. Ms. Suri urged that the same reasoning will also hold good as far as identification of the appellant by P.Ws 10 and 11, Basavaraju and Natesh, are concerned, since they were only chance witnesses. While P.W.10 was living in a house opposite to the rented accommodation of the appellant, P.W.11 was a close neighbour of the deceased, and it is only by chance that they claim to have been present at the exact moment when the appellant allegedly came out of the house of the deceased. Ms. Suri submitted that as had been held by this Court in *Musheer Khan alias Badshah Khan & Anr. Vs. State of Madhya Pradesh* [(2010) 2 SCC 748], the reliability of a Test Identification Parade under Section 9 of the Evidence Act, 1872, becomes doubtful when the same is held much after the incident and when the accused is kept in police custody during the intervening period. Ms. Suri submitted that while the incident is stated to have occurred on 28.2.1998, the T.I. Parade was conducted by the Tehsildar K.S. Ramanjanappa (P.W.24) on 30.3.2005 about seven years after the incident had taken place.

12. Ms. Suri then took up the question of recovery of M.Os. 1 to 23 from the house of the appellant in the presence of P.Ws. 4, 5 and 12. It was urged that the evidence of P.W.4, Maare Gowda, the appellant's landlord, in cross-examination, was sufficient to throw doubts over P.W.5 Ravi's role as a panch witness to the recovery of the articles which were later identified as belonging to the deceased by her elder sister Manjula (P.W.22). Even as far as P.W.12 Manjunath is concerned, Ms. Suri submitted that it was quite evident that he was not an independent witness as he used to serve tea, coffee and food to the people in Peenya Police Station, including those in the

lock-up, and was available as a witness whenever called upon by the police.

13. From the Mahazar prepared in the presence of P.Ws 5 and 12, Ms. Suri pointed out item No.186 which was described as a cream-coloured panty with mixed stains which was said to have been removed by the appellant to have sexual intercourse with the deceased and was thereafter worn by him while returning home. Learned counsel submitted that in his evidence P.W.29, the Investigating Officer, had indicated that he had seized an underwear which was white in colour and only subsequently another cream-coloured underwear was shown to him which was marked as M.O.32. Referring to the list of Material Objects marked by the prosecution, Ms. Suri pointed out M.O.28, which was shown as a white underwear, while M.O.32 was shown as a cream-coloured underwear. Ms. Suri submitted that No.23-a design sari, M.O.25-white colour brassiere, M.O.26-Red colour blouse and M.O.27-Red colour cloth like tape, had been recovered from the body of the deceased by P.W.26, Dr. M. Somasekar, who conducted the Post-mortem examination on the body of the deceased and proved the same in his evidence. Ms. Suri submitted that there was no mention of recovery of any panty or underwear from the body of the deceased during the Post-mortem examination. On the other hand, M.O.28, which was a white underwear and certain blood samples (M.Os.29 and 30) had been proved by the forensic expert, D. Siddaramaiah (P.W.27), which established the fact that the white underwear M.O.28 and not M.O.32, the cream-coloured panty which the accused is alleged to have worn after sexually assaulting the deceased, had been sent to the Serologist for examination. Ms. Suri submitted that the cream-coloured panty was subsequently introduced in the investigation by P.W.29, inasmuch as, in his evidence P.W.27 clearly stated that the white underwear (M.O.28) did not contain any trace of semen. Ms. Suri also pointed out that in his evidence P.W.29 had stated that while drawing up the Mahazar he had seized one underwear. On the basis of the evidence

led by the prosecution the said underwear could only have been M.O.28 listed in the Mahazar, which was sent to F.S.L. and was proved by P.W.27, on which traces of human blood had been found, but not semen. It was during his examination-in-chief that a cream-coloured panty which had not been sent to the F.S.L., was shown to P.W.29 and was marked M.O.32. Ms. Suri submitted that since the white underwear was shown as M.O.28 in the Mahazar, the same could only be taken into consideration in appraising the evidence.

14. Ms. Suri then addressed the third aspect of the prosecution case relating to lifting of the finger print of the appellant from the handle of the almirah in the room of the deceased. It was contended that the procedure adopted for obtaining the finger print of the appellant by P.W.25, while he was in custody, for the purpose of comparison with the finger print lifted from the handle of the almirah in the room of the deceased, left sufficient room for doubt about the authenticity of the finger print taken from the appellant for the purpose of comparison. It was submitted that rather curiously all the other finger prints in the room, including the one taken from the wall clock, were smudged and were of no use for the purpose of comparison, which also gave rise to doubts as to whether the finger prints alleged to have been taken from the handle of the almirah in the room of the deceased, had actually been lifted from the said place. Ms. Suri submitted that the finger print of the appellant taken by P.W.25 when the appellant was in custody, should have been taken before a Magistrate to ensure its authenticity. Furthermore, although, the said finger print was taken on 8.3.1998, the same was sent to the F.S.L. only on 15.3.1998.

15. Referring to the provisions of the Identification of Prisoners Act, 1920, Ms. Suri submitted that Section 2(a) defined “measurements” to include finger impressions and Section 2(b) defined “Police Officer” to mean an officer in charge of a police station, a police officer making an

investigation or any other police officer not below the rank of Sub-Inspector. Learned counsel also pointed out that Section 4 of the Act provided for the taking of measurements of non-convicted persons, which under Section 5 could be ordered by a Magistrate if he was satisfied that the same was for the purpose of investigation. Ms. Suri, however, also pointed out that in *State of Uttar Pradesh Vs. Ram Babu Misra* [(1980) 2 SCC 343], this Court while considering the provisions of Section 5 of the above Act and Section 73 of the Indian Evidence Act, 1872, held that Section 73 did not permit a Court to give a direction to the accused to give specimen writings for anticipated necessity for comparison in a proceeding which may later be instituted in the court. Direction under Section 73 to any person present in the court to give specimen writings is to be given for the purpose of enabling the court to compare and not for the purposes of enabling the Investigating or other agency to make any comparison of such handwriting. Ms. Suri also referred to the decision of this Court in *Mohd. Aman & Anr. Vs. State of Rajasthan* [(1997) 10 SCC 44], where finger prints of the accused found on a brass jug seized from the house of the deceased were kept in the police station for five days without any justifiable reason. Furthermore, the specimen finger prints of the accused had not been taken before or under the order of the Magistrate and, accordingly, the conviction based on the evidence of the finger prints of the accused on the brass jug were held to be not sustainable. Ms. Suri also referred to the decision in *Musheer Khan's* case (supra), where the question of the evidentiary value of a finger-print expert was considered apart from the question of identification and it was held that such evidence fell within the ambit of Section 45 of the Evidence Act, 1872. In other words, the evidence of a finger print expert is not substantive evidence and can only be used to corroborate some items of substantive evidence which are otherwise on record and could not, therefore, have been one of the main grounds for convicting the appellant of the offences with which he had been charged.

16. Regarding the charge of rape, Ms. Suri submitted that there was no evidence to connect the appellant with the offence. Not only were there no eye-witnesses, but even the oral evidence relied upon by the prosecution or the Material Objects seized from the scene of the crime or recovered from the body of the victim during Post-mortem examination or from the appellant, established the commission of rape on the deceased by the appellant.

17. Ms. Suri submitted that having regard to the state of the evidence adduced by the prosecution, no case could be said to have been made out against the appellant either under Section 302 or under Sections 392 and 376 I.P.C.

18. Coming to the question of sentencing, Ms. Suri submitted that even if the conviction of the appellant under Sections 302, 392 and 376 I.P.C. was to be accepted, the case did not fall within the category of "rarest of rare cases", which merits imposition of the death penalty. In order that a death sentence be passed on an accused, the court has to keep in mind various factors such as :

(1) that the murder of the deceased was not premeditated;

(2) that the accused did not have any previous criminal record so as to draw a conclusion that the accused was a menace to society;

(3) that the death was caused in a fit of passion;

(4) that the accused was of young age and there was nothing on record to indicate that he would not be capable of reform; and

(5) that the death was not as a part of conspiracy or with the intention of causing death.

19. Ms. Suri submitted that the two Hon'ble Judges of the Karnataka High Court hearing the Criminal Appeal differed on the question of awarding death penalty to the appellant. Learned counsel submitted that Justice V.G. Sabhahit confirmed the death sentence imposed by the trial Court upon holding that there was something uncommon about the crime in the present case which renders the sentence of imprisonment for life inadequate. Justice Sabhahit held that the commission of the offence not only of rape but also of murder and theft indicated that the appellant was not only cruel, heartless, unmerciful and savage, but also brutal, pitiless, inhuman, merciless and barbarous, considering the fact that he had taken undue advantage of a helpless woman. However, Justice R.B. Naik, while agreeing with the conviction of the appellant by the trial Court, was of the view that as a rule death sentence should be imposed only in the rarest of rare cases in order to eliminate the criminal from society, but the same object could also be achieved by isolating the criminal from society by awarding life imprisonment for the remaining term of the criminal's natural life. Ms. Suri submitted that on account of the difference of opinion of the two Hon'ble Judges, the question of sentencing was referred to a third judge, the Hon'ble Mr. Justice S.R. Bannurmath, who, in Criminal Reference Case No.3 of 2006, concurred with the view taken by Justice Sabhahit and confirmed the death penalty imposed by the trial Court.

20. Ms. Suri submitted that in order to have a deterrent effect on social crimes, the view taken by Justice Naik was more acceptable as it would have effect not only in removing the accused from society, but would also enable him to realize the gravity of the offence committed by him.

21. In support of her submissions, Ms. Suri firstly relied on the decision of this Court in *Ronny alias Ronald James Alwaris & Ors. Vs. State of Maharashtra* [(1998) 3 SCC 625], where despite conviction under Sections 302, 449, 347, 394, 376(2)(g), Sections 467, 471 and 201 read with Section 34

I.P.C., this Court while upholding the conviction held that it was not possible to identify the case as being a rarest of rare case and, accordingly, commuted the death sentence imposed on the accused to life imprisonment. Reference was also made to the decision of this Court in *Om Prakash Vs. State of Haryana* [(1999) 3 SCC 19], where upon conviction under Sections 302 and 307 read with Section 34 I.P.C. and Section 27(3) of the Arms Act, the accused was sentenced to death for committing the brutal murder of seven persons belonging to one family for the purpose of taking revenge. This Court taking into account the mental condition and age of the accused held that it could not be treated to be one of the rarest of rare cases and accordingly, commuted the death sentence to one of imprisonment for life.

22. In addition to the above, Ms. Suri also referred to (1) *Akhtar Vs. State of U.P.* [(1999) 6 SCC 60]; (2) *Bantu alias Naresh Giri Vs. State of M.P.* [(2001) 9 SCC 615]; (3) *Surendra Pal Shivbalakpal Vs. State of Gujarat* [(2005) 3 SCC 127]; (4) *Kulwinder Singh Vs. State of Punjab* [(2007) 10 SCC 455]; and (5) *Sebastian alias Chevithiyan Vs. State of Kerala* [(2010) 1 SCC 58]. In each of the said cases, this Court commuted the death sentence to life imprisonment on account of the circumstances which could not be included within the category of rarest of rare cases which merited the death penalty.

23. Ms. Suri submitted that in the instant case also there is nothing on record to indicate that the appellant had any premeditated design to cause the death of the victim or that the circumstances indicated that the offence had been committed in a manner which brought it within the ambit of "rarest of rare cases", for which anything less than the death penalty would be inadequate. Ms. Suri submitted that taken at its face value all that can be said of the prosecution case is that the appellant committed rape and murder of the deceased while committing theft at the same time, which did not make such offence one of the rarest of rare cases, which merited the

death penalty.

24. Appearing for the State, Ms. Anitha Shenoy, learned Advocate, submitted that although the appellant's conviction was based on circumstantial evidence, such evidence had established a conclusive chain which clearly establish that no one other than the appellant could have committed rape on the deceased and, thereafter, cause her death, besides committing theft of various articles from the house of the deceased. Ms. Shenoy submitted that the manner in which the murder had been committed after raping the deceased and his previous history of conviction in both rape and theft cases, as also his subsequent conduct after this incident, did not warrant interference with the death penalty awarded to the appellant.

25. Ms. Shenoy submitted that from the Inquest Report it appears that the body of Jayashri was found in the bedroom lying on her back. Both her hands had been bound with a yellow, green and red-coloured flower designed sari and the other end of the sari had been tied to an inner window bar in the room. The tongue of the deceased was found to be protruding and both the eyes were closed. A designed sari was on the body and a pink-coloured blouse and white brassiere was on her shoulders. A red tape-like cloth was near the head of the deceased and there was bleeding from the deceased's genitals and blood was also found on the floor. In addition, there were injuries on her right breast and abrasions near her right elbow and stomach. Ms. Shenoy also referred to the deposition of P.W.9 who was a Mahazar witness, wherein it was stated that the deceased Jayashri was lying naked, there were abrasions on her body and both of her hands were tied with a red tape lengthy cloth and the other end was tied to a window. There were scratch marks on her breasts and blood oozing out of her genitals. What was also stated was that there were strangulation marks on her neck. Ms. Shenoy submitted that the Inquest Report and the Mahazar of the scene of occurrence was further corroborated by the evidence of P.W.1 (Police), P.W.2

(son of deceased), P.W.3 (a neighbour), P.W.8 (landlady of the deceased) and P.W.29 (the Investigating Officer). Ms. Shenoy then urged that the Post-mortem report indicated that there was a faint ligature mark present on the front and sides of the neck over the thyroid cartilage in front 2 inches away from the right ear and 2.5 inches from the left ear. The other injuries noted were :

"1. Laceration on the inner aspect of the upper lip meddle 1 c.m. x 0.5 c.m. x-ray 5 c.m.

2. In both lips abrasion on inner aspect present.

3. Abrasion three number present on upper part of right side chest.

4. Laceration over left nostril with adjacent abrasion.

5. Scratch marks present over chest upper and middle region and over right breast and below right breast.

6. Abrasion over right forearm outer back aspect near the elbow and wrist.

7. Abrasion over left elbow outer aspect.

8. Upon dissection patches of contusion seen on chest wall front.

Genital region blood stains seen at the vaginal outlet. Laceration of vagina 1 c.m. in length from vaginal outlet on the posterior wall was present. Semen like material was present in the vagina, which was collected and sent for Micro Biological examination which shows the presence of sperms."

26. Ms. Shenoy also referred to the chemical examiner's report, wherein it was opined that the vaginal smear sent for

microbiological examination showed presence of spermatozoa. Ms. Shenoy pointed out that according to the opinion of P.W.26, Dr. M. Somashekar, who conducted the Post-mortem examination on the deceased, death was due to asphyxia as a result of smothering and evidence of violent sexual intercourse and attempted strangulation. Ms. Shenoy further submitted that in his evidence P.W.26 had mentioned the fact that while stating the facts about the incident, the appellant had stated that he pushed the victim and removed her clothes, tied her hands and committed theft.

27. On the question of the extra-judicial confession said to have been made by the appellant before P.W.26, Ms. Shenoy referred to the decision of this Court in *M.A. Antony v. State of Kerala* [(2009) 6 SCC 220], in which, in a similar situation, the extra-judicial confession made to a doctor was accepted upon rejection of the defence claim that such confession had been made in the presence of police officers. This Court held that there was no evidence at all to suggest that any policeman was present when the appellant made the confessional statement before the doctor, whereupon such confession could have been kept out of consideration. Ms. Shenoy submitted that even in the instant case there is nothing on record to indicate that the confessional statement said to have been made by the appellant before P.W.26 Dr. Somashekar was made in the presence of any police personnel. There was also no suggestion in cross-examination of P.W.26 that at the time of examination of the appellant for evidence of sexual intercourse either any force was used or any police personnel was present when he is said to have made the confessional statement to P.W.26.

28. Ms. Shenoy then submitted that the question relating to the reliability of an extra-judicial confession also came up for the consideration of this Court in *Ram Singh v. Sonia & Ors.* [(2007) 3 SCC 1] in which case also the value of an extra-judicial confession made before a stranger came up for consideration and it was held that such a submission could not

be accepted since in several decisions this Court had held that an extra-judicial confession made even to a stranger cannot be eschewed from consideration if the Court found it to be truthful and voluntarily made before a person who had no reason to make a false statement. Similar was the view of this Court in *Gura Singh v. State of Rajasthan* [(2001) 2 SCC 205], wherein it was observed that despite inherent weakness of an extra-judicial confession as an item of evidence, it cannot be ignored that such confession was made before a person who had no reason to state falsely and to whom it is made in the circumstances which tend to support the statement. Several other decisions on this point were referred to by Ms. Shenoy which did not, however, detain us, as they are in the same vein as the decisions already cited.

29. On the question of identification which has been one of the main pillars of the prosecution case in order to weave a chain of circumstantial evidence which in clear terms pointed towards the guilt of the accused, the prosecution examined the minor son of the deceased, Suresh (P.W.2) and P.Ws 4, 5, 11 and 17, who were near the place of occurrence at the relevant point of time. Ms. Shenoy submitted that except for P.W.2, the minor son of the deceased who is stated to have actually seen the accused in the room where the deceased was lying, all the other witnesses had seen the appellant at some time or the other before the commission of the crime. As far as P.W.2 is concerned, Ms. Shenoy submitted that the incident was so graphic that it left an indelible imprint in his mind and that the evidence of all the witnesses who identified the appellant conclusively establishes the presence of the appellant in the house of the deceased at the time of the commission of rape, murder and theft and in further establishing that Umesh Reddy, the appellant is the same person who introduced himself as Venkatesh to P.Ws.2, 4, 5, 11 and 17.

30. Regarding the conducting of the Test Identification Parade by the Tehsildar, P.W.24, it was submitted that no

irregularity could be pointed out on behalf of the defence to discredit the same.

31. The fourth question which had been indicated by Ms. Shenoy regarding the identification of the finger-prints taken from the handle of the steel almirah kept in the room of the deceased, where the charged offences had been committed, clearly establishes the presence of the appellant in the said room. Ms. Shenoy submitted that there was no acceptable explanation from the side of the defence to explain the finger prints of the appellant on the handle of the almirah which was in the room of the deceased. Ms. Shenoy urged that once the presence of the appellant was established in the room when and where the offences were perpetrated, the chain of circumstantial evidence was to a large extent almost complete and was completed with the recovery of the articles stolen from the room of the deceased, in the room rented to the appellant by Jayamma (P.W.17).

32. Ms. Shenoy submitted that apart from the aforesaid circumstances in commission of the offences with which the appellant had been charged, the subsequent incidents leading to the arrest of the appellant could not be discounted. Ms. Shenoy pointed out that while the offences in relation to the instant case were committed on 28.2.1998, on 2.3.1998 the appellant was apprehended by local people living in Officers' Model Colony. From the deposition of P.W.18, A.S.I. Peenya Police Station, it is revealed that on receipt of a communication from the Police Control Room that a thief had been caught by the public in S.M. Road in Officers' Model Colony, he had gone there and was informed that the thief, who was later identified as the appellant, had tried to robe the house of one Seeba by forcibly entering her house and inflicting blood injuries on her. Ms. Shenoy submitted that the evidence of P.W.18 was duly corroborated by the evidence of P.W.20, Head Constable Laxminarasappa, attached to the Vidhan Soudha security who was present when the accused was apprehended.

33. Responding to the submissions made by Ms. Suri in support of the defence case, Ms. Shenoy submitted that the minor discrepancies in the evidence of P.W.2 and P.W.17 relating to identification of the appellant and recovery of various items belonging to the deceased from the house of the appellant, could not discredit their evidence, on account of the facts that the deposition was recorded seven years after the incident had occurred. Ms. Shenoy submitted that in view of the evidence of other witnesses, minor lapses could not and did not take away from the case as made out by the prosecution and accepted by the Trial Court as well as the High Court. Ms. Shenoy then submitted that in any event two items of jewellery, viz., the gold gundas and leg chain, which were on the body of the deceased and had been recovered from the appellant, had been duly identified by P.W.2, Suresh. Lastly, on the question of sentence, Ms. Shenoy referred to and relied upon the various decisions of this Court beginning with *Bachan Singh v. State of Punjab* [(1980) 2 SCC 684] and *Machhi Singh Vs. State of Punjab* [(1983) 2 SCC 47.3.0], which were subsequently consistently followed in the other decisions cited by Ms. Shenoy.

34. Ms. Shenoy submitted that the constitutionality of the death penalty for murder provided in Section 302 I.P.C. and the sentencing procedure embodied in Section 354(3) of the Criminal Procedure Code, 1973, had been considered in the case of *Bachan Singh Vs. State of Punjab* [(1980) 2 SCC 684], on reference by a Constitution Bench of this Court and the constitutional validity of the imposition of death penalty under Section 302 I.P.C. was upheld with Hon'ble Bhagwati J., giving a dissenting judgment. The other challenge to the constitutionality of Section 354(3) Cr.P.C. was also rejected, though certain mitigating factors were suggested as under:

"Dr. Chitale has suggested these mitigating factors:

Mitigating circumstances.— In the exercise of its discretion in the above cases, the court shall take into account the following circumstances:

(1) That the offence was committed under the influence of extreme mental or emotional disturbance.

(2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(4) The probability that the accused can be reformed and rehabilitated.

The State shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above.

(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(6) That the accused acted under the duress or domination of another person.

(7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct."

The said mitigating circumstances as suggested by learned counsel, Dr. Chitale, were held to be relevant circumstances to which great weight in the determination of sentence was required to be given. It was also observed in the majority decision as follows :

"There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation. "We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society." Nonetheless, it cannot be over-emphasised that the scope and concept of mitigating

factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in Section 354(3). Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and Figures, albeit incomplete, furnished by the Union of India, show that in the past, courts have inflicted the extreme penalty with extreme infrequency — a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guide-lines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3) viz. that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."

35. Ms. Shenoy submitted that the Constitution Bench was fully aware of the concern for the dignity of human life and that taking of a life through law's instrumentality ought not to be resorted to except in the rarest of rare cases, when none of the mitigating circumstances could justify the imposition of a lesser penalty.

36. Ms. Shenoy then referred to the decision of this Court in *Machhi Singh Vs. State of Punjab* [(1983) 3 SCC 470], wherein a Bench of Three Judges had occasion to apply the decision in *Bachan Singh's* case (supra) in regard to four of the twelve accused who were sentenced to death. This Court rejected the appeals filed by the said accused and confirmed the death sentence awarded to three of the appellants. While

confirming the death sentence awarded to the said three accused, the Court culled out certain propositions from *Bachan Singh's* case, as extracted hereinbelow :

> "In this background the guidelines indicated in Bachan Singh case will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from Bachan Singh case:
>
> (i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.
>
> (ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.
>
> (iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.
>
> (iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

37. This Court then went on to observe that in order to apply the said guidelines the following questions could be asked and answered :

> "In order to apply these guidelines inter alia the following questions may be asked and answered:
>
> (a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?
>
> (b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?"

38. Ms. Shenoy submitted that in the aforesaid case, the Court took into consideration the calculated and cold blooded murders of innocent defenceless women, children, veterans and newly-married couples in an exceptionally depraved, heinous, horrendous and gruesome manner for reprisal, as a result of family feud, with a view to wipe out the entire family and relatives of the opponent, in which circumstances only death sentence and not life imprisonment would be adequate.

39. Ms. Shenoy submitted that the propositions enunciated in *Bachan Singh's* case (supra) and *Machhi Singh's* case (supra) have been consistently followed in subsequent cases involving death sentence with minor variations with regard to the circumstances in which the murders were committed and mitigating factor, if any. For example, in the case of *Holiram Bordoloi Vs. State of Assam* [(2005) 3 SCC 793], this Court observed that there was nothing on record to show that there was any repentance by him at any point of time nor was any attempt made to give an explanation to the occurrence even while being questioned under Section 235(2) Cr.P.C., the accused had nothing to say at the point of sentence. It was also observed that there was no spark of any kindness or compassion and the mind of the appellant was brutal and the

entire incident would have certainly shocked the collective conscience of the community. On the basis of such observation, this Court held that there was no mitigating circumstance to refrain from imposing the death penalty on the appellant. Ms. Shenoy also referred to the decision of this Court in *Dilip Premnarayan Tiwari & Anr. Vs. State of Maharashtra* [(2010) 1 SCC 775], wherein while considering confirmation of death sentence awarded to some of the accused, this Court had observed that in a death sentence matter, it is not only the nature of crime, but the background of the criminal, his psychology, his social condition and his mind set for committing the offence, were also relevant.

40. Ms. Shenoy submitted that applying the tests indicated in *Bachan Singh's* case (supra), the facts of the present case were not covered by any of the mitigating circumstances enunciated in the two sets of cases and all subsequent cases following the same and consequently, there could be no reason for commuting the death sentence awarded to the appellant and the appeal was, therefore, liable to be dismissed.

41. Since the conviction of the appellant is based on circumstantial evidence leading to the awarding of the death sentence to him along with his conviction under Sections 376 and 392 I.P.C., we have carefully looked into the evidence adduced by the prosecution with care and caution. That Jayashri, the mother of P.W.2, was murdered inside her house on 28.2.1998 between 4.30 and 5.00 p.m. is not disputed, nor is it disputed that P.W.2 Suresh, the son of the deceased, came back to the house after playing with his friends at about 5.00 p.m. and discovered the body of his mother lying on the ground stained with blood, with both her hands tied with a sari at one end, while the other end of the sari was tied to a window. It has also been established that after discovering his mother's body in the above manner, Suresh went to Kusuma Shetty, a neighbour and told her what he had seen. On receiving the said information, Kusuma Shetty called Geetha Hegde and Lalitha

Jaya and together they went to Jayashri's house with Suresh and through the window they saw Jayashri lying on the ground. Lalitha Jaya who was later examined as P.W.8 by the prosecution has deposed that she called Bylappa (P.W.7), a Police Constable, living in the same locality, who telephoned Papanna (P.W.9), the Inspecting Officer, who then came to the place of occurrence with Police Constable Gurudappa (P.W.6). It also transpires from the evidence that on receiving information, P.W.14, a Police Constable working in the Dogs Squad, P.W.16, a Police Photographer and P.W.13, a Police Inspector and Finger-Prints Expert, arrived at the scene of occurrence. Thereafter, B.N. Nyamaagowda (P.W.29), the Investigating Officer of the case, along with Papanna (P.W.9), who was a Mazahar witness, went inside the room and found the deceased Jayashri lying naked on the ground with abrasions on her body and both her hands tied in the manner indicated hereinbefore. In addition, it was also found, which finding was also indicated in the Inquest Report that the tongue of the deceased protruded a little. There were scratch marks on her breasts and blood oozing out of her genitals. There were also strangulation marks on her neck. That the death of the victim was homicidal has been amply proved by the Post-mortem report of the Doctor (P.W.26), who was of the opinion that the death was due to asphyxia as a result of smothering and evidence of violent sexual intercourse and attempted strangulation. In addition, it may be added that the appellant Umesh was also examined by P.W.26 for evidence of sexual intercourse and during such examination the appellant confessed that he had pushed the victim and removed her cloths, tied her hands and committed theft.

42. The nature of the victim's death having been established to be homicidal in nature, it is now to be seen as to whether the circumstantial evidence on which reliance has been placed by the trial Judge in convicting the appellant and was also accepted by the High Court while confirming the same, makes out a complete chain of events to establish

beyond all reasonable doubt that it was the appellant and the appellant alone, who could have committed the offences with which he was charged. In this regard, the evidence of P.W.2, Suresh, the minor son of the deceased, is of great importance, notwithstanding the fact that he was about 7 years old when the incident had occurred. He has very clearly depicted the manner in which after returning from playing with his friends he found the appellant, who described himself as Venkatesh uncle, coming out of the room in which he and his mother lived. He has also narrated, without any ambiguity, the statement made by the appellant that his mother being possessed by the devil, the appellant had to tie her hands and was going to call a doctor. He also disclosed that while leaving the house the accused was carrying several things in a bag, including a VCR that was in the house. He also identified the accused in a T.I. Parade conducted at the Central Jail by Tehsildar (P.W.24) and also in the Court room while deposing. In addition, P.W.2 also identified a VCR, gold case watch, clock and anklets, saris and other things as belonging to his mother. His evidence has remained unshaken on cross-examination. The evidence of P.W.2 was corroborated by the evidence of Basvaraju (P.W.10) who lived in a rented house almost opposite to the rented house of the deceased Jayashri. He has stated that the deceased being a tenant in the opposite house was familiar to him and that the distance separating the two premises would be about 30 feet. Although, described as a chance witness by the defence, he has explained his presence in his house at 2.00 p.m. on 28th February, 1998, having completed his work in the first shift. His explanation is quite plausible and he has stated without hesitation that he had seen the accused coming out of the house of the deceased with a bag and proceeding towards the pipe line. He also identified the accused in Court as being the person whom he had seen coming out of Jayashri's house on the day of the incident at about 4.30 p.m. The said witness also identified the accused in the T.I. Parade conducted by the Tehsildar (P.W.24).

43. The evidence of Natesh (P.W.11) further corroborated the evidence of P.W.2 regarding the presence of the accused in the house of the deceased at the time of the incident. He too lives in a house opposite to the house of the deceased at a distance of about 50 feet. He too has been described as a chance witness by the defence, but has explained his presence in the premises at the relevant time. In his evidence he has stated that at about 4.30-5.00 p.m. he saw a person coming out of the house of the deceased and proceeding towards the pipe line. He too identified the appellant in Court as being the person who had come out of the house of the deceased on the said date. He was also one of the witnesses, who identified the appellant in the T.I. Parade conducted by P.W.24. The evidence of P.Ws 2, 10 and 11 as to the presence of the appellant at the place of occurrence on 28.2.1998 at the relevant time has been duly accepted by the trial Court as well as the High Court and nothing has been shown to us on behalf of the appellant to disbelieve the same.

44. In fact, the identification of the appellant by P.Ws 2, 10 and 11 is further strengthened by his identification by Jayamma (P.W.17) who has also deposed regarding the seizure of various items from the rented premises of the appellant, such as gold ornaments, suitcases, a television set and clothes.

45. Manjula (P.W.22), the elder sister of the deceased Jayashri also identified some of the articles seized by the Investigating Officer from the house of the appellant, as belonging to her deceased sister Jayashri. Such items included a VCR, a pair of gold beads, 4 gold bangles, one pair of silver anklets and 15 to 20 silk and ordinary saris.

46. Maare Gowda (P.W.4), who had been approached by the appellant for a rented premises and who introduced the appellant to Ravi (P.W.5) identified the accused Umesh Reddy to be the same person who had approached him for a rented accommodation stating that his name was Venkatesh. He was also one of the witnesses to the seizure of various items by the

Investigating Officer. He has stated that after arresting the appellant, the Peenya Police had brought him to the rented accommodation in which he was staying and on the instructions of the police inspector, the appellant opened the door of the house with his own key, and, thereafter, upon entering the house, the police seized various items such as suitcases, saris, panties, VCR, TV and antenna, pants, shirts, ornaments and cash. Much the same statements were made by Ravi (P.W.5), the owner of the house which had been rented out to the appellant. He corroborated the evidence of P.W.4 that the said witness had brought the appellant to him for the purpose of renting a house. P.W.5 was also a witness to the seizure.

47. Lalitha Jaya (P.W.8) who was the landlady of the deceased, corroborated the prosecution story that Suresh (P.W.2) on seeing the body of his mother lying on the ground in the room rushed to Kusuma Shetty (C.W.8), who has not, however, been examined by the prosecution, who rushed to P.W.8 and told her of the incident. All of them went to the house of the deceased and saw Jayashri lying on the ground on her back through the window and thereafter they went to the house of Bylappa (P.W.7) and informed him about the incident.

48. All the witnesses who claimed to be present at or near the place of occurrence remained unshaken in cross-examination, thereby completing the chain of circumstantial evidence in a manner that clearly indicates that no one other than the appellant committed the offences with which he was charged. The trial Court has also relied upon the extra-judicial confession made by the appellant to Dr. Somashekar (P.W.26), who examined him as to his sexual capacity, to the effect that he had pushed down the victim, removed her clothes, tied her hands and committed theft in the house.

49. The aforesaid position is further strengthened by the Forensic Report and that of the Finger-Print Expert to establish that the finger prints which had been lifted by P.W.13 from the

handle of the steel almirah in the room, matched the finger print of the appellant which clearly established his presence inside the house of the deceased. The explanation attempted to be given for the presence of the finger prints on the handle of the almirah situated inside the room of the deceased does not inspire any confidence whatsoever. In a way, it is the said evidence which scientifically establishes beyond doubt that the appellant was present in the room in which the deceased was found after her death and had been identified as such not only by P.W.2, who actually saw him in the house immediately after Jayashri was murdered, but also by P.Ws 10 and 11, who saw him coming out of the house at the relevant point of time with the bag in his hand. The finger print of the appellant found on the handle of the almirah in the room of the deceased proves his presence in the house of the deceased and that he and no other caused Jayashri's death after having violent sexual intercourse with her against her will.

50. Apart from causing the death of the victim, the evidence also points to the commission of rape of the deceased by the appellant. That the deceased was lying naked with blood oozing out of her genitals and both her hands tied by a sari at one end clearly indicates violent sexual intercourse with the deceased. The presence of semen-like material in her vagina, which was found during the Post-mortem examination, was collected and sent for micro-biological examination and showed the presence of sperms. The presence of spermatozoa in the vaginal smear which was sent for micro-biological examination and the presence of blood stains at the vaginal outlet together with laceration of the vagina from the vaginal outlet on the posterior wall establishes and confirms the charge of violent sexual intercourse, viz., rape. In addition to the above, the examination of the accused by P.W.26, the doctor, who conducted the Post-mortem examination, discloses laceration on the inner aspect of the upper lip and inner abrasions in both lips, scratch abrasions over the right side of the face. Abrasions over the front of right shoulder and over the right side at the back

of the neck of the appellant indicated that the same could have been caused due to resistance and strengthens the case of the prosecution of forced sexual intercourse with the victim against her wishes.

51. Even after committing the above-mentioned offences, the appellant robed various articles, including jewellery and a VCR set from the house of the deceased, and even made up a suitable story about his presence in the house in order to impress a young child who happened to notice him as he was leaving the house. The remorseless attitude of the appellant is further evident from the fact that after having committed such heinous offences on 28.2.1998, within two days on 2.3.1998 he attempted a similar crime in the house of one Seeba and was caught by the public while trying to escape, as evidenced by P.Ws 18 and 20.

52. Ms. Suri has raised certain questions relating to the identification of the appellant by P.Ws 2, 10, 11 and 17. It has been submitted that the picture of the appellant had been published in the newspapers after the incident. There may have been some substance in the aforesaid submission had it not been for the fact that being the immediate neighbours of the appellant, P.Ws 10 and 11 had occasion to see the appellant earlier. As far as P.W.17 is concerned, she was the appellant's landlady at the relevant point of time. The decision in *Musheer Khan's* case (supra) cited by Ms. Suri is not, therefore, of any help to the appellant's case.

53. On the question of recovery of M.Os.2 to 23 from the rented premises of the appellant, though an attempt has been made to discredit the role of P.W.5 Ravi as a panch witness, we see no reason to disbelieve the same since such recovery was also witnessed by P.W.22, Manjula, the sister of the deceased, who also identified the recovered articles.

54. As to the procedure adopted by the Investigating Officer for obtaining the finger-print of the appellant through P.W. 25

who was serving as Constable in Peenya Police Station at the relevant time, the same has been considered and dealt with by the High Court in its impugned judgment. It has been stated that such a procedure was available under the Karnataka Police Manual read with Section 5 of the Identification of Prisoners Act, 1920, and that it had been duly proved that the finger-print recovered from the handle of the almirah in the room of the deceased matched the right finger print of the appellant. In that view of the matter, the submission of Ms. Suri on this point must also be rejected.

55. We, therefore, have no hesitation in confirming the conviction of the Appellant under Sections 376, 392 and 302 IPC.

56. On the question of sentence we are satisfied that the extreme depravity with which the offences were committed and the merciless manner in which death was inflicted on the victim, brings it within the category of rarest of rare cases which merits the death penalty, as awarded by the Trial Court and confirmed by the High Court. None of the mitigating factors as were indicated by this Court in *Bachan Singh's* case (supra) or in *Machhi Singh's* case (supra) are present in the facts of the instant case. The appellant even made up a story as to his presence in the house on seeing P.W.2 Suresh, who had come there in the meantime. Apart from the above, it is clear from the recoveries made from his house that this was not the first time that he had committed crimes in other premises also, before he was finally caught by the public two days after the present incident, while trying to escape from the house of one Seeba where he made a similar attempt to rob and assault her and in the process causing injuries to her. As has been indicated by the Courts below, the antecedents of the appellant and his subsequent conduct indicates that he is a menace to society and is incapable of rehabilitation. The offences committed by the appellant were neither under duress nor on provocation and an innocent life was snuffed out by him after committing violent

rape on the victim. He did not feel any remorse in regard to his actions, inasmuch as, within two days of the incident he was caught by the local public while committing an offence of a similar type in the house of one Seeba.

57. In such circumstances, we do not think that this is a fit case which merits any interference. The Appeals are, accordingly, dismissed and the death sentence awarded to the Appellant is also confirmed. Steps may, therefore, be taken to carry out the sentence.

R.P. Appeals dismissed.

U.P. STATE TEXTILE CORPN. LTD.

v.

SURESH KUMAR

(Civil Appeal No. 2080 of 2011)

FEBRUARY 02, 2011

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

Service law – Appointment of employee for a fixed tenure of three years – Termination within two years on the ground of unauthorized absence – Challenge to – Re-instatement with continuity of service and back wages by courts below – On appeal, held: Appointment itself was for a fixed period of three years and no relief beyond that period could have been given to the employee by the courts below –Orders modified to the extent that the employee would be deemed to be in service up to the expiry of three years from the date of his joining and not thereafter – As regards the grant of back wages, it is a matter of discretion vested in the court – Conduct of the employee and the financial status of the employer, a defunct organization, does not justify the payment of any back wages.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2080 of 2011.

From the Judgment & Order dated 21.05.2007 of the High Court of Judicature at Allahabad in Civil Misc. Writ Petition No. 30651 of 1992.

Rakesh Uttamchandra Upadhyay for the Appellant.

Subodh Kr. Pathak, Yash Anand, Dharmemdra Kumar Sinha for the Respondent.

The following order of the Court was delivered

O R D E R

Leave granted.

The U.P. Textile Corporation Limited, the appellant herein is, as of today, we are told, a defunct organization and proceedings before the Board of Industrial and Financial Reconstruction (BIFR) are going on. The respondent, Suresh Kumar, was appointed as a Deputy Manager (Export) for a fixed tenure of three years vide order dated 21th april, 1987. As per this order his services would come to an end automatically on the expiry of three years from the date of his joining unless the term was extended as per Clause-1 thereof. It was also stipulated in the aforesaid order that the tenure of the appointment was terminable without assigning any reason on three months notice from either side or on payment of salary in lieu thereof. Admittedly the respondent joined the services of the appellant on the 7th September, 1987. His services were however terminated vide order dated 26th April, 1989 on the ground that he was in the habit of remaining absent for long periods of time without prior approval and that he had been on unauthorized absence from March, 1989. The order of 26th April, 1989 was challenged by the respondent before the U.P. Public Services Tribunal. The Tribunal vide its judgment dated 7.5.1992 held that the order impugned before it was stigmatic inasmuch that it referred to the continued absence of the respondent over a long period and in this view of the matter it could not be sustained. The relief of reinstatement with continuity of service and back wages was accordingly ordered by the Tribunal. This order was challenged by the appellant-Corporation before the Allahabad High Court. The writ petition has been dismissed vide judgment dated 21.5.2007 on similar grounds. It is in this background that the matter is before us.

The learned counsel for the appellant has raised primarily two arguments before us. He has contended that the reference to the unauthorized absence of the respondent could not in any manner be said to be stigmatic and that the finding to the contrary was unsustainable. Alternatively he has contended that the respondent had joined the post on the 7th September, 1987 for a period of three years which would have come to an end

on the 6th September, 1990 and as such the direction for reinstatement could not have been granted to him. It has been pleaded that as a consequence of the order of the Tribunal and of the High Court, the respondent has been put back into service.

The learned counsel for the respondent has however supported the judgments of the Tribunal and the High Court.

In the facts of the case we need not examine the effect of the order dated 26th April 1989 whereby the services of the respondent had been terminated as being stigmatic or not as we are of the opinion that in the light of the fact that appointment itself was for a fixed period of three years which would have come to an end on the 6th September, 1990, no relief beyond that period could have been given to the respondent by the Tribunal or the High Court. We accordingly feel that these orders need to be modified to the extent that the appellant shall be deemed to be in service up to the 6th September, 1990 and not thereafter. The other question relates to the back wages for a period of one year and five months. We are of the opinion that the grant of back wages is a matter of discretion vested in the Court and the conduct of an employee is an extremely relevant factor on this aspect. The financial status of the employer must also be kept in mind. We are therefore of the opinion that the conduct of the respondent and the financial status of the appellant does not justify the payment of any back wages.

Accordingly, we allow the appeal in the above terms.

N.J. Appeal allowed.

SMT. MONA PANWAR

v.

THE HON'BLE HIGH COURT OF JUDICATURE AT

ALLAHABAD THROUGH ITS REGISTRAR AND OTHERS
(Criminal Appeal No. 298 of 2011)

FEBRUARY 02, 2011

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

Judicial restraint: Disparaging remarks normally should not be made against the members of the lower judiciary – Higher courts should observe restraint – In the instant case, application was filed u/s.156(3),Cr.P.C. by a woman alleging that her father-in-law had committed rape on her and the police had refused to register her FIR – Appellant-judicial officer passed an order registering her application u/s.156(3), Cr.P.C. as complaint and directing registry to present the file before her for recording the statement of the complainant u/s.200, Cr.P.C. – Single Judge of High Court held that the appellant had done the gravest injustice to the complainant and she being a lady magistrate ought to have thought about the nature of crime committed by the accused and the order was passed ignoring all judicial disciplines and without application of judicial mind – Appellant sought expunging of remarks – Held: Disparaging remarks made by the Single Judge of the High Court were not justified at all – While passing the order registering application u/s.156(3), Cr.P.C. as complaint, the appellant had considered the report called from the concerned police station wherein it was mentioned that no case was registered on the basis of complaint – At the time of filing of application before the appellant, the complainant had filed her own affidavit, copy of the application sent by her to the Senior Superintendent of Police with its postal registration and photocopy of the medical certificate – If on a reading of a complaint, appellant found that the allegations therein disclosed cognizable offence and forwarding of the complaint to the police for investigation u/s.156(3), Cr.P.C. would not be conducive to justice then there

was no error on her part in adopting the course suggested in s.200, Cr.P.C. – The judicial discretion exercised by appellant was in consonance with the scheme postulated by the Code and was neither arbitrary nor perverse – Disparaging remarks made by the Single Judge of the High Court quashed – Code of Criminal Procedure, 1973 – ss.156(3), 200.

Code of Criminal Procedure, 1973: s.156(3) – Power of Magistrate under – Discussed.

The appellant was a member of judicial service of the State of Uttar Pradesh. An application under Section 156(3), Cr.P.C. was filed by respondent no.3 before the appellant. The grievance of respondent no.3 was that her father-in-law had committed rape on her and the police had refused to register her FIR. She had also filed an application before the Senior Superintendent of Police but he had also not taken any action, and, therefore, she filed the application under Section 156(3), Cr.P.C. before the appellant. In the application the details of the incident of rape were mentioned and prayer was made for direction to the Officer-in-charge of Police Station to register her complaint and investigate the case against the accused under Section 156(3), Cr.P.C.

The appellant passed an order on August 1, 2009 registering the application filed by complainant-respondent no. 3 under Section 156 (3), Cr.P.C. as complaint and directing the Registry to present the file before her on August 9, 2009 for recording the statement of the complainant under Section 200, Cr.P.C.

Respondent No.3 filed the petition under Section 482 Cr.P.C. for quashing the order dated August 1, 2009 passed by the appellant and for direction to the police to register FIR and to investigate the same as provided under Section 156(3), Cr.P.C. The Single Judge of the High

Court was of the view that the appellant had done the gravest injustice to respondent No. 3 and the appellant being a lady magistrate ought to have thought about the outcome of ravishing the chastity of daughter-in-law by her father-in-law and the nature of crime committed by the accused. The Single Judge noticed that the incident had occurred inside the room and there was no mention of any witness in application filed by the respondent but in the order passed by the appellant it was noted that the victim was in the knowledge of all the facts and that the witnesses were also known to her and that this indicated non-application of mind by the appellant. The Single Judge expressed the view that the appellant had passed the order ignoring all judicial disciplines and had not at all applied her judicial mind and had only referred to some of the judgments of the Allahabad High Court, which were contrary to the opinion expressed by the Apex Court rendered in many decisions. The Single Judge set aside the order dated August 1, 2009, passed by the appellant, and directed the appellant to decide the application of respondent no. 3 within the ambit of her power under Section 156(3), Cr.P.C. and also directed her to pass order for registration of FIR against the erring police officers, who had refused to register the FIR of respondent No. 3. The instant appeal was filed for expunging the remarks made by the Single Judge of the High Court.

Disposing of the appeal, the Court

HELD: 1. The reply affidavit filed by the Deputy Superintendant of Police stated inter alia that the office record maintained at the Police Station, Nakur or in the office of the Senior Superintendant of Police, Saharanpur did not disclose receipt of any complaint from respondent no. 3. It was mentioned therein that when the impugned judgment passed by the Single Judge of High

Court was brought to the notice of the authorities concerned, an FIR was lodged at the Police Station, Nakur against accused and offence punishable under Section 376 IPC was registered. The reply proceeded to state that the Investigating Officer had recorded the statement of respondent no. 3 as well as that of her mother and the statement of her brother-in-law. But the mother and the brother-in-law had mentioned that they were not eye-witnesses to the incident. The reply mentioned that inquiries made by Investigating Officer with the neighbourers of the accused indicated that respondent no. 3 was a divorcee and was residing at her parents house from the date of divorce. As per the reply of Deputy Superintendant of Police almost all neighbourers had unanimously informed the Investigating Officer that respondent no. 3 was not seen at her husband's house on 17th, 18th and 19th June, 2009 and thus the incident referred to by respondent no. 3 in her complaint was found to be a concocted story. The reply further mentioned that the Investigating Officer had recorded the statement of doctor who had medically examined respondent no. 3 and the doctor had categorically stated that medical examination of respondent no. 3 did not confirm allegation of rape made by her. In the reply it was stated that on completion of investigation, the Investigating Officer had closed the investigation and submitted the final report as contemplated by Section 169, Cr.P.C. [Para 8] [426-F-H; 427-A-E]

2. Section 156(1), Cr.P.C. authorizes the police to investigate into a cognizable offence without requiring any sanction from a judicial authority. However, sub-section (3) of Section 156, Cr.P.C. provides that any Magistrate empowered under Section 190, Cr.P.C. may order such an investigation as mentioned in sub-section

(1) of the said Section. Section 190, Cr.P.C. deals with cognizance of offences by Magistrates and inter alia provides that any Magistrate of the first class may take cognizance of an offence (a) upon receiving a complaint of facts which constitute such offence, (b) upon a police report of such facts and (c) upon information received from any person other than a police officer or upon his own knowledge that such offence has been committed. Neither Section 154 nor Section 156, Cr.P.C. contemplates any application to be made to the police under Section 156(3), Cr.P.C. When the complaint was presented before the appellant, the appellant had mainly two options available to her. One was to pass an order as contemplated by Section 156(3), Cr.P.C. and second one was to direct examination of the complainant upon oath and the witnesses present, if any, as mentioned in Section 200 and proceed further with the matter as provided by Section 202, Cr.P.C. An order made under sub-section (3) of Section 156, Cr.P.C. is in the nature of a pe-remptory reminder or intimation to the police to exercise its plenary power of investigation under Section 156(1). Such an investigation embraces the entire continuous process which begins with the collection of evidence under Section 156 and ends with the final report either under Section 169 or submission of charge sheet under Section 173, Cr.P.C. A Magistrate can under Section 190, Cr.P.C. before taking cognizance ask for investigation by the police under Section 156(3), Cr.P.C. The Magistrate can also issue warrant for production, before taking cognizance. If after cognizance has been taken and the Magistrate wants any investigation, it will be under Section 202, Cr.P.C. The phrase "taking cognizance of" means cognizance of offence and not of the offender. Taking cognizance does not involve any formal action or indeed action of any kind but occurs as

soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance, therefore, takes place at a point when a Magistrate first takes judicial notice of an offence. This is the position whether the Magistrate takes cognizance of an offence on a complaint or on a police report or upon information of a person other than a police officer. Before the Magistrate can be said to have taken cognizance of an offence under Section 190(1)(b), Cr.P.C., he must have not only applied his mind to the contents of the complaint presented before him, but must have done so for the purpose of proceeding under Section 200 and the provisions following that Section. However, when the Magistrate had applied his mind only for ordering an investigation under Section 156(3), Cr.P.C. or issued a warrant for the purposes of investigation, he cannot be said to have taken cognizance of an offence. Taking cognizance is a different thing from initiation of the proceedings. One of the objects of examination of complainant and his witnesses as mentioned in Section 200, Cr.P.C. is to ascertain whether there is prima facie case against the person accused of the offence in the complaint and to prevent the issue of process on a complaint which is either false or vexatious or intended only to harass such person. Such examination is provided, therefore, to find out whether there is or not sufficient ground for proceeding further. [Para 9] [427-F-H; 428-A-H; 429-A-F]

Gulab Chand v. State of U.P. **2002 Cr.L.J. 2907,** *Ram Babu Gupta v. State of U.P.* **2001 (43) ACC 50,** *Chandrika Singh v. State of U.P.* **2007 (50) ACC 777;** *Sukhwasi S/o Hulasi v. State of U.P.* **2007 (59) ACC 739 – referred to.**

3. From the order dated August 1, 2009, passed by the appellant, it is evident that the appellant had called for report from the concerned police station and

considered the said report wherein it was inter alia mentioned that no case was registered on the basis of the application made by respondent no. 3. Respondent no.3 at the time of filing complaint before the appellant had filed her own affidavit, carbon copy of the application sent by her to the Senior Superintendent of Police, Saharanpur with its postal registration and photocopy of the medical certificate. Under the circumstances, the appellant had exercised judicial discretion available to a Magistrate and directed that the application, which was submitted by respondent no.3 under Section 156(3), Cr.P.C. be registered as complaint and directed the Registry to present the said complaint before her on August 28, 2009 for recording the statement of respondent no.3 under Section 200, Cr.P.C. The judicial discretion exercised by the appellant was in consonance with the scheme postulated by the Code. There is no material on the record to indicate that the judicial discretion exercised by the appellant was either arbitrary or perverse. There was no occasion for the Single Judge of High Court to substitute the judicial discretion exercised by the appellant merely because another view was possible. The appellant was the responsible judicial officer and after assessing the material placed before him she had exercised the judicial discretion. In such circumstances, the High Court had no occasion to interfere with the discretion exercised judiciously in terms of the provisions of Code. Normally, an order under Section 200, Cr.P.C. for examination of the complainant and his witnesses would not be passed because it consumes the valuable time of the Magistrate being vested in inquiring into the matter which primarily is the duty of the police to investigate. However, the practice which has developed over the years is that examination of the complainant and his witnesses under Section 200,

Cr.P.C. would be directed by the Magistrate only when a case is found to be serious one and not as a matter of routine course. If on a reading of a complaint, the Magistrate finds that the allegations therein disclose a cognizable offence and forwarding of the complaint to the police for investigation under Section 156(3), Cr.P.C. will not be conducive to justice, he will be justified in adopting the course suggested in Section 200, Cr.P.C. In the instant case, respondent no. 3 had averred in the application submitted before the appellant that the Officer-in-charge of the Nakur Police Station had refused to register her complaint against her father-in-law regarding alleged rape committed on her and that no action was taken by the Senior Superintendent of Police though necessary facts were brought to his notice. Under the circumstances, the judicial discretion exercised by the appellant, to proceed under Section 200, Cr.P.C. could not have been faulted with nor the appellant could have been subjected to severe criticism as was done by the Single Judge. There was no reason for the Single Judge of the High Court to record his serious displeasure against the order of the appellant which was challenged before him as an illegal order nor the Single Judge was justified in severely criticizing the conduct of the appellant as Judicial Magistrate because the application submitted by respondent no. 3 was ordered to be registered as a complaint and was not dismissed. Higher courts should observe restraint and disparaging remarks normally should not be made against the members of the lower judiciary. [Paras 10, 11] [429-F-H; 430-A-H; 431-A-H; 432-A]

Ishwari Prasad Mishra v. Mohd. Isa **(1963) 3 SCR 722;** *'K' a Judicial Officer v. Registrar General, High Court of Andhra Pradesh* **2001 (3) SCC 54 – relied on.**

4. The record would show that the appellant had discharged her judicial duties to the best of her capacity. To err is human. It is often said that a Judge, who has not committed an error, is yet to be born. This dictum applies to all the Judges at all levels from the lowest to the highest. The difference in views of the higher and the lower courts is purely a result of a difference in approach and perception. But merely because there is difference in views, it does not necessarily establish that the lower courts are necessarily wrong and the higher courts are always right. Therefore, there is need to adopt utmost judicial restraint against making the disparaging remarks so far as members of lower judiciary are concerned. On the facts and in the circumstances of the case, the disparaging remarks made by the Single Judge of the High Court, were not justified at all. The disparaging remarks made by the Single Judge of the High Court are set aside and quashed. [Paras 11, 12 and 13] [433-H; 434-A-D; F-G]

K.P. Tiwari vs. State of M.P. **1994 Supp. (1) SCC 540 – relied on.**

Case Law Reference:

2002 Cr.L.J. 2907	**Referred to**	**Para 4**
2001 (43) ACC 50	**Referred to**	**Para 4**
2007 (50) ACC 777	**Referred to**	**Para 4**
2007 (59) ACC 739	**Referred to**	**Para 4**
(1963) 3 SCR 722	**Relied on**	**Para 11**
2001 (3) SCC 54	**Relied on**	**Para 11**
1994 Supp. (1) SCC 540	**Relied on**	**Para 11**

CRIMINAL APPELLATE JURISDICITON : Criminal Appeal

No. 298 of 2011.

From the Judgment & Order dated 10.09.2009 of the High Court of at Allahabad in Criminal Miscellaneous Application No. 21606 of 2009.

Rakesh Dwivedi, Kavin Gulati, Rashmi Singh, T. Mahipal for the Appellant.

Ratnakar Dash, Rajeev Dubey, Ravi Prakash Mehrotra, Deepti R. Mehrotra, Kamlendra Mishra for the Respondents.

The Judgment of the Court was delivered by

J.M. PANCHAL, J. 1. Leave granted.

2. The present appeal is filed by the appellant, who is member of judicial service of the State of Uttar Pradesh, for expunging the remarks made by the learned Single Judge of the High Court of Judicature at Allahabad in Criminal Misc. Application No. 21606 of 2009 while setting aside order dated August 1, 2009, passed by the appellant in case No. nil of 2009 titled as Shabnam vs. Irshad registering the application filed by the respondent No. 3 under Section 156(3) of the Code of Criminal Procedure ("Code" for short) as complaint and directing the Registry to present the file before the appellant on August 9, 2009 for recording the statement of the complainant, i.e., of Shabnam under Section 200 of the Code.

3. The facts giving rise to the present appeal are as under:

The respondent No. 3 is wife of one Mustqeem and resides at Village Sayyed Mazra, District Saharanpur with her husband and in-laws. It may be stated that the accused is her father-in-law. According to the respondent No. 3 her father-in-law had bad eye on her since her marriage. The case of the respondent No. 3 was that in the intervening night of June 18/19, 2009 at about 3 O'clock she was all alone in her room as her husband had gone out and she was sleeping but the doors of the room

were kept open due to heat. The allegation made by the respondent No. 3 is that Irshad, i.e., her father-in-law came inside her room, caught hold of her with bad intention, scratched her breasts, forcibly pushed cloth in her mouth and forcibly committed rape on her. The case of the respondent No. 3 was that though she offered resistance, Irshad did not pay any heed and committed rape on her. The allegation made by her was that because of the incident she became unconscious and in the morning she narrated the whole incident to her mother-in-law Bindi, but she advised her not to disclose the incident to anyone as it was a matter of reputation of the family. According to respondent No. 3 she telephoned her mother, who arrived at her in-laws' place along with Muneer, her brother-in-law, on a motor cycle but Irshad in the meanwhile had fled away from the village. The case projected by the respondent No. 3 was that as her condition was deteriorating, she was got medically examined in District hospital by her mother and thereafter she had gone to the Police Station, Nakur, but the police had refused to register her FIR. It was claimed by the respondent No. 3 that under the circumstances she had moved an application before the Senior Superintendent of Police, Saharanpur but he had also not taken any action and, therefore, she had filed an application under Section 156(3) of the Code before the learned Judicial Magistrate II, Court No. 14, Saharanpur mentioning therein as to how the incident of rape with her had taken place and praying the learned Magistrate to direct the Officer-in-charge of Police Station, Nakur, to register her complaint and investigate the case against the accused under Section 156 (3) of the Code.

4. On receipt of the application the appellant called for report from the concerned police station. As per the report received no case was registered regarding the incident narrated by the respondent No. 3. The respondent No. 3 had filed her own affidavit in support of the case pleaded in the application filed before the appellant and produced a carbon copy of the application sent by her to the Senior Superintendent

of Police, Saharanpur with its postal registration as well as photocopy of medical certificate. The learned Magistrate perused the averments made by the respondent No. 3 in her application as well as documents annexed to the said application. The appellant was of the view that the respondent No. 3 was acquainted with the facts and circumstances of the case and was also familiar with the accused and knew the witnesses too. The appellant was of the view that the respondent No. 3 would be able to produce all the evidence herself. The appellant referred to the principles of law laid down by the Allahabad High Court in *Gulab Chand vs. State of U.P.* 2002 Cr.L.J. 2907, *Ram Babu Gupta vs. State of U.P.* 2001 (43) ACC 50, *Chandrika Singh vs. State of U.P.* 2007 (50) ACC 777 and *Sukhwasi S/o Hulasi vs. State of U.P.* 2007 (59) ACC 739 and after taking into consideration the principles laid down in the above referred to decisions the appellant was of the view that this was not a fit case to be referred to the police for investigation under Section 156(3) of the Code and, therefore, directed that the application submitted by the respondent under Section 156(3) of the Code be registered as complaint and further ordered the Registry to present the file before her on August 28, 2009 for recording the statement of the respondent No. 3 i.e. the original complainant under Section 200 of the Code.

5. Feeling aggrieved, the respondent No. 3 invoked jurisdiction of the High Court under Section 482 of the Code by filing Criminal Misc. Application No. 21606 of 2009 and prayed the High Court to quash the order dated August 1, 2009, passed by the appellant and to direct the police to register her F.I.R. filed against Irshad and to investigate the same as provided under Section 156(3) of the Code.

6. The learned Single Judge of the High Court, who heard the matter, was of the view that the appellant had done the gravest injustice to the respondent No. 3. According to the learned Single Judge though the appellant is a lady Magistrate

yet she could not think about the outcome of ravishing the chastity of daughter-in-law by her father-in-law and the nature of crime committed by the accused. After going through the order dated August 1, 2009, passed by the appellant, the learned Single Judge expressed the view that the order indicated total non-application of mind by the appellant. The learned Single Judge noticed that the incident had occurred inside the room in early hours of June 19, 2009 and there was no mention of any witness in application filed by the respondent but in the order passed by the appellant it was noted that the victim was in the knowledge of all the facts and that the witnesses were also known to her, which indicated non-application of mind by the appellant. The learned Single Judge while setting aside the order dated August 1, 2009, passed by the appellant, observed that the order was a blemish on justice meted out to a married lady who was ravished by her own father-in-law. The learned Single Judge expressed the view that the appellant had passed the order ignoring all judicial disciplines and had not at all applied her judicial mind and had only referred to some of the judgments of the Allahabad High Court, which were contrary to the opinion expressed by the Apex Court rendered in many decisions. After observing that a judicial order should be passed by applying judicial mind, the learned Single Judge severely criticized the conduct of the appellant and recorded his serious displeasure against the appellant for passing such type of illegal orders. The learned Single Judge further warned the appellant for future and cautioned the appellant to be careful in passing the judicial orders. The learned Single Judge observed that the appellant should have thought that the rape not only causes physical injury to the victim but also leaves scars on the mind of the victim for the whole life and implant the victim with such ignominy which is worse than her death. The learned Single Judge expressed the view that he was inclined to refer the matter to the Administrative Committee for taking action against the appellant but refrained from doing so because the appellant is a young officer and has a long career to go. The learned Single

Judge by his judgment dated September 9, 2009 set aside the order dated August 1, 2009, passed by the appellant, and directed the appellant to decide the application of the respondent No. 3 within the ambit of her power under Section 156(3) of the Code and also directed her to pass order for registration of FIR against the erring police officers, who had refused to register the FIR of the respondent No. 3. The learned Single Judge directed the Registry of the High Court to send a copy of his judgment to the appellant for her future guidance and also to the Senior Superintendent of Police, Saharanpur. As noted above, the disparaging remarks made by the learned Single Judge while setting aside the order passed by the appellant has given rise to the present appeal.

7. This Court has heard the learned counsel for the appellant as well as the learned counsel for the State Government and the learned counsel representing the High Court of Judicature at Allahabad. The record shows that the Respondent No.3 i.e. the original complainant is duly served in the matter but she has neither appeared through a lawyer or in person nor has filed any reply in the matter. This Court has also considered the documents forming part of the present appeal.

8. On receipt of notice issued by this Court, Mr. Anand Kumar, Deputy Superintendant of Police, Saharanpur, U.P. has filed reply affidavit mentioning inter alia that as per the office record maintained at the Police Station, Nakur or in the officer of the Senior Superintendant of Police, Saharanpur does not disclose receipt of any complaint from the Respondent No. 3. It is mentioned in the reply that when the impugned judgment dated September 10, 2009 passed by the learned Single Judge of High Court was brought to the notice of the authorities concerned a first information report was lodged at the Police Station, Nakur being FIR 36/2009 against accused Irshad and offence punishable under Section 376 IPC was registered. The reply proceeds to state that the Investigating Officer had

recorded the statement of the Respondent No. 3 as well as that of her mother and the statement of her brother-in-law. But the mother and the brother-in-law had mentioned that they were not eye-witnesses to the incident. The reply mentions that inquiries made by Investigating Officer with the neighbourers of the accused indicated that Respondent No. 3 was a divorcee and was residing at her parents house from the date of divorce. As per the reply of Deputy Superintendant of Police almost all neighbourers had unanimously informed the Investigating Officer that the Respondent No. 3 was not seen at her husband's house on 17th, 18th and 19th June, 2009 and thus the incident referred to by Respondent No. 3 in her complaint was found to be a concocted story. The reply further mentions that the Investigating Officer had recorded the statement of doctor who had medically examined the Respondent No. 3 and the doctor had categorically stated that medical examination of the Respondent No. 3 did not confirm allegation of rape made by her. What is relevant to notice is that in the reply it is stated that on completion of investigation the Investigating Officer had closed the investigation and submitted the final report as contemplated by Section 169 of the Code on December 18, 2009.

9. Section 156(1) of the Code authorizes the police to investigate into a cognizable offence without requiring any sanction from a judicial authority. However, sub-section (3) of Section 156 of the Code provides that any Magistrate empowered under Section 190 of the Code may order such an investigation as mentioned in sub-section (1) of the said Section. Section 190 of the Code deals with cognizance of offences by Magistrates and inter alia provides that any Magistrate of the first class may take cognizance of an offence (a) upon receiving a complaint of facts which constitute such offence, (b) upon a police report of such facts and (c) upon information received from any person other than a police officer or upon his own knowledge that such offence has been committed. Neither Section 154 nor Section 156 of the Code

contemplates any application to be made to the police under Section 156(3) of the Code. What is provided in Section 156(1) of the Code is that any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquiry into or try under the provisions of Chapter XIII. However, this Court finds that in the present case it was alleged by the respondent No. 3 that she had filed complaint before police but according to her, the police officer in charge of the police station had refused to register her complaint and, therefore, she had made application to the Senior Superintendent of Police as required by Section 154(3) of the Code, but of no avail. Therefore, the respondent No. 3 had approached the appellant, who was then discharging duties as Judicial Magistrate II, Court No. 14, Saharanpur. When the complaint was presented before the appellant, the appellant had mainly two options available to her. One was to pass an order as contemplated by Section 156(3) of the Code and second one was to direct examination of the complainant upon oath and the witnesses present, if any, as mentioned in Section 200 and proceed further with the matter as provided by Section 202 of the Code. An order made under sub-section (3) of Section 156 of the Code is in the nature of a peremptory reminder or intimation to the police to exercise its plenary power of investigation under Section 156(1). Such an investigation embraces the entire continuous process which begins with the collection of evidence under Section 156 and ends with the final report either under Section 169 or submission of charge sheet under Section 173 of the Code. A Magistrate can under Section 190 of the Code before taking cognizance ask for investigation by the police under Section 156(3) of the Code. The Magistrate can also issue warrant for production, before taking cognizance. If after cognizance has been taken and the Magistrate wants any investigation, it will be under Section 202 of the Code. The phrase "taking cognizance of" means cognizance of offence and not of the offender. Taking cognizance does not involve any formal action

or indeed action of any kind but occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance, therefore, takes place at a point when a Magistrate first takes judicial notice of an offence. This is the position whether the Magistrate takes cognizance of an offence on a complaint or on a police report or upon information of a person other than a police officer. Before the Magistrate can be said to have taken cognizance of an offence under Section 190(1)(b) of the Code, he must have not only applied his mind to the contents of the complaint presented before him, but must have done so for the purpose of proceeding under Section 200 and the provisions following that Section. However, when the Magistrate had applied his mind only for ordering an investigation under Section 156(3) of the Code or issued a warrant for the purposes of investigation, he cannot be said to have taken cognizance of an offence. Taking cognizance is a different thing from initiation of the proceedings. One of the objects of examination of complainant and his witnesses as mentioned in Section 200 of the Code is to ascertain whether there is prima facie case against the person accused of the offence in the complaint and to prevent the issue of process on a complaint which is either false or vexatious or intended only to harass such person. Such examination is provided, therefore, to find out whether there is or not sufficient ground for proceeding further.

10. From the order dated August 1, 2009, passed by the appellant, it is evident that the appellant had called for report from the concerned police station and considered the said report wherein it was inter alia mentioned that no case was registered on the basis of the application made by the respondent No. 3. The respondent No. 3 at the time of filing complaint before the appellant had filed her own affidavit, carbon copy of the application sent by her to the Senior Superintendent of Police, Saharanpur with its postal registration and photocopy of the medical certificate. Under the circumstances the appellant had exercised judicial discretion

available to a Magistrate and directed that the application, which was submitted by the respondent No. 3 under Section 156(3) of the Code, be registered as complaint and directed the Registry to present the said complaint before her on August 28, 2009 for recording the statement of the respondent No.3 under Section 200 of the Code. The judicial discretion exercised by the appellant was in consonance with the scheme postulated by the Code. There is no material on the record to indicate that the judicial discretion exercised by the appellant was either arbitrary or perverse. There was no occasion for the learned Single Judge of High Court to substitute the judicial discretion exercised by the appellant merely because another view is possible. The appellant was the responsible judicial officer on the spot and after assessing the material placed before him he had exercised the judicial discretion. In such circumstances this Court is of the opinion that the High Court had no occasion to interfere with the discretion exercised judiciously in terms of the provisions of Code. Normally, an order under Section 200 of the Code for examination of the complainant and his witnesses would not be passed because it consumes the valuable time of the Magistrate being vested in inquiring into the matter which primarily is the duty of the police to investigate. However, the practice which has developed over the years is that examination of the complainant and his witnesses under Section 200 of the Code would be directed by the Magistrate only when a case is found to be serious one and not as a matter of routine course. If on a reading of a complaint the Magistrate finds that the allegations therein disclose a cognizable offence and forwarding of the complaint to the police for investigation under Section 156(3) of the Code will not be conducive to justice, he will be justified in adopting the course suggested in Section 200 of the Code. Here, in this case the respondent No. 3 had averred in the application submitted before the appellant that the Officer-in-charge of the Nakur Police Station had refused to register her complaint against her father-in-law regarding alleged rape committed on her and that no action was taken by the Senior

Superintendent of Police though necessary facts were brought to his notice. Under the circumstances, the judicial discretion exercised by the appellant, to proceed under Section 200 of the Code in the light of principles of law laid down by the Allahabad High Court in various reported decisions could not have been faulted with nor the appellant could have been subjected to severe criticism as was done by the learned Single Judge. There was no occasion for the learned Single Judge to observe that the appellant, a Judicial Magistrate, had done the gravest injustice to the victim or that though the appellant is a lady Magistrate, yet she did not think about the outcome of ravishing the chastity of daughter-in-law by her father-in-law or the seriousness of the crime committed by the accused and the reason assigned by the learned Magistrate in not directing the police to register the FIR indicated total non-application of mind by the appellant and that the order dated August 1, 2009, passed by the appellant, was a blemish on the justice system. The learned Single Judge was not justified in concluding that the appellant as Judicial Magistrate had passed the order dated August 1, 2009 ignoring all judicial disciplines or that the appellant had not at all applied her judicial mind and had only referred to some of the judgments of the Allahabad High Court, which were contrary to the opinion of the Apex Court rendered in many decisions. There was no reason for the learned Single Judge of the High Court to record his serious displeasure against the order of the appellant which was challenged before him as an illegal order nor the learned Single Judge was justified in severely criticizing the conduct of the appellant as Judicial Magistrate because the application submitted by the respondent N. 3 was ordered to be registered as a complaint and was not dismissed.

11. This Court has laid down in several reported decisions that higher courts should observe restraint and disparaging remarks normally should not be made against the learned members of the lower judiciary. In *Ishwari Prasad Mishra vs. Mohd. Isa* (1963) 3 SCR 722, a Three Judge Bench of this

Court has emphasized the need to adopt utmost judicial restraint against using strong language and imputation of motive against the lower judiciary by noticing that in such matters the concerned Judge has no remedy in law to vindicate his position. The law laid down by this Court in the matter of expunction of remarks where a subordinate Judge has been subjected to disparaging and undeserved remarks by the superior Court, is well settled by this Court in the matter of *'K' a Judicial Officer Vs. Registrar General, High Court of Andhra Pradesh* 2001 (3) SCC 54. In the said decision this Court has succinctly outlined the guidelines in this regard in paragraph 15 of the said Judgment as under:

> ".....The existence of power in higher echelons of judiciary to make observations even extending to criticism incorporated in judicial orders cannot be denied. However, the High Courts have to remember that criticisms and observations touching a subordinate judicial officer incorporated in judicial pronouncements have their own mischievous infirmities. Firstly, the judicial officer is condemned unheard which is violative of principles of natural justice. A member of subordinate judiciary himself dispensing justice should not be denied this minimal natural justice so as to shield against being condemned unheard. Secondly, the harm caused by such criticism or observation may be incapable of being undone. Such criticism of the judicial officer contained in a judgment, reportable or not, is a pronouncement in the open and therefore becomes public. Thirdly, human nature being what it is such criticism of a judicial officer contained in the judgment of a higher court gives the litigating party a sense of victory not only over his opponent but also over the Judge who had decided the case against him. This is subversive of judicial authority of the deciding Judge. Fourthly, seeking expunging of the observations by a judicial officer by filing an appeal or petition of his own reduces him to the status of a litigant arrayed as a party

before the High Court or Supreme Court- a situation not very happy from the point of view of the functioning of the judicial system. And last but not the least, the possibility of a single or casual aberration of an otherwise honest, upright and righteous Judge being caught unawares in the net of adverse observations cannot be ruled out. Such an incident would have a seriously demoralizing effect not only on him but also on his colleagues. If all this is avoidable why should it not be avoided?"

However, this Court has further provided that the parameters outlined hereinbefore must not be understood as meaning that any conduct of a subordinate judicial office unbecoming of him and demanding a rebuff should be simply overlooked. This Court has outlined an alternate safer and advisable course of action in such a situation, that is of separately drawing up proceedings, inviting the attention of the Hon'ble Chief Justice to the facts describing the conduct of the subordinate Judge concerned by sending a confidential letter or note to the Chief Justice. The actions so taken would all be on the administrative side with the subordinate Judge concerned having an opportunity of clarifying his position and he would be provided the safeguard of not being condemned unheard, and if the decision be adverse to him, it being on the administrative side, he would have some remedy available to him under the law.

Again, in *K.P. Tiwari vs. State of M.P.* 1994 Supp. (1) SCC 540, this Court had to remind all concerned that using intemperate language and castigating strictures on the members of lower judiciary diminishes the image of judiciary in the eyes of public and, therefore, the higher courts should refrain from passing disparaging remarks against the members of the lower judiciary. The record would show that the appellant had discharged her judicial duties to the best of her capacity. To err is human. It is often said that a Judge, who has not committed an error, is yet to be born. This dictum applies to all the learned Judges at all levels from the lowest to the

highest. The difference in views of the higher and the lower courts is purely a result of a difference in approach and perception. But merely because there is difference in views, it does not necessarily establish that the lower courts are necessarily wrong and the higher courts are always right. Therefore, this Court in several reported decision has emphasized the need to adopt utmost judicial restraint against making the disparaging remarks so far as members of lower judiciary are concerned.

12. On the facts and in the circumstances of the case, this Court is of the opinion that the disparaging remarks referred to above, made by the learned Single Judge of the Allahabad High Court, were not justified at all and, therefore, the appeal will have to be accepted.

13. For the foregoing reasons, the appeal succeeds. The disparaging remarks made by the learned Single Judge of the High Court of Judicature at Allahabad in Criminal Misc. Application No. 21606 of 2009, decided on September 9, 2009, while setting aside order dated August 1, 2009, passed by the appellant in case No. nil of 2009 titled as *Shabnam vs. Irshad* directing that the application submitted by the respondent No. 3 be registered as complaint and ordering the Registry to present the same before her for recording statement of the respondent No. 3 under Section 200 of the Code, are hereby set aside and quashed. In this Appeal prayer is to expunge remarks made by the learned Single Judge of High Court against the Appellant. The other directions are not subject matter of challenge in the appeal, therefore, those directions are not interfered with.

14. The appeal accordingly stands disposed of.

D.G. Appeal disposed of.

M. NAGABHUSHANA

v.

STATE OF KARNATAKA & OTHERS

(Civil Appeal No. 1215 of 2011)

FEBRUARY 02, 2011

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

Karnataka Industrial Areas Development Act, 1966 – s. 28(4) and (5) – Acquisition of land belonging to the appellant – Challenge to – Acquisition proceedings approved by the High Court as also Supreme Court – Appellant on the identical issues filing a new writ petition – Rejection of, by the Single Judge and the Division Bench of the High Court – On appeal, held: Attempt by the appellant to re-agitate the same issues which were considered by this Court and were rejected expressly in the previous judgment is a clear instance of an abuse of process of this Supreme Court – Such issues are barred by principles of Res Judicata or Constructive Res Judicata and principles analogous thereto – On facts, it cannot be said that the Notification u/s.28(4) stands vitiated in view of the provisions of s. 11A of the 1894 Act since no award was passed within two years from the date of the Notification – s. 11A of the 1894 Act does not apply to the acquisition under the KIAD Act – Main purpose of filing the instant appeal was to hold up the land acquisition proceeding which was initiated to achieve a larger public purpose – Thus, the State Government to complete the project as early as possible – Appellant directed to pay Rs 10 lacs as costs to State High Court Legal Services Authority – Code of Civil Procedure, 1908 – s. 11 – Principles of res judicata and constructive res judicata – Land Acquisition Act, 1894 – s 11A – Costs.

ss. 28(4) and (5) and ss. 4 and 6 of the Land Acquisition Act – Comparison between – Held: There is a substantial difference – Land which is subject to acquisition proceeding under the 1894 Act gets vested with the Government only when the Collector makes an award u/s. 11 of the 1854 Act, and the

Government takes possession – Under ss. 28(4) and 28(5) of the KIAD Act, vesting takes place by operation of law and it has nothing to do with the making of any award – Land Acquisition Act,1894.

Doctrines/Principles – Principles of res judicata – Application of – Held: Principle of res judicata is of universal application since it is based on principle of 'interest reipublicae ut sit finis litium' which means that it is in the interest of the State that there should be an end to litigation and the principle 'nemo debet his ve ari, si constet curiae quod sit pro un aet eademn cause' which means that no one ought to be vexed twice in a litigation if it appears to the court that it is for one and the same cause – Plea of Res Judicata is not a technical doctrine but is a fundamental principle which sustains the Rule of Law in ensuring finality in litigation – Its application should not be hampered by any technical rules of interpretation – Thus, any proceeding which has been initiated in breach of the principle of Res Judicata is prima-facie a proceeding which has been initiated in abuse of the process of the court.

The appellants-owner of two plots of land filed a writ petition challenging the acquisition proceedings with regard to the said lands. It was alleged that the said lands were outside the area of the Framework agreement (FWA) being acquired and the Notification issued under Sections 28(1) and 28(4) of Karnataka Industrial Areas Development Act, 1966 (KIAD). The Single Judge of the High Court quashed the acquisition proceedings. On appeal, the Division Bench of the High Court set aside the judgment of the Single Judge of the High Court and approved the acquisition proceedings. Thereafter, this Court upheld the order passed by the Division Bench of the High Court.

The appellant once again filed a writ petition before

the High Court challenging the said acquisition proceedings. The Single Judge of the High Court dismissed the writ petition. The appellant then filed an appeal. It was alleged that the acquisition stood vitiated since no award was published. The Division Bench of the High Court held that the second round of litigation was misconceived since the acquisition proceedings were upheld right upto the Supreme Court. Therefore, the appellant filed the instant appeal.

Dismissing the appeal, the Court,

HELD: 1.1 The principles of res judicata are of universal application as it is based on the principles, namely, 'interest reipublicae ut sit finis litium' which means that it is in the interest of the State that there should be an end to litigation and the other principle is 'nemo debet his ve ari, si constet curiae quod sit pro un aet eademn cause' meaning thereby that no one ought to be vexed twice in a litigation if it appears to the court that it is for one and the same cause. The doctrine of Res Judicata is common to all civilized system of jurisprudence to the extent that a judgment after a proper trial by a court of competent jurisdiction should be regarded as final and conclusive determination of the questions litigated and should for ever set the controversy at rest.[Para 14] [449-D-F]

1.2 The principle of finality of litigation is based on high principle of public policy. In the absence of such a principle great oppression might result under the colour and pretence of law in as much as there would be no end of litigation and a rich and malicious litigant would succeed in infinitely vexing his opponent by repetitive suits and actions. This might compel the weaker party to relinquish his right. The doctrine of Res Judicata has been evolved to prevent such an anarchy. Thus, it is

perceived that the plea of Res Judicata is not a technical doctrine but a fundamental principle which sustains the Rule of Law in ensuring finality in litigation. This principle seeks to promote honesty and a fair administration of justice and to prevent abuse in the matter of accessing court for agitating on issues which have become final between the parties. [Para 15] [449-G-H; 450-A-B]

1.3. While applying the principles of Res Judicata, the court should not be hampered by any technical rules of interpretation. Therefore, any proceeding which has been initiated in breach of the principle of Res Judicata is prima-facie a proceeding which has been initiated in abuse of the process of the court. [Paras 20 and 21] [452-E-G]

1.4. The principles of Constructive Res Judicata, as explained in explanation IV to Section 11 CPC, are also applicable to writ petitions. Thus, the attempt to re-argue the case which has been finally decided by the court of last resort is a clear abuse of process of the court, regardless of the principles of Res Judicata. [Paras 27 and 28] [454-E-F]

Direct Recruit Class II Engg. Officers' Assn. vs. State of Maharashtra **(1990) 2 SCC 715 – followed.**

State of Karnataka and Anr. vs. All India Manufactureres Organisation and Ors. **(2006) 4 SCC 683;** *K.K. Modi vs. K.N. Modi and Ors.* **(1998) 3 SCC 573 – relied on.**

Sheoparsan Singh vs. Rammanandan Prasad Singh **(1916) 1 I.L.R. 43 Cal. 694 – approved.**

Mussammat Lachhmi Vs. Mussamamat Bhulli **ILR Lahore Vol. VIII 384;** *Devilal Modi vs. Sales Tax Officer, Ratlam and Ors.* **AIR 1965 SC 1150;** *State of U.P. Vs. Nawab Hussain* **(1977) 2 SCC 806 – referred to.**

Greenhalgh vs.Mallard **(1947) 2 All ER 255(A) – referred to.**

Supreme Court Practice 1995 Sweet and Maxwell **– referred to.**

2.1 It is nobody's case that the appellant did not know the contents of Framework agreement (FWA). It was open to the appellant to question, in the previous proceeding filed by it, that his land which was acquired was not included in the FWA. No reasonable explanation was offered by the appellant to indicate why he had not raised this issue. Therefore, such an issue could not be raised in this proceeding in view of the doctrine of Constructive Res Judicata. [Para 19] [452-C-D]

2.2 It is clear that the attempt by the appellant to re-agitate the same issues which were considered by this Court and were rejected expressly in the previous judgment in *All India Manufacturers Organisation case, is a clear instance of an abuse of process of this Court apart from the fact that such issues are barred by principles of Res Judicata or Constructive Res Judicata and principles analogous thereto. [Para 30] [455-E-F]

State of Karnataka and Anr. vs. All India Manufactureres Organisation and Ors.* **(2006) 4 SCC 683 – relied on.

3.1 It cannot be said that the Notification dated 30.3.2004 issued under Section 28(4) of Karnataka Industrial Areas Development Act, 1966 stands vitiated in view of the provisions of Section 11A of the Land Acquisition Act, 1894 inasmuch as no award was passed within two years from the date of the Notification. More so, the said question was not urged by the appellant in its writ petition before the Single Judge of the High Court. This was urged before the Division Bench of the High

Court unsuccessfully. [Paras 31, 32 and 33] [455-G-H; 456-A-B]

3.2 The appellant did not challenge the validity of Sections 28(4) and 28(5) of the KIAD Act. Therefore, on a combined reading of the provisions of Sections 28 (4) and 28 (5) of the KIAD Act, it is clear that on the publication of the Notification under Section 28 (4) of the KIAD Act i.e. from 30.3.2004, the land in question vested in the State free from all encumbrances by operation of Section 28(5) of the KIAD Act, whereas the land acquired under the said Act vests only under Section 16 thereof. On a comparison of Sections 28(4) and 28(5) of the KIAD Act with Section 16 of the 1894 Act, it is clear that the land which is subject to acquisition proceeding under the 1894 Act gets vested with the Government only when the Collector makes an award under Section 11, and the Government takes possession. Under Sections 28(4) and 28(5) of the KIAD Act, such vesting takes place by operation of law and it has nothing to do with the making of any award. This is where Sections 28(4) and 28 (5) of the KIAD Act are vitally different from Sections 4 and 6 of the said Act. It cannot be said that acquisition under KIAD Act lapsed for alleged non-compliance with the provisions of Section 11A of the 1894 Act. [Paras 36, 37, 45] [456-G-H; 457-A, C-D; 459-E-F]

Offshore Holdings Pvt. Ltd. vs. Bangalore Development Authority and Ors. **2011 (1) SCALE 533 – followed.**

Pratap and Anr. vs. State of Rajasthan and Ors. **(1996). 3 SCC 1;** *Munithimmaiah vs. State of Karnataka and Ors.* **(2002) 4 SCC 326 – referred to.**

3.3 On a comparison between the provisions of Land Acquisition Act and KIAD Act, it is found that those two Acts were enacted to achieve substantially different

purposes. KIAD Act is a self contained Code and the Central Act is not supplemental to it. The said Act is primarily a law regulating acquisition of land for public purpose and for payment of compensation. The acquisition of land under the 1894 Act is not concerned solely with the purpose of planned development of any city. It has to cater to different situations which come within the expanded horizon of public purpose. [Paras 42 and 43] [458-C-G]

Girnar Traders vs. State of Maharashtra and Ors. **2011 (1) SCALE 223 – referred to.**

Mariyappa and Ors. vs. State of Karnataka and Ors. **(1998) 3 SCC 276 – held inapplicable.**

4. The filing of the instant appeal before this Court is an instance of an abuse of the process of Court. The main purpose was to hold up, on one or other pretext, the land acquisition proceeding which was initiated to achieve a larger public purpose. Thus, the State Government should complete the project as early as possible and should not do anything, including releasing any land acquired under the said project, as that may impede the completion of the project and would not be compatible with the larger public interest which the project is intended to serve.[Paras 47 and 48] [459-G-H; 460-A-B]

State of Karnataka and Anr. vs. All India Manufactureres Organisation and Ors. **(2006) 4 SCC 683 – relied on.**

5. The appellant is directed to pay Rs. 10 lacs as costs in favour of Karnataka High Court Legal Services Authority within the stipulated period. [Para 49] [460-C]

Case Law Reference:

ILR Lahore Vol. VIII 384	**Referred to**	**Para 16**
(1916) 1 I.L.R. 43 Cal. 694	**Referred to**	**Para 20**
AIR 1965 SC 1150	**Referred to**	**Para 22**
(2006) 4 SCC 683	**Relied on**	**Para 23,30,47**
(1977) 2 SCC 806	**Referred to**	**Para 25**
(1990) 2 SCC 715	**Followed**	**Para 27**
(1947) 2 All ER 255(A)	**Referred to**	**Para 24**
(1998) 3 SCC 573	**Relied on**	**Para 28**
(1996) 3 SCC 1	**Referred to**	**Para 38**
(2002) 4 SCC 326	**Referred to**	**Para 40**
2011 (1) SCALE 533	**Followed**	**Para 41**
2011 (1) SCALE 223	**Referred to**	**Para 43**
(1998) 3 SCC 276	**Held inapplicable**	**Para 44**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1215 of 2011.

From the Judgment & Order dated 23.07.2010 of the High Court of Karnataka at Bangalore in W.A. No. 1192 of 2007.

Anoop Choudhary, June Choudhary, Raghavendra S. Srivatsa, Venkat Subramanium for the Appellant.

Dushyant Dave, Dr. Abhishek M. Singhvi, Anant Raman, R.V.S. Nair, Shanth Kr. V. Mahale, Anitha Shenoy for the Respondents.

The Judgment of the Court was delivered by

GANGULY, J. 1. Leave granted.

2. This appeal is directed against the judgment and order dated 23rd July 2010 passed by Division Bench of the High Court of Karnataka whereby the learned Judges dismissed the W.A. No.1192 of 2007 which was filed impugning an acquisition proceeding to the State of Karnataka. It may also be noted that while dismissing the appeal, the Division Bench affirmed the judgment of the learned Single Judge dated 28th May 2007.

3. From the perusal of the judgment of learned Single Judge it appears that the appellant claims to be the owner of the land bearing Sy. No.76/1 and Sy. No.76/2 of Thotadaguddadahalli Village, Bangalore North Taluk. The appellant alleged that these two plots of land were outside the purview of the Framework Agreement (FWA) and notification issued under Sections 28(1) and 28(4) of Karnataka Industrial Areas Development Act (KIAD Act). While dismissing the writ petition, the learned Single Judge held that the acquisition proceedings in question were challenged by the writ petitioner, the appellant herein, in a previous writ petition No.46078/03 which was initially accepted and the acquisition proceedings were quashed. Then on appeal, the Division Bench (in writ appeal Nos.713/04 and 2210/04) reversed the judgment of the learned Single Judge. Thereafter, the Division Bench order was upheld before this Court and this Court approved the acquisition proceedings.

4. Therefore, the writ petition, out of which this present appeal arises, purports to be an attempt to litigate once again, inter alia, on the ground that the aforesaid blocks of land were outside the purview of FWA dated 3.4.1997. The learned Judges of the Division Bench held the second round of litigation is misconceived inasmuch as the acquisition proceedings were upheld right upto this Court. The Division Bench in the impugned judgment noted the aforesaid facts which were also noted by the learned Single Judge. Apart from that the Division Bench also noted that another batch of public interest litigation in W.P. No.45334/04 and connected matters were also

disposed of by this Court directing the State of Karnataka and all its instrumentalities including the Housing Board to forthwith execute the project as conceived originally and upheld by this Court and it was also directed that FWA be implemented. The Division Bench, however, noted that on behalf of the appellant an additional ground has been raised that the acquisition stood vitiated since no award was passed as contemplated under Section 11A of the Land Acquisition Act (hereinafter "the said Act").

5. One of the contentions raised before the Division Bench on behalf of the appellant was that the question of principle of Constructive Res Judicata is not applicable to a writ petition. This contention was raised in the context of alleged non-publication of award and the consequential invalidation of the acquisition proceeding. Even though that contention was raised for the first time before the Division Bench. The Division Bench, after referring to several judgments of this Court, held that the said contention is not tenable in law. The Division Bench also noted that in the earlier round of litigation the contentions relating to the land falling outside the area of FWA being acquired, were raised and were repelled. In fact the contentions, raised in the previous round of litigation, have been noted expressly in para 17 of the impugned judgment, which are as under:

> "Most of the lands in question fall outside the area required for peripheral road etc. and they are fully developed. The acquisition for the benefit of private company like the NICE Ltd. could not be termed as public purpose."

> "The acquisition for peripheral road etc. would be illegal notwithstanding the definition of infrastructural facilities as incorporated under Section 2 (8a) of the Act. The proposed acquisition is in respect of the alleged contract between the State and M/s. NICE Ltd. which is stated to be based on agreement dated 3.4.1997."

"It amounts to colorable exercise of power and fraud on power and in such an event, the entire acquisition proceedings are to have been quashed by the learned Single Judge."

"On reading of para 23(2) of the impugned order, it is clear that the proposed acquisition of land as notified under Section 28(1) of the Act is different from the alleged purpose, which are quite different and from the same, it is clear that the acquisition initiated is not bonafide, but the same is as a result of colorable exercise of power coupled with exercise of fraud on power and on this count also, the notification issued under Section 28(1) also ought to have been quashed."

"The Government did not apply its mind to the acquisition proceedings and there is total non application of mind by the government to the relevant facts in initiating the acquisition proceedings under the KIADB Act."

"There was a total change in the stand of the opponents with regard to the 'public purpose' which was stated in the preliminary notification vis-à-vis their statement of objection filed before the Court and moreover the conduct of M/s. NICE Company in allotting certain extent of lands to the Association of India Machine Tool Manufacturers (AIMTM) to put up a big conventional centre, even before the acquisition proceedings are complete, disentitles them from supporting the acquisition of lands."

"Since admittedly no industrial area was being framed in the lands proposed to be acquired, the KIADB could never be permitted to acquire lands for the formation of infrastructural facility without there being any industries."

6. In the impugned judgment at para 18, the findings of the previous Division Bench, on the contentions extracted above, were also noted. Relevant parts of it are extracted:

"In so far as the appeals filed by the appellant – Indian Machine Tools Manufacturers Association in Writ Appeal Nos.3326-27/2004 are concerned, we find that there is considerable force in the submission made by the learned counsel for the appellant that the writ petition filed by the respondents 1 and 2 itself was not maintainable. In fact the learned Senior Counsel for the contesting respondent fairly conceded the same. *The writ petition filed by the 2nd respondent M. Nagabhushan in W.P. No.39559/2003 came to be dismissed by this court holding that he had purchased the land in question from its previous owner D.R. Raghavendra subsequent to final notification issued under Sec.28(4) of the Act and that further the previous owner D.R. Raghavendra had already handed over possession of the land in question to the Land Acquisition Officer by accepting the award."*

"Therefore apart from the fact that there is no merit in any of the contentions urged on behalf of the land owners, we find that the appeals filed by the appellant – Indian Machine Tool Manufacturers Association has to succeed on the ground that the writ petition filed by the respondents 1 and 2 itself was not maintainable. Since the appellant – IMTMA was not a party before the learned Single Judge, the leave sought for is granted."

7. Challenging the aforesaid judgment, the present appellant filed a special leave petition before this Court, which, on grant of leave, was numbered as Civil Appeal No.3878/2005. The grounds which were substantially raised by the present appellant in the previous appeal (No.3878/2005) have been raised again in this appeal. The alleged grounds in the present appeal about acquisition of land beyond the requirement of FWA were raised by the present appellant in the previous appeal No.3878/2005 also.

8. On those contentions, a three-judge Bench of this Court, while dealing with several appeals including the one filed by the

present appellant, rendered a judgment in *State of Karnataka and another Vs. All India Manufacturers Organisation and others* – (2006) 4 SCC 683, wherein the said three-judge Bench held:

> "The next contention urged on behalf of the landowners is that the lands were not being acquired for a public purpose. The counsel who have argued for the landowners have expatiated in their contention by urging that land in excess of what was required under the FWA had been acquired; land far away from the actual alignment of the road and periphery had been acquired; consequently, it is urged that even if the implementation of the highway project is assumed to be for a public purpose, acquisition of land far away therefrom would not amount to a public purpose nor would it be covered by the provisions of the KIAD Act."
>
> (Paragraph 76, page 711 of the report)

9. In paragraph 77 of the said report, it was further held:

> "In our view, this was an entirely misconceived argument. As we have pointed out in the earlier part of our judgment, the Project is an integrated infrastructure development project and not merely a highway project. The Project as it has been styled, conceived and implemented was the Bangalore-Mysore Infrastructure Corridor Project, which conceived of the development of roads between Bangalore and Mysore, for which there were several interchanges in and around the periphery of the city of Bangalore, together with numerous developmental infrastructure activities along with the highway at several points. As an integrated project, it may require the acquisition and transfer of lands even away from the main alignment of the road."

10. In paragraph 79 at page 712 of the report, this Court affirmed the previous judgment of the Division Bench of the

High Court in the following words:

> "The learned Single Judge erred in assuming that the lands acquired from places away from the main alignment of the road were not a part of the Project and that is the reason he was persuaded to hold that only 60% of the land acquisition was justified because it pertained to the land acquired for the main alignment of the highway. This, in the view of the Division Bench, and in our view, was entirely erroneous. The Division Bench was right in taking the view that the Project was an integrated project intended for public purpose and, irrespective of where the land was situated, so long as it arose from the terms of the FWA, there was no question of characterising it as unconnected with a public purpose. We are, therefore, in agreement with the finding of the High Court on this issue."

11. The Division Bench judgment of the High Court was further affirmed by this Court in clear and express words in paragraph 81 of the report:

> "In summary, having perused the well-considered judgment of the Division Bench which is under appeal in the light of the contentions advanced at the Bar, we are not satisfied that the acquisitions were, in any way, liable to be interfered with by the High Court, even to the extent as held by the learned Single Judge. We agree with the decision of the Division Bench that the acquisition of the entire land for the Project was carried out in consonance with the provisions of the KIAD Act for a public project of great importance for the development of the State of Karnataka. We do not think that a project of this magnitude and urgency can be held up by individuals raising frivolous and untenable objections thereto. The powers under the KIAD Act represent the powers of eminent domain vested in the State, which may need to be exercised even to the detriment of individuals' property rights so long as it achieves a larger public purpose. Looking at the case as

a whole, we are satisfied that the Project is intended to represent the larger public interest of the State and that is why it was entered into and implemented all along."

12. We find that disregarding the aforesaid clear finding of this Court, the appellant, on identical issues, further filed a new writ petition out of which the present appeal arises. That writ petition, as noted above, was rejected both by the learned Single Judge and by the Division Bench in clear terms.

13. It is obvious that such a litigative adventure by the present appellant is clearly against the principles of Res Judicata as well as principles of Constructive Res Judicata and principles analogous thereto.

14. The principles of Res Judicata are of universal application as it is based on two age old principles, namely, 'interest reipublicae ut sit finis litium' which means that it is in the interest of the State that there should be an end to litigation and the other principle is 'nemo debet his ve ari, si constet curiae quod sit pro un aet eademn cause' meaning thereby that no one ought to be vexed twice in a litigation if it appears to the Court that it is for one and the same cause. This doctrine of Res Judicata is common to all civilized system of jurisprudence to the extent that a judgment after a proper trial by a Court of competent jurisdiction should be regarded as final and conclusive determination of the questions litigated and should for ever set the controversy at rest.

15. That principle of finality of litigation is based on high principle of public policy. In the absence of such a principle great oppression might result under the colour and pretence of law in as much as there will be no end of litigation and a rich and malicious litigant will succeed in infinitely vexing his opponent by repetitive suits and actions. This may compel the weaker party to relinquish his right. The doctrine of Res Judicata has been evolved to prevent such an anarchy. That is why it is perceived that the plea of Res Judicata is not a

technical doctrine but a fundamental principle which sustains the Rule of Law in ensuring finality in litigation. This principle seeks to promote honesty and a fair administration of justice and to prevent abuse in the matter of accessing Court for agitating on issues which have become final between the parties.

16. Justice Tek Chand delivering the unanimous Full Bench decision in the case of *Mussammat Lachhmi Vs. Mussammat Bhulli* (ILR Lahore Vol.VIII 384) traced the history of this doctrine both in Hindu and Mohammedan jurisprudence as follows:-

> "In the Mitakshra (Book II, Chap. I, Section V, verse 5) one of the four kinds of effective answers to a suit is "a plea by former judgment" and in verse 10, Katyayana is quoted as laying down that "one against whom a judgment had formerly been given, if he bring forward the matter again, must be answered by a plea of Purva Nyaya or former judgment" (Macnaughten and Colebrooke's translation, page 22). The doctrine, however, seems to have been recognized much earlier in Hindu Jurisprudence, judging from the fact that both the Smriti Chandrika (Mysore Edition, pages 97-98) and the Virmitrodaya (Vidya-Sagar Edition, page 77) base the defence of Prang Nyaya (=former decision) on the following text of the ancient law-giver Harita, who is believed by some Orientalists to have flourished in the 9th Century B.C. and whose Smriti is now extant only in fragments:-
>
> "The plaintiff should be non-suited if the defendant avers: 'in this very affair, there was litigation between him and myself previously,' and it is found that the plaintiff had lost his case".
>
> There are texts of Prasara (Bengal Asiatic Society Edition, page 56) and of the Mayukha (Kane's Edition,

page 15) to the same effect.

Among Muhammadan law-givers similar effect was given to the plea of "Niza-i-munfasla" or "Amar Mania taqrir mukhalif." Under Roman Law, as administered by the Proetors' Courts, a defendant could repel the plaintiff's claim by means of 'exceptio rei judicatoe" or plea of former judgment. The subject received considerable attention at the hands of Ruman jurists and as stated in Roby's Roman Private Law (Vol.II, page 338) the general principle recognised was that "one suit and one decision was enough for any single dispute" and that "a matter once brought to trial should not be tried except, of course, by way of appeal".

(Page 391-392 of the report)

17. The learned Judge also noted that in British India the rule of Res Judicata was first introduced by Section 16 of the Bengal Regulation, III of 1973 which prohibited the Zilla and City Courts from entertaining any cause which, from the production of a former decree or the record of the Court, appears to have been heard and determined by any Judge or any Superintendent of a Court having competent jurisdiction. The learned Judge found that the earliest legislative attempt at codification of the law on the subject was made in 1859, when the first Civil Procedure Code was enacted, whereunder Section 2 of the Code barred every Court from taking cognizance of suits which, on the same cause of action, have been heard and determined by a Court of competent jurisdiction. The learned Judge opined, and in our view rightly, that this was partial recognition of the English rule in so far as it embodied the principles relating to Estoppel by judgment or Estopel by record.

18. Thereafter, when the Code was again revised in 1877, the operation of the rule was extended in Section 13 and the bar was no longer confined to the retrial of a dispute relating

to the same cause of action but the prohibition was extended against reagitating an issue, which had been heard and finally decided between the same parties in a former suit by a competent court. The learned Judge also noted that before the principle assumed its present form in Section 11 of the Code of 1908, the Section was expanded twice. However, the learned Judge noted that Section 11 is not exhaustive of the law on the subject.

19. It is nobody's case that the appellant did not know the contents of FWA. From this it follows that it was open to the appellant to question, in the previous proceeding filed by it, that his land which was acquired was not included in the FWA. No reasonable explanation was offered by the appellant to indicate why he had not raised this issue. Therefore, in our judgment, such an issue cannot be raised in this proceeding in view of the doctrine of Constructive Res Judicata.

20. It may be noted in this context that while applying the principles of Res Judicata the Court should not be hampered by any technical rules of interpretation. It has been very categorically opined by Sir Lawrence Jenkins that "the application of the rule by Courts in India should be influenced by no technical considerations of form but by matter of substance within the limits allowed by law". [See *Sheoparsan Singh Vs. Rammanandan Prasad Singh,* (1916) 1 I.L.R. 43 Cal. 694 at page 706 (P.C.)].

21. Therefore, any proceeding which has been initiated in breach of the principle of Res Judicata is prima-facie a proceeding which has been initiated in abuse of the process of Court.

22. A Constitution Bench of this Court in *Devilal Modi Vs. Sales Tax Officer, Ratlam & Ors.* – AIR 1965 SC 1150, has explained this principle in very clear terms:

"But the question as to whether a citizen should be allowed

to challenge the validity of the same order by successive petitions under Art. 226, cannot be answered merely in the light of the significance and importance of the citizens' fundamental rights. The general principle underlying the doctrine of res judicata is ultimately based on considerations of public policy. One important consideration of public policy is that the decisions pronounced by courts of competent jurisdiction should be final, unless they are modified or reversed by appellate authorities; and the other principle is that no one should be made to face the same kind of litigation twice over, because such a process would be contrary to considerations of fair play and justice, vide : *Daryao Vs. State of U.P.,* 1962-1 SCR 575; (AIR 1961 SC 1457)."

23. This Court in *All India Manufacturers Organisation* (supra) explained in clear terms that principle behind the doctrine of Res Judicata is to prevent an abuse of the process of Court.

24. In explaining the said principle the Bench in *All India Manufacturers Organisation* (supra) relied on the following formulation of Lord Justice Somervell in *Greenhalgh Vs. Mallard* – (1947) 2 All ER 255 (CA):

"I think that on the authorities to which I will refer it would be accurate to say that res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them."

25. The Bench also noted that the judgment of the Court of Appeal in "Greenhalgh" was approved by this Court in *State of U.P. Vs. Nawab Hussain* – (1977) 2 SCC 806 at page 809,

para 4.

26. Following all these principles a Constitution Bench of this Court in *Direct Recruit Class II Engg. Officers' Assn. Vs. State of Maharashtra* – (1990) 2 SCC 715 laid down the following principle:

"……an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had decided as incidental to or essentially connected with subject matter of the litigation and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and defence. Thus, the principle of constructive res judicata underlying Explanation IV of Section 11 of the Code of Civil Procedure was applied to writ case. We, accordingly hold that the writ case is fit to be dismissed on the ground of res judicata"

27. In view of such authoritative pronouncement of the Constitution Bench of this Court, there can be no doubt that the principles of Constructive Res Judicata, as explained in explanation IV to Section 11 of the CPC, are also applicable to writ petitions.

28. Thus, the attempt to re-argue the case which has been finally decided by the Court of last resort is a clear abuse of process of the Court, regardless of the principles of Res Judicata, as has been held by this Court in *K.K. Modi Vs. K.N. Modi and Ors.* – (1998) 3 SCC 573. In paragraph 44 of the report, this principle has been very lucidly discussed by this Court and the relevant portions whereof are extracted below:

"One of the examples cited as an abuse of the process of the court is relitigation. It is an abuse of the process of the court and contrary to justice and public policy for a party to relitigate the same issue which has already been tried and decided earlier against him. The reagitation may or

may not be barred as res judicata..."

29. In coming to the aforementioned finding, this Court relied on the Supreme Court Practice 1995 published by Sweet & Maxwell. The relevant principles laid down in the aforesaid practice and which have been accepted by this Court are as follows:

> "This term connotes that the process of the court must be used bona fide and properly and must not be abused. The court will prevent improper use of its machinery and will in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation. ... The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed but depend on all the relevant circumstances. And for this purpose considerations of public policy and the interests of justice may be very material."

30. In the premises aforesaid, it is clear that the attempt by the appellant to re-agitate the same issues which were considered by this Court and were rejected expressly in the previous judgment in *All India Manufacturers Organisation* (supra), is a clear instance of an abuse of process of this Court apart from the fact that such issues are barred by principles of Res Judicata or Constructive Res Judicata and principles analogous thereto.

31. The other point which has been argued by the appellant is that notification dated 30.3.2004 issued under Section 28(4) of KIAD Act stands vitiated in view of the provisions of Section 11A of the said Act inasmuch as no award was passed within two years from the date of the notification.

32. This Court is unable to accept the aforesaid contention for the following reasons.

33. It may be noted that the said question was not urged by the appellant in its writ petition before the learned Single Judge. Of course, this was urged before the Division Bench of the High Court unsuccessfully. Apart from that we also find no substance in the aforesaid contentions.

34. If we compare the provisions of Sections 28(4) and 28(5) of KIAD Act with the provisions of Sections 4 and 6 of the said Act, we discern a substantial difference between the two.

35. In order to appreciate the purport of both Sections 28(4) and 28(5) of the KIAD Act, they are to be read together and are set out below:

> "28. Acquisition of land-
>
> xxx xxx
>
> (4) After orders are passed under sub-Section (3), where the State Government is satisfied that any land should be acquired for the purpose specified in the notification issued under sub-section(1), a declaration shall, by notification in the official Gazette, be made to that effect.
>
> (5) On the publication in the official Gazette of the declaration under sub-section (4), the land shall vest absolutely in the State Government free from all encumbrances."

36. The appellant has not challenged the validity of the aforesaid provisions. Therefore, on a combined reading of the provisions of Sections 28(4) and 28(5) of the KIAD Act, it is clear that on the publication of the notification under Section 28(4) of the KIAD Act i.e. from 30.3.2004, the land in question vested in the State free from all encumbrances by operation of Section 28(5) of the KIAD Act, whereas the land acquired under

the said Act vests only under Section 16 thereof, which runs as under:

> "16. Power to take possession:- When the Collector has made an award under section 11, he may take possession of the land, which shall thereupon vest absolutely in the Government free from all encumbrances"

37. On a comparison of the aforesaid provisions, namely, Sections 28(4) and 28(5) of the KIAD Act with Section 16 of the said Act, it is clear that the land which is subject to acquisition proceeding under the said Act gets vested with the Government only when the Collector makes an award under Section 11, and the Government takes possession. Under Sections 28(4) and 28(5) of the KIAD Act, such vesting takes place by operation of law and it has nothing to do with the making of any award. This is where Sections 28(4) and 28(5) of the KIAD Act are vitally different from Sections 4 and 6 of the said Act.

38. A somewhat similar question came up for consideration before a three-judge Bench of this Court in *Pratap and Another Vs. State of Rajasthan and Ors.* – (1996) 3 SCC 1. In that case the acquisition proceedings commenced under Section 52(2) of Rajasthan Urban Improvement Act, 1959 and the same contentions were raised, namely, that the acquisition notification gets invalidated for not making an award within a period of two years from the date of notification.

39. Repelling the said contention, the learned Judges held that once the land is vested in the Government, the provisions of Section 11A are not attracted and the acquisition proceedings will not lapse. (para 12 at page 8 of the report)

40. In *Munithimmaiah Vs. State of Karnataka and others* reported in (2002) 4 SCC 326 this Court held that the provisions of Sections 6 and 11A of the said Act do not apply to the provisions of Bangalore Development Authority Act, 1976 (BDA

Act). In paragraph 15 at page 335 of the report this Court made a distinction between the purposes of the two enactments and held that all the provisions of said Act do not apply to BDA Act.

41. Subsequently, the Constitution Bench of this Court in *Offshore Holdings Pvt. Ltd. Vs. Bangalore Development Authority and Ors.,* reported in 2011 (1) SCALE 533 – 574, held that Section 11A of the said Act does not apply to acquisition under BDA Act.

42. The same principle is attracted to the present case also. Here also on a comparison between the provisions of said Act and KIAD Act, we find that those two Acts were enacted to achieve substantially different purposes. In so far as KIAD Act is concerned, from its Statement of Objects and Reasons, it is clear that the same was enacted to achieve the following purposes:

> "It is considered necessary to make provision for the orderly establishment and development of Industries in suitable areas in the State. To achieve this object, it is proposed to specify suitable areas for Industrial Development and establish a Board to develop such areas and make available lands therein for establishment of Industries."

43. KIAD Act is of course a self contained code. The said Act is primarily a law regulating acquisition of land for public purpose and for payment of compensation. Acquisition of land under the said Act is not concerned solely with the purpose of planned development of any city. It has to cater to different situations which come within the expanded horizon of public purpose. Recently the Constitution Bench of this Court in *Girnar Traders Vs. State of Maharashtra & Others,* reported in 2011 (1) SCALE 223 held that Section 11A of the said Act does not apply to acquisition under the provisions of Maharashtra Regional and Town Planning Act, 1966.

44. The learned counsel for the appellant has relied on the judgment of this Court in the case of *Mariyappa and others Vs. State of Karnataka and others* reported in (1998) 3 SCC 276. The said decision was cited for the purpose of contending that Section 11A is applicable to an acquisition under KIAD Act. In *Mariyappa* (supra) before coming to hold that provision of Section 11A of the Central Act applies to Karnataka Acquisition of Land for Grant of House Sites Act, 1972 (hereinafter "1972 Act"), this Court held that the 1972 Act is not a self-contained code. The Court also held that the 1972 Act and the Central Acts are supplemental to each other to the extent that unless the Central Act supplements the Karnataka Act, the latter cannot function. The Court further held that both the Acts, namely, 1972 Act and the Central Act deals with the same subject. But in the instant case the KIAD Act is a self-contained code and the Central Act is not supplemental to it. Therefore, the ratio in *Mariyappa* (supra) is not attracted to the facts of the present case.

45. Following the aforesaid well settled principles, this Court is of the opinion that there is no substance in the contention of appellant that acquisition under KIAD Act lapsed for alleged non-compliance with the provisions of Section 11A of the said Act.

46. For the reasons aforesaid all the contentions of the appellant, being without any substance, fail and the appeal is dismissed.

47. For the reasons indicated hereinabove, this Court holds that the filing of this appeal before this Court is an instance of an abuse of the process of Court. The main purpose was to hold up, on one or other pretext, the land acquisition proceeding which, as held by this Court in *All India Manufacturers Organisation* (supra), was initiated to 'achieve a larger public purpose'.

48. In that view of the matter, this court makes it clear that the State Government should complete the project as early as possible and should not do anything, including releasing any land acquired under this project, as that may impede the completion of the project and would not be compatible with the larger public interest which the project is intended to serve.

49. This Court, therefore, dismisses this appeal with costs assessed at Rs.10 Lacs, to be paid by the appellant in favour of Karnataka High Court Legal Services Authority within a period of six weeks from date. In default, a proceeding will be initiated against the appellant on a complaint by the Karnataka High Court Legal Services Authority by the appropriate authority under the relevant Public Demand Recovery Act for recovery of this cost amount as arrears of land revenue.

50. The appeal is, thus, dismissed with costs as aforesaid. Interim orders, if any, are vacated.

N.J. Appeal dismissed.

CHAIRMAN, BHARTIA EDUCATION SOCIETY & ANR.

v.

STATE OF HIMACHAL PRADESH & ORS.

(Civil Appeal No. 1227 of 2011)

FEBRUARY 02, 2011

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

Education/Educational Institutions:

National Council for Teacher Education Act, 1933:

s. 14 – Recognition of Institutions offering course or training in teacher education – Teacher Training Institute run by appellant society – Recognition of Institute by National Council for Teacher Education (NCTE) for conducting two year Junior Basic Training (JBT) from the academic session 2000 - 2001 – Grant of affiliation to the Institute for the JBT course (2001-2003) by State Board of School Education – Admission of 160 students to the two year JBT course in year 1999 – Grant of one-time relaxation in respect of students admitted by the Institute for the academic session 1999 - 2001 and direction to the Board to conduct examination – 68 students found eligible out of 160 and permitted to take examination and their result was announced – Remaining 92 students were found ineligible but were permitted to take the first year examination – However, their results were not announced nor were permitted to take second year examination – Writ Petition by the 92 students seeking direction to the Board to declare their first year results and conduct the second year examination – Dismissed by the High Court – On appeal, held: Practice of admitting students by unrecognized institutions and then seeking permission for the students to appear for the examinations cannot be accepted – Having regard to the provisions of the NCTE Act, before NCTE granted recognition on 17.7.2000, the Institute could not offer the JBT course nor admit any students to such course – There was no recognition in the year 1999 – Therefore, the admissions made by the Institute in the year

1999 for the academic session 1999-2001 are illegal and irregular and could not be approved, recognised or regularised – The fact that the admissions of 68 students of 1999-2001 batch had been regularized cannot be a ground to perpetuate an illegality by requiring the Board to conduct the examinations for the remaining 92 students admitted in the year 1999 or declare their results – Thus, order of the High Court does not call for interference.

N. M. Nageshwaramma vs. State of AP **(1986) Supp. SCC 166;** *A.P. Christian Medical Education Society vs. Government of AP* **(1986) 2 SCC 667;** *State of Maharashtra vs. Vikas Sahelrao Roundale* **(1992) 4 SCC 435 – relied on.**

State of Tamil Nadu vs. St. Joseph Teachers Training Institute **(1991) 3 SCC 87 – referred to.**

s. 14(6) – Grant of affiliation to the Institution, where recognition has been granted – Recognition of Institute for conducting two years Junior Basic Training (JBT) course in the year 2000 – Grant of affiliation to the Institute for the JBT course (2001-2003), however, affiliation for subsequent JBT course not granted – Affiliation granted to the institute only for the year 2009 – Admission of student to the JBT course in the year 2002 and 2003 – Writ petitions seeking a direction to the Board to conduct the examinations for the academic session 2002-2004, and to grant affiliation to the Institute and permit students of 2003-2005 batch to appear for examination respectively – Disposed of, by the High Court – Direction issued to refund the fees paid by the students and pay Rs 50,000/- as damages – On appeal, held: An institution requires the recognition of NCTE as well as affiliation with the examining body, before it can offer a course or training in teacher education or admit students to such course or training – Sub-section (6) of Section 14 mandates every examining body to grant affiliation to the institution on receipt of the order of NCTE granting recognition to such institution – Recognition is a condition precedent for affiliation – Further, sub-section

(6) of section 14 cannot be interpreted in a manner so as to make the process of affiliation, an automatic rubber-stamping consequent upon recognition, without any kind of discretion in the examining body to examine whether the institution deserves affiliation or not, independent of the recognition – On facts, the Institute apparently proceeded under the mistaken impression that the recognition by NCTE on 17.7.2000, which was granted after the State Government issued a NOC, resulted in automatic affiliation with the examining body – The Board had granted affiliation to the Institute for an earlier period and also granted affiliations for the subsequent period – The students admitted in 2002 and 2003 have already completed the course and have also been permitted by the Board – In the interest of justice, the admissions of students to the Institute in the years 2002 and 2003 should be regularized subject to fulfilling the eligibility criteria prescribed by the Board and their results should be declared – Direction of the High Court to pay damages of Rs 50,000/- to students admitted in 2002 and 2003, set aside.

'Recognition' and affiliation' – Purpose of – Held: Are different – 'Affiliation' enables and permits an institution to send its students to participate in the public examinations conducted by the Examining Body and secure qualification in the nature of degrees, diplomas, certificates – 'Recognition' is licence to the institution to offer a course or training in teacher education.

s. 14(6) – Grant of affiliation to the institution, where recognition has been granted – Recognition of institute for conducting two years Junior Basic Training (JBT) course in the year 2000 – Affiliation to the institute for two years JBT course (2001-2003), however, affiliation for subsequent JBT course not granted – Affiliation to the Institute granted only for the year 2009 – Writ petition seeking affiliation to the Institute for academic session 2004-2006 and 2005-2007 and direction to the Government to sponsor students for

admission for the said academic session – Dismissed by the High Court – On appeal held: No candidates were allotted by the State Government to the Institute, nor did the Institute independently admit any candidate for the academic sessions 2004-2006 and 2005-2007 – The prayer seeking a direction to the Board to allot candidates for 2004-2006 and 2005-2007 does not survive – The question of granting affiliation for those years is academic and does not arise for consideration – Notifications related to constitution of a committee to examine whether the Institute had committed any irregularities in making admissions in the past before the recognition by NCTE, not erroneous – After recognition by NCTE and affiliation with the Board in 2009, the issue is academic – Thus, the appeals are dismissed as having become infructuous.

Case Law Reference:

(1991) 3 SCC 87	**Referred to**	**Para 10**
(1986) Supp. SCC 166	**Relied on**	**Para 11**
(1986) 2 SCC 667	**Relied on**	**Para 11**
(1992) 4 SCC 435	**Relied on**	**Para 11**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1227 of 2011.

From the Judgment & Order dated 03.09.2002 of the High Court of Himachal Pradesh, Shimla in C.W.P. No. 622 of 2004.

WITH

C.A. Nos. 1228, 1229, 1230-1231 & 1232-1233 of 2011.

P.S. Patwalia, Kiran Suri, Aparna Mattoo, S.J. Amith, Vijay Varma, Vinod Sharma, Irshad Ahmad for the Appellants.

Naresh K. Sharma, Kirti Renu Mishra, Rishi Jain, Balraj Dewan, Vikas Mahajan, Vishal Mahajan, E.C. Vidya Sagar, Tulika Prakash for the Respondents.

The order of the Court was delivered by

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

2. Bhartia Education Society ('Society' for short) runs an institute known as Rameshwari Teachers Training Institute ('Institute' for short) at Gandhi Nagar, Kullu, Himachal Pradesh. The Institute was recognized by National Council for Teacher Education (for short, 'NCTE') by order dated 17.7.2000 for conducting Two-year Junior Basic Training (JBT) course with an intake of 50, from the academic session 2000-2001. NCTE increased the intake to 100 from the academic session 2002-2004. After getting recognition, the Institute applied for affiliation to the Examining Body – Himachal Pradesh Board of School Education ('Board' for short) on 31.8.2001. The Board granted affiliation to the Institute for the two-year JBT course (2001-2003) by two orders that is order dated 31.12.2001 for the first year of the two-year course (2001-2002) and order dated 27.12.2002 for the second year of the two-year course (2002-2003). The Board however did not grant affiliation for the subsequent JBT courses and in fact refused affiliation by order dated 20.1.2004. Ultimately it is stated that affiliation to the Institute was granted by the Board only in the year 2009. The State Government by letter dated 17.10.2002, however granted one time relaxation in regard to students admitted by the Institute for the academic sessions 1999-2001 and 2000-2002 and directed the Board to conduct the examination for those students. In compliance thereof the Board permitted the eligible students of 1999-2001 and 2000-2002 batches to take the examination in December 2002.

3. The students admitted by the Institute to the two-year JBT Course in the year 1999 filed CWP Nos.819 of 2003,

1178, 1188, 1194, 1204 of 2004 and 50 of 2005, before the High Court praying for a direction to the Board to declare the first year JBT course results of 1999-2001 batch and a further direction to the Board to hold the second year examinations for the students belonging to the 1999-2001 batch. A student admitted by the Institute to the JBT course in the year 2002 filed CWP No.622 of 2004 seeking a direction to the Board to conduct the examinations for the students admitted for the academic session 2002-2004. The High Court, by its common judgment dated 13.1.2006, rejected the prayers in the said petitions relating to 1999-2001 and 2002-2004 batches but however a different relief to the students who had filed the writ Petitions by directing the Society and the Institute to refund the fee paid by them and also pay each of them Rs.50,000/- as damages.

4. CWP Nos.170 of 2005 and 1231 of 2005 were filed by some of the students admitted by the Institute in the year 2003, seeking a direction to the Board to take steps to grant affiliation to the Institute and permit the students of 2003-2005 batch to appear for the examinations. CWP Nos.251 and 252 of 2005 were filed by the Society/Institute seeking a direction to the Board to grant an affiliation for the academic sessions 2004-2006 and 2005-2007 and a direction to the Government to sponsor students for admission for the said 2004-2006 and 2005-2007 academic sessions. These four writ petitions were disposed of by another common judgment dated 12.7.2007. CWP Nos.251 and 252 of 2005 filed by the Society/Institute were dismissed. CWP Nos.170 and 1231 of 2005 filed by the students of 2003-2005 batch were disposed of by directing the Society and the Institute to refund the fees received from those students and pay Rs.50,000/- as damages to each of them.

5. CA Nos.1227/2011 is filed by the Society/Institute against the judgment dated 13.1.2006 in CWP No.622/2004 relating to 2002-2004 batch. CA No.1228/2011 is filed by the society/Institute and CA No.1229/2011 is filed by the students

admitted in 1999, against the judgment dated 13.1.2006 in CWP No.819/2003, 1178, 1188, 1194, 1204 of 2004 and 50/2005, relating to the 1999-2001 batch. CA Nos.1230-1231/2011 are filed by the Society/Institute against the judgment dated 12.7.2007 in CWP No.170/2005 and 1231/2005 relating to 2003-2005 batch. CA Nos. 1232-1233/2011 are filed by the society/Institute against the judgment dated 12.7.2007 in CWP Nos.251 and 252 of 2005 relating to academic sessions 2004-2006 and 2005-2007.

CA Nos.1228 & 1229 of 2011 (Admissions made in 1999)

6. The Institute admitted 160 students to the two-year JBT course, in the year 1999. The state government by letter dated 17.10.2002 addressed to the Board, communicated its decision to grant one-time relaxation in respect of admission of students made by the Institute for the academic session 1999-2001 and directed the Board to conduct the examination for them. In pursuance of such one-time relaxation by the State Government, the Board considered the eligibility of the 160 students admitted for the 1999-2001 academic session and found 68 students to be eligible and permitted them to take examination and announced their results. The Board found that the remaining 92 students were ineligible (either because they had not passed the matriculation examination in second division or did not fall within the prescribed age limit). The Board however permitted those 92 candidates also to take the first year examination, but their results were not announced nor were they permitted to take the second year examination. Learned counsel appearing for the students contended that there was some confusion in regard to the eligibility criteria/norms adopted by the state government and the Board, and benefit of the doubt/confusion should be extended to the students who did not possess the required second division in the matriculation or were beyond the age limits prescribed. They therefore sought a direction to the Board to declare the first year results and conduct the second year examination, for the 1999-

2001 batch students.

7. It is well settled that admission to a course can be given only to those candidates who are eligible as per the regulations of the Examining Body and the State Government. Therefore, unless the students fulfilled the eligibility requirements stipulated by the Board which is the affiliating and examining authority, their admissions will be invalid and they cannot be permitted to take the examination. As the Board found that 92 students did not fulfil the eligibility requirements, it rightly rejected their admission to the course. But more important than the non-fulfilment of the eligibility requirements of the Board, is the absence of NCTE recognition in the year 1999. As noticed above recognition was granted by NCTE to the Institute only on 17.7.2000, from the academic session 2000-2002. The question therefore is whether the admissions made in 1999, before recognition by NCTE, are valid.

8. The Society/Institute submitted that they applied to NCTE on 11.4.1997, seeking recognition; that NCTE responded by stating that it will consider the request for recognition, on the Institute obtaining an NOC from the State Government; that the State Government gave its NOC on 20.9.1999; and that therefore, they proceeded *bona fide* under the impression that the Institute could make the admissions from 1999 onwards. The Society/Institute therefore submitted that the admissions made in the year 1999 should be deemed to have been regularized, when the Institute was recognized on 17.7.2000.

9. Section 14 of the National Council for Teacher Education Act, 1993 ('NCTE Act' for short) relates to recognition of institutions offering course or training in teacher education. Sub-section (1) thereof provides that every institution offering or intending to offer a course or training in teacher education on or after the appointed day, may, for grant of recognition under the Act, make an application to the Regional Committee concerned in such form and in such manner as may be

determined by regulations. NCTE Act came into force on 1.7.1995 and the appointed day under the said Act is stated to be 17.8.1995. A combined reading of sections 14(1) and (5), 15, 16, and 17(3) and (4) of NCTE Act make it clear that after the appointed day, no institution can commence or offer a course or training in teacher education without recognition by the NCTE and consequently, no student could be admitted to such course or training nor could be permitted to appear in any examination relating to such course or training. The Society established and started the Institute after the appointed day. The Society applied to NCTE for recognition on 11.4.1997. NCTE required the Society to obtain and furnish an NOC from the Government of Himachal Pradesh. The said NOC was granted on 20.9.1999. In pursuance of it, NCTE granted recognition to the Institute on 17.7.2000. The order of NCTE made it clear that the recognition was for conducting the Two Years JBT course commencing from the academic year 2000-2001 with an annual intake of 50 students. Having regard to the clear provisions of the NCTE Act, before NCTE granted recognition on 17.7.2000, the Institute could not offer the JBT course nor admit any students to such course. Therefore, the admissions made by the Institute in the year 1999 for the academic session 1999-2001 are illegal and irregular and could not be approved, recognised or regularised.

10. The students pointed out that the State Government and the Board have accepted and regularized the admissions of 68 students of 1999-2001 batch and therefore they should not be denied similar benefit. The fact that the State Government and the Board chose to ignore the absence of NCTE recognition and permitted the students admitted in 1999 to take the examination or announced the results of 68 students who were eligible as per the criteria prescribed by the State/Board, cannot be a ground for us to ignore the mandatory statutory requirements of NCTE Act and perpetuate an illegality by requiring the Board to conduct the examinations for the remaining 92 students admitted in the year 1999 or declare

their results. In *State of Tamil Nadu vs. St. Joseph Teachers Training Institute* – (1991) 3 SCC 87, this Court disapproved the grant of any direction to permit the students of an unrecognized teachers training institute to take the examination, even in pre-NCTE era. This Court observed :

> "There is no dispute that the respondent educational institutions were established for imparting education in Teachers Training Course without obtaining recognition from the Education Department of the State Government. In the absence of recognition from the Education Department, the students pursuing their studies in these institutions could not appear at the public examination held by the Education Department. The Full Bench rightly held that students of unrecognized educational institutions could not be permitted to appear at the public examination held by the government. On its own findings, the Full Bench should have refused relief to the petitioners, but it was persuaded to issue directions on humanitarian grounds which were in effect destructive of its own findings, and the law laid down by it. The Full Bench issued directions permitting the students to appear at the examination and directing the appellant authorities to make a special provision for supplementary examination. These directions in our opinion were unauthorized and wholly unjustified. ……Courts cannot grant relief to a party on humanitarian grounds contrary to law. Since the students of unrecognized institutions were legally not entitled to appear at the examination held by the Education Department of the government, the High Court acted in violation of law in granting permission to such students for appearing at the public examination."

11. The practice of admitting students by unrecognized institutions and then seeking permission for the students to appear for the examinations have been repeatedly disapproved by this Court [See : *N. M. Nageshwaramma vs.*

State of AP – (1986) Supp. SCC 166, *A.P. Christian Medical Education Society vs. Government of AP* – (1986) 2 SCC 667, and *State of Maharashtra vs. Vikas Sahelrao Roundale* – (1992) 4 SCC 435]. We, therefore, find no reason to interfere with the decision of the High Court rejecting the prayer of the students admitted in 1999 to regularize their admissions by directing the Board to permit them to appear for the JBT examination conducted by it. The two appeals (CA Nos.1228 and 1229 of 2011) filed by the Society/Institute and the students in regard to the 1999 admissions are therefore liable to be dismissed.

CA Nos.1227 and 1230-1231 of 2011 (Admissions made in 2002 and 2003)

12. When the Institute made admissions to JBT course in the years 2002 and 2003 (for 2002-2004 and 2003-2005 academic sessions), the Institute had the recognition from NCTE vide order dated 17.7.2000. The admissions made by the Institute were within the permitted intake. The students admitted during 2002 and 2003 have completed the course. The students were also permitted by the Board to take the examination and only their results remain to be declared.

13. After securing recognition from NCTE on 17.7.2000, the Institute applied to the Board for affiliation for the academic session 2000-2002. The Board informed the Institute, by letter dated 31.8.2001 that it did not have jurisdiction to grant affiliation to JBT training institutions. However, by subsequent order dated 31.12.2001, the Board granted affiliation for the two year JBT course for the year 2001-2002 only, with a condition that the institution shall have to seek fresh affiliation for the second year of the course. The State Government by letters dated 20.1.2004 and 8.3.2004 rejected the request of the Society to regularize the admissions of the 2002-2004 batch and conduct examination for them, on the ground that the Institute had made admissions by ignoring the admission procedures prescribed by the State Government. By letter dated

30.10.2004, the State Government instructed the Board not to grant affiliation to the Institute because of frequent irregularities in admissions. The High Court refused relief to the students admitted to 2002-2004 and 2003-2005 sessions on the ground that the admission of students by the Institute without affiliation to the Examining Body, was illegal and invalid.

14. Learned counsel for the Institute submitted that having regard to the provisions of section 14(6) of the NCTE Act, the examining body is bound to grant affiliation to an institution in regard to which recognition has been granted by NCTE. He submitted that where an institution is granted recognition by NCTE, the affiliation with the examining body should automatically follow and in view of such deemed affiliation, the Examining Body had no discretion to deny affiliation. He submitted that when NCTE granted recognition on 17.7.2000, the institute *bona fide* proceeded on the assumption that the affiliation with the Examining Body was automatic and therefore it had proceeded to make admissions without awaiting any specific order of affiliation.

15. The purpose of 'recognition' and 'affiliation' are different. In the context of NCTE Act, 'affiliation' enables and permits an institution to send its students to participate in the public examinations conducted by the Examining Body and secure the qualification in the nature of degrees, diplomas, certificates. On the other hand, 'recognition' is the licence to the institution to offer a course or training in teacher education. Prior to NCTE Act, in the absence of an apex body to plan and co-ordinate development of teacher education system, respective regulation and proper maintenance of the norms and standards in the teacher education system, including grant of 'recognition' were largely exercised by the State Government and Universities/Boards. After the enactment of NCTE Act, the functions of NCTE as 'recognising authority' and the Examining Bodies as 'affiliating authorities' became crystallized, though their functions overlap on several issues. NCTE Act recognizes

the role of examining bodies in their sphere of activity.

16. Section 14 of the NCTE Act requires recognition of the institution by the NCTE, before the institute could offer any course or training in teacher education. Sub-section (4) of Section 14 provides that every order granting or refusing recognition to an Institution for a course or training in teacher education under sub-section (3) shall be published in the Official Gazette and communicated in writing for appropriate action to such institution and to the concerned examining body, the local authority or the State Government and the Central Government. Sub-section (6) of section 14 requires every Examining Body on receipt of the order under sub-section (4), grant affiliation to the institution, where recognition has been granted; or cancel the affiliation of the institution, where recognition has been refused. Section 16 of NCTE Act provides that notwithstanding anything contained in any other law for the time being in force, no examining body shall grant affiliation whether provisional or otherwise, to any institution, or hold examination for a course or training conducted by a recognized institution, unless the institution concerned has obtained recognition from the Regional Committee of NCTE under section 14 or permission for a course or training under section 15 of the Act.

17. Sub-section (6) of section 14 no doubt mandates every examining body to grant affiliation to the institution on receipt of the order of NCTE granting recognition to such institution. This only means that recognition is a condition precedent for affiliation and that the examining body does not have any discretion to refuse affiliation with reference to any of the factors which have been considered by the NCTE while granting recognition. For example, NCTE is required to satisfy itself about the adequate financial resources, accommodation, library, qualified staff, and laboratory required for proper functioning of an institution for a course or training in teacher education. Therefore, when recognition is granted by NCTE, it is implied

that NCTE has satisfied itself on those aspects. Consequently, the examining body may not refuse affiliation on the ground that the institution does not have adequate financial resources, accommodation, library, qualified staff, or laboratory required for proper functioning of the institution. But this does not mean that the examining body cannot require compliance with its own requirements in regard to eligibility of candidates for admissions to courses or manner of admission of students or other areas falling within the sphere of the State government and/or the examining body. Even the order of recognition dated 17.7.2000 issued by NCTE specifically contemplates the need for the institution to comply with and fulfil the requirement of the affiliating body and state government, in addition to the conditions of NCTE. We extract below conditions 4, 5 & 6 of the order of recognition issued by NCTE in this behalf :

> "4. The admission to the approved course shall be given only to those candidates who are eligible as per the regulations governing the course and in the manner laid down by the affiliating University/State Government.
>
> 5. Tuition fee and other fees will be charged from the students as per the norms of the affiliating University/State Government till such time NCTE regulations in respect of fee structure come into force.
>
> 6. Curriculum transaction, including practical work/ activities, should be organized as per the NCTE norms and standards for the course and the requirements of the affiliating University/Examining body."

The examining body can therefore impose its own requirements in regard to eligibility of students for admission to a course in addition to those prescribed by NCTE. The state government and the examining body may also regulate the manner of admissions. As a consequence, if there is any irregularity in admissions or violation of the eligibility criteria prescribed by the examining body or any irregularity with reference to any of

the matters regulated and governed by the examining body, the examining body may cancel the affiliation irrespective of the fact that the institution continues to enjoy the recognition of the NCTE. Sub-section (6) of section 14 cannot be interpreted in a manner so as to make the process of affiliation, an automatic rubber-stamping consequent upon recognition, without any kind of discretion in the examining body to examine whether the institution deserves affiliation or not, independent of the recognition. An institution requires the recognition of NCTE as well as affiliation with the examining body, before it can offer a course or training in teacher education or admit students to such course or training. Be that as it may.

18. Certain facts peculiar to this case requires to be noticed. The Institute apparently proceeded under the mistaken impression that the recognition by NCTE on 17.7.2000, which was granted after the State Government issued a NOC, resulted in automatic affiliation with the examining body. The Board had granted affiliation to the Institute for an earlier period and has also granted affiliations for the subsequent period. The students admitted in 2002 and 2003 have already completed the course and have also been permitted by the Board which is the examining and affiliating authority to appear for the examinations. In the peculiar circumstances, to do complete justice, we are of the view that the admissions of students to the Institute in the years 2002 and 2003 should be regularized subject to fulfilling the eligibility criteria prescribed by the Board and their results should be declared. To this limited extent, the appeals relating to 2002 and 2003 admissions succeed. CA No.1227/2011 and 1230-1231/2011 are disposed of accordingly.

19. The High Court has directed that the Society and Institute having violated the statutory provisions and norms, should refund the fees taken from all students who were writ petitioners and also pay to each of them Rs.50,000/- as damages. The said direction of the High Court to pay damages

of Rs.50,000/- to each student, is set aside insofar as students admitted in the years 2002 and 2003.

Civil Appeal Nos. 1232-1233/2011 (re : 2004-2006 and 2005-2007)

20. These appeals arise from the dismissal of the writ petitions (WP No.251-252/2005) filed by the society and the institute for the following reliefs: (a) for grant of affiliation to the Institute for 2004-2006 and 2005-2007; (b) for quashing the Notifications dated 20.6.2002 and 25.6.2002; and (c) for a direction to the State Government and the Board to sponsor students for the academic sessions 2004-2006 and 2005-2007.

21. Admittedly no candidates were allotted by the state government to the Institute, nor did the Institute independently admit any candidate for the academic sessions 2004-2006 and 2005-2007. As we are in the year 2011, the prayer seeking a direction to the Board to allot candidates for 2004-2006 and 2005-2007 does not survive. In view of grant of affiliation to the Institute in the year 2009 and in the absence of any students being admitted for the academic sessions 2004-2006 and 2005-2007, the question of granting affiliation for those years is academic and does not arise for consideration.

22. The Notifications dated 20.6.2002 and 26.5.2002 related to constitution of a committee to examine whether the Institute had committed any irregularities in making admissions in the past before the recognition by NCTE. There was nothing erroneous in constitution of such a committee. At all events, after recognition by NCTE and affiliation with the Board in 2009, this issue is academic. Consequently, CA Nos.1232-1233/2011 are liable to be dismissed as having become infructuous.

Conclusion:

23. We accordingly dispose of the appeals as follows :

(i) CA No.1228/2011 and 1229/2011 are dismissed

(ii) CA No.1227/2011 and 1230-1231/2011 are disposed of in terms of paras 18 and 19 above.

(iii) CA Nos.1232-1233/2001 are dismissed as having become infructuous.

(iv) As the students admitted in 1999 have been prosecuting the litigation from 2003, we direct that if these students seek fresh admission to the Institute in 2011, they shall be permitted to join the course, if they meet the eligibility criteria, by relaxing only the age requirement. As they have paid the fees for the course in 1999-2001, they shall not be charged any further fee by the Institute.

N.J. Appeals disposed of.

NACHHATTAR SINGH & ORS.
V.

STATE OF PUNJAB
(Criminal Appeal No. 808 of 2005)

FEBRUARY 03, 2011

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

Penal Code, 1860: s.306 – Abetment of suicide – Unnatural death of married woman – Allegation of maltreatment of victim by husband and parents-in-law on account of dowry demand – Victim found dead – Medical opinion that death was caused by poisoning – Trial court convicted accused u/s.304B – High Court held that case u/s. 304B was not made out but accused were liable to conviction u/s. 306 for having abetted the suicide of the victim – SLPs filed by husband and parents-in-law – SLP of husband dismissed – In respect of appeal filed by parents-in-law, held: There was no evidence to show that suicide was a dowry death as evidence with respect to the demand for dowry was vague and stale – In the background of the findings recorded while acquitting the accused of the charge u/s.304B, no inferences or presumptions can be drawn – Cruelty means any wilful conduct of such a nature as was likely to drive a woman to commit suicide or to cause grave injury or danger to life, limb or health whether mental or physical) to the woman – Evidence of victim's brother that the victim wanted to join service but her parents-in-law were old and insisted her to stay at home to look after household chores and this led her into depression and to commit suicide – Difference of opinion within a family on everyday mundane matters would not fall within the category of wilful conduct – Merely because the parents-in-law wanted her to look after them in old age could not be abetment of suicide – Presumption against them u/s.113A of the Evidence Act, 1872 cannot thus be drawn – High Court's judgment suffers from serious contradictions –

Conviction set aside – Evidence Act, 1872 – s.113A.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 808 of 2005.

From the Judgment & Order dated 16.09.2004 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 88-SB of 1991.

Rahul Sharma, Abhishek Anand, P.N. Puri for the Appellants.

Kuldip Singh for the Respondent.

The following order of the Court was delivered

O R D E R

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

Balbir Kaur, the deceased, was married with Nachhattar Singh appellant about five years prior to the date of occurrence. Out of the wedlock, the couple bore a female child. About 2 or 3 years after the marriage, the appellant and his parents(the three accused) started making demands for dowry on the allegation that Balbir Kaur's parents had not given sufficient amounts at the time of marriage, but as the demands could not be satisfied she was maltreated which led the deceased to leave the matrimonial home on several occasions. It appears, however, that on the intervention of well-wishers on both sides she returned to the matrimonial home. The ill-treatment however, continued unabated and whenever Balbir Kaur's brother Sukhmander Singh, P.W. 6, would meet her she would complain that she was not being treated properly. On the 25th December, 1987 at about 7:00a.m. information with regard to Balbir Kaur's unnatural death was received by her parents on which Sukhmander Singh, P.W., along with other family members rushed to the house of the accused. They saw Balbir

Kaur lying dead on her cot. The police were informed and a First Information Report was registered. The dead body was despatched for its post mortem examination. The viscera was also sent to the Chemical Examiner who rendered an opinion that the death had been caused by poisoning. A criminal complaint was also filed by P.W. 6 Sukhmander Singh against the appellant in the meanwhile. The complaint case as well as the case arising out of the First Information Report were clubbed together and on the completion of the investigation a charge under Section 302 read with Section 34 and 304B IPC was framed against the accused.

The prosecution relied primarily on the evidence of P.W. 6, the complainant, P.W. 1, Dr. Yashpal Garg who had performed the post mortem of the dead body, P.W. 2 the Chemical Examiner and P.W. 7 Sajjan Singh, a resident of Moga who deposed to the demands for dowry made by the accused even a day before the incident. The prosecution case was then put to the accused and they denied the allegations levelled against them and on the contrary pleaded that as Balbir Kaur was a qualified Steno-typist she wanted to join service and live at Moga but as her parents-in-law were old they had insisted that she stay at home to look after the house hold chores and this frustration had led her into a depression and finally to suicide. The trial court, on a consideration of the evidence, acquitted the accused for the offence punishable under Section 302/34 of the Indian Penal Code but convicted them for the offence punishable under section 304B and awarded a sentence of 7 years rigorous imprisonment. An appeal was thereafter filed by the accused before the High Court. The High court partly allowed the appeal inasmuch that it held that a case under Section 304B of the IPC was not made out but the accused were nonetheless liable to conviction under Section 306 for having abetted the suicide of Balbir Kaur. The Court found as a fact that there was absolutely no evidence to show that Balbir Kaur's suicide was a dowry death as the evidence with respect to the demands for dowry were both

vague and stale and could not form the basis for conviction. This is what the Court had to say:

> "Analysis of statements of prosecution witnesses, referred to above, clearly indicates that allegations regarding demand of dowry and cruelty inflicted upon the deceased are in general terms and vague. None of the prosecution witnesses had stated as to when, in which year, date and month, any act of cruelty in connection with demand of dowry was committed by any fo the appellants against the deceased. Not even a single witness had given any specific instance in that regard. None of them except Sajjan Singh (PW &) had stated that soon before death, acts of cruelty in connection with demand of dowry were committed by the appellants against the deceased."

The Court nevertheless went on to hold that though there were no specific instances of demands of dowry yet an inference that certain demands had been made was available from their testimony and the other documentary evidence on record and particularly, that no woman who had a young child would commit suicide (as had happened in the present case) unless she had been driven to it by the ill treatment meted out to her. The accused were, accordingly, acquitted of the offences under Section 304B of the IPC but convicted under Section 306 IPC and awarded a sentence of four years. It is the conceded case that a Special Leave Petition filed by Nachhattar Singh, the husband, has since been dismissed. The present appeal is thus confined only to the in-laws i.e. Nirmal Singh and Harbans Kaur, the appellants before us.

We have gone through the evidence as also the reasons given by the High Court to arrive at its conclusions. It will be seen that the allegations against the accused were that they had driven the deceased to suicide on account of cruelty which included demands for dowry. The High Court has rejected the story about the demands for dowry but has drawn an inference

that there must have been some cruelty which had forced a young woman to suicide despite the fact that she had a young child. We find that in the background of the findings recorded while acquitting the accused of the charge under Section 304B of the IPC, no inferences or presumptions can be drawn. Moreover, a perusal of Section 498A IPC would show that cruelty would mean any wilful conduct which was of such a nature as was likely to drive a woman to commit suicide or to cause grave injury or danger to life, limb or health whether mental or physical) to the woman. We find no evidence on this score and it has been so found by the High Court. On the contrary, a perusal of the evidence of P.W. 6 shows that the defence story is in fact reflected in his cross-examination. He initially testified that it was wrong to suggest that she did not want to stay in the village or that she wanted to join service but in the very next line he admitted that the reason that the deceased was not encouraged to shift to Moga was that as the appellants were old they had wanted her to work in the house and to look after them. In this view of the matter, we find that the wilful conduct referred to above should be of such a nature as would provoke a person of common prudence to commit suicide and a difference of opinion within a family on everyday mundane matters would not fall within that category. We find that merely because the appellants were of the opinion that the deceased, as a good daughter-in-law, should look after them in old age could not be said to an abetment of suicide. The presumption against the appellants raised under Section 113A of the Evidence Act, 1872 cannot thus be drawn. We are, therefore, of the opinion that the High Court's judgment suffers from serious contradictions. We, accordingly, allow this appeal and set aside the conviction of the appellants before us. Their bail bonds be discharged.

D.G. Appeal allowed.

JAGGA SINGH AND ANR.

v.

STATE OF PUNJAB
(Criminal Appeal No. 807 of 2007)

FEBRUARY 03, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Penal Code, 1860: s.302, s.325 – Three accused – Two victims – Gunshot injury to first victim which hit him on the leg – Second victim taken away by the accused – 20 minutes later, the sound of 3 or 4 gun shots heard – Dead body of the second victim found next morning – Conviction by trial court u/s.307 – High Court, however, convicting them u/s.302 – Held: As per the post mortem report, there were only lacerated wounds on the dead body of the second victim – There was no gun shot wound on his body – Accused entitled to benefit of doubt and consequently acquitted of charge u/s.302, however, they were guilty u/s. 325 r/w s.34 as admittedly a gun shot was fired at first victim which hit him on the leg.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 807 of 2007.

From the Judgment & Order dated 4.12.2006 of the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 740-SB/1997 and Criminal Appeal No. 213 DBA/1998.

Rajiv Garg, Ashish Garg and Annam D.N. Rao for the Appellant.

Kuldip Singh for the Respondent.

The following Order of the Court was delivered

O R D E R

Heard learned counsel for the parties.

This Appeal has been filed against the impugned judgment of the High Court of Punjab and Haryana dated 04.12.2006.

The facts have been set out in the impugned judgment and hence we are not repeating the same here except where necessary.

In brief, the prosecution case is that on 24.4.92 at about 8.30 p.m., the 3 accused came to the house of Raja Singh. Later, one of them fired at Baggar Singh on his right thigh. Baggar Singh fell down. Then the accused took away the deceased Hoshiar Singh towards village Heerawala. After about 20 minutes the sound of 3 or 4 shots was heard. Next morning the dead body of Hoshiar Singh was found.

The trial Court convicted Jagga Singh to 7 years R.I. and a fine under Section 307 IPC. Jagtar Singh and Kaka Singh were also sentenced to 7 years R.I. and a fine. The appeals of the accused to the High Court were dismissed, but the appeal of the State regarding acquittal of the accused under Section 302 read with Section 34 was allowed, and they were convicted under Section 302. Hence, this appeal.

On the facts of the case, we are of the opinion that the appellants are entitled to get the benefit of doubt so far as offence under Section 302 Indian Penal Code is concerned because the prosecution case was that Hoshiar Singh was taken away by the accused and after 15/20 minutes gun shots were heard. However, the post mortem examination on the dead body of the deceased found that there were only lacerated wounds. There was no gun shot wound on the body of the deceased. Hence, some doubt is created in the prosecution version regarding the charge under Section 302 IPC whose benefit will go to the accused. Thus the appellants are entitled to get the benefit of doubt on that charge and consequently they are acquitted of charge under Section 302

IPC.

However, we are of the opinion that the appellants are guilty under Section 325 IPC read with Section 34 IPC because admittedly a gun shot was fired at Baggar Singh which hit him in the leg. On that count we award the sentence of the period already undergone by the appellants.

The impugned judgment of the High Court is modified to the extent stated above. The Appeal is disposed of accordingly.

On 14.09.2007 this Court had ordered that the sentence of imprisonment imposed on the appellants shall remain suspended during the pendency of the Appeal provided each of them furnishes personal bond in the sum of Rs. 20,000/- (Twenty Thousand Only) with two sureties in the sum of Rs. 10,000/- (Ten Thousand Only) each to the satisfaction of the trial court. Their bonds are discharged accordingly.

D.G. Appeal disposed of.

GIAN KAUR
v.

RAGHUBIR SINGH
(Civil Appeal No. 1142 of 2003)

FEBRUARY 03, 2011

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

Specific Relief Act, 1963 – s. 34 – Suit for declaration – Decreed by trial court and first appellate court – However, set aside by High Court on a finding that suit simpliciter for declaration is not maintainable u/s. 34 and the plaintiff should have filed a suit for possession – Held: Finding of the High Court that suit simpliciter for declaration is not maintainable u/s. 34, is not sustainable – In the suit, apart from a prayer for declaration there was a consequential prayer for a decree for permanent injunction as also an alternative prayer for decree for possession – Also, the issue relating to the maintainability of the suit in the present form was raised before the trial court and was not proved by the defendant and as such was decided against the defendant – Said issue was not raised before the first appellate court – The suit is not hit by s. 34 – Order of the High Court set aside and that of the first appellate court, restored.

The trial court and the first appellate court decreed the suit for declaration filed by the appellant in respect of the land in question. In the Second Appeal, the High Court held that the suit simpliciter for declaration is not maintainable under Section 34 of the Specific Relief Act, 1963 and the appellant should have filed a suit for possession. Therefore, the appellant filed the instant appeal.

Allowing the appeal, the Court

HELD: 1.1 From the plaint, it appears, prima facie, that

apart from making a prayer for declaration there is also a consequential prayer for a decree for permanent injunction restraining the defendant from alienating the suit property or interfering in peaceful possession of the plaintiff. There is an alternative prayer for decree for possession also. From the prayers made in the plaint, it is clear that the consequential relief of permanent injunction was prayed, and before the trial court, the issue relating to the maintainability of the suit in the present form was raised but the same was not pressed by the defendant nor was any such question raised before the first appellate court. In that view of the matter, the finding of the High Court that the suit is merely for declaration and is not maintainable under Section 34 of the Specific Relief Act, cannot be sustained. Thus, the suit is not hit by Section 34 of the Specific Relief Act, 1963. [Paras 8, 9, 10, 11 and 13] [491-B-E-G]

1.2 The High Court set aside the concurrent finding of the courts below on an erroneous appreciation of the admitted facts of the case and also the legal question relating to Section 34 of the Specific Relief Act, 1963. Therefore, the order of the High Court is set aside and that of the first appellate court is restored. [Paras 14 and 15] [491-H; 492-A-B]

Ram Saran and Anr. vs. Ganga Devi **AIR 1972 SC 2685 – distinguished.**

Case Law Reference:

AIR 1972 SC 2685 Distinguished Para 6

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1142 of 2003.

From the Judgment & Order dated 26.08.2002 of the High Court of Punjab and Haryana at Chandigarh in R.S.A. No. 1806

of 2000.

Devender Mohan Verma for the Appellant

The Judgment of the Court was delivered by

GANGULY, J. 1. This appeal is directed against the judgment and order dated 26.08.2002 of the Punjab and Haryana High Court in Regular Second Appeal No.1806 of 2000. By the judgment under appeal, the Hon'ble High Court reversed the judgment and decree of the Court below and held that the suit for declaration that the plaintiff is the owner in possession of land measuring 16 kanals situated in village Ajnoha, is not maintainable. The plaintiff is in appeal before this Court. The material facts of the case are as under.

2. Labhu, an agriculturist of village Sarhola Mundia, Tehsil & District Jalandhar, Punjab had three sons, namely, Khusi Ram, Raghubir Singh and Kashmir Singh and a daughter called Pritam Kaur. The shares of the sons were partitioned by the Revenue Authorities as early as on 30.4.1990 and share of Khushi Ram was separated from Raghubir Singh each getting 16 kanals. Khushi Ram executed a Will in favour of Gian Kaur and appointed her as his Mukhtiar-e-am. Subsequently, relations between them became strained and he cancelled his Will and his Power of Attorney. The appellant is daughter of Pritam Kaur and Khushi Ram was living with Pritam Kaur in her house and Pritam Kaur was serving him. Both Gian Kaur and Khushi Ram opened a joint account in a Bank and out of love and affection Khushi Ram subsequently executed a Will dated 12.4.1990 in favour of the appellant-plaintiff. Under these circumstances, the appellant claimed that she is in actual physical possession of the suit land. Even after a compromise was arrived at between the parties on 2.10.1991, the defendant brought a suit for declaration challenging the Will. That suit was withdrawn on 1.12.1993 without any permission of the Court to file a fresh a suit. After the withdrawal of the aforesaid suit, the

filing of the present suit for declaration and permanent injunction became necessary as the defendant threatened to dispossess the plaintiff from the suit property.

3. Before the trial Court, the stand of the defendant was that the property is a Joint Hindu Family property and the plaintiff has no cause of action to file the suit. It was also the contention of the defendant that Khushi Ram was a saintly person and wanted to donate land to a religious institution. The relationship between Khushi Ram and the plaintiff was admitted but the fact of opening a joint bank account with the plaintiff was denied. The trial Court framed about eight issues in the matter. Those issues are as follows:

"1. Whether Khushi Ram has executed any will dated 12.4.1990? OPP

2. Whether the Plaintiff is owner in possession of the Suit land? OPP

3. Whether the Plaintiff is entitled to the declaration as prayed for? OPP

4. Whether the Suit is not maintainable in the present form? OPD

5. Whether the jurisdiction of the Civil Court is barred? OPD

6. Whether the Suit property is joint Hindu undivided property? If so, its effect? OPD

7. Whether the Suit is not properly valued? OPD

8. Relief."

4. As would appear from the issues set out above that issue relating to maintainability of the suit was framed and on that issue finding of the trial Court is that the issue was not

proved by the defendant and that issue remained unproved and as such was decided against the defendant.

5. From the judgment of the First Appellate Court also it appears that the issue of maintainability was not raised and the First Appellate Court affirmed the findings of the trial Court and dismissed the appeal, inter alia, holding the application filed by the defendant for leading additional evidence is also without any merit.

6. Hon'ble High Court while entertaining the Second Appeal against such concurrent finding, came, inter alia, to a finding that the suit simpliciter for declaration is not maintainable under Section 34 of the Special Relief Act and the plaintiff should have filed a suit for possession. By referring to a judgment of this Court in the case of *Ram Saran and another vs. Ganga Devi* – AIR 1972 SC 2685, the High Court dismissed the suit and allowed the appeal.

7. The plaint which as been produced before this Court by way of additional documents contained the following prayer:

"(a) A decree of declaration to the effect that the plaintiff is owner in possession of 16 Kanal 0 Marla of land fully detailed and described in headnote of plaint and situated in village Ajnoha H.B. No.52, P.S. Mahilpur, District Hoshiarpur as entered in latest jamabandi, in view of Will dated 12.4.90 executed by Khushi Ram s/o Ram Ditta in her favour;

(b) With consequential relief decree for permanent injunction restraining the Deft not to alienate the suit property or interfering in peaceful possession of plaintiff therein; and

(c) In the alternative decree for possession if the plaintiff is dispossessed by Deft during pendency

of suit;

may kindly be passed in favour of the plaintiff and against the Deft with costs."

8. It appears, prima facie, that apart from making a prayer for declaration there is also a consequential prayer for a decree for permanent injunction restraining the defendant from alienating the suit property or interfering in peaceful possession of plaintiff therein.

9. There is an alternative prayer for decree for possession also.

10. From the prayers made in the plaint, it is clear that the consequential relief of permanent injunction was prayed and before the Trial Court the fourth issue relating to the maintainability of the suit in the present form was raised but the same was not pressed by the defendant nor was any such question raised before the First Appellate Court.

11. In that view of the matter, the finding of the High Court that the suit is merely for declaration and is not maintainable under Section 34 of the Specific Relief Act cannot be sustained. The High Court's reliance on a decision of this Court in *Ram Saran* (supra) is also not proper.

12. From the decision in *Ram Saran* (supra), it is clear that in that suit the plaintiff merely claimed a declaration that they are the owners of the property and they have not sought for possession of the said properties.(see para 4)

13. For the reasons aforesaid, this Court holds that the suit is not hit by Section 34 of the Specific Relief Act. The decision in *Ram Saran* (supra) was rendered on totally different facts and cannot be applied to the present case.

14. We are, therefore, constrained to observe that the High Court reversed the concurrent finding of the Courts below on

an erroneous appreciation of the admitted facts of the case and also the legal question relating to Section 34 of the Specific Relief Act.

15. We, therefore, allow the appeal set aside the order of the High Court and restore that of the First Appellate Court. There shall be no order as to costs.

N.J. Appeal allowed.

JOYDEEP MUKHARJEE

v.

STATE OF WEST BENGAL & ORS.

(Writ Petition (Civil) No. 43 of 2006)

FEBRUARY 03, 2011

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

Constitution of India, 1950 – Articles 226 and 32 – Public Interest Litigation (PIL) – Allotment of Government lands in Salt Lake City, Kolkata – PIL alleging that the allotment made by the Chief Minister from his discretionary quota was arbitrary, illegal and in violation of the Master Plan – Held: Different writ petitions and/or appeal were filed before the High Court as well as Supreme Court with regard to allotment of large number of plots in Salt Lake City – Though doubts were raised by the High Court as well as Supreme Court regarding the said allotments, the allotments in favour of the private parties were not set aside, for one reason or the other – However, as all these judgments have attained finality, they cannot be permitted to be agitated over and over again including in the instant writ petition – Principles of finality as well as fairness demand that there should be an end to the litigation – Recently, guidelines have been issued for allotment of both individual and co-operative residential plots in Salt Lake – At present, only 14 plots are left for allotment under the discretionary quota and the State Government has taken a conscious decision not to make further allotments – Questions raised have become merely academic as rights of the parties have been finally settled and have attained finality, and the parties have acted thereupon to their respective prejudices – Thus, PIL dismissed – Urban Development – Judgment/Order – Maxims – Interest rei publicae ut sit finis litium.

Dipak K. Ghosh v State of West Bengal **(2006) 3 SCC**

765; *A Registered Society v. Union of India* **(1996) 6 SCC 530;** *Tarak Singh v. Jyoti Basu* **(2005) 1 SCC 201 – referred to.**

Case Law Reference:

(2006) 3 SCC 765	**Referred to**	**Para 2, 9, 12**
(1996) 6 SCC 530	**Referred to**	**Para 8, 10, 13**
(2005) 1 SCC 201	**Referred to**	**Para 9, 12, 14**

CIVIL ORIGINAL JURISDICTION : Writ Petition Civil No. 43 of 2006.

Under Article 32 of the Constitution of India.

S.K. Bhattacharya, Niraj Boby Paonam for the Petitioner.

T.R. Andhyarujina, K.K. Venugopal, Tara Chandra Sharma, A. Subhashini, Pranab Kumar Mullick, Kumar Mihir, Sanjeev Kumar (for Khaitan & Co.), Bijan Kumar Ghosh, Manjit Singh, Kamal Mohan Gupta, H.K. Puri, P. Puri, V.M. Chauhan, A.K.S. Jain, A.D.N. Rao for the Respondents.

The following order of the Court was delivered

O R D E R

Petitioner, who claims to be a public spirited person from the State of West Bengal and a member of the All India Legal Aid Forum, which is an organisation stated to be working for upliftment of the downtrodden, has filed the present Public Interest Litigation claiming the following relief:

(a) allow this writ petition and appoint a committee functioning under direct supervision of the court to scrutinize all the cases of discretionary allotments after due notice to the allottees and based upon this committee's report issue a writ of and/or direction in the nature of mandamus quashing all the

allotments of Government lands in Salt Lake City made unconstitutionally, illegally, arbitrarily, whimsically, capriciously with mala fide motive and in clandestine manner in colourable and arrogant exercise of so-called "Discretionary Power" by the respondent; and

(b) pass an order directing the Calcutta High Court to send the case record of CO No.7553(W) of 1986, Bidhannagar (Salt Lake) Welfare Association vs. State of West Bengal to furnish the same to this Hon'ble Court with notice to the petitioner therein and to hear and dispose of the said CO No.7553(W) of 1986 on its merit after setting aside the order dated 2.9.2003.

(c) direct the respondents herein to produce the Master Plan as originally framed from the original records of the Salt Lake City.

(d) impose exemplary damages of substantially high amount on the respondent No.2 to 6 to set a deterrent example and also to compensate the public exchequer for the loss caused to the general public for reasons of discretionary allotment of valuable plots by the Respondents to suit their personal, political, nepotistic and financial ends; and

(e) pass any other order further order/s as this Hon'ble Court may deem fit and proper."

Above prayers are claimed on the averment that even after pronouncement of judgment of this Court in Dipak K. Ghosh v. State of West Bengal [(2006) 3 SCC 765], there has been violation of the original Master Plan of the Salt Lake City against which several demonstrations were taken out. The petitioner also submits that the issues raised in Writ Petition

No. 7553 filed in the Calcutta High Court have not been settled by that Court or even by this Court. In his submissions, these issues require consideration being questions of great importance.

According to the petitioner, the Salt Lake City was the result of dream of the late Chief Minister Dr. B.C. Roy of establishing a new township for the lower and middle income groups on the eastern side of Calcutta (now Kolkata) and the land to be used for that purpose was the reclaimed land of the Salt Lake. In the year 1967, a Master Plan was prepared under the Government instructions and the Government was expected to develop the area in accordance with that Master Plan which had, *inter alia,* made the following provisions:

"a) 60% plots are earmarked as residential plots.

b) Separate drainage and sewerage system.

c) Open space to the tune of 12%

d) Location of commercial plots in one zone.

e) Location of few shop allowable plots meant to cater to the local needs of each residential plots.

f) Roads on different types.

g) Open space and other amenities such as Park.

h) Separate area to reserve for co-operative or different organisations like CMDA Union Government Departments, Administrative building local centres, play ground, education institutions and also suitable allocation of Parks in each block."

The development scheme contained various restrictions regarding user of plots, construction of buildings, transfer and/or partition of plots and buildings.

The West Bengal Government Township (Extension of Civic Amenities) Ordinance, 1975, was promulgated to provide for an extension of civic amenities of Government Township in West Bengal and for the matters connected therewith and incidental thereto. This Ordinance was replaced by the West Bengal Government Township (Extension of Civic Amenities) Act, 1975 (hereinafter referred to as 'the Act'). Section 2(b) of the Act enumerated different civic amenities like drainage, sewerage, sanitation, roads, maintenance, public health, parks etc. Till about 1977, according to the petitioner, there was great transparency in functioning of the Administrator, appointed under Section 4 of the Act, who was responsible for implementation of the provisions of the Act and except 500 plots, out of nearly 6000 plots, rest have been distributed.

It is alleged that the Chief Minister's discretionary quota was created by unlawful and confidential executive orders without even informing the Cabinet and illegally usurping the statutory powers of the Administrator. Further that the State Government formed a Salt Lake Advisory Committee which started distributing the plots clandestinely. Certain deviations were also made from the Master Plan. The Government started carving out new residential plots from the land originally earmarked for civic amenities, ecological balance, maintenance, public facilities etc. in violation of the approved Master Plan. Sometime in the year 1985, in view of the serious public protest, the Government dissolved the Salt Lake Advisory Committee and amended the Act by West Bengal Government Township (Extension of Civic Amenities) (Amendment) Act, 1985 (for short, the '1985 Amendment Act'). The amendment also validated the allotments which had been made since October 1, 1976.

As already noticed, Writ Petition No.7553 of 1986 was filed before the Calcutta High Court praying for issuance of an appropriate direction to the authorities not to deviate from the Master Plan and to declare the 1985 Amendment Act as ultra

vires. Still another writ petition being Writ Petition No.17306 of 1997 was filed before that Court challenging the exercise of discretionary powers by the Chief Minister in regard to allotment of plots in the Salt Lake City. Challenge was also raised against the deviation from the Master Plan and various instances of the same were given in that writ petition. The writ petition, particularly, referred to Sectors 1, 2 and 3 of the City. As alleged by the petitioner herein, Writ Petition No. 7553 of 1986 came to be dismissed for default without deciding the case on merits vide order dated September 2, 2003.

Writ Petition No. 17306 of 1997 also came to be dismissed by the judgment of the Calcutta High Court dated February 5, 1999, primarily, on the ground that there was non-joinder of necessary parties, i.e. the persons to whom the allotments have been made under the discretionary quota and whose names had been disclosed in the reply affidavit filed in those proceedings have not been made parties in that petition. The learned Single Judge further observed that an interim order dated June 11, 1987 passed by another Bench of that Court in Writ Petition No.7553 of 1986 had allowed the Chief Minister to make allotment of plots from his discretionary quota and that order was still subsisting. As that order was passed in independent proceedings no directions in that regard were issued. But, however, the Court cautioned the Chief Minister that discretion in allotment of plots should be exercised in accordance with the criteria stated by the Supreme Court in the case of *Common Cause, A Registered Society v. Union of India* [(1996) 6 SCC 530].

The petitioner in that case filed a Special Leave Petition before this Court wherein leave was granted and it came to be registered as Civil Appeal No.6707 of 1999. This Court, vide its judgment dated November 19, 2004 titled as *Tarak Singh v. Jyoti Basu* [(2005) 1 SCC 201], dismissed this Civil Appeal along with one writ petition, being Writ Petition No. 216 of 1999 titled as *Dipak K. Ghosh v. State of West Bengal,* which was

directly filed as a Public Interest Litigation before this Court raising similar challenges. In these proceedings, vide order dated November 13, 2003, this Court allowed the impleadment of Respondent No. 24 (to be read as Respondent No. 8 vide order of that Bench dated December 17, 2004), Mr. B.P. Banerjee, former Judge of the Calcutta High Court and passed the final order/judgment dated November 19, 2004 quashing the allotment made in favour of that Respondent despite the fact that he had raised construction on that plot. This writ petition was dismissed qua all the respondents except against Respondent No. 24. The writ petition was allowed qua that Respondent on the ground that the learned Judge had compromised his divine duty with his personal interest during the hearing of Writ Petition No.7553 of 1986. It is further the allegation of the petitioner that the plots from the discretionary quota were allotted on political and financial consideration and in lieu of favourable services rendered and that there was a complete abuse of the discretionary quota by the authorities concerned and even the change in land use from commercial to residential and vice-versa on the will of the allottees was in arbitrary manner.

Petitioner further prays that this Court should appoint a Committee to scrutinize all those cases where allotments have been made from the discretionary quota and quash all the allotments made thereunder. The challenge of the petitioner is primarily based upon the ground that discretionary quota for distribution of plots in the Salt Lake City was arbitrary, illegal and in violation of the Master Plan. Resultantly, it was in violation of equality and right to life as enshrined in Articles 14 and 21 of the Constitution of India. Further, by allotting lands earmarked for civic amenities, the State has violated its promise extended in the Master Plan on the basis of which people have purchased plots in the scheme and, as such, these allotments tantamount to undue enrichment of the State at the cost of the allottees and, therefore, such allotments are in violation of the law stated by the Supreme Court in the case of *Common Cause, A*

Registered Society (supra).

Before we proceed to discuss the merits of the challenge made by the petitioner to the discretionary allotment, we would like to complete the factual matrix of the case by referring to the facts which appeared from the record and/or the reported judgments dealing with the same subject matter. As already noticed, Civil Appeal No. 6707 of 1999 was heard along with Writ Petition No. 216 of 1999 by this Court. During the pendency of these proceedings, Mr. B.P. Banerjee was ordered to be impleaded as Respondent No. 24 and thereafter he appeared before this Court and contested the matter. The direction with regard to cancellation of the plot in his favour was finally passed by this Court. While allowing the appeal limited to that extent, the writ petition as well as the appeal was dismissed against all other respondents and the Court held as under:

> **"20.** It is also contended by Mr Ganguli that a large number of Judges of the High Court and the Supreme Court have also been allotted plots in Salt Lake City under the discretionary quota of the Chief Minister and it will be unfair to single out Respondent 24 for meting out a different treatment. At the time of hearing of this writ petition, we requested the learned Senior Counsel to inform us whether any other Judge or Judges obtained the allotment order from the discretionary quota of the Chief Minister by compromising his judicial duties, we would also proceed against such allottee. He, however, was unable to receive any instructions in this behalf. It is trite, unequals cannot be treated equally.
>
> **24.** In the backdrop of the facts and circumstances, as recited above, we are of the view that the conduct of the learned Judge is beyond condonable limits. We are aware that the order, we propose to pass, no doubt is painful, but we have to perform a painful duty to instil public confidence

in the judiciary. It is a case where a private interest is pitted against the public interest. It is now a well-settled principle of law that in such cases the latter must prevail over the former. Consequently, the order dated 24-7-1987 passed by the Chief Minister and the formal allotment order dated 16-10-1987 allotting Plot No. FD-429 measuring 4 cottahs in Salt Lake City in favour of Respondent 24 Justice B.P. Banerjee are hereby quashed and cancelled. The plot shall stand vested with the Government.

27. The net result is that Writ Petition No. 216 of 1999 against Respondent 24 is allowed and is dismissed qua other respondents. CA No. 6707 of 1999 is dismissed. Rule is discharged.

28. We clarify that dismissal of the writ petition against other respondents should not be misunderstood as approval of the policy decision of the Government with regard to the allotment of land by the Chief Minister from his discretionary quota."

As the directions contained in the case of *Tarak Singh* (Supra) were not being properly implemented by the State Government and the concerned authorities, Mr. Dipak Ghosh, the petitioner in Writ Petition No. 216 of 1999, filed another application for strict implementation and compliance of the above order passed by this Court. In those proceedings, applications were also filed by Mr. B.P. Banerjee stating that the order of the Supreme Court in *Tarak Singh's* case (supra) is a nullity, void and non est against him. In its judgment in the case of *Dipak Ghosh* (supra), this Court dismissed the applications filed by Mr. B.P. Banerjee and directed that the order of the Court in *Tarak Singh's* case (supra) be complied with. The Court also specifically directed that no application filed by either of the parties in this case shall be accepted by the Registry without leave of the Court. Since then, no application appears to have been filed in either of these

proceedings.

The above prolonged history of this case clearly shows that in proceedings before the Calcutta High Court, the merit or otherwise of the discretionary allotments made by the Chief Minister was not decided in accordance with law. One writ petition, being W.P. No. 7553 of 1986, came to be dismissed for default vide order dated September 2, 2003 which order attained finality as no further proceedings were taken by the petitioners therein. Thereafter, WP No. 17306 of 1997 came to be dismissed, primarily, on the ground of non-joinder of necessary parties and the allotments under the discretionary quota of the Chief Minister were not set aside. On the contrary, while referring to the order dated June 11, 1987 of the other Bench in Writ Petition No. 7553 of 1986 that was still subsisting, it was observed that the Chief Minister was permitted to make allotments from the discretionary quota, however, in accordance with the judgment of the Supreme Court in the case of *Common Cause, A Registered Society* (supra). A Civil Appeal No. 6707 of 1999 against that judgment also came to be dismissed by this Court along with Writ Petition No.216 of 1999 which had also questioned the discretionary allotments. In other words, the allotment of large number of plots in Salt Lake City, Kolkata had been the subject matter of different writ petitions and/or appeal before the Calcutta High Court as well as this Court and for one reason or the other the allotments in favour of the private parties had not been set aside, though there were doubts raised by the Calcutta High Court as well as this Court regarding allotments under the discretionary quota of Chief Minister and the manner in which they were made. However, as all these judgments have attained finality, they cannot be permitted to be agitated over and over again including in the present writ petition. The principles of finality as well as fairness demand that there should be an end to the litigation and it is in the interest of public that the issues settled by the judgments of courts, including this Court, which have attained finality should

not be permitted to be re-agitated all over again, interest rei publicæ ut sit finis litium.

We are unable to appreciate that para 28 of the judgment of this Court in the case of *Tarak Singh* (supra) leaves the questions open for a fresh adjudication. All that the Bench has said in that case was that the Court had not approved the policy decision of the Government with regard to allotment of land by the Chief Minister from his discretionary quota, but at the same time what is of significance is that none of the allotments made except that in favour of Respondent No. 24, was set aside by the Court. The Court then clarified that it had not granted approval to the action of the State Government of making discretionary allotments in the manner in which they had been made. This is further substantiated by the fact that allotment in favour of Respondent No. 24 was specifically set aside. Thus, the arguments advanced on behalf of the petitioner that para 28 of that judgment leaves all issues open for future determination in this proceeding or like cases, is legally unsustainable and misconceived.

The jurisdiction of this Court, in a Public Interest Litigation, cannot be pressed into service where the matters have already been completely and effectively adjudicated upon not only in the individual petitions but even in the writ petitions raising larger question as was raised in Writ Petition No. 216 of 1999 before this Court.

Another important aspect of this case which has persuaded us not to interfere with settled rights and grant the prayers in this Public Interest Litigation is that an affidavit on behalf of the State of West Bengal has been filed recently on December 3, 2010 revealing certain pertinent facts for proper adjudication of this case. The affidavit, sworn by Mr. Abanindranath Palodhi, Joint Secretary, Urban Development Department, Government of West Bengal, has stated that guidelines for allotment of both individual and co-operative residential plots in Salt Lake were issued by a Government

order on December 7, 1999 on the strength of the Cabinet decision taken on November 10, 1999. The then Chief Minister, Late Mr. Jyoti Basu, had already allotted 276 plots out of 290 plots from his discretionary quota which were available at that point of time and presently only 14 plots are left in that discretionary quota. This affidavit further states as under:

> "Subsequently, on 7th December, 1999 four orders were issued with regard to allotment of residential plots, non-residential plots for educational institutions and for allotment of plots for cultural, institutional, industrial, commercial etc. purposes at Salt Lake. All these notifications required advertisement in newspapers and invitation of application. *But what is significant is that no guidelines had in fact been framed for allotment of plots from the discretionary quota of the Chief Minister, as a result of which all the 14 plots belonging to the discretionary quota, which were in existence in February, 1999, still continue to remain unallotted. As a result, these 14 plots will no more be treated as part of the discretionary quota.*
>
> (Emphasis supplied by us)

From the above specific averments made in the affidavit, it is clear that there are very few plots presently left for allotment under the discretionary quota. The State Government has taken a conscious decision not to make further allotments under the discretionary quota even qua those plots. As far as already allotted plots are concerned, the rights of the parties appear to have been settled and attained finality, as in none of the writ petitions/appeals referred above any of these allotments was set aside by the Courts of competent jurisdiction. The petitioners in those cases, in fact, did not even care to take further proceedings to have the matters adjudicated before the higher Courts and in accordance with law. In these circumstances it will be a futile exercise of jurisdiction of this Court to reopen the whole controversy once again. The

questions raised in the present petition have become merely academic as the rights of the parties have been finally settled and further the parties have acted thereupon to their respective prejudices. Without intending to state any law in the peculiar facts and circumstances of the present case we find no merit in this Public Interest Litigation which is dismissed. However, there will be no order as to costs.

N.J. Writ petition dismissed.

ARUP BHUYAN

v.

STATE OF ASSAM

(Criminal Appeal No. 889 of 2007)

FEBRUARY 03, 2011

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

Terrorist and Disruptive Activities (Prevention) Act, 1987 – ss. 3(5) and 15– Appellant, allegedly a member of ULFA, a banned organization – Conviction u/s 3(5) on basis of his alleged confessional statement made before the Superintendent of Police (SP) – Sustainability of – Held: Prosecution relied upon the alleged confessional statement of the appellant before the SP which is an extra-judicial confession and there is absence of corroborative material – Thus, it would not be safe to convict the appellant on the basis of alleged confessional statement – Though s. 3(5) makes mere membership of a banned organization criminal, s. 3(5) cannot be read literally, otherwise it would violate Articles 19 and 21 – Mere membership of a banned organization will not make a person a criminal unless he resorts to violence or incites people to violence or creates public disorder by violence or incitement to violence – Even assuming that the appellant was a member of ULFA, it has not been proved that he was an active member and not a mere passive member – Thus, conviction u/s. 3(5) not sustainable – Constitution of India, 1950 – Articles 19 and 21.

Evidence Act 1872 – s. 25 – Confession before police official – Admissibility of – Held: Is inadmissible by virtue of s. 25 – However, it is admissible in TADA cases by virtue of s. 15 of the TADA – Confession is a very weak kind of evidence – In India, use of third degree methods by police for extracting confessions from the alleged accused is well known – Thus, where prosecution case mainly rests on the

confessional statement made to the police by the alleged accused, in the absence of corroborative material, courts must be cautious in accepting extra-judicial confessional statements – Terrorist and Disruptive Activities (Prevention) Act, 1987 – s. 15.

State of Kerala vs. Raneef **2011 (1) SCALE 8 – relied on.**

Kedar Nath vs. State of Bihar **AIR 1962 SCC 955 – referred to.**

Elfbrandt vs. Russell **384 U.S. 17(1966);** *Clarence Brandenburg vs. State of Ohio* **395 U.S. 444 (1969);** *United States vs. Eugene Frank Robel* **389 U.S. 258 – referred to.**

Case Law Reference:

2011 (1) SCALE 8	**Relied on.**	**Para 12**
384 U.S. 17(1966)	**Referred to.**	**Para 12**
AIR 1962 SCC 955	**Referred to.**	**Para 12**
395 U.S. 444 (1969)	**Referred to.**	**Para 13**
389 U.S. 258	**Referred to.**	**Para 14**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 889 of 2007.

From the Judgment & Order dated 28.3.2007 of the Designated Court, Assam at Guwahati in TADA Sessions Case No. 13 of 1991.

Vijay Hansaria, Aseem Mehrotra, Abhijat P. Medh for the Appellant.

Avijit Roy (for Corporate Law Group) for the Respondent.

The following Order of the Court was delivered

O R D E R

Heard learned counsel for the parties.

This Appeal has been filed against the impugned judgment of the Designated Court, Assam at Guwahati dated 28.03.2007 passed in TADA Sessions Case No. 13 of 1991.

The facts have already been set out in the impugned judgment and hence we are not repeating the same here except wherever necessary.

The appellant is alleged to be a member of ULFA and the only material produced by the prosecution against the appellant is his alleged confessional statement made before the Superintendent of Police in which he is said to have identified the house of the deceased.

Confession to a police officer is inadmissible vide Section 25 of the Evidence Act, but it is admissible in TADA cases vide Section 15 of the Terrorist and Disruptive Activities (Prevention) Act, 1987.

Confession is a very weak kind of evidence. As is well known, the wide spread and rampant practice in the police in India is to use third degree methods for extracting confessions from the alleged accused. Hence, the courts have to be cautious in accepting confessions made to the police by the alleged accused.

Unfortunately, the police in our country are not trained in scientific investigation (as is the police in Western countries) nor are they provided the technical equipments for scientific investigation, hence to obtain a conviction they often rely on the easy short cut of procuring a confession under torture.

Torture is such a terrible thing that when a person is under torture he will confess to almost any crime. Even Joan of Arc confessed to be a witch under torture. Hence, where the

prosecution case mainly rests on the confessional statement made to the police by the alleged accused, in the absence of corroborative material, the courts must be hesitant before they accept such extra-judicial confessional statements.

In the instant case, the prosecution case mainly relies on the alleged confessional statement of the appellant made before the Superintendent of Police, which is an extra-judicial confession and there is absence of corroborative material. Therefore, we are of the opinion that it will not be safe to convict the accused on the basis of alleged confessional statement.

For the reasons stated above, we are in agreement with the impugned judgment so far as it has taken the view that the confessional statement in question cannot be acted upon as the sole basis for conviction of the appellant.

However, the TADA Court has convicted the appellant under Section 3(5) of the TADA which makes mere membership of a banned organisation criminal. Although the appellant has denied that he was a member of ULFA, which is a banned organisation. Even assuming he was a member of ULFA it has not been proved that he was an active member and not a mere passive member.

In *State of Kerala Vs. Raneef,* 2011 (1) SCALE 8, we have respectfully agreed with the U.S. Supreme Court decision in *Elfbrandt Vs. Russell,* 384 U.S. 17 (1966) which has rejected the doctrine of 'guilt by association'. Mere membership of a banned organisation will not incriminate a person unless he resorts to violence or incites people to violence or does an act intended to create disorder or disturbance of public peace by resort to violence (See : also the Constitution Bench judgment of this Court in *Kedar Nath Vs. State of Bihar,* AIR 1962 SCC 955 para 26).

In *Clarence Brandenburg Vs. State of Ohio,* 395 U.S. 444 (1969) the U.S. Supreme Court went further and held that mere

"advocacy or teaching the duty, necessity, or propriety" of violence as a means of accomplishing political or industrial reform, or publishing or circulating or displaying any book or paper containing such advocacy, or justifying the commission of violent acts with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism, or to voluntarily assemble with a group formed "to teach or advocate the doctrines of criminal syndicalism" is not per se illegal. It will become illegal only if it incites to imminent lawless action. The statute under challenge was hence held to be unconstitutional being violative of the First and Fourteenth Amendments to the U.S. Constitution.

In *United States Vs. Eugene Frank Robel,* 389 U.S. 258, the U.S. Supreme Court held that a member of a communist organisation could not be regarded as doing an unlawful act by merely obtaining employment in a defence facility.

We respectfully agree with the above decisions, and are of the opinion that they apply to India too, as our fundamental rights are similar to the Bill of Rights in the U.S. Constitution.

In our opinion, Section 3(5) cannot be read literally otherwise it will violate Articles 19 and 21 of the Constitution. It has to be read in the light of our observations made above. Hence, mere membership of a banned organisation will not make a person a criminal unless he resorts to violence or incites people to violence or creates public disorder by violence or incitement to violence.

Hence, the conviction of the appellant under Section 3(5) of the TADA is also not sustainable.

The impugned judgment of the Designated Court, Assam at Guwahati dated 28.03.2007 passed in TADA Sessions Case No. 13 of 1991 is set aside and the Appeal stands allowed.

By Order dated 29.10.2007 this Court had directed that the appellant be released on bail on his furnishing adequate security to the satisfaction of the trial court. Security furnished by the appellant in pursuance of Order dated 29.10.2007 shall stand discharged.

N.J. Appeal allowed.

INDIAN OIL CORPORATION LTD.
v.
M/S. SPS ENGINEERING LTD.

(Civil Appeal No. 1282 of 2011)

FEBRUARY 03, 2011

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

Arbitration and Conciliation Act, 1996 – s. 11 – Appointment of arbitrator under – Termination of contract alleging non-completion of work within the stipulated period – Contractor raising claims against the Company and invoking arbitration agreement – Appointment of arbitrator – Counter-claim raised by the company, for the extra cost in getting the work completed through the alternative agency – Passing of award – However, rejection of the counter claim – Petition u/s. 11 for appointment of an arbitrator to decide the said counter claim – Dismissed by the Designate of the Chief Justice of the High Court on the ground that the alternative agency having completed its work much before the earlier arbitration proceedings came to an end, the claim in regard to the actual cost ought to have been crystallized and claimed in the first arbitration itself – Thus, the application was held to be misconceived, barred by res judicata, and mala fide – Held: Not justified – Designate committed a jurisdictional error in dismissing the application u/s. 11, on the ground that the claim for extra cost was barred by res judicata and by limitation – Chief Justice or his designate cannot examine the tenability of the claim, in particular whether the claim is barred by res judicata, while considering an application u/s. 11 – Such an issue would be examined by the arbitral tribunal – A decision on res judicata requires consideration of the pleadings as also the claims and the award in the first round of arbitration, in juxtaposition with the pleadings and the issues/claims in the second arbitration – If the cause of action arose after the completion of pleadings and commencement of hearing in the first round of arbitration, the company can raise a separate claim by initiating a second arbitration –

Claim for reimbursement of the extra cost for getting the work completed, is a claim for damages which is yet to be adjudicated by an adjudicating forum – Thus, the company cannot adjust the amount due by it under the award, against a mere claim for damages made by it against the contractor – Application u/s. 11 is allowed – Res judicata.

The appellant, a public sector company, awarded a contract which was to be completed within 13 months from the date of issuance of the order. The appellant terminated the contract after two years alleging that the respondent contractor was unable to complete the work within the stipulated period and notified the respondent that according to the Clause 7.0.9.0 of the General Conditions of Contract the extra cost in getting the work completed through an alternative agency would be borne by him. The respondent raised certain claims against the appellant and invoked the arbitration agreement. An application was filed under Section 11 of the Arbitration and Conciliation Act, 1996 and a retired High Court Judge was appointed as an arbitrator. The appellant made several counter-claims. The arbitrator passed an award. He adjusted Rs. 11,10,662/- awarded to the appellant, towards the sum of Rs. 91,33,844/- awarded in favour of the respondent and directed the appellant to pay to the respondent, the balance of Rs. 80,23,182/-. However, the counter claim of the appellant in regard to the extra cost involved in getting the work completed through an alternative contractor was rejected. The appellant did not challenge the award. The appellant sent a notice to the respondent to pay the amount specified towards the said counter claim but the respondent did not pay the amount. The appellant then filed a petition under Section 11 of the Act praying for appointment of an arbitrator to decide its claim for the extra cost in getting the work completed through the alternative agency. The Designate of the Chief Justice of the High Court dismissed the application

holding that the application under Section 11 of the Act by the appellant was misconceived, barred by *res judicata*, and *mala fide*. It was held that claim with regard to the extra cost was considered and rejected by the arbitrator; that the claim was barred by limitation; and that the alternative agency completed its work much before the earlier arbitration proceedings came to an end, thus, the claim in regard to the actual cost ought to have been crystallized and claimed in the first round of arbitration. Therefore, the appellant filed the instant appeal.

Allowing the appeal, the Court

HELD: 1.1 In an application under Section 11 of the Arbitration and Conciliation Act, 1996, it has to be decided whether there is an arbitration agreement between parties. The Chief Justice or his designate is not expected to go into the merits of the claim or examine the tenability of the claim, in an application under Section 11 of the Act. The Chief Justice or his Designate might however, choose to decide whether the claim is a dead (long-barred) claim or whether the parties have, by recording satisfaction, exhausted all rights, obligations and remedies under the contract, so that neither the contract nor the arbitration agreement survived. When it is said that the Chief Justice or his Designate might choose to decide whether the claim is a dead claim, it is implied that he would do so only when the claim is evidently and patently a long time barred claim and there is no need for any detailed consideration of evidence. If the distinction between apparent and obvious dead claims, and claims involving disputed issues of limitation is not kept in view, the Chief Justice or his designate would end up deciding the question of limitation in all applications under Section 11 of the Act. [Para 11] [526-B-H]

1.2. An application under Section 11 of the Act is expected to contain pleadings about the existence of a dispute and the existence of an arbitration agreement to decide such dispute. The applicant is not expected to justify the claim or plead exhaustively in regard to limitation or produce documents to demonstrate that the claim is within time in a proceedings under Section 11 of the Act. That issue should normally be left to the Arbitral Tribunal. If the Chief Justice or his designate is of the view that in addition to examining whether there is an arbitration agreement between the parties, he should consider the issue whether the claim is a dead one (long time barred) or whether there has been satisfaction of mutual rights and obligation under the contract, he should record his intention to do so and give an opportunity to the parties to place their materials on such issue. Unless parties are put on notice that such an issue would be examined, they would be under the impression that only questions of jurisdiction and existence of arbitration agreement between the parties would be considered in such proceedings. [Para 12] [527-A-D]

1.3 The question whether a claim is barred by *res judicata,* does not arise for consideration in a proceedings under Section 11 of the Act. Such an issue would have to be examined by the arbitral tribunal. A decision on *res judicata* requires consideration of the pleadings as also the claims/issues/points and the award in the first round of arbitration, in juxtaposition with the pleadings and the issues/points/claims in the second arbitration. The limited scope of Section 11 does not permit such examination of the maintainability or tenability of a claim either on facts or in law. It is for the arbitral tribunal to examine and decide whether the claim was barred by *res judicata.* There can be no threshold consideration and rejection of a claim on the ground of *res judicata,* while considering an application under Section 11 of the Act. [Para 13] [527-E-

G]

2.1 On a perusal of the order of the Designate, it is found that the Designate clearly exceeded his limited jurisdiction under Section 11 of the Act, by deciding that the claim for extra cost, though covered by the arbitration agreement was barred by limitation and by the principle of res judicata. He was also not justified in terming the application under Section 11 of the Act as 'misconceived and malafide'. Nor could he attribute '*mala fides*' to the appellant, a public sector company, in filing an application under Section 11 of the Act, without any material to substantiate it. The findings of fact recorded by the Designate were wholly unwarranted in a proceeding under Section 11 of the Act and the fallacy in such findings: (i) Finding: *The appellant did not state anywhere in the petition the date which the final bill was settled and did not produce any document containing such information.* The appellant was not expected or required to give such information in a petition under Section 11 of the Act or produce the documents showing the settlement of final bill along with the said petition. Therefore, the appellant could not be found fault for such omission. In fact, the Designate noticed that the work was completed on 29.12.2007. The claim was in time with reference to the date on which the work completed (29.12.2007) by the alternative agency. (ii) Finding: *As the work was completed on 29.12.2007 and as the award was made only on 27.10.2008, the appellant ought to have crystalised the extra cost and claimed it in the first arbitration proceedings.* The assumption that the appellant ought to have made the claim for extra cost which arose after the commencement of the arbitration proceedings, in the pending proceedings by way of amendment, has no basis either in law or in contract. If the cause of action arose after the completion of pleadings and commencement of hearing in the first

round of arbitration, nothing prevented the appellant from making a separate claim by initiating a second arbitration. (iii) Finding: *Once a risk and cost tender is issued at the risk and cost of a person, then, the amount which is to be claimed from the person who is guilty of breach…. becomes crystallized when the risk purchase tender at a higher cost is awarded.* This might be true as a general proposition. But it might not apply if there is a specific provision in the contract (like clause 7.0.9.0) which requires that the employer should claim as extra cost, only the difference between the "amounts as would have been payable to the contractor in respect of the work" and "the amount actually expended by the owner for completion of the entire work". [Para 18] [532-A-H; 533-A-C]

2.2 The Designate should have avoided the risks and dangers involved in deciding an issue relating to the tenability of the claim without necessary pleadings and documents, in a proceeding relating to the limited issue of appointing an Arbitrator. It is clear that the Designate committed a jurisdictional error in dismissing the application filed by the appellant under Section 11 of the Act, on the ground that the claim for extra cost was barred by *res judicata* and by limitation. Consideration of an application under Section 11 of the Act, does not extend to consideration of the merits of the claim or the chances of success of the claim. [Para 19] [533-C-E]

2.3 The award amount due to the respondent under the award dated 27.10.2008 is an ascertained sum due, recoverable by executing the award as a decree. On the other hand the claim of the appellant for reimbursement of the extra cost for getting the work completed, is a claim for damages which is yet to be adjudicated by an adjudicating forum. The appellant cannot, therefore, adjust the amount due by it under the award, against a mere claim for damages made by it against the

respondent. The appellant would have to pay the award amount due to the respondent and if necessary modify its claim for extra cost against the respondent. [Para 20] [533-F-G]

3. The order of the Designate is set aside. The application under Section 11 of the Act filed by appellant before the Chief Justice of the Delhi High Court is allowed. [Para 21] [534-A-B]

National Insurance Co. Ltd. vs. Boghara Polyfab Private Limited **2009 (1) SCC 267;** *SBP and Co. v. Patel Engineering Ltd.* **2005 (8) SCC 618 – referred to.**

Case Law Reference:

2009 (1) SCC 267	**Referred to**	**Para 10**
2005 (8) SCC 618	**Referred to**	**Para 10**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1282 of 2011.

From the Judgment & Order dated 08.12.2009 of the High Court of Delhi at New Delhi in A.A. No. 288 of 2009.

Goolam E. Vahanvati, AG, Rakesh Sawhney, Mona Aneja, Aruna Mathur, Anoopam N. Prasad, Nishant Patil (for Arputham, Aruna & Co.) for the Appellant.

Arvind Minocha for the Respondent.

The Judgment of the Court was delivered by

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

2. The Indian Oil Corporation Limited, the appellant herein, awarded an infrastructure work relating to drinking water system for its Paradip Refinery project to the respondent on 17.10.2000 and followed by a formal agreement dated 18.1.2001. The period stipulated under the contract for

completion of the work was 13 months from the date of issue of the order dated 17.10.2000 and the contract value was Rs.16,61,17,473/-. The appellant terminated the contract on 29.10.2002 alleging that the respondent contractor though required to complete the work within 13 months, had achieved a progress of hardly 15.94% till 30.4.2002 and notified the respondent that the work will be got completed through an alternative agency, at the risk and cost of the respondent under Clause 7.0.9.0 of the General Conditions of Contract.

3. In view of the said termination, the respondent raised certain claims against the appellant and invoked the arbitration agreement contained in the General Conditions of Contract and filed an application under section 11 of the Arbitration and Conciliation Act, 1996 ('Act' for short) before the Delhi High Court for appointment of an arbitrator. The Designate of the Chief Justice of the High Court, by order dated 17.3.2003, appointed a retired High Court Judge as the arbitrator.

4. Before the arbitrator, the respondent filed a statement of claims raising eight claims. However in its written submission before the Arbitrator, the contractor confined its claims to only three, aggregating to Rs.1,31,81,288/-.

5. The appellant made several counter-claims aggregating to Rs.92,72,529/-. Subsequently the statement of counter-claims was amended and the following para was added in regard to the extra cost in getting the work completed through an alternative contractor:

> *"Since the aforementioned contract is still pending and IOCL is in the process of inducting agency (ies) to complete the said* work, the Engineer-in-charge of the said contract, EIL estimated a minimum expenditure of Rs.18,36,20,000/- for completion of the works under the said contract which EIL intimated to IOCL by its letter dated 23.5.2002, a copy whereof is annexed hereto and marked *Annexure RY. The said estimated expenditure has been revised by IOCL who has arrived at the reduced figure of Rs.2,10,41,626/-* (Rupees Two Crores Ten Lacs Forty One Thousand Six Hundred Twenty Six Only) in its proposal dated 09.09.2006, a copy whereof is annexed hereto and marked Annexure RY-1. *Accordingly, IOCL is entitled to recover from SPSEL any additional sums including the abovementioned Rs.2,10,41,626/- (Rupees Two Crores Ten Lacs Forty One Thousand Six Hundred Twenty Six Only) that it will according to its estimate incur upon execution of the balance work by other agencies pursuant to the termination of the said contract in terms of Clause 7.0.6.0 of GCC along with any other additional expenditure incurred by IOCL in completion of the said works.* IOCL, therefore, is entitled to an amount of Rs.2,10,41,626/- (Rupees Two Crores Ten Lacs Forty One Thousand Six Hundred Twenty Six Only) from SPSEL which SPSEL has not paid till date."

(emphasis supplied)

The prayer in the counter-claim however remained unaltered and did not include the claim of Rs.2,10,41,626/- on account of risk - execution of balance work. Even after the above amendment, the prayer continued to be as under :

"It is therefore prayed that the learned Arbitrator may be pleased to:

(i) award a sum of Rs.92,72,529/- (Rupees Ninety Two Lacs Seventy Two Thousand Five Hundred Twenty Nine Only) against SPSEL and in favour of IOCL along with the additional amounts which in IOC's estimate, IOC will incur in further executing and completing at the Claimant's risk and cost, the balance works remaining incomplete under the said contract.

(ii) grant pendent lite interest @ 18% per annum on the

awarded amount;

(iii) grant interest on the awarded amount @ 18% per annum from the date of award till the date of payment in full;

(iv) grant cost of arbitration proceedings to IOCL;

(v) grant such other or further order(s) and/or relief as are deemed appropriate in the circumstances of the case;"

6. The arbitrator made an award dated 27.10.2008. He awarded Rs.91,33,844 towards the claims of respondent. As against the counter claims aggregating to Rs.92,72,529 made by the appellant, the arbitrator awarded a sum of Rs.11,10,662. In regard to the averments made by the appellant in regard to the extra cost involved in getting the work completed through an alternative contractor, the arbitrator observed thus :

"102. The contract was terminated in October 2002 and till date the balance work of the contract has not been executed. Such damage could have been allowed to the respondent if in a reasonable period after termination of the contract, the respondent had executed the balance work at the risk and costs of the claimant. In case the costs actually incurred have been more than the costs which were required to be incurred under the contract, then the difference between the two costs could have been awarded as damages to the respondent. There is no proper evidence on the record to show that what could have been the costs of the balance work if it had been executed within reasonable period after the termination of the contract. *Such damage cannot be awarded on mere opinion of any particular person or on hypothetical basis*. Under clause 7.0.9.0 of General Conditions of the Contract, the respondent was entitled at the risk and expenses of the contractor to get completed the balance

work and recover the costs from the claimant. *This clause further contemplates that on the amount actually expended by the owner for the completion of the work 15% to be added as supervision charges, the same would have become recoverable from the claimant. In the present case, no such cost has been incurred till date*. Thus, for these reasons, I reject this counter claim."

(emphasis supplied).

The arbitrator adjusted Rs.11,10,662 awarded to the appellant, towards the sum of Rs.91,33,844 awarded in favour of the respondent and consequently directed the appellant to pay to the respondent, the balance of Rs.80,23,182. He further directed that if the amount was not paid within three months from the date of award, the appellant shall pay interest at the rate of 12% per annum from the date of award till payment. The appellant did not challenge the award and it thus attained finality.

7. The appellant claims that it entrusted the incomplete work to Deepak Construction Company for completion in the year 2005, that the said contractor completed the work on 29.12.2007, and that the final bill of the said alternative agency was settled on 7.5.2008. On that basis, the appellant calculated the actual extra cost incurred in completing the work and the total amount recoverable from the petitioner in terms of the contract, as under:

A.	Amount determined as payable to the alternative agency (Deepak Construction Co.) for the balance work	Rs.4,05,74,465.00
B.	Material supplied to the alternative agency for completing the work (+)	Rs.2,78,68,861.64
C.	Total Cost (A + B)	Rs.6,84,43,326.64

D.	The cost of such unfinished work, if it had been completed by the respondent, as per its contract rates.	Rs.3,30,93,996.75
E.	Extra cost incurred on account of getting the work completed at the risk and cost of respondent (C – D)	Rs.3,53,49,329.89
F.	Supervision charges at 15% on (+) Rs.6,84,43,326.64	Rs.1,02,66,499.00
	Total amount recoverable from the respondent (E+F)	Rs.4,56,15,828.89

Towards the said claim against the respondent, the appellant adjusted the sum of Rs.80,23,182/- awarded by the arbitrator to the respondent and arrived at the net amount recoverable from the respondent towards extra cost for completion as Rs.3,75,92,646.89. The appellant by notice dated 22.1.2009 called upon the respondent to pay the said sum of Rs.3,75,92,646.89 (and interest thereon at 18% per annum if the amount was not paid within seven days) and informed the respondent that if it disputed its liability, to treat the said letter as appellant's notice invoking arbitration. The appellant also suggested a panel of three names (including Justice P.K. Bahri - the arbitrator who had made the award dated 27.10.2008) with a request to select one of them as the arbitrator. The respondent by reply dated 18.3.2009 refused to comply, contending that the counter claim in regard to the risk-execution cost had already been rejected by the arbitrator, by his award dated 27.10.2008 and that award having attained finality, there could be no further arbitration. In view of the said stand of the respondent, the appellant filed a petition under section 11 of the Act praying for appointment of an arbitrator to decide its

claim for the extra cost in getting the work completed through the alternative agency.

8. The learned Designate of the Chief Justice of the Delhi High Court (for short 'the Designate') by the impugned order dated 8.12.2009 dismissed the application with costs of Rs.50,000/-. He held that the application under section 11 of the Act by the appellant was misconceived, barred by *res judicata*, and *mala fide*. The Designate held (i) that the claim by the appellant in regard to extra cost had already been considered and rejected by the Arbitrator; (ii) that the claim regarding extra cost was barred by limitation (by drawing an inference from the observation of the Arbitrator that the risk execution tender was not awarded to Deepak Construction Co. within a reasonable period of termination of respondent's contract); and (iii) that as the work was completed by Deepak Construction Co. on 29.12.2007 and the earlier arbitration proceedings had came to an end much later on 27.10.2008, the claim in regard to actual extra cost ought to have been crystallized and claimed in the first round of arbitration.

9. The said order is challenged in this appeal by special leave. On the contentions urged the questions that arise for consideration are as follows :

(i) Whether the Chief Justice or his designate can examine the tenability of a claim, in particular whether a claim is barred by *res judicata,* while considering an application under section 11 of the Act?

(ii) Whether the Designate was justified in holding that the claim was barred by *res judicata* and that application under section 11 of the Act was misconceived and *mala fide*?

Re : Question (i)

10. This Court, in *National Insurance Co. Ltd. vs. Boghara Polyfab Private Limited* [2009 (1) SCC 267] following the decision in *SBP & Co. v. Patel Engineering Ltd*. [2005 (8) SCC 618], identified and segregated the issues that may be raised in an application under section 11 of the Act into three categories, as under :

"22.1. The issues (first category) which the Chief Justice/ his designate will have to decide are :

(a) Whether the party making the application has approached the appropriate High Court?

(b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement?

22.2. The issues (second category) which the Chief Justice/his designate may choose to decide (or leave them to the decision of the Arbitral Tribunal) are:

(a) Whether the claim is a dead (long-barred) claim or a live claim?

(b) Whether the parties have concluded the contract/ transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection?

22.3. The issues (third category) which the Chief Justice/ his designate should leave exclusively to the Arbitral Tribunal are:

(i) Whether a claim made falls within the arbitration clause (as for example, a matter which is reserved for final decision of a departmental authority and excepted or excluded from arbitration)?

(ii) Merits or any claim involved in the arbitration."

11. To find out whether a claim is barred by *res judicata*, or whether a claim is "*mala fide*", it will be necessary to examine the facts and relevant documents. What is to be decided in an application under section 11 of the Act is whether there is an arbitration agreement between parties. The Chief Justice or his designate is not expected to go into the merits of the claim or examine the tenability of the claim, in an application under section 11 of the Act. The Chief Justice or his Designate may however choose to decide whether the claim is a dead (long-barred) claim or whether the parties have, by recording satisfaction, exhausted all rights, obligations and remedies under the contract, so that neither the contract nor the arbitration agreement survived. When it is said that the Chief Justice or his Designate may choose to decide whether the claim is a dead claim, it is implied that he will do so only when the claim is evidently and patently a long time barred claim and there is no need for any detailed consideration of evidence. We may elucidate by an illustration : If the contractor makes a claim a decade or so after completion of the work without referring to any acknowledgement of a liability or other factors that kept the claim alive in law, and the claim is patently long time barred, the Chief Justice or his Designate will examine whether the claim is a dead claim (that is, a long time barred claim). On the other hand, if the contractor makes a claim for payment, beyond three years of completing of the work but say within five years of completion of work, and alleges that the final bill was drawn up and payments were made within three years before the claim, the court will not enter into a disputed question whether the claim was barred by limitation or not. The court will leave the matter to the decision of the Tribunal. If the distinction between apparent and obvious dead claims, and claims involving disputed issues of limitation is not kept in view, the Chief Justice or his designate will end up deciding the question of limitation in all applications under section 11 of the Act.

12. An application under section 11 of the Act is expected to contain pleadings about the existence of a dispute and the

existence of an arbitration agreement to decide such dispute. The applicant is not expected to justify the claim or plead exhaustively in regard to limitation or produce documents to demonstrate that the claim is within time in a proceedings under section 11 of the Act. That issue should normally be left to the Arbitral Tribunal. If the Chief Justice or his designate is of the view that in addition to examining whether there is an arbitration agreement between the parties, he should consider the issue whether the claim is a dead one (long time barred) or whether there has been satisfaction of mutual rights and obligation under the contract, he should record his intention to do so and give an opportunity to the parties to place their materials on such issue. Unless parties are put on notice that such an issue will be examined, they will be under the impression that only questions of jurisdiction and existence of arbitration agreement between the parties will be considered in such proceedings.

13. The question whether a claim is barred by *res judicata,* does not arise for consideration in a proceedings under section 11 of the Act. Such an issue will have to be examined by the arbitral tribunal. A decision on *res judicata* requires consideration of the pleadings as also the claims/issues/points and the award in the first round of arbitration, in juxtaposition with the pleadings and the issues/points/claims in the second arbitration. The limited scope of section 11 of the Act does not permit such examination of the maintainability or tenability of a claim either on facts or in law. It is for the arbitral tribunal to examine and decide whether the claim was barred by *res judicata.* There can be no threshold consideration and rejection of a claim on the ground of *res judicata,* while considering an application under section 11 of the Act.

Re : Question (ii)

14. We extract below the reasoning adopted by the Designate to dismiss the appellant's application under section 11 of the Act :

"5. In my opinion, not only the aforesaid para 102 in the Award dated 27.10.2008 operates as *res judicata* against the present petitioner, I find that the present petition is misconceived and and *mala fide* because, if the present petitioner is correct in saying and which I doubt it is, that its limitation/right would only begin after the work is completed by M/s Deepak Construction Company when the amount of the higher cost is known, even then, the work was completed by the M/s Deepak Construction Company admittedly on 29.12.2007, and thus the present petitioner, could well have proved its counter claim in the earlier proceedings and could have crystallized the amount in the said earlier arbitration proceedings. If necessary it could have even amended its pleadings as regards the counter claim. On a further query by the Court to the counsel for the petitioner with respect to the statement in the notice dated 22.01.2009 sent by the petitioner to the respondent which states that M/s Deepak Construction Company has completed the work on 29.12.2007 and its final bill has now been settled" that when was the bill of M/s Deepak Construction Company settled, the counsel for petitioner states that for the present no such information is at all available whether in the form of any assertion in the present petition or in any document in support thereof.

6. A conspectus of the aforesaid facts show that firstly in the earlier arbitration proceedings, the counter claim of the present petitioner on this very subject matter was specifically dismissed by holding and observing that the risk purchase tender awarded to M/s Deepak Construction Company was not given within a reasonable period of time after termination of the work of the present respondent. Secondly, it has further become clear that the work was completed by M/s Deepak Construction Company admittedly as per the case of the petitioner on 29.12.2007 and the earlier arbitration proceedings came to an end later by passing of the Award on 27.10.2008 and, therefore,

the claim with respect to any cost of the total materials for the substitute contract for the risk purchase could very well have been crystallized and claimed in the earlier arbitration proceedings. Thirdly, admittedly there is no challenge to the award dated 27.10.2008 by the present petition whereby its counter claim was rejected. Fourthly, I am of the view that once a risk and cost tender is issued at the risk and cost of a person, then, the amount which is to be claimed from the person who is guilty of breach of contract and against whom risk and cost is tendered, becomes crystallized when the risk purchase tender at a higher cost is awarded. Once a higher cost of work is known as compared to the cost of the work for the earlier work for which the earlier contract was there and with respect to which the earlier contractor was in breach, then not only the amount becomes crystallized but limitation also commences for filing of the legal proceedings against the person in breach of obligations under the earlier contract. It cannot be that limitation and a right continues indefinitely to be extended till the performance is completed under a subsequent risk purchase contract. This would give complete uncertainty to the period of limitation striking at the very root of one of the principles of the Limitation Act and which is that evidence is lost by passage of time and which will cause grave prejudice to the person against whom a stale claim is filed."

15. The appellant submitted that having regard to clause 7.0.9.0 of the contract, damages can be claimed by it (as employer), in regard to the additional amount incurred for getting the work completed through an alternative agency at the risk and cost of the contractor along with the supervision charges, only when the *amount was actually expended* for completion of the entire work; and therefore, unless the work was completed by the alternative agency and the final bill was settled or finalized, the actual extra cost could not be determined. It was pointed out that in the first round of arbitration, the hearing was

concluded by the Arbitrator on 13.3.2008 and matter was reserved for orders and the award was declared on 27.10.2008; that the work was completed by the alternative agency on 29.12.2007 and final bill of the alternative agency was drawn and settled only on 7.5.2008, *after the conclusion of the hearing,* by the Arbitrator; that the actual extra cost could be worked out only when the final bill was prepared, and not on the date of completion of work; that therefore the appellant could not make the claim for actual extra cost, in the first round arbitration. It was also submitted that the appellant was not expected to give details of completion of work and preparation of the final bill, or produce documents in support of it in a proceeding under section 11 of the Act; and that the Designate was not therefore justified in finding fault with the appellant for not stating the date of settlement of the final bill in the petition under section 11 of the Act and for not producing the final bill.

16. The appellant also contended that when its statement of counter claim was amended before the Arbitrator, the appellant had only indicated its estimation of the probable extra cost to be Rs.2,10,41,626/-, as advance indication of a claim to be made in future on the basis of actuals, and that it had not prayed for award of the said amount in the said proceeding. It was pointed out that even after mentioning the proposed claim by amending the statement of counter claim, the actual counter claim before the arbitrator remained as only Rs.92,72,529/- exclusive of any claim on account of the risk completion cost. It was submitted that having regard to clause 7.0.9.0, the counter claim for extra cost could not have been made when the first arbitration was in progress and that the arbitrator had in fact noticed in his award (at para 102) that only when the cost actually incurred, the appellant could make the claim for the extra cost. It is contended that the "rejection" by the arbitrator was not on the ground that the claim for extra cost was not recoverable, nor on the ground that no extra cost was involved in completing the work, but on the ground that as on the date of the award, the appellant had not actually incurred any specific

extra cost; and that as the arbitrator clearly held that any claim for extra cost was premature and could not be considered at that stage, the observation that 'I reject this counter claim' only meant that the claim relating to extra cost was not being considered in that award and that appellant should make the claims separately after the amount was actually expended.

17. Clause 7.0.9.0 of the contract relied upon by the appellant reads thus :

"clause 7.0.9.0

Upon termination of the contract, the owner shall be entitled at the risk and expenses of the contractor by itself or through any independent contractor(s) or partly by itself and/or partly through independent contractor(s) to complete to its entirety the work as contemplated in the scope of work and to recover from the contractor in addition to any other amounts, compensations or damages that the owner may in terms hereof or otherwise be entitled to (including compensation within the provisions of clause 4.4.0.0 and clause 7.0.7.0 hereof) the difference between the amounts as would have been payable to the contractor in respect of the work (calculated as provided for in clause 6.2.1.0 hereof read with the associated provisions thereunder and clause 6.3.1.0 hereof) *and the amount actually expended by the owner for completion of the entire work as aforesaid together with 15% (fifteen per cent) thereof to cover owner's supervision charges, and in the event of the latter being in the excess former, the owner shall be entitled (without prejudice to any other mode of recovery available to the owner) to recover the excess from security deposit or any monies due to the contractor."*

(emphasis supplied)

18. On a perusal of the order of the Designate, we find that the Designate has clearly exceeded his limited jurisdiction

under section 11 of the Act, by deciding that the claim for extra cost, though covered by the arbitration agreement was barred by limitation and by the principle of res judiata. He was also not justified in terming the application under section 11 of the Act as 'misconceived and malafide'. Nor could he attribute '*mala fides'* to the appellant, a public sector company, in filing an application under section 11 of the Act, without any material to substantiate it. We may refer to some of the findings of fact recorded by the Designate, which were wholly unwarranted in a proceeding under section 11 of the Act and the fallacy in such findings :

(i) *Finding : The appellant did not state anywhere in the petition the date which the final bill was settled and did not produce any document containing such information.* The appellant was not expected or required to give such information in a petition under section 11 of the Act or produce the documents showing the settlement of final bill along with the said petition. Therefore, the appellant could not be found fault for such omission. In fact, the Designate noticed that the work was completed on 29.12.2007. The claim was in time with reference to the date on which the work completed (29.12.2007) by the alternative agency.

(ii) *Finding : As the work was completed on 29.12.2007 and as the award was made only on 27.10.2008, the appellant ought to have crystalised the extra cost and claimed it in the first arbitration proceedings.* The assumption that the appellant ought to have made the claim for extra cost which arose after the commencement of the arbitration proceedings, in the pending proceedings by way of amendment, has no basis either in law or in contract. If the cause of action arose after the completion of pleadings and commencement of hearing in the first round of arbitration, nothing prevented the appellant from making a separate claim by initiating a second arbitration.

(iii) *Finding : Once a risk and cost tender is issued at the risk and cost of a person, then, the amount which is to be*

claimed from the person who is guilty of breach……. becomes crystallized when the risk purchase tender at a higher cost is awarded.. This may be true as a general proposition. But it may not apply if there is a specific provision in the contract (like clause 7.0.9.0) which requires that the employer should claim as extra cost, only the difference between the "amounts as would have been payable to the contractor in respect of the work" and "the amount actually expended by the owner for completion of the entire work".

19. The Designate should have avoided the risks and dangers involved in deciding an issue relating to the tenability of the claim without necessary pleadings and documents, in a proceeding relating to the limited issue of appointing an Arbitrator. It is clear that the Designate committed a jurisdictional error in dismissing the application filed by the appellant under section 11 of the Act, on the ground that the claim for extra cost was barred by *res judicata* and by limitation. Consideration of an application under section 11 of the Act, does not extend to consideration of the merits of the claim or the chances of success of the claim.

20. We may at this stage refer to one aspect of the claim for extra cost. The award amount due to the respondent under the award dated 27.10.2008 is an ascertained sum due, recoverable by executing the award as a decree. On the other hand the claim of the appellant for reimbursement of the extra cost for getting the work completed, is a claim for damages which is yet to be adjudicated by an adjudicating forum. The appellant cannot therefore adjust the amount due by it under the award, against a mere claim for damages made by it against the respondent. The appellant will have to pay the award amount due to the respondent and if necessary modify its claim for extra cost against the respondent.

21. In view of the foregoing, this appeal is allowed and the order of the Designate is set aside. The application under section 11 of the Act filed by appellant before the Chief Justice

of the Delhi High Court is allowed and Justice P.K.Bahri (Retd.) who was the earlier Arbitrator is appointed as the sole arbitrator to decide the appellant's claim in regard to the additional cost for completing the work. It is open to the respondent to raise all contentions against the claim of the appellant including the contention of limitation, maintainability and res judicata, before the arbitrator. Nothing in this order shall be construed as expression of any opinion on the merits or tenability of the claim of the appellant regarding extra cost.

N.J. Appeal allowed.

NARINDER KAUR
v.

PUNJAB & HARYANA HIGH COURT & ORS.
(Civil Appeal No(s). 1380 of 2011)

FEBRUARY 04, 2011

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

Service Law – Date of birth – Change in service record – Application by appellant-Civil Judge within two years from date of her entry into Government service to correct date of birth from 26.01.1971 to 09.01.1972 – Rejection of, by the Registrar of the High Court – Writ petition also dismissed – On appeal held: No material was produced on record to show that the appellant took undue advantage of the recorded date of birth – After receipt of the application for change of birth date, no inquiry undertaken by the High Court – It was preposterous on the part of the High Court to assume that the members of the Selection Committee while selecting the appellant as Civil Judge must have been influenced by the age of the appellant declared by her in the application form for selection – Director, Health & Family Welfare-cum-Chief Registrar, Births and Deaths filed affidavit to the effect that the correct date of birth of the appellant as per births and deaths record was 09.01.1972 – Presumptive value is attached to birth and death records – Thus, application made by appellant to change her date of birth from 26.01.1971 to 09.01.1972 is allowed – Punjab Financial Volume I Rules, 2001 – Punjab Financial Volume I (Haryana First Amendment) Rules, 2001.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1380 of 2011.

From the Judgment & Order dated 20.04.2006 of the High Court of Punjab & Haryana at Chandigarh in CWP No. 16151 of 2003.

P.N. Mishra, Harikesh Singh, T. Singh, Sohovan, Kamal Mohan Gupta for the Appellant.

Manjit Singh, Ajay Pal, Abha Jain, Naresh Bakshi for the Respondents.

The following order of the Court was delivered

O R D E R

Leave granted.

This appeal is directed against the judgment dated 20.4.2006 rendered by the High Court of Punjab & Haryana at Chandigarh in CWP No.16151 of 2003 by which the prayer made by the appellant to quash order dated 12.5.2002 passed by the Punjab & Haryana High Court at Chandigarh on its administrative side declining the request made by the appellant for effecting change in her date of birth from 26.1.1971 to 9.1.1972 is rejected.

From the record of the case, it is evident that the appellant was selected to the Haryana Civil Services (Judicial) and was posted as Civil Judge (Jr. Division) Ambala City. She joined her duties on 20.5.2000. The case of the appellant is that her date of birth is 9.1.1972 but it was wrongly mentioned in the records as 26.1.1971, on the basis of factually incorrect birth certificate wherein her date of birth was shown to be 26.1.1971. The Governor of Haryana in exercise of powers conferred by clause (2) of Article 283 of the Constitution made Punjab Financial Volume I (Haryana First Amendment) Rules, 2001 amending certain provisions of Punjab Financial Vol.I Rules 2001 providing inter alia that in regard to the date of birth, a declaration of age made at the time of, or for the purpose of entry into Government service, shall as against the Government employee, be deemed to be conclusive unless he applies for correction of age as recorded within two years from date of his entry into Government service and when such an application is made a special inquiry shall be made to ascertain correct age by making reference to all available sources of information such as certified copies of entries in the municipal birth register,

university or school certificate indicating age, Janam Patrika, horoscopes etc.

The appellant realising that her date of birth was wrongly recorded in the birth certificate, as 26.1.1971 made an application dated 12.4.2002 i.e. within two years from the date of her entry into Government service, requesting the authority concerned to change her date of birth from 26.1.1971 to 9.1.1972. By communicating a non-speaking order dated 12.5.2002, the appellant was informed by the Registrar of Punjab and Haryana High Court, Chandigarh that the representation made by her seeking change in her date of birth was rejected by the High Court.

Feeling aggrieved, the appellant filed CWP No.16151 of 2003 before the High Court. The High court by the impugned judgment has dismissed the petition giving rise to the present appeal.

This Court has heard the learned counsel for the parties and considered the documents forming part of the instant appeal.

The main reason assigned by the High Court for dismissing the writ petition filed by the appellant is that the appellant had failed to show satisfactorily that she had not taken any advantage of the recorded date of birth. It was further held by the High Court that the appellant belonged to a mature class and her age as declared in the application Form for selection must have influenced the mind of the Selection Committee and, therefore, the principle of estoppel would apply to the facts of the case. The High Court also held that notification dated 13.8.2001 is discretionary in nature and the appellant is not entitled to change in her birth date on the basis of the said notification.

It may be mentioned that the State of Punjab and Punjab and Haryana High Court had filed reply affidavit before the High

Court. However, no material was produced on the record of the case to show that the appellant had taken undue advantage of the recorded date of birth. The proceedings relating to the selection of the appellant as Civil Judge never formed part of the instant case and, therefore, it was preposterous on the part of the High Court to assume that the learned High Court Judges who were members of the Selection Committee while selecting the appellant as Civil Judge (J.D.) must have been influenced by the age of the appellant as declared by her in the application form for selection. The record does not indicate that after receipt of the application from the appellant regarding change of her birth date, any inquiry, much less a special inquiry as contemplated by amended Rules of 2001 was undertaken by the High Court. It is true that the amended Rules of 2001 are discretionary in nature but that fact by itself does not justify the High Court on its administrative side to ignore them altogether and then to come to the conclusion that on the basis of the discretionary rules, the appellant is not entitled to claim change in her date of birth.

In the present appeal, Dr. J. P. Singh, Director, Health & Family Welfare-cum-Chief Registrar, Births & Deaths, Punjab has filed an affidavit on 26.8.2010 mentioning that as per the record maintained by the office of Local Registrar, Births & Deaths, Municipal Council, Rajpura, Tehsil Rajpura, Distt. Patiala, Punjab, the entry of the birth of the appellant is recorded with particulars as Annual Sr. No.10, Date of Registration 11.1.1972, Date of Birth 9.1.1972. Thus, the State of Punjab has now admitted in this affidavit that the correct date of birth of the appellant as per births and deaths record was 9.1.1972. The contents of the affidavit filed by Dr. J. P. Singh, Director, Health & Family Welfare-cum-Chief Registrar, Births & Deaths, Punjab are not disputed or controverted in any manner by the Punjab and Haryana High Court.

In view of the presumtive value which attachs to the birth and death records, this Court is of the opinion that appeal

deserves to be allowed.

For the foregoing reasons, the appeal succeeds. The judgment dated 20.4.2006 rendered by Division Bench of the High Court of Punjab and Haryana at Chandigarh in CWP No. 16151 of 2003, is hereby set aside. CWP No. 16151 of 2003 filed by the appellant in the High Court is allowed. The order dated 12.5.2002 passed by Punjab and Haryana High court on its Administrative side rejecting the application dated 12.4.2002 made by the appellant to the High Court with a request to change her date of birth from 26.1.1971 to 9.1.1972 is also set aside. The application dated 12.4.2002 made by the appellant to the High Court to change her date of birth from 26.1.1971 to 9.1.1972 stands allowed. Both the respondents are hereby directed to carry out necessary changes in service record of the appellant by mentioning her date of birth to be 9.1.1972. The appeal accordingly stands disposed of.

N.J. Appeal disposed of.

KILAKKATHA PARAMBATH SASI & ORS.

v.

STATE OF KERALA

(Criminal Appeal No. 1383 of 2003)

FEBRUARY 4, 2011

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

Penal Code, 1860 – s.302 r/w s.34 – Accused persons allegedly formed themselves into an unlawful assembly and assaulted PW-1 and his brother with sword, axe and knife due to political animosity – PW-1 was injured while his brother died at the hospital – Trial Court acquitted all the seven accused – High Court, however, reversed the acquittal of four accused (the appellants) – Justification of – Held: Justified – The findings of the High Court as to the spontaneity of the FIR are fully endorsed – PW-1 is an injured witness and his presence, therefore, cannot be disputed – PW-1 was not an active politicial worker, and hence question of false implication at his instance, on account of political rivalry, appears to be remote – Even otherwise, it is difficult to believe that PW-1 would have left out the true assailants of his brother – The prosecution story was entirely correct and was fully supported by the evidence of PW 2 and two independent witnesses (PWs 3 and 4).

Appeal against acquittal – Scope for interference – Held: The High Court should not interfere in an appeal against acquittal save in exceptional cases – Interference in such an appeal is called for only if the findings of the Trial Court is not borne out by the evidence and is perverse.

According to the prosecution, the accused persons belonged to the Bhartiya Janta Party whereas PW-1 and his brother were workers of the Congress Party, and that on account of political animosity, the accused persons formed themselves into an unlawful assembly and

assaulted PW-1 and his brother with sword, axe and knife, when they just got out of a bus at the bus stand. PW-1 was grievously injured while his brother died at the hospital.

The dead body of PW-1's brother was subjected to post-mortem, on which PW-7, the doctor, found 58 injuries thereon, most of them incised and cutting wounds, some of them of huge dimensions. PW-1 was examined by the doctor PW-8, and three incised wounds were found on him as well.

The accused were charged for offences punishable under Sections 147, 148, 307, 324 and 302 read with Section 149 of the IPC. The Trial Court acquitted all the seven accused. On appeal, the High Court held that the judgment of the trial court was perverse and accordingly reversed the acquittal of four accused (the appellants), who were convicted under Section 302 r/w Section 34 IPC and sentenced to life imprisonment, whereas the acquittal of other three accused was maintained.

In the instant appeals, the conviction of the appellants was challenged on various grounds. It was contended by the appellants that the facts of the case did not justify interference by the High Court in an appeal against acquittal.

Dismissing the appeal, the Court

HELD: 1. The High Court should not interfere in an appeal against acquittal save in exceptional cases, and that interference in such an appeal is called for, only if the findings of the Trial Court is not borne out by the evidence and is perverse. However, it is equally well established that the High Court can re-appraise the evidence so as to find out as to whether the view taken by the Trial Court was justified or not and if it finds that

the Trial Court's findings were not possible on the evidence, interference must be made failing which there would be a travesty of justice. In the instant case, the High Court was fully justified in interfering in this matter under the guidelines and principles in Arulvelu's case. [Para 10] [551-E-G]

Arulvelu and Anr. v. State represented by the Public Prosecutor and Anr. **[2009 (10) SCC 206] – referred to.**

2. The incident happened at about 2.30 p.m. and the police had arrived at the place of occurrence an hour later. PW-1 and the deceased were taken to the Government Hospital, Thalassery where the deceased was examined at about 3.40 p.m. but referred to the Medical College, Kozikhode as his injuries were grave whereas PW-1 was admitted to the Government Hospital. It has also come in the evidence that the ASI, who had taken the injured to the Hospital at Thalassery, was on law and order duty but he nevertheless had gone to the Kuthuparamba Police Station and given information about the incident in that Police Station. The police had arrived, thereafter, at the General Hospital and recorded PW-1's statement at 5.30 p.m. and on its basis, the formal report had been registered at 7.15 p.m. and immediately forwarded to the Magistrate who received it at 10.00 p.m. The Trial judge has, however, found fault in this matter by observing that one of the persons accompanying the injured could have gone to the police station and given a statement. This observation is farfetched and it does not take into account the realities of life. The deceased had suffered as many as 58 injuries, most of them incised and cutting wounds with large quantities of blood spilling out, and was in a very serious condition and the first anxiety of everybody, including the attendants and the doctors, was to see him to a hospital. He also died at about 4:00 p.m. Therefore, the findings of the High Court as to the

spontaneity of the FIR are fully endorsed. [Para 11] [552-A-H; 553-A]

3. PW-1 is an injured witness and his presence, therefore, cannot be disputed. Even as per the defence put up by the accused, PW-1 was not an active worker of the Congress Party. The question of false implication of BJP workers at his instance on account of political rivalry, therefore appears to be remote. Even otherwise, it is difficult to believe that PW-1 would have left out the true assailants of his brother. The Trial Court had however given a finding that in the FIR, PW-1 had given the names of only four of the accused (who are the appellants) whereas he had added three more subsequently by way of a supplementary statement and as such, his story could not be believed. Likewise, the Trial Court had found some doubt as to the story put up by PW-1 as to his medical examination in the Thalassery Hospital where he had told the doctor that he and his brother had been injured by BJP workers but had not divulged the names to him. The Trial court has supported this finding by referring to the doctor's evidence that had the names been given, he would have noted them down in the medical record. This observation is farfetched. First and foremost, it is not the function of the doctor to record the names of those who may have caused the injuries to the person who is being examined by him. On the contrary, the fact that the statement about the involvement of BJP had been made at about 4.00 p.m. in the Thalassery Hospital suggests that the prosecution story was entirely correct. Also PW-1 has given full details as to how he and his brother had happened to meet by chance in the bus and the manner in which the incident had happened at Ayithara bus stand. [Para 11] [553-B-H; 554-A-B]

4. The prosecution story is also fully supported by

the evidence of PWs 2,3 and 4. The High Court has relied on PW-1's statement with respect to the presence of PWs 3 and 4, but expressed some doubt as to the presence of PW-2. PW-2 was one of those who had taken the deceased and PW-1 to the Thalassery Hospital after the incident, as his name figures as being present in the Hospital at the time of the examination of the injured. Merely therefore because PW-1 does not refer to PW's presence in the FIR does not mean that he was not present. PWs 3 and 4 are independent witnesses. Significantly, PW-1 and PW-2 did state that PW-3 was also traveling in the same bus, PW-3 also gave a categoric statement that she had seen the deceased and PW-1 in the bus and had witnessed the incident outside Babu's shop at the Ayithara bus stand. There is absolutely no doubt with regard to the presence of PW-4 who is a truly independent witness. He stated that he was an auto-rickshaw driver and had come to the place to get his auto-rickshaw repaired and had seen the incident as it happened. There is absolutely no reason as to why his statement should be discarded. [Para 12] [554-C-G]

5. It is true that PW-15, the Investigation Officer, did testify that he had taken into possession the 'Trip-Sheet' for the route which the bus had taken. Even assuming, however, that the bus crew ought to have been examined as that would have greatly enhanced the value of the prosecution evidence, but their non-examination case would not mean that the entire prosecution story would fall through as there were several other credible witnesses including an injured one. [Para 12] [554-H; 555-A-B]

Case Law Reference:

2009 (10) SCC 206 referred to Para 10

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal

No.1383 of 2003.

From the Judgment & Order dated 23.05.2003 of the High Court of Kerala at Ernakulam in Crl. Appeal No. 198 of 2000.

U.R. Lalit, E.M.S. Anam, Fazlin Anam for the Appellants.

Dinesh Dwivedi, G. Prakash, Beena Prakash, V. Senthil for the Respondent.

The Judgment of the Court was delivered by

HARJIT SINGH BEDI, J. 1. The prosecution story, given by PW-1 Shaji, who is the brother of the deceased, Sathyan is as under:-

At about 1:45 p.m. on the 24th March, 1994, Shaji (PW-1) was to travel by bus on the route from Thalassery to Vataparra via Ayitharapuzha and Kuthuparamba. He got into the bus at Ayitharapara. As he entered the bus, he found his brother Sathyan also traveling by the same bus and as there was a vacant seat besides him, he too sat down on the seat. 10 or 15 other passengers including Prakasan (PW-2), Shyamala (PW-3) and the accused Sasi and Dasan were also in the bus. At about 1:55 p.m. the bus reached Ayitharapuzha but before PW-1 and the deceased could get down from the bus, Sasi and Dasan shouted out that they would be murdered and on saying so they pushed PW-1 and Sathyan out on to the road. Three other persons then ran towards the bus from Babu's shop which was alongside the road. Ambu and Perutheri-accused handed over a sword each to Sasi and Dasan whereupon Sasi inflicted injuries on the hands of Shaji. Ashokan-accused who was armed with an axe caused injuries on the face and head of Sathyan whereas accused Babu armed with a long knife caused injuries on the left hand of Sathyan and Dasan inflicted a stab injury with a sword on the stomach of Sathyan. The other accused also inflicted some injuries on the deceased as well as on PW-1. As per PW-1's statement, he had recognized all the seven accused who had

inflicted injuries on him and his brother. A police jeep soon arrived at the spot and PW-1 and Sathyan were taken to Kuthuparamba Hospital but as they were in critical condition, they were removed in a car and brought to the Thalassery Government Hospital where both of them were examined by the Doctor and while PW-1 was admitted therein Sathyan was referred to Kozhikode Medical College where he soon died. At about 5:30 p.m., the police arrived in the Thalassery Hospital and recorded the statement of PW-1 leading to the recording of the FIR referring to seven assailants but naming only four, and suggesting that the murder was the outcome of political rivalry as the accused belonged to the Bhartiya Janta Party whereas the deceased and PW-1 were workers of the Congress Party. In the FIR it was also noted that the incident had been seen by Prakasan (PW-2) and Manoharan (PW-4). Sathyan's dead body was also subjected to a post-mortem, and PW-7 the doctor, found 58 injuries thereon, most of them incised and cutting wounds, some of them of huge dimensions. PW-1 was also examined for the injuries by the doctor PW-8, and three incised wounds were found on him as well. On the completion of the investigation, the accused were charged for offences punishable under Sections 147, 148, 307, 324 and 302 read with Section 149 of the Indian Penal Code.

2. The Trial Court held that though PW-1 was an injured witness, yet he could not be believed as in the FIR he had named only four accused i.e. Sasi, Dasan, Ashokan and Babu, although, he had referred to three others and had in a supplementary statement to the circle inspector named these three as well and that he had also admitted to the deep political animosity between the two groups, which cast a doubt on his story. The court also held that the police had admittedly carried PW-1 and his fatally injured brother in the police jeep to the hospital, but as the police officer had made no attempt at recording the statement of PW-1, at that stage, the prosecution story was, apparently, an after-thought and could not be relied upon. The Court also observed that the manner in which the

injuries had been caused by all the accused, could not be believed as the eye-witnesses were discrepant on this material aspect. The Trial Court went through the evidence of PW-2, Prakasan and found that he had not been able to explain his presence in the bus at the relevant time despite the fact that his presence had been specifically indicated in the FIR. The court then examined the evidence of Shyamala (PW-3), one of the other passengers in the bus, and observed that her presence too was doubtful as her name did not figure in the FIR. The court also found that PW-4, another eye-witness had deposed that he had been present at the bus stop at Ayithara near Babu's shop and that when the bus had stopped and the passengers were getting down, he had heard a great deal of shouting and had subsequently, witnessed the incident in which the four main accused-appellants herein caused a large umber of injuries to the deceased and PW-1, but as PW-4 was admittedly an autorickshaw driver operating from Kuthuparamba and as his autorickshaw was stationed at Kuthuparamba, the story projected by him that he had come to Ayithara to get it repaired, appeared to be doubtful. The court also opined that the eye-witness account was not substantiated by the medical evidence in the light of the fact that all the incised injuries appeared to bear clear-cut margins whereas the prosecution had suggested that accused nos.5 to 7 had been armed with a crow bar and sticks.

3. The court also went into the evidence of the primary investigating officer PW-15 and opined that there appeared to be something remiss in the manner in which the investigation had been conducted by him. In conclusion, the Trial Court observed that :

> "On an appreciation of the entire evidence available on record, I am to hold that the evidence of the alleged eye-witnesses PWs 1 to 4 are inconsistent regarding the weapon used and also the witnesses have improved their version when they deposed before the Court. Several material points, which have not been stated to the police have been deposed before the court. I have no doubt in my mind that in this case the witnesses have not deposed before this court the real incident that happened. Developments were made and therefore, I am unable to accept the version of the witnesses as true and correct. So also, the medical evidence is not in conformity with the evidence given by PW-2 and the case of the prosecution that murder of Sathyan and Shaji formed themselves into an unlawful assembly and waited at the shop of the 4th accused Babu for the deceased to reach the place in the bus also cannot be believed. In this circumstance, I am to hold that the prosecution has not presented before this court the true incident in this case in which another youth has been murdered allegedly due to the political animosity. Therefore, I am to hold that the prosecution has failed to prove the case convincingly against these accused."

4. The Trial Court, accordingly, acquitted all the accused. An appeal was thereafter taken by State to the High Court. The High Court re-examined the evidence taking note of the principle, now universally accepted, that if the view taken by the trial judge was reasonable and could possibly be taken on the evidence, no interference by the appellate court was called for as the presumption of innocence of an accused was strengthened by an acquittal recorded by the trial court. The High Court then examined the evidence in the light of the above broad principle and observed that the incident had happened at about 2:30 p.m. and the injured had been removed first to the Kuthuparamba Government Hospital and then to the Thalaserry Government Hospital at 4:00 p.m. whereafter Sathyan had been referred to the Medical College at Kozhikode. The court noted that due to Sathyan's serious condition, his family had removed him to the Hospital at the earliest to save him and the FIR had been promptly recorded at about 5:30 p.m. at the instance of Shaji (PW-1) in which the accused Sasi, Dasan, Ashokan and Babu, the appellants

herein, had been named. The court then considered the evidence of the eye-witnesses and first examined the evidence of PW-1 who was admittedly an injured witness. The court noted that in the FIR, it had been recorded that Sasi and Dasan, two of the appellants and Prakasan (PW-2) and Shymala (PW-3) had been present in the bus when the incident had happened and that his graphic description fitted in the incident with the other circumstances. The court then went into the evidence of PW-2 who was alleged to be a close friend of the deceased and accepted the statement that at 10:00 a.m. on that day he and Sathyan had gone to a film show at Kuthuparamba and as they were to take lunch at home they had taken a bus to get back and when the bus had reached Ayithara bus stand, the incident had happened. He also stated that he too had been in the police jeep which had taken the injured to the hospital. The court also examined the statement of Shymala (PW-3) whose name had also figured in the FIR and the statement of Manoharan (PW-4), a truly independent witness, as he was standing near the shop of Babu to get his autorickshaw repaired and had no connection with either party.

5. In this background of the facts, the court observed that the findings of the Trial Court that there was a delay in the recording of the FIR was perverse and could not be accepted, the moreso as the special report had been delivered to the Magistrate at 7:50 p.m, the same day. The court also found that the first anxiety of the family and friends of the injured was to see them to a hospital and if an hour or two was taken in that effort it was but to be expected in the circumstances. The court also held that the presence of PW-1, who was an injured witness, could not be challenged, and as the dispute was apparently between two rival political parties, it would be difficult to believe that the true assailants would be left out and others involved instead. The court further observed that the evidence of PW-1 was corroborated by PW-2, PW-3 and PW-4 who were truly independent witnesses and though PW-2's name did not figure in the FIR but the fact that he was present when the

injured had been removed to the hospital which was evident from the wound certificate, his presence had also to be accepted. The court finally found that the judgment of the trial court was perverse and accordingly allowed the appeal qua the appellants herein i.e. Sasi, Dasan, Ashokan and Babu whereas the acquittal of accused Nos.5 to 7 i.e. P. Sudhakaran, V. Sudhakaran and V. Raghu was maintained.

6. The High Court accordingly awarded a sentence of life imprisonment to the four appellants under Section 302 read with Section 34 of the Indian Penal Code.

7. That the matter is before us on these facts.

8. Mr. Lalit, the learned senior counsel for the appellants has raised several arguments before us. He has first argued that there was an unexplained delay in the lodging of the FIR and as there was admittedly serious enmity between the parties, this delay had been utilized by the prosecution to create a false story and to involve innocent persons. He has also been submitted that the High Court too had endorsed the finding of the Trial Court that three of the accused had apparently not been present which caused grave doubts on the veracity of the prosecution witnesses. It has also been pleaded that the eye-witness's account of the four eye-witnesses was discrepant inter-se and was also not supported by the medical evidence of PWs-7 and 8, the two doctors which clearly showed that the eye-witnesses had not been present at the spot. It has further been pointed out that the presence of PWs 2, 3 and 4 was even otherwise to be ruled out more particularly as the presence of PW-2 was not indicated in the FIR and that the best witnesses to depose for the prosecution were the crew of the bus who were not examined, although the investigating officer PW-15 had admitted that he had recovered the trip-sheet from them. In conclusion he has submitted that the facts did not justify interference in an appeal against acquittal.

9. Mr. Dwivedi, the learned counsel for the State of Kerala,

has however, controverted the above submissions and pointed out that the High Court had set aside the order of the trial court fully cognizant of the fact that it was a dealing with an appeal against acquittal wherein the High Court's interference was circumscribed and had observed that interference was called for as the judgment of the trial court was perverse. He has, further, submitted out that there was absolutely no delay in the lodging of the FIR and the finding of the trial court to the contrary, was perverse and could not be sustained on the evidence. It has further been pointed out that there could be no doubt as to the presence of Shaji (PW-1) who was admittedly an injured witness and the brother of the deceased, nor the other witnesses as they were truly independent ones and merely because PW-1 did not name all the seven accused at the first instance, was of no consequence at this stage as the three who had not been named, had been acquitted and were not in appeal before this court.

10. Before we go into the merits of the evidence, we must deal with the question of the High Court's interference in an appeal against the acquittal. It is true that in *Arulvelu and Anr. Vs. State represented by the Public Prosecutor and Anr.* [2009 (10) SCC 206], and a string of earlier & later judgments, it has been held that the High Court should not interfere in an appeal against acquittal save in exceptional cases, and that interference in such an appeal was called for only if the findings of the Trial Court were not borne out by the evidence and were perverse. It is however equally well established that the High Court can re-appraise the evidence so as to find out as to whether the view taken by the Trial Court was justified or not and if it finds that the Trial Court's findings were not possible on the evidence, interference must be made failing which there would be a travesty of justice. We are of the opinion that in the light of what follows, the High Court was justified in interfering in this matter.

11. Mr. Lalit's primary argument is with regard to the delay

in lodging of the FIR. He has submitted that the incident had happened at about 2.30 p.m. and as per the prosecution, the statement of PW-1 had been recorded at about 5.30 p.m., but as the special report had been delivered to the Magistrate at about 10.00 p.m., it appeared that the FIR statement had been recorded at about 7 or 7.30 p.m. and that too after due deliberation.

It is true, and if it is so found, that a FIR has been lodged belatedly, an inference can rightly follow that the prosecution story may not be true but equally on the other side if it is found that there is no delay in the recording of the FIR, the prosecution story stands immeasurably strengthened. The High Court has re-examined the findings recorded by the Trial Court with respect to this matter. We notice that the incident happened at about 2.30 p.m. and the police had arrived at the place of occurrence an hour later. PW-1 and the deceased were taken to the Government Hospital, Thalassery where the deceased was examined at about 3.40 p.m. but referred to the Medical College, Kozikhode as his injuries were grave whereas PW-1 was admitted to the Government Hospital. It has also come in the evidence that the ASI, who had taken the injured to the Hospital at Thalassery, was on law and order duty but he nevertheless had gone to the Kuthuparamba Police Station and given information about the incident in that Police Station. The police had arrived, thereafter, at the General Hospital and recorded PW-1's statement at 5.30 p.m. and on its basis, the formal report had been registered at 7.15 p.m. and immediately forwarded to the Magistrate who received it at 10.00 p.m. The Trial judge has, however, found fault in this matter by observing that one of the persons accompanying the injured could have gone to the police station and given a statement. To our mind, this observation is farfetched and it does not take into account the realities of life. It is to be noted that the deceased had suffered as many as 58 injuries, most of them incised and cutting wounds with large quantities of blood spilling out, and was in a very serious condition and the first anxiety of everybody,

including the attendants and the doctors, was to see him to a hospital. He also died at about 4:00 p.m. We, therefore, fully endorse the findings of the High Court as to the spontaneity of the FIR.

Mr. Lalit has also questioned the evidence of PW-1 who is admittedly an injured eye-witness and whose presence cannot be doubted. It has been contended that as the incident was the outcome of political rivalry between the Bhartiya Janta Party and the Congress workers, and the fact that PW-1 had not named all the assailants to the doctor in Thalassery Hospital when he had been examined by him and merely stated that BJP workers were responsible, cast a doubt on his statement. It has, accordingly, been pleaded that PW-1 apparently did not know the names of the accused and that the accused had been involved after deliberation. We find absolutely no merit in this submission, as admittedly PW-1 is an injured witness and his presence, therefore, cannot be disputed. Even as per the defence put up by the accused, PW-1 was not an active worker of the Congress Party. The question of the false implication of BJP workers at his instance on account of political rivalry, therefore appears to be remote. Even otherwise, we find it difficult to believe that PW-1 would have left out the true assailants of his brother. The Trial Court had however given a finding that in the FIR, PW-1 had given the names of only four of the accused (who are the appellants before us) whereas he had added three more subsequently by way of a supplementary statement and as such, his story could not be believed. Likewise, the Trial Court had found some doubt as to the story put up by PW-1 as to his medical examination in the Thalassery Hospital where he had told the doctor that he and his brother had been injured by BJP workers but had not divulged the names to him. The Trial court has supported this finding by referring to the doctor's evidence that had the names been given, he would have noted them down in the medical record. We find this observation to be farfetched. First and foremost, it has to be borne in mind that it is not the function of the doctor

to record the names of those who may have caused the injuries to the person who is being examined by him. On the contrary, the fact that the statement about the involvement of BJP had been made at about 4.00 p.m. in the Thalassery Hospital suggests that the prosecution story was entirely correct. We also see that PW-1 has given full details as to how he and his brother had happened to meet by chance in the bus and the manner in which the incident had happened at Ayithara bus stand.

12. The prosecution story is also fully supported by the evidence of PWs 2,3 and 4. The High Court has relied on PW-1's statement with respect to the presence of PWs 3 and 4, but expressed some doubt as to the presence of PW-2. We have examined the findings arrived at by the High Court vis-à-vis the observations of the Trial judge. We see that PW-2 was one of those who had taken the deceased and PW-1 to the Thalassery Hospital after the incident, as his name figures as being present in the Hospital at the time of the examination of the injured. Merely therefore because PW-1 does not refer to PW's presence in the FIR does not mean that he was not present. We also find that PWs 3 and 4 are independent witnesses. Significantly, PW-1 and PW-2 did state that PW-3 was also traveling in the same bus, PW-3 also gave a categoric statement that she had seen the deceased and PW-1 in the bus and had witnessed the incident outside Babu's shop at the Ayithara bus stand. We are further of the opinion that there is absolutely no doubt with regard to the presence of PW-4 who is a truly independent witness. He stated that he was an auto-rickshaw driver and had come to the place to get his auto-rickshaw repaired and had seen the incident as it happened. There is absolutely no reason as to why his statement should be discarded.

Mr. Lalit has, however, also raised some argument with regard to the non-examination of the bus crew. It is true that PW-15, the Investigation Officer, did testify that he had taken

into possession the 'Trip-Sheet' for the route which the bus had taken. Even assuming, however, that the bus crew ought to have been examined as that would have greatly enhanced the value of the prosecution evidence, but their non-examination case would not mean that the entire prosecution story would fall through as there were several other credible witnesses including an injured one.

We are, therefore, of the opinion that the High Court was fully justified in interfering in this matter under the guidelines and principles in *Arulvelu's* case (Supra).

The appeal is accordingly dismissed.

B.B.B. Appeal dismissed.

CHAIRMAN AND M.D. INDIAN OVERSEAS BANK & ORS.

v.

TRIBHUWAN NATH SRIVASTAVA

(Civil Appeal No. 1186 of 2005)

FEBRUARY 4, 2011

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

Service law: Retirement – Voluntary retirement scheme – IOB Officers and Employees Voluntary Retirement Scheme, 2000 – Object and purpose of – Application for voluntary retirement – Acceptance and rejection of – Administrative decision – Judicial review – Scope of – Held: The object of the scheme in question was to adopt measures to have optimum human resources at various levels in keeping with the business strategies, skill profile to achieve balanced age and requirement of the bank – In the process of shedding surplus manpower, no organization would like to lose its best people – It is a matter of personnel management and the competent authority is expected to factor in such considerations while taking a decision on individual applications – Such considerations would certainly not be a ground for the court to interfere with the decision of the competent authority – However, the discretion vested in the competent authority is not absolute in the sense of being completely uncontrolled, whimsical or capricious – In the instant case, the bank had properly appraised the respondent's request for voluntary retirement under the scheme and its decision not to accept the request was within the legitimate exercise of discretion that did not warrant any interference by the High Court.

On December 15, 2000, the respondent made an application seeking voluntary retirement from the service of the appellant-bank under the IOB Officers and Employees Voluntary Retirement Scheme, 2000. At that

time, the respondent was working as Chief Manager (in Scale IV). He was a permanent employee with more than 15 years of service and was over 40 years of age and was eligible for making the application. The bank intimated him that his application was not accepted considering the business/organizational requirements and administrative exigencies of the bank.The respondent filed a writ petition before the High Court. The High Court allowed the writ petition on the ground that the bank had acted arbitrarily in his case and had rejected his application without according good reasons. The High Court directed the bank to reconsider the matter and take a fresh decision. The Bank constituted a committee to reconsider his request for voluntary retirement as directed by the High Court. The Committee reconsidered the matter taking into account the service record of the respondent. The Committee did not to accept the voluntary retirement application under the scheme keeping in view his exemplary track record, the specialized skill expertise, potential, training imparted, organizational requirement and administrative exigencies. The decision of the Committee was communicated to the respondent who challenged it before the High Court in writ petition. The High Court allowed the writ petition holding that the bank and its officers had acted in a highly arbitrary, discriminatory and malafide manner and had not shown any respect to the High Court by totally flouting its earlier judgment. It further held that despite the clear observation in its earlier judgment, the bank authorities had taken the stand that it was the absolute discretion of the competent authority either to accept or reject the application. The instant appeal was filed challenging the order of the High Court.

Allowing the appeal, the Court

Held: 1.1. The reasonableness of a decision or an action can only be judged in the totality of the facts and circumstances and having regard to the object and purpose sought to be achieved. If the object is to select someone for public employment or for promotion to a higher post, the only reasonable thing to do would be to select the most suitable and meritorious among the candidates. The selection of a person of inferior merit or someone who is not even eligible would be wholly unreasonable if the object is to choose the best as it should be in case of selection for public employment or promotion to a higher post. But in case an organisation undertakes manpower planning with a view to downsize the personnel and cut down the overhead costs, very different considerations would apply and in that case the application of the yard stick for selection for public employment or for promotion to a higher post would lead to results opposed to the very object of the exercise. [Para 14] [571-A-D]

Board of Trustees, Vishakhapatnam Port Trust and Ors. v. T.S.N. Raju and Anr., **(2006) 7 SCC 664 – referred to.**

1.2. The High Court committed the fundamental mistake in completely misconstruing the object and purpose of the voluntary retirement scheme. Even though depending upon personal circumstances, voluntary retirement under the scheme might have appeared to some individual officers as personally beneficial, it was not envisaged by the bank as a means to give personal rewards or to punish individual employees by granting or refusing to grant voluntary retirement to them. The objective of the scheme was to adopt measures to have optimum human resources at various levels in keeping with the business strategies, skill profile to achieve balanced age and requirement of the bank. Bearing in mind the object and purpose of the scheme, it is not

difficult to see how the competent authority in the bank would deal with the applications for voluntary retirement made by individual officers; other things being equal between two applicants he would like to let go the one with the inferior service record and lower potential and consequently he would accept the application of the officer with the lower merit and may not accept the request of the officer with superior merit. This is for the simple reason that in the process of shedding surplus manpower no organisation would like to lose its best people. From a purely subjective point of view, the decision of the competent authority may appear to be "unfair" or even a 'punishment" to the officer with the superior merit nevertheless it would be the proper and reasonable exercise of discretion in view of the basic objective of the scheme. The denial of request for voluntary retirement to an officer in practice may result in souring of relationship between the concerned officer and the bank (as it actually happened in the instant case) and as a consequence the concerned officer in future may not show the same competence and efficiency in the discharge of his duties for which he was sought to be retained in service. But that is a matter of personnel management and the competent authority is expected to factor in such considerations while taking a decision on individual applications. Such considerations would certainly not be a ground for the court to interfere with the decision of the competent authority. The discretion vested in the competent authority as stipulated in paragraph 4 under the heading 'General Conditions' (of the scheme) must be understood in this way and not absolute in the sense of being completely uncontrolled, whimsical or capricious. Seen in this light even the grant of voluntary retirement to an employee who may not be strictly eligible under the scheme may not improve the claim of another applicant who might not only be eligible but with highly superior credentials. An employee facing

a disciplinary proceeding and, therefore, ineligible under the scheme may otherwise also be completely useless. The bank may try to get rid of him by dropping the disciplinary proceeding or even by waiving the eligibility clause in his case. At worst, the action of the bank may be irregular or even invalid in case of that particular employee. But unlike a selection for appointment or promotion to a superior post, this in itself would not provide a ground to another employee (legible and with superior credentials) to claim retirement as a matter of right. It was the definite case of the bank before the High Court that no person ineligible under the scheme was granted voluntary retirement. As regards the officers/ employees who were allegedly allowed voluntary retirement even though they were given charge-sheets or show cause notices in contemplation of disciplinary proceedings, the bank in its counter affidavit had explained that the decision on their application for voluntary retirement was taken by the competent authority after "disposal" of the charge-sheets. The High Court brushed aside the plea by observing that charge-sheets were not "disposed of"; a charge-sheet may be recalled or a proceeding arising from the charge-sheet may lead either to exoneration or the finding of guilt of the concerned employee. It further observed that the statement was made for obfuscation of the matter in issue. The High Court took a highly technical view of the matter. What perhaps was meant by the bank was that the decision to accept their request for voluntary retirement was taken after the proceedings against those officers/employees were closed/dropped. Here, it may be recalled that this was quite in accordance with paragraph 10 of the "General Conditions". As regards the officers who were allegedly given special training and were, therefore, ineligible for voluntary retirement, only Mr. Anthony Joseph, Pondicherry Branch, was in Scale IV, i.e. in the same scale as the respondent. In regard to

Anthony Joseph, the bank in its rejoinder affidavit denied that he was given training in foreign exchange. There is no reason not to accept the statement made by the bank in this regard. The bank had properly appraised the respondent's claim for voluntary retirement under the scheme and its decision not to accept the request was within the legitimate exercise of discretion that did not warrant any interference by the High Court. The judgment of the High Court is unsustainable. [Paras 15, 17 to 23] [571-E-G; 573-C-H; 574-A-H; 575-A-D]

Bank of India and Anr. v. K. Mohandas and Ors., **(2009) 5 SCC 313 – relied on.**

Case Law Reference:

(2006) 7 SCC 664	**referred to**	**Para 11**
(2009) 5 SCC 313	**relied on**	**Para 16**

CIVIL APPELLATE JURISDICTION : Civil Appeal No.1186 of 2005.

From the Judgment & Order dated 03.09.2003 of the High Court of Judicature at Allahabad in Civil Misc. Writ Petition No. 6162 of 2003.

C.U. Singh, Rishi Agrawala, Gaurav Goel, Mahesh Agarwal (for E.C. Agrawala) for the Appellants.

Sanjay Kr. Dubey, Rupesh Kumar for the Respondent.

The Judgment of the Court was delivered by

AFTAB ALAM, J. 1. This appeal by special leave is directed against the judgment and order dated September 3, 2003 passed by a division bench of the Allahabad High Court on a writ petition (Civil Miscellaneous Writ Petition No.6162 of 2003) filed by the respondent who was at that time working as an officer in the appellant-bank. The High Court allowed the writ

petition filed by the respondent, quashed the decision of the bank rejecting his application for voluntary retirement under the bank's scheme and directed the appellant-bank to accept his application for voluntary retirement forthwith.

2. This Court while granting special leave to appeal, by order dated February 11, 2005, stayed the operation of the order of the High Court coming under appeal. As a result, the respondent continued in service and eventually retired on reaching the age of superannuation on June 6, 2009. He has been paid his terminal dues and is also getting regularly his monthly pension. In view of this material change in circumstances during the pendency of the appeal, we suggested that the parties should negotiate and try to come to some amicable settlement. They were, however, unable to come to terms and the respondent insisted that the appeal be heard on merits and in case it is finally dismissed, then, the Court may consider how to appropriately mould the relief in his favour. We, accordingly, proceeded to examine the respondent's claim for grant of voluntary retirement under the scheme of the bank on merits.

3. In order to examine the case of the rival sides in perspective, it would be useful to briefly state the relevant facts. The board of directors of the appellant-bank in its meeting held on November 25, 2000 approved a voluntary retirement scheme for the officers and employees of the bank, called the IOB Officers/Employees Voluntary Retirement Scheme - 2000 ("the scheme" for short). The object of the scheme was "to adopt measures to have optimum human resources at various levels in keeping with the business strategies, skill profile to achieve balanced age and requirement of the bank." The scheme remained in operation for 5 weeks from December 15, 2000 to January 19, 2001.

4. The eligibility to apply for voluntary retirement under the scheme was laid down in Clause 4. Clause 4.1 provided that all permanent employees with 15 years of service or 40 years

of age would be eligible to apply for voluntary retirement under the scheme. Clause 4.2 enumerated the six categories (from sub-clauses 'a' to 'f') that would not be eligible to seek voluntary retirement under the scheme. Under the heading 'General Conditions' it was stated, in paragraph 4, that depending upon the requirement of the bank, the competent authority would have absolute discretion, subject to recording the reasons for the decision, either to accept or reject the request of an officer/employee seeking voluntary retirement under the scheme. Paragraph 10 provided that the cases of officers/employees opting for voluntary retirement under the scheme against whom disciplinary proceedings were contemplated would be considered by the respective disciplinary authorities having regard to the facts of each case before forwarding the request of such officers/employees to the competent authority. Under the heading 'Clarifications' (in Annexure II to the Scheme), it was stated, in paragraph 2, that disciplinary proceedings would be deemed to be pending for the purpose of VRS, if the member had been placed under suspension or any notice had been issued to him to show cause why disciplinary proceedings should not be instituted against him and would be deemed to be pending until final orders were passed by the disciplinary authority.

5. On December 15, 2000, the respondent made an application seeking voluntary retirement from the service of the bank under the scheme. At that time, the respondent was working as Chief Manager (in Scale IV), Indian Overseas Bank, Allahabad. It is not disputed that he was quite eligible for making the application in that he was a permanent employee with more than 15 years of service and was over 40 years of age. Nevertheless, the bank did not accept his request and intimated him by letter dated February 21, 2001 that "the Competent Authority has decided not to accept his application considering (the) business/organizational requirements and administrative exigencies of the bank".

6. The respondent challenged the decision of the bank communicated to him vide letter dated February 21, 2001 in a Writ Petition (CMWP No.4167 of 2001) before the Allahabad High Court. In the supplementary counter affidavit filed in the case on behalf of the bank, it was stated that in Scale IV, to which the respondent belonged, there were 187 posts out of which 80 persons had applied for VRS under the scheme. The management accepted the applications of only 22 officers and the rest of the applications were rejected taking into account the various considerations, and the merits and demerits of the officers. In paragraph 6 of the supplementary counter affidavit, it was asserted that it was purely within the discretion of the bank to accept or not to accept the application of any particular officer for grant of voluntary retirement under the scheme. The High Court took exception to the stand of the bank that the matter lay purely within the discretion of the competent authority and criticised it as opposed to the mandate of Article 14 of the Constitution. The High Court also took the view that the words "taking into account the various considerations and merits and demerits of the officers" provided a very vague basis to decide whether or not to accept the application for VRS made by different officers. It also noted the allegations made on behalf of the respondent that the bank had allowed voluntary retirement even to officers against whom disciplinary proceedings were pending or contemplated and who, therefore, were not eligible under the scheme. It, accordingly, allowed the respondent's writ petition by judgment and order dated November 27, 2002 holding that the bank had acted arbitrarily in his case and had rejected his application without according good reasons. The High Court quashed the order dated February 21, 2001 and directed the bank to reconsider the matter in light of the observations made by it and take a fresh decision, on the respondent's application for grant of VRS in accordance with the law and the scheme, within 6 weeks from the date of production of a certified copy of its order.

7. The respondent submitted a copy of the High Court

order to the bank along with his representation dated December 7, 2002 whereupon the board of directors of the bank in its meeting held on January 11, 2003 constituted a committee consisting of the Chairman and Managing Director, the Executive Director and the General Manager (Personnel) to reconsider his request for voluntary retirement as directed by the High Court. The Committee in its meeting held on January 11, 2003 reconsidered the matter in great detail, taking into account the service record of the respondent. The Committee noted that the respondent was an agricultural engineering graduate and was appointed as a clerk in the bank on October 26, 1970. For his sincere and hard work, he was promoted as officer in Junior Management Grade Scale I on June 1, 1975, within 5 years of his appointment as clerk. His performance in the post was exemplary. The bank, therefore, decided to utilize his services abroad and posted him to the Hong Kong branch. Ordinarily, overseas assignments are given to Middle Management Grade Officers in Scale II and above but in the case of the respondent, who was at that time an officer in the Junior Management Grade I, he was given the assignment in view of his dedicated work and educational background. Even while serving abroad he was promoted to Middle Management Grade Scale II on July 1, 1982. After completing foreign assignment for a term, he was posted to the Lucknow region in August, 1982 and his services were utilized at the Varanasi Cantonment and Lucknow Branches. While working at Lucknow, the respondent was able to canvass a good number of deposit accounts and provided satisfactory customer service which earned him appreciation from the Zonal Manager. In view of his rich experience in Lucknow, the bank elevated him in position and posted him as Senior Manager in the Kankhal branch, which was selected by the Bank Management as the best branch during his tenure. The Committee further noted that considering his potential and ability the bank provided him various in-house and external trainings. He was promoted to the Middle Management Grade III during 1992 and further promoted to the Senior Management

Grade Scale IV in the year 1998. His services were well utilized not only to core banking but also in specialized areas like foreign exchange, overseas trading, etc. and he had a track record of unblemished service. He had scored good ratings in all confidential reports. He had been given good exposure including foreign postings and had a lot of potential. Therefore, the bank did not want to lose the benefit of his services. The Committee concluded that keeping in view the past track record, the specialized skill expertise, potential, training imparted, organizational requirement and administrative exigencies, the services of the respondent were required for the development of the bank and hence, resolved not to accept the voluntary retirement application under the scheme. The decision of the Committee was communicated to the respondent who once again challenged it before the High Court in Civil Miscellaneous Writ Petition No.6162 of 2003.

8. In the second round of litigation, the appellant-bank, while resisting the writ petition filed by the respondent before the High Court on merits, once again referred to paragraph 4 of the General Conditions of the scheme, taking the stand that the acceptance or rejection of the request for voluntary retirement under the scheme lay within the absolute discretion of the competent authority.

9. The rejection of the respondent's application for voluntary retirement by the bank for the second time and the reiteration that the matter was within the absolute discretion of the competent authority, seems to have offended the High Court and it wrote a rather angry judgment. The High Court observed that the bank and its officers had acted in a highly arbitrary, discriminatory and malafide manner and had not shown any respect to the High Court by totally flouting its earlier judgment. It further said that despite the clear observation in its earlier judgment, the bank authorities had again "dared" to take the stand that it was the absolute discretion of the competent authority either to accept or reject the application. The court

went on to say that the Chief Regional Manager of the bank who had filed the counter affidavit had absolutely no respect for the High Court and further that the court was at first inclined to issue a notice of contempt to him for invoking the absolute discretion of the competent authority which, according to the High Court, amounted to grossly contemptuous averments. The High Court, however, refrained from issuing any contempt notice assuming in his favour that he was probably not able to understand what he said in the affidavit. Adverting to the merits of the case, the court accepted the respondent's allegations that even while his request was turned down many officers who were not eligible were granted voluntary retirement under the scheme. The court held that the bank authorities had adopted a 'pick and choose' policy in accepting and rejecting the applications made by different officers/employees for grant of voluntary requirement. The High Court in its judgment (at page 19 of the SLP paper book) gave a list of employees, who, according to the respondent, were allowed voluntary retirement even though they were charge-sheeted or given show cause notice in contemplation of disciplinary proceedings and who were, therefore, ineligible in terms of Clause 4.2(c) of the scheme. The High Court gave another list of officers/employees (at page 20 of the SLP paper book) who, according to the respondent, were granted voluntary retirement even though they were given specialized training in the area of credit and foreign exchange and were, for that reason, ineligible in terms of clause 4.2(e) of the scheme. The High Court observed that the bank acted in a highly arbitrary and discriminatory manner by allowing voluntary retirement to officers/employees who were ineligible under the scheme and on the other hand denying it to the respondent who according to its own showing had a sterling record. In this connection, the High Court made the following observation:

> "In our opinion the petitioner is fully eligible for VRS, 2000, and his application has been rejected arbitrarily and has been discriminated again. He has also been unnecessarily harassed by the respondents, as stated in para 18 of the petition by first transferring him to Chennai during the pendency of his writ petition and then posting him under an officer 3 years his junior.
>
> The respondents themselves have admitted that the petitioner has been working with utmost sincerely (sic), honestly and diligence in discharging his duties in the bank. *It seems that the policy of the bank is to punish the good, honest and competent officers and to reward those who are not. This, in our opinion, will lead to total demoralization of the good, honest and competent officers and employees of the bank if it is permitted to continue any further. The VRS scheme was floated for giving the benefit to the good officers and not for those who are having a bad service record, but it seems that the Bank in total disregard of the scheme has adopted a policy of pick and choose. Thus merit has in fact become demerit in the Bank. Those who are competent are denied VRS but those having a bad record are being given benefit of the VRS."*
>
> (emphasis added)

10. Proceeding thus, the High Court allowed the respondent's writ petition and by judgment and order dated September 3, 2003, set aside the decision of the appellant-bank not to accept the respondent's request for voluntary retirement and observing that any further remand would not serve any useful purpose, the High Court went on to direct the bank to accept the respondent's application for grant of voluntary retirement.

11. Mr. C.U. Singh, learned senior counsel appearing for the appellant-bank submitted that the High Court was in grave error in reviewing the bank's decision on the respondent's application for voluntary retirement as an appellate authority and substituting its own decision for that of the bank. Mr. Singh

further submitted that the High Court was equally in error in denying to the competent authority in the bank the absolute discretion for accepting or rejecting the request for voluntary retirement made by an officer of the bank as expressly stipulated in the scheme. Learned counsel asserted that in the matter of voluntary retirement under the scheme, the bank has an absolute discretion to grant or reject the request and the legal position in this regard was settled by this Court. In support of the submission he referred to a decision of this Court in Board of Trustees, Vishakhapatnam Port Trust and Ors. v. T.S.N. Raju and Anr., (2006) 7 SCC 664, and relied upon the observations made in paragraphs 22, 33 and 34, which are as under:

> "22. In our opinion, under the Scheme, the Chairman of the Port Trust has an absolute right either to accept or not to accept the applications filed by the employees for retirement under the voluntary retirement scheme…
>
> 33. In our opinion, the Chairman is competent to frame the scheme having regard to the exigencies of work and no one can claim voluntary retirement as of right. The learned Judges of the High Court have also not seen that the respondent's application for voluntary retirement cannot be considered in view of the seniority of service of the employees concerned.
>
> 34. In our opinion, the request of the employees seeking voluntary retirement was not to take effect until and unless it was accepted in writing by the Port Trust Authorities. The Port Trust Authorities had the absolute discretion whether to accept or reject the request of the employee seeking voluntary retirement under the scheme. There is no assurance that such an application would be accepted without any consideration. The process of acceptance of an offer made by an employee was in the discretion of the Port Trust. We, therefore, have no hesitation in coming to the conclusion that VRS was not a proposal or an offer but merely an invitation to treat and the applications filed by the employees constituted an offer."

12. The decision relied upon by Mr. Singh evidently supports his contention but the observations made by this Court as quoted above need to be understood in the context of the case. In the case of T.S.N. Raju, the Chairman of the Port Trust made a review on the implementation of the scheme for voluntary retirement and keeping in view the concern expressed by the Secretary, Department of Shipping, Ministry of Surface Transport, Government of India, took the decision that the request for voluntary retirement under the scheme should be considered only in case of employees who were below the age of 58 years. The application of T.S.N. Raju (and another respondent in that case) came up for consideration after they had crossed the age of 58 years and were accordingly rejected on the basis of the decision of the Chairman. They challenged the action of the Port Trust in rejecting their request for voluntary retirement, taking the plea before the court that the Port Trust had no discretion to reject their request to take retirement under the voluntary retirement scheme except in cases of the exigencies of service or the compelling necessities or the indispensability of the employees concerned. It was to rebut such sweeping assertion of right that this Court made the observation that under the scheme, the Chairman of the Port Trust had the absolute right to accept or not accept the request for voluntary retirement under the scheme.

13. The observations made in T.S.N. Raju do not mean that this Court endorsed or approved the discretion vested in the employer (be it the Port Trust or the bank) as absolute in the manner of an unruly horse prancing beyond the control of anyone or anything. In the 62nd year of the Republic, it is rather late in the day for the State or any of the State's agencies or instrumentalities to claim absolute discretion, like the discretion of a despot or a discretion completely divorced from reasonableness.

14. But at the same time, it must also be realized that reasonableness is not something in the abstract. The reasonableness of a decision or an action can only be judged in the totality of the facts and circumstances and having regard to the object and purpose sought to be achieved. For example, if the object is to select someone for public employment or for promotion to a higher post, the only reasonable thing to do would be to select the most suitable and meritorious among the candidates. The selection of a person of inferior merit or someone who is not even eligible would be wholly unreasonable if the object is to choose the best as it should be in case of selection for public employment or promotion to a higher post. But in case an organisation undertakes manpower planning with a view to downsize the personnel and cut down the overhead costs, very different considerations would apply and in that case the application of the yard stick for selection for public employment or for promotion to a higher post would lead to results opposed to the very object of the exercise.

15. We feel that the High Court committed the fundamental mistake in completely misconstruing the object and purpose of the voluntary retirement scheme. As wrongly assumed by the High Court, the object of the scheme was not to reward the good officers or to punish the bad ones. Even though depending upon personal circumstances, voluntary retirement under the scheme might have appeared to some individual officers as personally beneficial, it was not envisaged by the bank as a means to give personal rewards or to punish individual employees by granting or refusing to grant voluntary retirement to them. The objective of the scheme as stated in the circular issued by the bank was "to adopt measures to have optimum human resources at various levels in keeping with the business strategies, skill profile to achieve balanced age and requirement of the bank".

16. In *Bank of India and Anr. v. K. Mohandas and Ors.,* (2009) 5 SCC 313, one of us (Lodha, J.) had the occasion to examine the genesis and raison d'être of the voluntary scheme

framed by the banks; in that judgment it was observed, in paragraphs 3, 4, 5 and 36, as follows:

> "3. In the month of May, 2000, Government of India, Ministry of Finance (Banking Division), advised the nationalized banks to carry out detailed manpower planning as these banks were found to have 25% of their manpower as surplus. A Human Resource Management Committee was constituted to examine the said issue and to suggest suitable remedial measures.
>
> 4. The Committee so constituted observed that high establishment cost and low productivity in public sector banks affect their profitability and it was necessary for these banks to convert their human resources into assets compatible with business strategies. Inter alia, the Committee placed the draft voluntary retirement scheme with the Central Government that would assist the banks in their efforts to optimize their human resources and achieve a balanced age and skills profile in keeping with their business strategies.
>
> 5. With the approval of the Central Government, Indian Banks' Association (IBA) circulated salient features of the draft scheme to the nationalized banks for consideration and adoption by their respective boards vide its letter dated 31-8-2000. The Board of Directors of each of the nationalized banks, keeping in view the objectives, considered the draft scheme and adopted it separately.
>
> 36. Any interpretation of the terms of VRS 2000, although contractual in nature, must meet the test of fairness. It has to be construed in a manner that avoids arbitrariness and unreasonableness on the part of the public sector banks who brought out VRS 2000 with an objective of rightsizing their manpower. *The banks decided to shed surplus manpower. By formulation of the special scheme (VRS 2000), the banks intended to achieve their objective of*

rationalising their force as they were overstaffed. The special Scheme was, thus, oriented to lure the employees to go in for voluntary retirement. In this background, the consideration that was to pass between the parties assumes significance and a harmonious construction to the Scheme and the Pension Regulations, therefore, has to be given." (emphasis added)

17. Bearing in mind the object and purpose of the scheme as explained in the decision in Bank of India it is not difficult to see how the competent authority in the bank would deal with the applications for voluntary retirement made by individual officers; other things being equal between two applicants he would like to let go the one with the inferior service record and lower potential and consequently he would accept the application of the officer with the lower merit and may not accept the request of the officer with superior merit. This is for the simple reason that in the process of shedding surplus manpower no organisation would like to lose its best people.

18. From a purely subjective point of view the decision of the competent authority may appear to be "unfair" or even a 'punishment" to the officer with the superior merit nevertheless it would be the proper and reasonable exercise of discretion in view of the basic objective of the scheme. We are not unconscious that the denial of request for voluntary retirement to an officer in practice may result in souring of relationship between the concerned officer and the bank (as it actually happened in this case) and as a consequence the concerned officer in future may not show the same competence and efficiency in the discharge of his duties for which he was sought to be retained in service. But that is a matter of personnel management and the competent authority is expected to factor in such considerations while taking a decision on individual applications. Such considerations would certainly not be a ground for the court to interfere with the decision of the competent authority. The discretion vested in the competent

authority as stipulated in paragraph 4 under the heading 'General Conditions' (of the scheme) must be understood in this way and not absolute in the sense of being completely uncontrolled, whimsical or capricious.

19. Seen in this light even the grant of voluntary retirement to an employee who may not be strictly eligible under the scheme may not improve the claim of another applicant who might not only be eligible but with highly superior credentials. An employee facing a disciplinary proceeding and, therefore, ineligible under the scheme may otherwise also be completely useless. The bank may try to get rid of him by dropping the disciplinary proceeding or even by waiving the eligibility clause in his case. At worst the action of the bank may be irregular or even invalid in case of that particular employee. But unlike a selection for appointment or promotion to a superior post, this in itself would not provide a ground to another employee (legible and with superior credentials) to claim retirement as a matter of right.

20. In this case, however, we need not go into that aspect of the matter because it was the definite case of the bank before the High Court that no person ineligible under the scheme was granted voluntary retirement. As regards the officers/employees who were allegedly allowed voluntary retirement even though they were given charge-sheets or show cause notices in contemplation of disciplinary proceedings, the bank in its counter affidavit had explained that the decision on their application for voluntary retirement was taken by the competent authority after "disposal" of the charge-sheets. The High Court brushed aside the plea by observing that charge-sheets were not "disposed of"; a charge-sheet may be recalled or a proceeding arising from the charge-sheet may lead either to exoneration or the finding of guilt of the concerned employee. It further observed that the statement was made for obfuscation of the matter in issue.

21. We are of the view that the High Court took a highly technical view of the matter. What perhaps was meant by the bank was that the decision to accept their request for voluntary retirement was taken after the proceedings against those officers/employees were closed/dropped. Here, it may be recalled that this was quite in accordance with paragraph 10 of the "General Conditions".

22. As regards the officers who were allegedly given special training and were, therefore, ineligible for voluntary retirement, only Mr. Anthony Joseph, Pondicherry Branch, was in Scale IV, i.e. in the same scale as the respondent. In regard to Anthony Joseph, the bank in its rejoinder affidavit denied that he was given training in foreign exchange. We see no reason not to accept the statement made by the bank in this regard.

23. In light of the discussion made above, we are clearly of the view, that the bank had properly appraised the respondent's claim for voluntary retirement under the scheme and its decision not to accept the request was within the legitimate exercise of discretion that did not warrant any interference by the High Court. We are, therefore, constrained to hold that the judgment of the High Court coming under appeal is quite unsustainable.

24. We, accordingly, allow the appeal, set aside the impugned judgment and order passed by the High Court and dismiss the writ petition filed by the respondent.

25. There will be no order as to costs.

26. We are told that some other case(s) between the parties are pending before the High Court on some other issues. Needless to say that that case will be decided on its own merits and the decision in this appeal will not prejudice the case of the respondent.

D.G. Appeal allowed.

SUNIL SHARMA & ORS.
v.
BACHITAR SINGH & ORS.
(Civil Appeal No. 1440 of 2011)

FEBRUARY 07, 2011

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

MOTOR VEHICLES ACT, 1988:

Fatal motor accident – Claim petition – Compensation – Computation of income of deceased – Deductions – Multiplier – Compensation towards revision in pay, loss of love and affection and consortium – Held : Deduction from the income of deceased towards HRA, CCA, EPF, GIS, medical allowance should not have been made by Tribunal – As deceased was married, 1/3rd should be deducted from her income towards personal expenses – Annual income of deceased, thus, calculated to Rs. 1,89,640/- – Addition of 30% by way of future prospects allowed – Deceased being 41 years of age, multiplier 14 to be applied – Accordingly compensation calculated to Rs. 22,34,960/- – Further, a sum of Rs. 25,000/- awarded towards loss of love and affection and consortium – Thus, total compensation payable to claimants rounded off to Rs. 22,60,000/- with 6% interest from date of filing of claim petition – Respondents jointly and severally liable to make the payment.

The legal heirs and dependants of a victim of fatal motor accident filed a claim petition before the Motor Accident Claims Tribunal, claiming Rs.40,00,000/- as compensation. The deceased was 41 years of age at the time of the accident and was employed. The Tribunal deducted House Rent Allowance, City Compensatory Allowance and Medical allowance etc and calculated her total carry home salary to be Rs.10,000/- (annual

equivalent being Rs.1,20,000/-. It made further deduction of 40% towards personal expenses and, applying the multiplier 11, awarded Rs.7,92,000/- as compensation along with 6% interest. The High Court applied the multiplier of 14 and accordingly enhanced the compensation by a further sum of Rs.2,16,000/-

In the instant appeal filed by the claimants, it was contended for the appellants that the Tribunal should not have deducted HRA, CCA, EPF, contribution towards Group Insurance Scheme, and repayment of computer advance from the income of the deceased; that the deduction of 40% towards personal expenses was not correct; that the revision of pay scale which had come into force before the death of the victim should have been taken into consideration; and that compensation towards loss of love and affection, consortium and funeral rites should also have been allowed.

Partly allowing the appeal, the Court

HELD:

(a) <u>Computation of Income</u> :

1.1 The deductions made by the Tribunal on account of HRA, CCA and medical allowance are done on an incorrect basis and should have been taken into consideration in calculation of the income of the deceased. Further, deduction towards EPF and GIS should also not have been made in calculating the income of the deceased. However, the computer advance should not form a part of the monthly income. The monthly income of the deceased thus amounts to Rs.15,351/-. Accordingly, the annual income of the deceased would amount to Rs. 1,84,212/-. [para 11-12] [583-B-C]

Raghuvir Singh Matolya & Ors. v. Hari Singh Malviya &

Ors., **2009 (5) SCR 379 =(2009) 15 SCC 363 and** *Sarla Verma (Smt.) and others v. Delhi Transport Corporation & Anr.,* **2009 (5) SCR 1098 =(2009) 6 SCC 121 – relied on.**

(b) <u>Deduction for Personal Expenses</u> :

1.2 As the deceased was married, a deduction of 1/3rd should be made to her income by way of personal expenses. After such deduction, the income of the deceased would thus amount to Rs.1,22,808/-, which is rounded off to Rs.1,22,800/-. [para 14] [583-G-H]

(c) <u>Revision in Pay Scale</u> :

1.3 In *Sarla Verma* this Court laid down a 'rule of thumb' with respect to addition in income due to future prospects and observed that the addition should be only 30% if the age of the deceased was 40 to 50 years. In the instant case, the deceased was aged 41 years. Thus, an addition of 30% by way of future prospects is allowed. The annual income of the deceased would thus be Rs.1,59,640/-. Considering the age of the deceased, a multiplier of 14 is to be applied. Accordingly, annual dependency comes to Rs.22,34,960/-. [para 15-16] [584-A-C]

<u>Compensation for Loss of Love and Affection and Consortium</u>:

1.4 In cases of fatal motor accidents, some amount must always be awarded by way of compensation for loss of love and affection and consortium. It is of course impossible to compensate for the loss of a life, in the instant case, that of a wife and mother, in terms of money. However, a sum of Rs.25,000/- is awarded for loss of love and affection and consortium. [para 17] [534-D-E]

1.5 Thus, total compensation payable to the claimants-appellants would be Rs.22,59,960/- which is

rounded off to Rs.22,60,000/- with interest at the rate of 6% from the date of filing the claim petition. The respondents are jointly and severally liable to make the payment. [para 18 and 20] [534-F-G]

Case Law Reference:

2009 (5) SCR 379	**relied on**	**para 9**
2009 (5) SCR 1098	**relied on**	**para 13**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1440 of 2011.

From the Judgment & Order dated 07.08.2009 of the High Court of Punjab & Haryana at Chandigarh in First Appeal No. 2662 of 2008.

Ashwani Kumar, Kalyan V. for the Appellants.

Manjeet Chawla for the Respondents.

The Judgment of the Court was delivered by

GANGULY, J. 1. Leave granted.

2. On 2.08.2006, around 4.40 PM, one Mrs. Sunita Sharma (aged 41 years) was returning to Panchkula from Chandigarh on her scooter, when the offending vehicle (a Tata 407 bearing registration no. HR-58-5649) driven by the second respondent hit her and ran over her. She was declared dead when taken to hospital.

3. Legal heirs of the deceased, her husband and two children, filed a claim petition before the Motor Accident Claims Tribunal (MACT) claiming Rs.40,00,000/- as compensation, along with interest @ 24% p.a.

4. MACT awarded total compensation of Rs.7,92,000/-. It calculated the same by arriving at gross salary of Rs.14,541/-

(based on salary certificate provided by Haryana Women Development Corporation Ltd.), the employer of Mrs. Sunita Sharma. From the same, Rs.1310/- was deducted on various accounts- she was an income tax assessee, was paid HRA amounting to Rs.885/-, CCA Rs.200/- and medical allowance Rs.250/-. MACT concluded that these sums could not be taken into account in the total salary of Sunita. Thus, her total carry home salary was taken to be Rs.10,000/- (annual equivalent being Rs.1,20,000/-). A deduction of 40% was made for personal expenses, as she was a working woman and was also maintaining a scooter. Thus, dependency was calculated at Rs.72,000/-, to which a multiplier of 11 was applied. Hence, compensation was calculated at Rs.7,92,000/- along with interest at the rate of 6% p.a.

5. Aggrieved by the award of MACT, the claimants filed an appeal before the High Court of Punjab and Haryana for enhancement of compensation. The High Court applied the multiplier of 14, instead of 11 applied by MACT. The High Court took annual dependency same as that calculated by MACT, i.e. Rs.72,000. Accordingly, High Court awarded Rs.2,16,000/- over and above what was awarded by MACT.

6. Still aggrieved, the claimants filed the present appeal before this Court. The claimants, appellants in the present appeal, contended that:

a. MACT should not have deducted HRA, CCA, EPF Group Insurance Scheme and computer advance from the income of the deceased and these deductions should not have been upheld by the High Court.

b. Deduction of 40% for personal expenses, which was upheld by the High Court, was not correct.

c. MACT and the High Court did not take into consideration the revision in pay scale of the

deceased that came into force from January 2006 (before her death) while calculating her income.

d. High Court did not grant any compensation for loss of love and affection, consortium and expenses towards funeral rites of the deceased.

7. We have heard the parties and perused the evidence on record, along with the judgments of the Tribunal and High Court. We now proceed to deal with each point separately.

a. Computation of Income

8. In the case of *National Insurance Co. Ltd. v. Indira Srivastava & Ors.* [AIR 2008 SC 845], S.B. Sinha J, has observed that "The term 'income' has different connotations for different purposes. A court of law, having regard to the change in societal conditions must consider the question not only having regard to pay packet the employee carries home at the end of the month but also other perks which are beneficial to the members of the entire family. Loss caused to the family on a death of a near and dear one can hardly be compensated on monitory terms." His Lordship also stated that if some facilities were being provided whereby the entire family stood to benefit, the same must be held to be relevant for the purpose of computation of total income on the basis of which the amount of compensation payable for the death of the kith and kin of the applicants was required to be determined. This Court held that superannuation benefits, contributions towards gratuity, insurance of medical policy for self and family and education scholarship were beneficial to the members of the family. This Court clarified that by opining that 'just compensation' must be determined having regard to the facts and circumstances of each case. The basis for considering the entire pay packet is what the dependents have lost in view of death of the deceased. It is in the nature of compensation for future loss towards the family income" and that "the amounts, therefore, which were required to be paid to the deceased by his

employer by way of perks, should be included for computation of his monthly income as that would have been added to his monthly income by way of contribution to the family as contradistinguished to the ones which were for his benefit. We may, however, hasten to add that from the said amount of income, the statutory amount of tax payable thereupon must be deducted."

9. In *Raghuvir Singh Matolya & Ors. v. Hari Singh Malviya & Ors.,* [(2009) 15 SCC 363], this Court has observed that dearness allowance and house rent allowance should be included for computation of income of the deceased.

10. In the present case, Haryana Women Development Corporation Ltd. certified that the deceased had drawn her salary for the month of July, 2006 as under:

Basic Pay	-Rs.7,100/-
D.P	-Rs.3,550/-
D.A.	-Rs.2,556/-
HRA	-Rs.885/-
CCA	-Rs.200/-
Med. Allowance	-Rs.250/-
Gross Total	**-Rs.14,541**
Deduction	
EPF	-Rs.780/-
GIS	-Rs.30/-
Computer Advance	-Rs.500/-
Total Deduction	**-Rs.1.310/-**

Net Payable= Rs.14,541 - Rs.1,310 = Rs.13,231/-

11. Based on the aforementioned judgments, we are of the view that deductions made by the Tribunal on account of HRA, CCA and medical allowance are done on an incorrect basis and should have been taken into consideration in calculation of the income of the deceased. Further, deduction towards EPF and GIS should also not have been made in calculating the income of the deceased.

12. Thus, we calculate the income of the deceased by taking the abovementioned allowances into consideration. However, the computer advance should not form a part of the monthly income. The monthly income of the deceased thus amounts to Rs.15,351/-. Thus, the annual income of the deceased would amount to Rs. 1,84,212/-.

b. Deduction for Personal Expenses

13. The Tribunal deducted 40% from the income of the deceased by way of personal expenses and the same was upheld by the High Court. We are of the view that both courts erred in doing the same in light of the judgment in the case of *Sarla Verma (Smt.) and others v. Delhi Transport Corporation & Anr.,* [(2009) 6 SCC 121], wherein this Court held:

> "we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased, should be one-third (1/3rd) where the number of dependent family members is 2 to 3, one-fourth (1/4th) where the number of dependent family members is 4 to 6, and one-fifth (1/5th) where the number of dependent family members exceed six."

14. Hence, we hold that as the deceased was married, a deduction of 1/3rd should be made to her income by way of personal expenses. After such deduction, the income of the deceased would thus amount to Rs.1,22,808/-, which we round off to Rs.1,22,800/-.

c. Revision in Pay Scale

15. In *Sarla Verma* (supra), this Court laid down a 'rule of thumb' with respect to addition in income due to future prospects. This Court observed that the addition should be only 30% if the age of the deceased was 40 to 50 years.

16. In the present case, the deceased was aged 41 years. Thus, we allow an addition of 30% by way of future prospects. The annual income of the deceased would thus be Rs.1,59,640/-. Considering the age of the deceased, a multiplier of 14 is to be applied. Accordingly, annual dependency comes to Rs.22,34,960/-.

d Compensation for Loss of Love and Affection, Consortium, Funeral Rites

17. In cases of fatal motor accidents, some amount must always be awarded by way of compensation for loss of love and affection and consortium. It is of course impossible to compensate for the loss of a life, in the present case, that of a wife and mother, in terms of money. However, we can make an attempt to do so. Accordingly we award Rs.25,000/- for loss of love and affection and consortium.

18. Thus, total compensation payable to the claimants-appellants is Rs.22,59,960/- which is rounded off to Rs.22,60,000/- with interest at the rate of 6% from the date of filing the claim petition.

19. Accordingly the appeal of the claimants-appellants is allowed to the extent indicated above.

20. The respondents are jointly and severally liable to make the aforesaid payment, after adjusting payment, if any, is made. Such payment is to be made within three months. No costs.

R.P. Appeal partly allowed.