RAMESH

v.

STATE OF RAJASTHAN

(Criminal Appeal No. 1236 of 2006)

FEBRUARY 22, 2011

[V.S SIRPURKAR AND T.S. THAKUR, JJ.]

Penal Code, 1860 – ss. 120-B, 457, 302, 379, 404, 201, 414 and s. 34 – Double murder – RL and his wife were engaged in the business of money lending by pledging gold and silver ornaments – Robbery committed at the house-cum-shop of RL – RL and his wife found dead in the pool of blood – Four accused arrested – Trial court convicted A 1 to A 3 u/ss. 120-B, 457, 302, 379, 404 and 201 – A 1 awarded death sentence whereas A2 and A3 sentenced to life imprisonment – Accused convicted on other counts also – A 4 convicted u/ss. 201, 404 and 414 – High Court upheld the order passed by the trial court – On appeal by A 1 to A 3, held: A 3 found in possession of huge haul of gold weighing one kilo and cash immediately after theft – Ornaments recovered from A 2 and A 1 – There was an effort to melt the ornaments – Recovery of clothes and shoes of accused stained with human blood – Recovery of blood stained murder weapon at the instance of A 3 – Weapon was stained with human blood of blood group A which was the blood group of deceased – Clothes of deceased found stained with his own blood of blood group A – No explanation offered by accused of this highly incriminating circumstance – Theft of the articles, ornaments more particularly, the melting apparatus machine and Katordan and tiffin on which the name of the deceased was engraved fully established – Identification of the property also established – Investigation not tainted – Though police was not able to recover ornaments in one go, but merely because recoveries were made from the same place which was already

visited by the police, would not dispel the evidence of discovery and recovery – A4 was receiver of stolen property and had helped in melting of some of the gold items with the machines removed from the house of deceased – Conviction of A1 to A3 upheld, however, no evidence as to who was the actual author of the injuries on the deceased though all the three were participants of the crime – Thus, death sentence awarded to A 3 modified to life imprisonment and life imprisonment imposed on A1 and A2 upheld – Sentence/Sentencing.

Sentence/Sentencing – Death sentence – Award of – Commission of double murder – Award of death sentence to A 3 by courts below – On appeal held: Though it was a double murder, but it could not be said to be brutal, grotesque and diabolical – Crime could not be said to be of enormous proportion – A 3 was not in a dominating position – It was a murder of gains – Case was purely based on circumstantial evidence – No definite evidence about the acts on the part of each of the accused – Difficult to say that A 3 alone was author of injuries on the deceased – A 3 was young and this was his first proved offence – It could not be said that there was no possibility of reformation of A 3 – It was not established that alternative punishment of life imprisonment would be futile and would serve no purpose – Also, it could not be established that hairs in the hands of the deceased belonged to A 3 – A 3 languishing in death cell for more than 6 years – Thus, death sentence is modified to life imprisonment.

'RL' alongwith his wife 'SD' were engaged in the business of money lending by pledging gold and silver ornaments and were selling steel utensils. On the fateful day, they were found lying dead in the pool of blood. According to the prosecution, A-1 conspired with A-2, A-3 and A-4 to commit a robbery at the place of 'RL'. They trespassed into the house of 'RL' by night and looted the house and decamped with the looted ornaments, cash

and other articles. Both the deceased persons had human hair in their hands. A blood-stained needle and syringe was found near the dead body of 'SD'. The clothes of the deceased persons and some other materials were seized. The accused persons as also accused No. 4 were arrested. The murder weapon 'Jharbad' was recovered from A-3. The clothes and the shoes worn by the accused at the time of incident as also the ornaments stolen from the house of 'RL' were recovered. The stolen gold ornaments were melted at the house of A-4 and converted into a nugget (Dhalia). The instrument used for melting ornaments was found at the house of accused No. 4 which was allegedly stolen from the house of deceased 'RL'. The materials were sent for investigations and reports were obtained. The trial court convicted A-1, A2 and A3 for the offences punishable under Sections 120-B, 457, 302, 379, 404 and 201 IPC. A-3 was sentenced to death, whereas A1 and A2 were awarded life imprisonment. On appeal, the High Court upheld the order of conviction and sentence of A-1, A2 and A3. A-4 was convicted for the offence punishable u/ss. 201,404 and 414 IPC and sentenced accordingly by the courts below. Therefore, A1, A2 and A3 filed the instant appeals.

Dismissing the appeals, the Court

HELD: 1.1. The instant case depends upon circumstantial evidence and, as such every circumstance would have to be proved beyond reasonable doubt and further the chain of circumstances should be so complete and perfect that the only inference of the guilt of the accused should emanate therefrom. At the same time, there should be no possibility whatsoever of the defence version being true. Both the courts below have held that such circumstances are proved by the prosecution and that the only inference flowing therefrom would be that of the guilt on the part of the three accused persons. The

scope for interference in factual findings by this Court is very limited. This Court would, under such circumstances, examine whether the findings are pervert or impossible. The instant case is not a case of a single accused, and, therefore, the incriminating circumstances would have to be individually weighed vis-à-vis each accused and it would have to be seen as to whether such examination justifies the conviction of the accused as ordered by the trial court and the appellate court. [Para 10] [605--D-E]

1.2. The courts came to the conclusion that A4 knew or had reason to know that the offence had been committed. He not only tried to screen the offence by melting the ornaments but was found in possession of the stolen property like the ornaments and the gold ingots. It was on this basis that A4 was convicted for offences under Sections 201 and 404 as also Section 414 IPC. There was a definite connection between A-4 and the other accused A-1. Very surprisingly, the finding regarding the ornaments received by A4 coming from A3 and fellow accused has not been challenged in any of the appeals. If the ornaments were found to be belonging to 'RL' as they were kept in the tiffin on which the name of 'RL' was engraved and further if A4 had given no explanation, it was obvious that the ornaments proceeded from A3 and his fellow accused to A4 with the sole objective of melting the ornaments. A4 knew that it was stolen property and had accepted the same. In such circumstances, it was incumbent upon the other accused being A-1, A-2 and A-3 to challenge at least the finding against A4 even if A4 had not challenged his conviction. The finding given against A4 regarding the stolen property having been given to him by accused A3 ought to have been challenged. There was no challenge on this major circumstance with the result that it is now the

factual situation that the ornaments stolen from 'RL' house and the other connecting materials like tiffin were passed on to A 4. [Para 11] [607-C-H; 608-A-B]

1.3. The submission that there was no theft or that the prosecution had not proved that any theft was committed at 'RL's house was not made even before the trial court or the appellate court. However, the submission fails on the simple ground that the ornaments found with A4 were kept in a tiffin bearing the name of 'RL'; that A4 could not give any explanation of the huge amount of ornaments melted and other things found in his possession; that there was also a Katordan which was found by the Investigating Officer with A1 though there is some controversy as to from which accused the said Katordan bearing the name of 'RL' was found; that the Katordan did belong to 'RL' and there is no explanation whatsoever as to how the Katordan came out of the house of 'RL'; and that the huge amount of gold which was found with A3 being 1347 gms. (some ornaments being intact and some turned into gold ingots for which there was virtually no explanation, as also the ornaments found with A1 and A2 without any reasonable explanation). It does not stand to reason that the police must have collected all these ornaments from the house of 'RL' after the murder and planted the ornaments without any purpose. [Para 13] [608-D-H; 609-A]

1.4. Considering the case of A-3 whose complicity has been held to be proved, the submission that there were some minor contradiction with regard to the date, time and place of the discoveries and recoveries are of no consequence. It is sufficiently proved by the prosecution that when A-3 was arrested, he was having a black bag containing huge amount of gold ornaments and cash. This is all the more true as there is absolutely

no explanation by A-3 for the possession of the huge haul of gold. Therefore, the so-called contradictions in the evidence of PW-10, PW-19 and PW-33 are not impressive. The High Court and the trial court were correct in holding that a huge haul of gold was found weighing 1347 gms., which is more than a Kilo of gold. [Para 14] [609-A-H; 610-A-D]

1.5. It is clear from the evidence that prosecution had proved its case against A-3 that he was involved in the robbery which was clear from the human blood detected on his clothes and shoes and the murder weapon which was recovered at his instance. The murder weapon was found stained with human blood and its blood group was shown to be 'A'. The clothes of 'RL' were stained with his own blood which was of group 'A'. This is a very weighty circumstance against A-3 and there is absolutely no explanation offered by A-3 of this highly incriminating circumstance. The courts below accepted the recoveries and the discoveries. In addition, A-3 was found to be in possession of huge amount of gold in form of ornaments and ingots and cash, for which he had no explanation. The said articles were seized from his person. It is not understood as to why the gold would be in the form of ingots from the recovery of the gold melting apparatus from A 4. It was clear that there was effort to melt the gold. The necessity of melting the gold and the fact that the accused persons like A 4 made efforts to melt the gold and further A3 being found in possession of gold ingots which could not have been in that form lends support to the theory that A3 was in possession of the stolen property. There is no explanation by A3 even for the huge cash. He did not accept the cash belonging to him. He is not shown to be a wealthy person so as to be in possession of 1347 gms. of gold and a huge cash of about Rs. 30,000/-. All this would clinch the case against A3. [Para 15] [611-E-H; 612-A-B]

1.6. The High Court was absolutely correct in believing the recoveries and discoveries also, particularly, as against the accused A3. There may be some irregularities here and there or some casual investigation by the police, however, the investigation was not tainted. There was absolutely no reason for the police to falsely implicate A-3 and the other two accused persons. Nothing has been brought in the cross-examination of the police officers and, more particularly, the cross-examination of PW-35, Investigating Officer. [Para 16] [612-D-F]

1.7. The statement that A 1 was not participant in the crime cannot be accepted. Human blood was found on A1's shirt. His shoes were also found to be stained with human blood. It is only his pant which seems to be innocuous in the sense that no blood was found on the same. However, there is no explanation by A1 as to how his T-shirt and shoes were found to be stained with human blood. [Para 17] [612-G-H; 613-A]

1.8. The evidence of identification parade especially of PW-22-tehsildar and both the courts having accepted the evidence about the identification of ornaments which were recovered from A3, has been gone through. There is no reason to dis-believe that evidence. Therefore, it is established that A3 was undoubtedly in possession of the ornaments which ornaments can be connected with 'RL'. [Para 18] [613-F-G]

1.9. PW 30-R was the nephew of deceased 'RL'. He surfaced immediately after it was known that 'RL' and his wife 'SD' were murdered. He claimed that he had seen his maternal uncle using the chain and two rings and his aunt using four bangles and four rings and ear rings in her ears. He performed the last rites of 'RL' and 'SD'. He correctly identified the chain of maternal uncle and also the bangles of his maternal aunt. The four gold bangles

which were identified by 'R' were seized from A-2 while the chain which was identified by him was seized from A-1. PW-22 specifically stated that these ornaments were correctly identified. There is hardly any cross-examination which is worthy and can be relied upon and accepted. The cross-examination only consists of some futile suggestions. This witness had no interest against the accused or in favour of the prosecution. He was doing his duty. His evidence connects A-1 and A-2 with the crime. Therefore, the identification is accepted. The finding of the High Court that the recoveries from A-1 and A-2 of the ornaments including the identified bangles and the chain were fully proved, is accepted. There is hardly any explanation by A-1 and A-2. [Para 18] [613-G-H; 619-A-H; 615-A-D]

1.10. As regards, the submission that the police have seized the gold chain on 19.2.2003 even when they had visited the same place on 09.02.2003 for recovering the cloths on 13.02.2003 for recovering the other ornaments including the Katordan, it is quite possible that the police were not able to recover all the ornaments in one go. The High Court gave good reasons to set aside the finding of the trial court to the effect that this recovery was not proved. There is clear cut evidence on record that the ornaments which were recovered on 13.02.2003 were kept in a Katordan. The full name of deceased 'RL' was engraved on the Katordan. The recovery of Katordan would clinch the issue insofar as the identification of the ornaments is concerned. A1 had no explanation whatsoever for these ornaments or for the Katordan. A1 was also in possession of the stolen property almost immediately after the theft and was directly connected with the crime. Therefore, the prosecution has been able to prove the guilt of A1 who was not only a participant in the crime but was also found in possession of the gold ornaments including the gold chain which was clearly

identified by witness PW-30. Therefore, the finding of the High Court is upheld in that behalf and the High Court was right in dismissing the appeal of A1. Considering the oral evidence of PW-6 as also PW-35 further considering Exhibit P-35, the Katordan on which name of deceased 'RL' was engraved was undoubtedly seized from A1. [Para 19] [615-E-H; 616-A-D]

1.11. As per Exhibit P-126, A 2's T-shirt as well as pant as also his shoes were stained with human blood and further his pant and shirt were found to be stained with blood group A which was the blood group of 'RL'. This circumstance alone is sufficient to clinch the issue against A 2. Also, gold ornaments were recovered from A2 which was supported by the evidence of PW-13. However, the trial court rejected this recovery. The High Court set aside that finding and held that the recovery was fully proved. It cannot be forgotten that A2 gave no explanation about the huge amount of silver ornaments found with him. It cannot be said as to how the silver ingots weighing 205 gms. could be found unless the silver ornaments were turned into the shape of ingots. Four gold bangles were found by way of this discovery which was proved by PW-11, and in the identification proceedings bangles were correctly identified by PW-30. PW-30 and PW-22 held the identification parade. This in fact clinches the issue. The discovery made by the accused and the recovery of the ornaments in pursuance of that are completely credible, seen in the light of other evidence of his blood stained T-shirt and shoes. The counsel could not explain the finding of the blood as also the clinching evidence of the recovery of ornaments in pursuance of the discovery statement made by the accused. Therefore, even A2 would be held liable and would be held guilty for the offence alleged against him. [Para 20] [616-F-H; 617-A-G]

1.12. The theft of the articles, more particularly, the melting apparatus machine and the ornaments was fully established. The identification of the property was also established. It is not only the gold which connects the accused with the crime but also the articles like Katordan and tiffin on which the name of the deceased was engraved. The evidence clearly showed that the Katordan was seized with the ornaments in it. Further, some of the ornaments like gold bangles and the chain were actually identified and the identification evidence is accepted. [Para 22] [619-B-F]

Chandmal and Anr. v. State of Rajasthan **1976 (1) SCC 621;** *Mohd. Aman and Anr. v. State of Rajasthan etc. etc.,* **1997 (10) SCC 44;** *Mahabir Sao alias Mahadeo Sao v. The State of Bihar* **1972 (1) SCC 505;** *Inspector of Police, Tamil Nadu v. Bala Prasanna* **2008 (11) SCC 645;** *State of Rajasthan v. Raja Ram* **2003 (8) SCC 180;** *Yeshwant and Ors. v. The State of Maharashtra etc. etc.* **1972 (3) SCC 639;** *Raghunath v. State of Haryana and Anr. etc. etc.* **2003 (1) SCC 398;** *Hardyal Prem v. State of Rajasthan* **1991 Supp. (1) SCC 148;** *Manish Dixit and Ors. v. State of Rajasthan etc. etc.* **2001 (1) SCC 596;** *Subhash Chand v. State of Rajasthan* **2002 (1) SCC 702 – distinguished.**

State of M.P. v. Nisar **2007 (5) SCC 658 – referred to.**

1.13. There is no question of the principles regarding Section 27, Evidence Act. However, on facts it is found that the discoveries of all the three accused persons to be reliable in the peculiar facts of the instant case. [Para 23] [621-G-H]

Pulukari Kottaiah v. King Emperor **AIR 1947 PC 67;** *Mohd. Inayatullah v. State of Maharashtra* **1976 (1) SCC 828;** *Pohalya Motya Valvi v. State of Maharashtra* **1980 (1) SCC 530;** *Mohd;Abdul Hafeez v. State of Andhra Pradesh* **1983**

(1) SCC 143; *Ram Pal Pithwa Rahidas v. State of Maharashtra* **1994 Suppl. (2) SCC 73 – referred to.**

1.14. There is no reason to differ on the principle of honesty and fair investigation. However, there is no reason to hold that the investigation was in any way unfair. Merely because the recoveries were made from the same place which was already visited by the police, that would itself not dispel the evidence of discovery and recovery, on the basis of the peculiar evidence led in the instant case. It is true that the investigation officer should have thoroughly searched the premises of A-1 and A-2 on 09.02.2003 itself. However, if the accused agreed to discover different things on different dates and those things were actually found in pursuance of the information given by the accused, the discoveries cannot be faulted for only that reason. Thus, the conviction and sentence of A-1 and A-2 is upheld. [Paras 24 and 25] [622-F-H; 623-A-B]

2.1. The conviction of A-3 is confirmed. As regards his sentence, both the courts below have unanimously awarded death sentence to A-3 treating this to be a rarest of the rare case. The trial court held that it was A-3 who inflicted injuries on both the deceased 'RL' and 'SD'. It is only on that ground that A-3 alone was condemned to death. The reasoning given by the trial court is not satisfactory. Before awarding the death sentence, the trial court was expected to give elaborate reasons. [Paras 25 and 26] [623-B-E]

Shri Bhagwan v. State of Rajasthan **2001 (6) SCC 296;** *Suhil Murmu v. State of Jharkhand* **AIR 2004 SC 394 – referred to.**

2.2. In the instant case, none of the four circumstances relevant in awarding the death sentence are available. It is true that the murder of 'RL' and 'SD' was

cruel. However, it cannot be said to be brutal, grotesque and diabolical nor could it be said that the murder was committed in a revolting manner so as to arise intense and extreme indignation. This was not a case where A-3 was in a dominating position or in a position of trust nor could it be said to be a murder for personal reasons. This is also not a case of bride burning or dowry death which is committed in order to remarry for extracting dowry once again. Though this is a double murder, it cannot be said to be a crime of enormous proportion. A-3 could not be said to be a person in a dominating position as this is not a murder of an innocent child or a helpless woman or old or infirm person. This was undoubtedly a murder for gains. The High Court held that A 3 was having criminal record. However, no previous conviction has been proved against A-3 by the prosecution. It is apparent that the original intention was theft and on account of the deceased having been awakened, the accused persons took the extreme step of eliminating both the inmates of the house for the fear of being detected. It cannot be said that it was A-3 alone who committed the murder only because he was the one who discovered the murder weapon *Jharbad.* It is not clear from the evidence as to who was the actual author of the injuries on 'RL' and 'SD' though all the three were participants of the crime. There is no definite evidence about the acts on the part of each of the accused. Therefore, it would be difficult to say that A 3 alone was the author of injuries on 'RL' as well as 'SD'. Money was the motive. The accused person did not come from a wealthy background. On the other hand, they could not justify the possession of ornaments found with them; and they were unlikely to own the ornaments on account of their financial position. [Paras 27, 28 and 30] [624-F-H; 625-A-D; 626-D-E]

Dilip Premnarayan Tiwari v. State of Maharashtra **2010 (1) SCC 775;** *Mulla v. State of U.P.* **2010 (3) SCC 508;**

Santosh Kumar Shantibhushan Beriyar v. State of Maharashtra **2009 (6) SCC 498 – referred to.**

2.3. The instant case is purely on the circumstantial evidence. It should not be understood that in all cases of circumstantial evidence, the death sentence cannot be given. The case being dependent upon circumstantial evidence is one of the relevant considerations. It is one of the circumstances in formulating the sentencing policy. [Para 31] [627-A-D]

Santosh Kumar Shantibhushan Beriyar v. State of Maharashtra **2009 (6) SCC 498;** *Shivaji @ Dadya Shankar Alhat v. State of Maharashtra* **2008 (15) SC 269 – relied on.**

2.4. Considering the principles emanating from *Bachan Singh's* case, it cannot be said that there was no possibility of reformation of the accused persons. It is true that the accused were driven by their avarice for wealth but given a chance there is every possibility of their being reformed. In the instant case, it is not established that alternative punishment of life imprisonment would be futile and would serve no purpose. In *Santosh Kumar's* case it was held that the life imprisonment can be said to be completely futile only when the sentencing aim of reformation can be said to be unachievable. "*Therefore, being satisfied the second explanation of rarest of rare doctrine the court would have to provide clear evidence as to why the convict is not fit for any kind of reformative and rehabilitation scheme.* In the instant case, there has been no such exercise taken either by the trial court or appellate court nor any discussion is found about the life imprisonment being rendered futile and serving no purpose. [Paras 31, 32 and 33] [627-C-H; 628-A-C]

Bachan Singh v. State of Punjab **1980 (2) SCC 684;** *Santosh Kumar Shantibhushan Beriyar v. State of Maharashtra* **2009 (6) SCC 498 – relied on.**

2.5. A 3 is a young person. It must also be taken into consideration that this was the first proved offence of A 3. No other conviction has been proved against him by the prosecution. There is no reason as to why he cannot be reformed and rehabilitated. Further, this is not seen to be an offence by the organized criminals so as to affect the society as a whole. Also if the deceased 'RL' and 'SD' had not been awakened, the ghastly incident might not have occurred. [Paras 34, 35 and 36] [628-D-F-H; 629-A]

2.6. It has come in evidence that the deceased 'RL' and 'SD' had hair in their hands. The prosecution wanted to point out that it must be during the scuffle that the two dying persons might have pulled the hair of the assailants and this is how hair came in the hands of the deceased persons. It is significant to note that on scientific examination, it could not be established that hair in the hands of the deceased belonged to A 3. Though there are other clinching circumstances also to hold that A 3 and the two accused were undoubtedly the assailants. This circumstance would be considered in not confirming the death sentence. A 3 who was convicted and awarded the death sentence by the Sessions Judge in 2004 is languishing in death cell for more than six years. This also would be one of the mitigating circumstances. Thus, the death sentence awarded to A 3 would not be justified and instead is modified to life imprisonment. However, conviction for the other offences as also sentences awarded are upheld. [Paras 37, 38 and 39] [629-C-G]

Santosh Kumar Shantibhushan Beriyar v. State of Maharashtra **2009 (6) SCC 498 – relied on.**

Case Law Reference:

2007 (5) SCC 658	**Distinguished.**	**Para 21**
1976 (1) SCC 621	**Distinguished.**	**Para 22**

1997 (10) SCC 44	**Distinguished.**	**Para 22**
1972 (1) SCC 505	**Distinguished.**	**Para 22**
2008 (11) SCC 645	**Distinguished.**	**Para 22**
2003 (8) SCC 180	**Distinguished.**	**Para 23**
1972 (3) SCC 639	**Distinguished.**	**Para 23**
2003 (1) SCC 398	**Distinguished.**	**Para 23**
1991 Supp. (1) SCC 148	**Distinguished.**	**Para 23**
2001 (1) SCC 596	**Distinguished.**	**Para 23**
2002 (1) SCC 702	**Distinguished.**	**Para 23**
AIR 1947 PC 67	**Referred to**	**Para 23**
1976 (1) SCC 828	**Referred to**	**Para 23**
1980 (1) SCC 530	**Referred to**	**Para 23**
1983 (1) SCC 143	**Referred to**	**Para 23**
1994 Suppl. (2) SCC 73	**Referred to**	**Para 23**
2001 (6) SCC 296	**Referred to.**	**Para 26**
AIR 2004 SC 394	**Referred to.**	**Para 26**
2010 (1) SCC 775	**Referred to.**	**Para 29 and 36**
2010 (3) SCC 508	**Referred to.**	**Para 29**
2009 (6) SCC 498	**Relied on.**	**Paras 31, 32, 36, 37**
2008 (15) SC 269	**Relied on.**	**Para 31**
1980 (2) SCC 684	**Relied on.**	**Para 31**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1236 of 2006.

From the Judgment & Order dated 19.1.2006 of the High Court of Judicature for Rajasthan at Jodhpur in D.B. Criminal Appeal No. 625 of 2004.

WITH

Crl. Appeal Nos. 1235 & 1237 of 2006.

Sushil Kumar Jain, Puneet Jain, Gopal, Trishna, Anis Ahmed Khan, Shoaib, Ahmad Khan, M.L. Lahoty, Rana Mukherjee, Sadharth Gautam, Ankita Mishra (for Goodwill Indeevar), Manish Singhvi, D.K. Devesh, Sahil S. Chauhan, Milind Kumar, Imtiaz Ahmed, Naghma Imtiaz for the appearing parties.

The Judgment of the Court was delivered by

V.S. SIRPURKAR, J. 1. This judgment will dispose of Criminal Appeal No. 1236 of 2006 filed by Ramesh @ Gaguda (original accused No. 3), Criminal Appeal No. 1235 of 2006 filed by Bharat Kumar @ Bhatia (original accused No. 2) and Criminal Appeal No. 1237 of 2006 filed by Gordhan Lal (original accused No. 1). We shall refer to the appellants as per their position before the Trial Court. While Ramesh @ Guguda (A-3) is sentenced to death by Trial and appellate Courts, the other two accused being Bharat Kumar @ Bhatia (A-2) and Gordhan Lal (A-1) are facing the life imprisonment alongwith fines on different counts. That is how the matters have come up before us.

2. Human avarice has no limits nor does it know of any emotions. The present case is the sordid saga of the crime which emanated purely from human avarice.

3. Phalodi is a quiet Taluk place in the State of Rajasthan. Ramlal Lunawat alongwith his wife Shanti Devi was doing business of money lending by pledging gold and silver ornaments and was selling steel utensils. On 5.2.2003, Anil (PW-1) telephoned to Police Station Phalodi that the door of

the house-cum-shop of Ramlal was lying suspiciously open and nobody from the house was responding to the calls. Kishan Singh (PW-35) who was the Station House Officer of the Police Station Phalodi, reached the house alongwith some other police personnel. They found that Ramlal and his wife Shanti Devi were lying dead in the pool of blood. The FIR by Anil (PW-1) was recorded and the investigation was commenced for offences under Sections 302 and 457 of the Indian Penal Code (hereinafter called "the IPC" for short). The necessary spot panchnamas were executed and the Material Objects found on the scene were seized. It was found that both the deceased persons had human hair in their hands. There was a blood-stained needle and syringe found near the dead body of Shanti Devi. Some other materials were collected from the spot to find out the finger prints. The clothes of the deceased persons were also seized. On suspicion, the accused persons were arrested. One other accused Rajesh (original accused No. 4) was also arrested. He stands acquitted by the Courts below. The accused persons gave information under Section 27 of the Indian Evidence Act and the clothes that they were wearing at the time of incident and their shoes were recovered. The ornaments stolen from the house of Ramlal were also recovered. Their hair were also taken for comparing with the sample of hairs founded at the scene of occurrence. The instrument used for melting ornaments was found at the house of Rajesh (A-4), which was allegedly stolen from the house of deceased Ramlal. The materials were sent to the Forensic Science Laboratory (FSL), Jaipur/Jodhpur and the reports were obtained. On the completion of investigation, the chargesheet was filed against four persons.

4. Case of the prosecution is that Gordhan Lal (A-1) had some dealings with Ramlal (deceased) which was evident from the diary found from the pocket of Ramlal. The prosecution alleged that Gordhan Lal (A-1), therefore, decided to commit a robbery at the place of Ramlal, who was a rich person, and conspired with the other accused persons, namely, Bharat

Kumar @ Bhatia (A-2), Ramesh @ Guguda (A-3) and Rajesh (A-4). They trespassed into the house of Ramlal by night and looted the house and decamped with the looted ornaments of silver and gold, cash and other articles. It is alleged by the prosecution that certain stolen gold ornaments were melted at the house of Rajesh (A-4) and converted into a nugget (Dhalia). Ramesh (A-3) and Bharat Kumar (A-2) had past criminal background. They were involved in number of criminal cases for offences such as attempt to murder, house trespass, looting etc. The murder weapon 'Jharbad' was recovered from Ramesh (A-3). The chargesheet was filed for offences punishable under Sections 120-B, 302, 201, 404, 414, 457, 460/34 of the IPC as also for the offence punishable under Section 4/25 of the Arms Act against Ramesh (A-3). The evidence was led and as many as 35 witnesses came to be examined in support of the charge. Prosecution relied on 132 documents and also produced 105 articles (M.Os.).

5. The defence was that of denial and false implication. In addition to that, accused Ramesh claimed that at the time of incident, he was taking part in a Jagran in Pali. Four defence witnesses came to be examined by Ramesh (A-3) while Gordhan Lal (A-1) produced one witness. The accused persons also filed a few documents. The defence did not prevail in case of the present appellants as also Rajesh (A-4). Against Ramesh (A-3), the case was treated to be the rarest of rare case. Ramesh (A-3) was ordered to be hanged. He was also convicted for other offences punishable under Sections120-B, 457, 302, 379, 404, 201 of the IPC. On the first two counts, he was awarded 5 years' rigorous imprisonment and on the others, 1 year's rigorous imprisonment consecutively with fine of Rs.500/- on each count. He was also convicted for the offence punishable under Section 5/25 of the Arms Act and was sentenced with 1 year's rigorous imprisonment with fine of Rs.500/-. Gordhan Lal (A-1) and Bharat Kumar @ Bhatia (A-2) were convicted with the aid of Section 34, IPC but were spared by ordering them to suffer rigorous imprisonment for life.

On the other counts, the identical punishment, as was awarded to Ramesh (A-3), was awarded to them. Rajesh (A-4) was convicted for the offence punishable under Sections 201, 404 and 414 of the IPC and was sentenced to undergo 5 years' rigorous imprisonment on the first count and 1 year's rigorous imprisonment on the other counts with fine of Rs.500/- on each count. Reference was made to the High Court for confirmation of the death sentence of Ramesh (A-3) while the accused persons also filed their appeals. The appeals filed by the present three appellants and Rajesh (A-4) were dismissed by the High Court and the sentences were also confirmed. The present appellants have challenged the judgment of the High Court; however, Rajesh (A-4) has not come before us. The reference was answered in affirmative and the High Court confirmed the death sentence in case of Ramesh (A-3) and that is how the matters have come up before us.

6. Shri Sushil Kumar Jain, learned counsel appearing on behalf of Ramesh (A-3) submitted that, in the first place, there was no evidence to establish theft at the house of the deceased persons and, therefore, there was no question of any motive. The learned counsel also urged that there was no evidence to show that the articles alleged to have been recovered from the appellant Ramesh were belonging to or otherwise in possession of the deceased persons before their death. The learned counsel pointed out that the arrest and recoveries made from the appellants are doubtful since there are discrepancies in respect of the date, time and place of the arrest and recoveries made. The learned counsel also urged that the prosecution also could not connect the accused persons with the crime on the basis of FSL reports regarding the blood. Even in respect of the weapon, the learned counsel pointed out that the recovery of the murder weapon itself was doubtful. Lastly, the learned counsel urged that at any rate, it was not the rarest of rare case and as such the death sentence was not justified. Shri M.N. Krishnamani, learned senior counsel and Shri Anis Ahmed Khan, learned counsel contended on

behalf of Bharat Kumar @ Bhatia (A-2) that the evidence of recovery of clothes and shoes of Bharat Kumar @ Bhatia (A-2) was suspicious and discrepant. They also attacked the alleged recovery of silver and gold ornaments at the instance of this accused. They pointed out that the FSL report was of no consequence against this accused. Similar is the contention raised by Shri M.L. Lahoty, learned counsel appearing on behalf of Gordhan Lal (A-1). Shri Lahoty pointed out that there was nothing incriminating found against this accused and that the so-called recoveries were farcical and inconsequential. The learned counsel further pointed out that this accused could not be booked on the basis of the FSL reports.

7. All the learned counsel pointed out that the quality of investigation was extremely poor and it was a pre-determined investigation. All the learned counsel, therefore, prayed for rebuttal.

8. As against this, learned counsel appearing on behalf of the State, supported the judgment while pointing out that though this was a case based on circumstantial evidence, the prosecution had fully proved the incriminating circumstances like the recovery of ornaments stolen from the house of Ramlal, their identification and the fact that the accused persons were found in possession of the stolen articles almost immediately after the crime and, therefore, the prosecution could use the presumption under Section 114 of the Indian Evidence Act. The learned counsel also pointed out that the prosecution had proved that Rajesh, the fourth conspirator, was a receiver of stolen property and had helped in melting of some of the gold items with the machines removed from the house of Ramlal (deceased). It was also pointed out that Gordhan Lal (A-1) was aware of sound financial condition of Ramlal as he was dealing with Ramlal which was clear from the diary found from the pocket of Ramlal's body. The learned counsel also pointed out that there were some clinching circumstances in the prosecution evidence which established that all the four

accused persons were working hand-in-glove and had entered into conspiracy to commit robbery at Ramlal's place. The learned counsel, therefore, urged that the accused would be answerable to the charge of murder as they not only had conspired, but had also developed a common intention to commit that crime and had actually committed the crime of robbery and in that process had committed murder of two innocent persons.

9. As regards the sentence, the learned counsel appearing on behalf of the State urged that this was undoubtedly the rarest of rare case, where the accused persons had committed the murder for their avarice with pre-planned mind and in cold blood. The learned counsel, therefore, justified the death sentence in case of Ramesh (A-3) and life imprisonment in respect of other accused persons.

10. Before we proceed with the matter, it has to be borne in mind that this case depends upon circumstantial evidence and, as such as, per the settled law, every circumstance would have to be proved beyond reasonable doubt and further the chain of circumstances should be so complete and perfect that the only inference of the guilt of the accused should emanate therefrom. At the same time, there should be no possibility whatsoever of the defence version being true. Both the Courts below have held that such circumstances are proved by the prosecution and that the only inference flowing therefrom would be that of the guilt on the part of the three accused persons. The scope for interference in factual findings by this Court is very limited. This Court would, under such circumstances, examine whether the findings are pervert or impossible. Again, this is not a case of a single accused, and, therefore, the incriminating circumstances would have to be individually weighed vis-à-vis each accused and it would have to be seen as to whether such examination justifies the conviction of the accused as ordered by the Trial Court and the appellate Court.

11. Initially, accused No.4, Rajesh was also tried with the

accused persons. He was charged with the offence under Sections 201, 404 and 414, Indian Penal Code. While convicting him, the Trial Court has recorded certain findings convicting him of all the three offences stated above. Basically, it was alleged against Rajesh (A-4) vide Exhibit P-31, that the stolen property of gold ornament was recovered from him. Exhibit P-32 is the site plan of the recovery. Rajesh initially was roped in as the conspirator also. However, it seems that he has been absolved of the charge of conspiracy. In that behalf, it has been held by the Trial Court that he cannot be booked for that offence since it was not proved that he had joined the conspiracy to the house-breaking in the house of Ram Lal. Recording this finding, the Sessions Judge also acquitted him of the offence under Section 302 and Section 120B, IPC. Indeed there could be no offence under Section 302, IPC alleged against him as there was no evidence against him of his having taken part in the actual act of house-breaking and the assault on Ram Lal and Shanti Devi. It is only on the basis of the discovery by him of ornaments and the machinery to melt gold that he has been booked for the offence under Sections 201, 404 and 414, IPC. The Trial Court as well as the appellate Court have accepted that he voluntarily gave information vide Exhibit P-106 after his arrest on 13.2.2003. Both the Courts below have further held that in pursuance of that, he took the Panchas and the Investigating Officer and discovered ornaments substantial in number. The discovery was supported by the evidence of PW-5, Chandulal and PW-16, Madho Singh while recovery of the ornaments was also supported by the evidence of PW-35, Kishan Singh. The most significant of the articles discovered by this accused is a steel tiffin on which the name of Ramlal Lunawat was engraved. The other ornaments were weighing about 350 gms. of gold. The Courts below have held that the appellant Rajesh was aware of the incident and the circumstance as to how the steel tiffin belonging to Ramlal Lunawat along with ornaments came to his possession was not explained by him. Besides this, the High Court also noted that certain jewels coming out from the ornaments were stuck on

the melting apparatus. Therefore, the Courts came to the conclusion that the appellant knew or had reason to know that the offence had been committed. He not only tried to screen the offence by melting the ornaments but was found in possession of the stolen property like the ornaments and the gold ingots. It was on this basis that Rajesh was convicted for offences under Sections 201 and 404 as also Section 414, IPC. The High Court wrote a finding "*on the basis of the same set of evidence, it can also be safely said that the appellant Rajesh assisted other accused appellants in disposal of the property*". The High Court has specifically held that accused had not given any satisfactory explanation regarding this recovery. He was an ordinary government employee but had kept the gold ornaments in his possession knowing them to be stolen property. The Trial Court, thereafter, gave a finding that it were accused Ramesh and Rajesh together who had melted gold ornaments and prepared dhalias with it, weighing 347 gms. which have been recovered from Ramesh and Rajesh and three ladis ingots weighing 151 gms. Thus, Rajesh had received the ornaments from none-else than Ramesh (A-3) who himself was found in possession of very substantial number of ornaments including 10 dhalias, weighing 1347 gms. It was, therefore, obvious that there was a definite connection between Rajesh (A-4) and the other accused (A-1) Ramesh. Very surprisingly, the finding regarding the ornaments received by Rajesh coming from Ramesh and fellow accused has not been challenged in any of the appeals. If the ornaments were found to be belonging to Ramlal as they were kept in the tiffin on which the name of Ramlal was engraved and further if Rajesh had given no explanation, it was obvious that the ornaments proceeded from accused Ramesh and his fellow accused to Rajesh with the sole objective of melting the ornaments. Rajesh knew that it was stolen property and had accepted the same. In such circumstances, it was incumbent upon the other accused being A-1, A-2 and A-3 to challenge at least the finding against Rajesh even if Rajesh had not challenged his conviction. The finding given against Rajesh regarding the

stolen property having been given to him by accused Ramesh ought to have been challenged. There was no challenge on this major circumstance with the result that it is now the factual situation that the ornaments stolen from Ramlal's house and the other connecting materials like tiffin were passed on to Rajesh.

12. However, that by itself will not be a clinching circumstance against the three appellants. The prosecution had to prove beyond reasonable doubt that these three accused persons entered the house-cum-shop of Ramlal and then committed the murder of the two and, thereafter, decamped with the cash and substantial amount of ornaments.

13. A very strange argument was raised by Shri Sushil Kumar Jain. According to him, the prosecution had not proved that there was any theft at all. This argument was not made even before the Trial Court or the appellate Court. However, the argument must fail on the simple ground that the ornaments found with Rajesh were kept in a tiffin bearing the name of Ramlal. Rajesh could not give any explanation of the huge amount of ornaments melted and other things found in his possession. Secondly, there was also a Katordan which was found by the Investigating Officer with Gordhan (though there is some controversy as to from which accused the said Katordan bearing the name of Ramlal was found). Even if there is such a controversy the fact of the matter is that the Katordan did belong to Ramlal and there is no explanation whatsoever as to how the Katordan came out of the house of Ramlal. Thirdly, the huge amount of gold which was found with Ramesh being 1347 gms. (some ornaments being intact and some turned into gold ingots for which there was virtually no explanation, as also the ornaments found with accused Gordhan and accused Bharat without any reasonable explanation), therefore, would completely destroy the argument of learned counsel that there was no theft. It does not stand to reason that the police must have collected all these ornaments from the house of Ramlal after the murder and planted the

ornaments without any purpose for the obvious weakness of the argument. Therefore, the first argument of Shri Jain on behalf of Ramesh, (A-3) that there was no theft or that the prosecution had not proved any theft having committed at Ramlal's house must fall to the ground.

14. Considering the case of Ramesh (A-3) whose complicity has been held to be proved, Shri Sushil Kumar Jain, learned counsel for the said appellant submitted that there was contradiction with regard to the date, time and place of the discoveries and recoveries. Some minor contradictions were shown which are of no consequence. The learned counsel tried to urge that though the accused was arrested on 9.2.2003 as per Exhibit P-102A (Rojnamcha of the Police Station Phalodi), according to Inder Singh (PW-10), he was arrested on 10.2.2003. We are not impressed by this argument at all, particularly, in view of the evidence of Inder Singh (PW-10), Mahendra Pal Singh (PW-19) and Nagaram (PW-33). There is nothing wrong if the said accused was arrested somewhere and brought to the Police Station Kotwali. After all, he was carrying the huge amount of ornaments and cash on his person. If that was so, it could not have been weighed in the open market. For that, he was required to be brought to the Police Station Kotwali. Therefore, this argument that there was some contradiction in the versions, does not impress us. Similarly, the learned counsel tried to argue that as per the evidence of Inder Singh, SHO (PW-10), after arresting Ramesh (A-3), they had come straight to Nagorigate Police Station. We do not find much substance in this argument as it is sufficiently proved by the prosecution that when Ramesh (A-3) was arrested, he was having a black bag containing huge amount of gold ornaments. It does not really matter as to whether the proceedings were done at Adharshila or at Nagorigate or even at Kotwali Police Station so long as it is proved that when apprehended, Ramesh (A-3) was carrying the black bag full of ornaments and cash which has been successfully proved by the prosecution. This is all the more true as there is absolutely no explanation by

Ramesh (A-3) for the possession of the huge haul of gold. Therefore, the so-called contradictions in the evidence of Inder Singh (PW-10), Mahendra Pal Singh (PW-19) and Nagaram (PW-33) does not impress us at all. We have already observed that it could not be possible for the police to collect all the gold and to put it against the three accused persons. The learned counsel tried to argue that there is no mention in Exhibit P-44 (Memo of Arrest) of the black bags specifically. That is not correct. A look at Exhibit P-44 is sufficient to show that there was a black bag with Ramesh (A-3). After all, he was not going to carry all these instruments in his shirt pockets and pant pockets. Even if it is not mentioned, that is of no consequence. A good explanation has been given that since the bag was empty, there was no necessity of its being sealed. We accept the explanation. Therefore, we hold that the High Court and the Trial Court were correct in holding that a huge haul of gold was found weighing as much as 1347 gms., which is more than a Kilo of gold. There was also no explanation for the cash. It is also significant that Ramesh (A-3) did not claim these ornaments as his ornaments. All that the accused is suggesting is that the ornaments were not seized from him. It is impossible to accept this version of the accused.

15. This takes us to a very strong circumstance against Ramesh (A-3) i.e. the presence of human blood on his (Ramesh's) clothes. Recovery Memo (Exhibit P-41) is in respect of clothes and shoes of Ramesh (A-3). That was effected on 15.2.2003. Exhibit P-42 is a site plan of the recovery of clothes and shoes. True it is that Ramesh's house was visited by Kishan Singh (PW-35), the Investigating Officer for recovery of Jharbad. It may be that at that time the concerned police officer did not show the presence of mind by searching the house for recovery of clothes and shoes. However, that by itself will not demolish the prosecution case. It has to be borne in mind that it was in pursuance of Exhibit P-108 that the information was given by the accused regarding the clothes and shoes. While he had given the information about the weapon

of offence 'Jharbad' vide Exhibit P-103 dated 12.2.2003, we do accept that the police officer on 12.3.2003 itself, when he seized the murder weapon i.e. Jharbad, should have taken the search of the whole house. But, failure on the part of the police officer to do that would not by itself wipe out the prosecution case, particularly, in view of the fact that the articles, namely, Jharbad, pant and the shoes were found to be stained with human blood, which is clear from Exhibit P-126. We have minutely seen and examined Exhibit P-126, where it is seen that shirt and shoes of Ramesh (A-3) were stained with human blood, though the blood group could not be detected. However, some explanation was bound to be offered by Ramesh (A-3) as to how the human blood came on the shoes and on the shirt. There is no explanation which is worthy. The murder weapon, however, has been found stained with human blood and even its blood group has been shown to be 'A'. It is to be seen that the clothes of Ramlal were stained with his own blood which was of group 'A'. This is a very weighty circumstance against Ramesh (A-3) and there is absolutely no explanation offered by Ramesh (A-3) of this highly incriminating circumstance. Thus, it is clear from this evidence that prosecution had proved its case against Ramesh (A-3) that he was involved in the robbery which was clear from the human blood detected on his clothes and the murder weapon which was recovered at his instance. Shri Jain, learned counsel tried to attack the recoveries and the discoveries. However, both the Courts below have accepted the same. In addition to this, Ramesh (A-3) was found to be in possession of huge amount of gold in form of ornaments and ingots and cash, for which he had no explanation. The said articles were seized from his person. It is not understood as to why the gold would be in the form of ingots from the recovery of the gold melting apparatus from Rajesh. It was clear that there was effort to melt the gold. The necessity of melting the gold and the fact that the accused persons like Rajesh made efforts to melt the gold and further accused Ramesh being found in possession of gold ingots which could not have been in that form lends support to the theory that Ramesh was in

possession of the stolen property. There is no explanation by Ramesh even for the huge cash. He did not accept the cash belonging to him. He is not shown to be a wealthy person so as to be in possession of 1347 gms. of gold and a huge cash of about Rs. 30,000/-. All this and the further evidence that his clothes and shoes were stained in blood and the Jharbad (weapon) recovered from him was also blood stained with A group of blood would clinch the case against Ramesh. Shri Jain also very earnestly suggested that discoveries and recoveries were farcical and that in fact, some of the discoveries and recoveries were disbelieved by the Trial Court also but had been accepted by the High Court.

16. We are of the clear opinion that the High Court was absolutely correct in believing the recoveries and discoveries also, particularly, as against the accused Ramesh. There may be some irregularities here and there or some casual investigation by the police, however, we do not think that the investigation in this case was tainted. There was absolutely no reason for the police to falsely implicate Ramesh (A-3) and the other two accused persons. True it is that Phalodi is a small place and there was great tension prevailing on account of the robbery, however, that by itself will not be the reason for police to falsely implicate Ramesh (A-3) and the other two accused persons. Nothing has been brought in the cross-examination of the police officers and, more particularly, the cross-examination of Kishan Singh (PW-35), the Investigating Officer. Before going to the other cited cases, we would consider the case of Gordhan Lal (A-1).

17. In so far as accused Gordhan is concerned, Shri Lahoti, learned counsel appearing for him, led much stress on the fact that there was no blood found on Gordhan's pant and T-shirt. The learned counsel further says that it is obvious that Gordhan was not the participant in the crime. That statement is clearly incorrect. Insofar as his T-shirt is concerned, Exhibit P-126 clearly speaks that human blood was found on his shirt.

As if this was not sufficient, his shoes were also found to be stained with human blood. Therefore, Exhibit P-126 would falsify the claim on behalf of accused Gordhan that he was not connected with the crime. It is only his pant which seems to be innocuous in the sense that no blood was found on the same. However, there is no explanation by Gordhan as to how his T-shirt and shoes were found to be stained with human blood. Shri Lahoti attacked the recovery of clothes as well as the ornaments on 9.2.2003. The prosecution has relied on PW-6, Mohan Lal, PW-7, Dev Kumar and PW-11, Ajit Jain. The recovery of clothes was on 9.2.2003, while the ornaments were recovered on 13.2.2003 and 19.2.2003. It was only the gold chain which was recovered on 19.2.2003 from him. Rest of the ornaments were recovered from him and it was found at the time of recovery that the ornaments were kept in a Katordan. It is specifically mentioned therein that the name of Ramlal was engraved on the said Katordan. The learned counsel very vehemently attacked this so-called recovery which was made on 13.2.2003. The recovery appears to have been made on 09.2.2003 vide Exhibit P-38. It was only on that day that the clothes and the shoes of Gordhan were seized. On 19.2.2003, Gordhan produced the chain. It must be remembered that this was the gold chain which was identified by PW-30 Rajesh in the identification parade by PW-22, Jitendra Kumar Pandey Tehsildar, Phalodi.

18. We have gone through the evidence of identification parade especially of PW-22, Jitendra Kumar Pandey and both the Courts having accepted the evidence about the identification of ornaments which were recovered from Ramesh. We do not find any reason to dis-believe that evidence. Therefore, it is established that Ramesh was undoubtedly in possession of the ornaments which ornaments can be connected with Ramlal. In this behalf, we must refer to the evidence of Rajesh who claimed in his evidence that he identified the chain of his maternal uncle. It is to be seen that Rajesh was the nephew of deceased Ramlal. He surfaced

immediately after it was known that Ramlal and his wife Shanti Devi were murdered. He claimed that he had seen his maternal uncle using the chain and two rings and his Mami i.e. Shanti Devi using four bangles and four rings and ear rings in her ears. He was the one who performed the last rites of Ramlal and Shanti Devi. He also referred to the search taken by police on 8.2.2003 and the Fard prepared therein vide Exhibit P-22. He described that the goods in the shop were lying scattered and there were small *Potlies* containing Rs.17,000/- in cash and some change. On 18.4.2003, he was called for identifying the ornaments. The identification proceedings are to be seen from Exhibits P-24 and P-25. He correctly identified the chain of maternal uncle and also the bangles of his maternal aunt. The learned counsel assailed this evidence vehemently. The mother of Rajesh was the first wife of his father and Ramlal was the brother of his mother who was no more. His claim that he used to stay with deceased Ramlal whenever he was in Phalodi, could not be demolished. It was urged that even Ramlal's first wife had died and Shanti Devi was his second wife, for whose marriage he was not invited. He corrected himself and claimed that though he was invited, since there was a death of a close relative, he could not come for the marriage from Madras. Even accepting that this witness was not called for the marriage, the fact that he used to stay with the deceased persons whenever he was in Phalodi could not be demolished. The tenor of his evidence shows that he indeed was very closely connected with Ramlal. We are not impressed by the huge and long cross-examination of this witness. Most of the cross-examination was irrelevant. In fact, it is in his cross-examination that it has come that there was a mark of flower and *patia* (leaves) on the gold bangles of his maternal aunt. It cannot be expected that the witness would give a graphic description of the ornaments. Much cross-examination was wasted in showing that he did not know from where the other bangles and chains were brought by the police for the identification purpose. That was absolutely irrelevant. The evidence of Jitender Kumar (PW-22) is extremely important inasmuch as both Ramesh (A-3) and Bharat

Kumar (A-2) are connected because of that evidence. The four gold bangles which were identified by Rajesh (A-4) were seized from Bharat Kumar (A-2) while the chain which was identified by him was seized from Gordhan Lal (A-1). This witness specifically stated that these ornaments were correctly identified. There is hardly any cross-examination which is worthy and can be relied upon and accepted. The cross-examination only consists of some futile suggestions. This witness had no interest against the accused or in favour of the prosecution. He was doing his duty. His evidence connects Gordhan (A-1) and Bharat Kumar (A-2) with the crime. We, therefore, accept the identification. We are also in agreement with the High Court that the recoveries from Gordhan Lal (A-1) and Bharat Kumar (A-2) of the ornaments including the identified bangles and the chain were fully proved. There is hardly any explanation by these two accused persons.

19. We are not impressed by the contention raised that the police have seized the gold chain on 19.2.2003 even when they had visited the same place on 9.2.2003 for recovering the cloths on 13.2.2003 for recovering the other ornaments including the Katordan. It is quite possible that the police were not able to recover all the ornaments in one go. The High Court has given good reasons to set aside the finding of the Trial Court to the effect that this recovery was not proved. In fact, there is clear cut evidence on record that the ornaments which were recovered on 13.2.2003 were kept in a Katordan. We have already commented that in Exhibit P35 itself, it is clearly mentioned that full name of deceased Ramlal was engraved on the Katordan. The recovery of Katordan would clinch the issue insofar as the identification of the ornaments is concerned. Gordhan had no explanation whatsoever for these ornaments or for the Katordan. Therefore, it is clear that Gordhan was also in possession of the stolen property almost immediately after the theft and was directly connected with the crime since his shirt and shoes were stained with human blood for which there was no explanation. We confirm the finding given

by the High Court regarding the recoveries. We have already pointed out earlier that the gold chain which was recovered from accused Gordhan was clearly identified by PW-30, Rajesh. We have closely seen the evidence of PW-7, Dev Kumar and PW-35, Kishan Singh. We have also considered the evidence of DW-5, Chhel Singh. We are, therefore, of the clear opinion that the prosecution has been able to prove the guilt of Gordhan who was not only a participant in the crime but was also found in possession of the gold ornaments including the gold chain which was clearly identified by witness PW-30,Rajesh. We, therefore, confirm the finding of the High Court in that behalf and hold that the High Court was right in dismissing the appeal of Gordhan. There is some controversy in respect of the Katordan as to whether it was seized from Gordhan or from Bharat Kumar. Considering the oral evidence of PW-6, Mohan Lal as also PW-35, Kishan Singh and further considering Exhibit P-35, we are of the clear opinion that Katordan on which name of deceased Ramlal was engraved was undoubtedly seized from this accused. We are, therefore, of the clear opinion that the High Court was right in dismissing the appeal of this accused.

20. This leaves us with the case of Bharat which is no better than Gordhan's case. It must be remembered that as per Exhibit P-126, Bharat Kumar's T-shirt as well as pant as also his shoes were stained with human blood and further his pant and shirt were found to be stained with blood group A which was the blood group of Ramlal. This circumstance alone is sufficient to clinch the issue against this accused. As if this is not sufficient, there has been the recovery of gold ornaments from Bharat Kumar. He was arrested on 7.2.2003 and vide Exhibit P-85, he agreed to produce the ornaments vide Exhibit P-105. The ornaments were recovered vide recovery memo being Exhibit P-53. The following ornaments were found with him:

"Silver Badia weighing 295 gms;

One pair of silver nevra weighing 270 gms;

One pair of silver kadla weighing 430 gms;

Silver 'dhala' weighing 076 gms;

Silver ring, bichhudi, 17 pairs of pech, 14 pech weighing 84 gms;

One silver ingot weighing 205 gms."

This recovery is supported by the evidence of PW-13, Jalim Chand. However, the Trial Court rejected this recovery. The High Court has set aside that finding and has held that the recovery was fully proved. It cannot be forgotten that Bharat gave no explanation about the huge amount of silver ornaments found with him. Again, we fail to follow as to how the silver ingots weighing 205 gms. could be found unless the silver ornaments were turned into the shape of ingots. Secondly, four gold bangles were found vide Exhibit P-114 by way of this discovery. This discovery was proved by PW-11, Ajit Jain and in the identification proceedings vide Exhibit 25, bangles were correctly identified by PW-30, Rajesh. We have already commented about Rajesh and PW-22, Jitender Kumar who held the identification parade. This in fact clinches the issue. A strong argument was advanced by the learned counsel Shri Krishnamani that this was a belated discovery and as such was not liable to be believed. We have already held that the discovery made by the accused and the recovery of the ornaments in pursuance of that are completely credible, seen in the light of other evidence of his blood stained T-shirt and shoes. Shri Krishnamani could not explain the finding of the blood as also the clinching evidence of the recovery of ornaments in pursuance of the discovery statement made by the accused. We are, therefore, of the clear opinion that even this accused would be held liable and would be held guilty for the offence alleged against him.

21. We shall now consider the case law relied upon by the

learned counsel for the defence. Shri Jain, learned counsel appearing on behalf of Ramesh (A-3) then relied on the decisions in *Chandmal & Anr. Vs. State of Rajasthan* [1976 (1) SCC 621], *Mohd. Aman & Anr. Vs. State of Rajasthan etc. etc.,* [1997 (10) SCC 44], *Mahabir Sao alias Mahadeo Sao Vs. The State of Bihar* [1972 (1) SCC 505] and *Inspector of Police, Tamil Nadu Vs. Bala Prasanna* [2008 (11) SCC 645]. Even as regards the detection of human blood, the learned counsel relied on the decisions in *State of Rajasthan Vs. Raja Ram* [2003 (8) SCC 180], *Yeshwant & Ors. Vs. The State of Maharashtra etc. etc.* [1972 (3) SCC 639], *Raghunath Vs. State of Haryana & Anr. etc. etc.* [2003 (1) SCC 398], *State of M.P. Vs. Nisar* [2007 (5) SCC 658] and *Hardyal Prem Vs. State of Rajasthan* [1991 Supp. (1) SCC 148] to suggest that mere presence of human blood would not constitute an incriminating circumstance. The other two cases relied upon by the learned counsel are *Manish Dixit & Ors. Vs. State of Rajasthan etc. etc.* [2001 (1) SCC 596] and *Subhash Chand Vs. State of Rajasthan* [2002 (1) SCC 702].

22. Insofar as the first group of cases is concerned, they are relating to the identification of the ornaments recovered from Ramesh. In *Chandmal & Anr. v. State of Rajasthan (cited supra),* this Court held that unless the property in possession of the accused is proved to be a stolen property the prosecution cannot benefit from mere possession of such property. That was a case where the property was recovered after two years of the murder and the alleged theft and, therefore, the Court held that presumption under Section 114 Illustration (a) of the Indian Evidence Act could not be applicable. The case is quite different on facts. In *Mohd. Aman & Anr. v. State of Rajasthan etc.etc. (cited supra)* the question was of the possession of the accused of four silver rings belonging to the deceased's wife. On facts, it was held that the same could not be stolen property as the prosecution had failed to prove that the rings belonged to the deceased's wife. It was further held that even assuming that the rings belonged to the

deceased wife, it was not established by the prosecution that the said rings were stolen at the time of commission of murder and not on earlier occasion. The Court had found, on appreciation of evidence, that the recovery of the stolen articles was not established. It was, therefore, that the Court left the said evidence out of the consideration. However, that is not the case here. We have already pointed out that the theft of the articles, more particularly, the melting apparatus machine and the ornaments was fully established. The identification of the property was also established. Hence the ruling is of no consequence.

In *Inspector of Police, Tamil Nadu v. Bala Prasannas' case (cited supra),* the Court observed that though the accused persons were found in possession of the gold ingots, the Court went on to hold that because of that it would be hazardous to come to the conclusion that in fact gold jewellery belonged to the deceased. That was a case where the earrings of the deceased remained intact on the body. The case turns on its own facts. In the present case, it is not only the gold which connects the accused with the crime but also the articles like Katordan and tiffin on which the name of the deceased was engraved. The evidence clearly showed that the Katordan was seized with the ornaments in it. Further, some of the ornaments like gold bangles and the chain were actually identified and we have accepted the identification evidence. Such was not the case in the reported decision. That decision would, therefore, be of no consequence.

The last decision relied upon by the learned counsel Shri Jain reported as *Mahabir Sao @ Mahadeo Sao v. The State of Bihar (cited supra)* was again on different facts. In this case the description of the stolen property itself differed.

23. The learned counsel then urged, relying on *State of Rajasthan Vs. Raja Ram (cited supra)*, that merely because the articles and weapons were found with human blood, that by itself would not connect the accused. The contention was raised

in respect of the murder weapon Jharbad. The contention is that mere recovery of weapon cannot be a foundation of the prosecution case and the conviction cannot be made merely on the basis of such recovery. It must be stated at this juncture that in this case the conviction of Ramesh is not being based merely on the recovery of weapon. It must be remembered that not only were the clothes blood stained but the Jharbad (weapon) was also found to be stained with blood of the blood group A which was the blood group of deceased Ramlal. We have nothing to say about the principles emanating from this ruling. However, the facts appear to be clearly different. The existence of blood on the clothes was explained in that case on the basis of the possibility of blood being that of the accused himself. Such is not the case here. None of the accused has pleaded that they were injured in any manner nor was any injury found on their person. The ruling is, therefore, of no consequence.

In *Yashwant's case, (cited supra)* the facts are quite different. That case turned on account of the identification parade not having been believed. The Court proceeded to hold that though a blood stained *dhoti* was found at the accused's residence, the blood group was not fixed. There was no connection established. It is on that ground that the Court proceeded to give the benefit of doubt. The Court has not held that in all the cases where the blood group is not fixed, the existence of blood on the wearing apparel becomes inconclusive. In this case, the existence of the blood is not the only circumstance on the basis of which the accused has been convicted. We, therefore, find no parity of reasoning in this case.

In *Raghunath's case (cited supra)* again, the Court was concerned with the blood stained earth, blood stained muffler and lathis. Since the blood group was not proved, the Court came to the conclusion that the mere fact that the blood was human, was not conclusive evidence. Insofar as some of the accused persons are concerned, even the blood group is fixed

and, therefore, this case would be of no consequence.

In *Hardayal Prem's case (cited supra),* the prosecution was not able to fix the blood group of blood found on the weapon. Under those circumstances, the prosecution case was not accepted. Such is not the case here. The blood on Jharbad was found to be a blood of blood group of A which was Ramlal's blood group.

In *Manish Dixit's case (cited supra)* the only circumstance was that the blood found on the motorcycle of the accused was found to be of the blood group of the deceased. Under the circumstances, this Court declined to convict the accused on that sole circumstance. It is very significant to note the observations made in para 35 "*if there were other circumstances apart from the recovery of some jewellery belonging to the deceased from the possession of this accused, perhaps the aforesaid circumstance (relating to the blood stained found on the motorcycle) would have lent support to an inference against him."* In fact the observations are more helpful to the prosecution than to the defence.

The case of *Subhash Chand (cited supra)* is completely different on facts. That was a case where the underwear which was blood stained and on which the semen stain was not shown to be belonging to the accused at all no connection was established. It was on that basis that the matter was decided. Therefore, this case is also of no consequence.

Some other cases were cited like oft-quoted case of *Pulukari Kottaiah v. King Emperor* [AIR 1947 PC 67]*, Mohd. Inayatullah v. State of Maharashtra* [1976 (1) 828], *Pohalya Motya Valvi v. State of Maharashtra* [1980 (1) SCC 530] and *Mohd. Abdul Hafeez v. State of Andhra Pradesh* [1983 (1) SCC 143]. There is no question of the principles regarding Section 27, Indian Evidence Act. However, on facts we have found the discoveries of all the three accused persons in this case to be reliable in the peculiar facts of this case. Lastly, the

learned counsel relied on *Ram Pal Pithwa Rahidas v. State of Maharashtra* [1994 Suppl. (2) SCC 73] which speaks about the necessity of a fair investigation. In para 37, the Court has observed as under:

> "37.The quality of a nation's civilization, it is said, can be largely measured by the methods it uses in the enforcement of the criminal law' and going by the manner in which the investigating agency acted in this case causes concern to us. In every civilized society the police force is invested with the powers of investigation of the crime to secure punishment for the criminal and it is in the interest of the society that the investigating agency must act honestly and fairly and not resort to fabricating false evidence or creating false clues only with a view to secure conviction because such acts shake the confidence of the common man not only in the investigating agency but in the ultimate analysis in the system of dispensation of criminal justice. Let no guilty man go unpunished but let the end not justify the means! The courts must remain ever alive to this truism. Proper results must be obtained by recourse to proper means- otherwise it would be an invitation to anarchy."

24. We have absolutely no reason to differ on the principle of honesty and fair investigation. However, we do not find any reason here in this case to hold that the investigation was in any way unfair. We have already held that merely because the recoveries were made from the same place which was already visited by the police, that would itself not dispel the evidence of discovery and recovery. This we have held on the basis of the peculiar evidence led in this case. True it is that the investigation officer should have thoroughly searched the premises of Gordhan and Bharat Kumar on 9.2.2003 itself. However, if the accused agreed to discover different things on different dates and those things were actually found in pursuance of the information given by the accused, the

discoveries cannot be faulted for only that reason.

25. In short, we are of the opinion, that the appeals filed by the accused persons, namely, Gordhan (A-1) and Bharat Kumar (A-2) have to be dismissed and they are dismissed. Even accused No.3, Ramesh has been convicted. We confirm the conviction of Ramesh. However, Ramesh has been awarded death sentence. We would, at this juncture, consider as to whether the death sentence is justified in the present case.

26. Both the Courts below have unanimously awarded death sentence to accused Ramesh, treating this to be a rarest of the rare case. The Trial Court has held that it was this accused Ramesh who inflicted injuries on both the deceased Ramlal and Shanti Devi. The Trial Court referred to the reported decision in *Shri Bhagwan v. State of Rajasthan* [2001 (6) SCC 296] and it is only on that ground that accused Ramesh alone was condemned to death. We are not quite satisfied with the reasoning given by the Trial Court. Before awarding the death sentence, the Trial Court was expected to give elaborate reasons. We have gone through the appellate Court's judgment. The appellate Court's judgment relied on the reported decision in *Suhil Murmu v. State of Jharkhand* [AIR 2004 SC 394] which observed that a balance-sheet of the aggravating and mitigating circumstances has to be drawn up and further to accord full weightage to the mitigating circumstances and then to strike just balance between the aggravating and mitigating circumstances before the option is exercised. The appellate Court has quoted paragraph 16 of that judgment and has given four circumstances which may be relevant in awarding the death sentence. They are as under:

> "The following guidelines which emerge from Bachan Singh case (supra) will have to be applied to the facts of each individual case where the question of imposition of death sentence arises: -

> (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. 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.

27. In our opinion, none of the four circumstances mentioned is available in the present case. It is no doubt true that the murder of Ramlal and Shanti Devi was cruel. However, that cannot be said to be brutal, grotesque and diabolical nor could it be said that the murder was committed in a revolting manner so as to arise intense and extreme indignation. This was not a case where accused Ramesh was in a dominating position or in a position of trust nor could it be said to be a murder for personal reasons. This is also not a case of bride burning or dowry death which is committed in order to remarry for extracting dowry once again. Though this is a double murder, it cannot be said to be a crime of enormous proportion. Ramesh could not be said to be a person in a dominating position as this is not a murder of an innocent child or a helpless

woman or old or infirm person. This was undoubtedly a murder for gains. The High Court has come out with a case that appellant Ramesh was having criminal record. However, we do not find any previous conviction having been proved against Ramesh by the prosecution. It is apparent that the original intention was theft and on account of the deceased having been awakened, the accused persons took the extreme step of eliminating both the inmates of the house for the fear of being detected.

28. It cannot be said that it was Ramesh alone who has committed the murder only because he was the one who discovered the murder weapon *Jharbad.* It is not clear from the evidence as to who was the actual author of the injuries on Ramlal and Shanti Devi though all the three were participants of the crime. There is no definite evidence about the acts on the part of each of the accused. It will be, therefore, difficult to say that Ramesh alone was the author of injuries on Ramlal as well as Shanti Devi.

29. The learned counsel relied on two decision of this Court, the first being *Dilip Premnarayan Tiwari v. State of Maharashtra* [2010 (1) SCC 775]. The other decisions relied upon is *Mulla v. State of U.P.* [2010 (3) SCC 508] as also *Santosh Kumar Shantibhushan Beriyar v. State of Maharashtra* [2009 (6) SCC 498]. In *Mulla's case* in paragraph 80 and 81, the Court held as under:

> "80.Another factor which unfortunately has been left out in much judicial decision-making in sentencing is the social-economic factors leading to crime. We at no stage suggest that economic depravity justify moral depravity, but we certainly recognize that in the real world, such factors may lead a person to crime. The 48th Report of the Law Commission also reflected this concern. Therefore, we believe, socio-economic factors might not dilute guilt, but they may amount to mitigating factor i.e. the ability of the guilty to reform. It may not be misplaced to note that a criminal who commits crimes due to his economic backwardness is most likely to reform. This Court on many previous occasions has held that his ability to reform amounts to a mitigating factor in cases of death penalty.
>
> 81.In the present case, the convicts belong to an extremely poor background. With lack of knowledge, on the background of the appellants, we may not be certain as to their past, but one thing which is clear to us is that they have committed these heinous crimes for want of money. Though we are shocked by their deeds, we find no reason why they cannot be reformed over a period of time."
>
> The observations are extremely germane to the question before us.

30. There can be no dispute that this was a case in which money was the motive. We have already seen that the accused person do not come from a wealthy background. On the other hand, it has been held that they could not justify the possession of ornaments found with them. It has also been held that they were unlikely to own the ornaments on account of their financial position.

31. Practically, the whole law on death sentence was referred to in *Santosh Kumar's case*. In paragraph 56, the Court observed "*the court must play a pro-active role to record all relevant information at this stage. Some of the information relating to crime can be culled out from the phase prior to sentencing hearing. This information would include aspects relating to the nature, motive and impact of crime, culpability of convict etc. Quality of evidence is also a relevant factor. For instance, extent of reliance on circumstantial evidence or child witness plays an important role in the sentencing analysis. But what is sorely lacking, in most capital sentencing cases, is information relating to characteristics and socio-economic background of the offenders. This issue was also raised in 48th Report of the Law Commission.* The Court, thus, has in a

guided manner referred to the quality of evidence and has sounded a note of caution that in a case where the reliance is on circumstantial evidence, that factor has to be taken into consideration while awarding the death sentence. This is also a case purely on the circumstantial evidence. We should not be understood to say that in all cases of circumstantial evidence, the death sentence cannot be given. In fact in *Shivaji @ Dadya Shankar Alhat v. State of Maharashtra* [2008 (15) SC 269], this Court had awarded death sentence though the evidence was of circumstantial nature. All that we say is that the case being dependent upon circumstantial evidence is one of the relevant considerations. We have only noted it as one of the circumstances in formulating the sentencing policy. Further in that case the Court upheld the principles emanating from *Bachan Singh v. State of Punjab* [1980 (2) SCC 684] where the probability that the accused can be reformed and rehabilitated was held as one of the mitigating circumstances and it was observed that the State should, by evidence prove that the accused does not satisfy these conditions, meaning thereby that the accused is not likely to be reformed. The Court went on to hold that the rarest of rare dictum imposes a wide ranging embargo on the award of death punishment which can only be revoked if the facts of the case successfully satisfy double qualification :

(1) that the case belongs to rarest of the rare category and;

(2) alternative option of life imprisonment will not suffice in the facts of the case.

32. The Court then observed that the rarest of the rare dictum places an extraordinary burden on the Court. Considering these principles, we do not think that there was no possibility of reformation of the accused persons. True it is that the accused were driven by their avarice for wealth but given a chance there is every possibility of their being reformed. We are also of the clear opinion that in this case it is not established

that alternative punishment of life imprisonment will be futile and would serve no purpose. In paragraph 66 of *Santosh Kumar's case (cited supra)*, the Court observed that life imprisonment can be said to be completely futile only when the sentencing aim of reformation can be said to be unachievable. The Court further went on to say "*therefore, being satisfied the second explanation of rarest of rare doctrine the court will have to provide clear evidence as to why the convict is not fit for any kind of reformative and rehabilitation scheme.*

33. In our opinion, there has been no such exercise taken either by the trial Court or appellate Court nor do we find any discussion about the life imprisonment being rendered futile and serving no purpose.

34. In *Bachan Singh's case (cited supra)* the age of accused was held to be one of the mitigation circumstances. Accused Ramesh is a young person. We do not see any reason as to why he cannot be reformed and rehabilitated.

35. We must also take into consideration that this was the first proved offence of accused Ramesh. No other conviction has been proved against him by the prosecution. Since this is his maiden conviction, we do not see as to how accused Ramesh cannot be reformed. Further we do not see this to be an offence by the organized criminals so as to affect the society as a whole.

36. Learned counsel also relied on *Dilip Premnarayan Tiwari v. State of Maharashtra (cited supra)* where the accused, who was guilty of three murders, was let off. That was also a case of the accused being of young age. The Court also took into consideration the argument that the deaths in that case were in reality not intended deaths but the dead persons became the victims of the circumstances since the deceased in that case tried to stop the assailants. The situation is somewhat similar here though not identical. We have already mentioned that if the deceased Ramlal and his wife had not

been awakened, the ghastly incident might not have occurred. There are number of other decisions which were relied upon by the learned counsel. However, since we have referred to *Santosh Kumar's case (cited supra)* which has considered the whole law on the subject, we find it unnecessary to repeat the same again.

37. It has come in evidence in this case that the deceased Ramlal and Shanti Devi had hair in their hands. The prosecution wanted to point out that it must be during the scuffle that the two dying persons might have pulled the hair of the assailants and this is how hair came in the hands of the deceased persons. It is significant to note that on scientific examination, it could not be established that hair in the hands of the deceased belonged to accused Ramesh. Though there are other clinching circumstances also to hold that Ramesh and the two accused were undoubtedly the assailants. This circumstance would also weigh in our mind in not confirming the death sentence. We say this particularly in the light of the principles emanating from *Santosh Kumar's case*.

38. Lastly, we must take into consideration that Ramesh who was convicted and awarded the death sentence by the learned Sessions Judge in 2004 is languishing in death cell for more than six years. This also would be one of the mitigating circumstances.

39. In short, we are of the opinion that the death sentence awarded to Ramesh would not be justified and instead we would modify the same to life imprisonment. However, conviction for the other offences as also sentences awarded are confirmed. All the three appeals are accordingly dismissed with the modifications of sentence in Criminal Appeal No.1236 of 2006 filed by Ramesh.

N.J. Appeals dismissed.

BHAWANI PRASAD SONKAR
v.
UNION OF INDIA & ORS.
(Civil Appeal No. 5101 of 2005)

MARCH 11, 2011

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

Service Law:

Grant of compassionate appointment – Object of – Held: Compassionate employment is given solely on humanitarian grounds and cannot be claimed as a matter of right – Ordinarily public employment must be strictly on the basis of open invitation of applications and comparative merit – Compassionate appointment is an exception to the general rule, carved out in the interest of justice, in certain exigencies, by way of a policy of an employer, which partakes the character of the service rules – The scheme has to be strictly construed and confined only to the purpose it seeks to achieve.

Compassionate appointment – Claim for – Guidelines governing the appointment – Held: Request for compassionate employment is to be considered strictly in accordance with the governing scheme – Application for compassionate employment must be preferred without undue delay and has to be considered within a reasonable period of time – Appointment on compassionate ground is to meet the sudden crisis occurring in the family on account of the death or medical invalidation of the bread winner while in service – It is permissible only to one of the dependants of the deceased/incapacitated employee, viz. parents, spouse, son or daughter and not to all relatives, and such appointments should be only to the lowest category that is Class III and IV posts – On facts, appellant's father was

declared as de-categorized employee, not offered alternative employment and was made to retire from services on 30.08.1999 on recommendation by the Standing Committee – In terms of Circular dated 22.09.1995 which contemplates compassionate employment for the wards of those employees who have been medically de-categorized, and have retired, without being offered an alternative suitable job, the appellant shall be entitled to employment on compassionate ground.

Appellant's father-Guard Mail/Express in the Railways, was declared a de-categorized employee and on recommendation by the Standing Committee was retired from service by the order dated 30th August, 1999 without offering him any alternate employment as stipulated in the service rules. Appellant's father filed applications before the Railway official seeking compassionate appointment for his son as a Class IV employee but the same were rejected. The appellant filed an application before the Tribunal which was also dismissed. The appellant then filed a writ petition seeking compassionate appointment. The High Court dismissed the petition on the ground that the employee did not fulfil the conditions envisaged in the Railway Board Circular dated 29th November, 2001. Therefore, the appellant filed the instant appeal.

Allowing the appeal, the Court

HELD: 1.1 The compassionate employment is given solely on humanitarian grounds with the sole object to provide immediate relief to the employee's family to tide over the sudden financial crisis and cannot be claimed as a matter of right. Appointment based solely on descent is inimical to the Constitutional scheme, and ordinarily public employment must be strictly on the basis of open invitation of applications and comparative merit, in consonance with Articles 14 and 16 of the Constitution

of India. No other mode of appointment is permissible. Nevertheless, the concept of compassionate appointment has been recognized as an exception to the general rule, carved out in the interest of justice, in certain exigencies, by way of a policy of an employer, which partakes the character of the service rules. That being so, it needs little emphasis that the scheme or the policy, as the case may be, is binding both on the employer and the employee. Being an exception, the scheme has to be strictly construed and confined only to the purpose it seeks to achieve. [Para 15] [640-B-E]

Umesh Kumar Nagpal vs. State of Haryana and Ors. **(1994) 4 SCC 138;** *Steel Authority of India Limited vs. Madhusudan Das and Ors.* **(2008) 15 SCC 560;** *V. Sivamurthy vs. State of Andhra and Ors.* **(2008) 13 SCC 730 – referred to.**

1.2 While considering a claim for employment on compassionate ground, the following factors have to be borne in mind:

(i) Compassionate employment cannot be made in the absence of rules or regulations issued by the Government or a public authority. The request is to be considered strictly in accordance with the governing scheme, and no discretion as such is left with any authority to make compassionate appointment dehors the scheme.

(ii) An application for compassionate employment must be preferred without undue delay and has to be considered within a reasonable period of time.

(iii) An appointment on compassionate ground is to meet the sudden crisis occurring in the family on account of the death or medical invalidation of the bread winner while in service. Therefore,

compassionate employment cannot be granted as a matter of course by way of largesse irrespective of the financial condition of the deceased/incapacitated employee's family at the time of his death or incapacity, as the case may be.

(iv) Compassionate employment is permissible only to one of the dependants of the deceased/ incapacitated employee, viz. parents, spouse, son or daughter and not to all relatives, and such appointments should be only to the lowest category that is Class III and IV posts.

Tested on the touchstone of the aforesaid broad guidelines governing appointment on compassionate ground, the appellant has made out a case for such appointment. [Paras 19 and 20] [642-G-H; 643-A-F]

2.1 It is manifest that in terms of circular dated 29th November, 2001 only those employees, who have been totally incapacitated from performing any service after 29th April, 1999 were entitled to seek compassionate employment for their wards. In the instant case, appellant's father retired on 30th August, 1999 i.e. after 29th April, 1999, but was not offered alternative employment in terms of the Circular dated 29th April, 1999. [Para 20] [643-F-H]

2.2 The circular/letter dated 29th November, 2001, on which reliance was placed while rejecting appellant's claim has to be understood in its correct perspective. Evidently, it seeks to limit the benefit of compassionate employment to only those incapacitated employees who had been retired after 29th April, 1999, as in case of employees who were found fit for performing services in a lower category, Circular dated 29th April, 1999 would be applicable, and the Railways was bound to offer

alternative employment to such employees. It flows therefrom that after 29th April 1999, those employees who did not accept the alternative employment, and opted for voluntary retirement could not be given the benefit of compassionate employment for their wards. [Para 21] [644-A-C]

2.3 In the instant case, the respondents have not placed any material on record to establish that the appellant's father who retired on 30th August, 1999 i.e. after 29th April, 1999 was offered any alternative employment in terms of Circular dated 29th April, 1999. On the contrary, it appears that the Standing Committee recommended his retirement. Having denied appellant's father the benefit of Circular dated 29th April 1999, the respondents cannot claim that Circular dated 29th November, 2001 was applicable to appellant's father, disentitling him from seeking employment on compassionate ground for his son as he was not totally incapacitated and had sought voluntary retirement. It is clear from the retirement order dated 30th August, 1999 that the appellant's father was retired from service pursuant to the recommendation of the Standing Committee. [Para 22] [644-D-F]

2.4 In light of the fact that Circular dated 29th November, 2001 was not applicable in the case of appellant's father, inasmuch as the benefit of the 29th April, 1999 Circular was not extended to him, and he was made to retire from service, that the earlier circular dated 22nd September, 1995 is applicable in the instant case. Consequently, the appellant would be entitled to employment on compassionate ground as the said Circular contemplates compassionate employment for the wards of those employees who have been medically de-categorized, and have retired, without being offered an alternative suitable job. The plea of the respondents

that on being de-categorized, appellant's father had opted for voluntary retirement cannot be accepted. The impugned judgment is set aside and it is directed that the appellant would be granted employment on compassionate ground. [Paras 23 and 24] [644-G-H; 645-A-C]

Case Law Reference:

(1994) 4 SCC 138	**Referred to**	**Para 16**
(2008) 15 SCC 560	**Referred to**	**Para 17**
(2008) 8 SCC 475	**Referred to**	**Para 17**
(2008) 13 SCC 730	**Referred to**	**Para 18**

CIVIL APPELLATE JURISDICTION : CIVIL APPEAL No. 5101 of 2005.

From the Judgment & Order dated 01.09.2003 of the High Court of Judicature at Allahabad (Lucknow Bench) Lucknow in Writ Petition No. 1178 (S/B) of 2003.

D.P. Chaturvedi (for Sheela Goel) for the Appellant.

Ashok Bhan, C.K. Sharma, A.K. Sharma, Madhurima Mridual, B. Krishna Prasad for the Respondents.

The Judgment of the Court was delivered by

D.K. JAIN, J.: 1. This appeal, by grant of special leave, is directed against the judgment dated 1st September, 2003 delivered by the High Court of Judicature at Allahabad at Lucknow, whereby the writ petition filed by the appellant herein, seeking compassionate appointment, has been dismissed on the ground that he did not fulfil the conditions envisaged in the Railway Board Circular dated 29th November, 2001.

2. Appellant's father, Mr. Prahladji Sonkar, was posted as a Guard Mail/Express, North Eastern Railway at the Lucknow

Junction. Respondent No. 2 viz. the Senior Divisional Karmik Adhikari, North Eastern Railway (N.E.R.), Lucknow directed the appellant's father to appear before the Medical Board for a medical examination. Accordingly, appellant's father appeared before the Medical Board and was declared medically unfit in A2, A3, B1 and B2 categories vide certificate dated 6th March, 1998. However, he was found fit in C1 and C2 categories and was directed to appear for another medical examination after six months.

3. Accordingly, appellant's father again appeared for a medical examination and vide certificate dated 13th July, 1999, he was declared medically unfit as de-categorized employee. Nevertheless, he was found fit in category B1 and below. Thereafter, on 9th August, 1999, appellant's father appeared before the Standing Committee which decided to retire him without offering him any alternate employment, as stipulated in the service rules. Ultimately, appellant's father was retired from service vide retirement order dated 30th August, 1999 issued by respondent No. 3 viz. Divisional Railways Manager (Karmik), Lucknow, which stated that:

> "Shri Prahlad Ji Sonkar, Guard Mail/Express in the pay scale of (5500-9000) at Lucknow Junction who having been declared as decategorised employee has been recommended by the standing committee for retirement, is retired with immediate effect."

4. At this juncture, it would be relevant to note that an appointment on compassionate ground in the Railways was governed by Railway Board Circular dated 22nd September, 1995 which provided that:

> "1. In terms of the instructions contained in para I(iv) of Board's letter No. E(NG)III/78/RC-1/1 dated 07.04.1983 and 03.09.1983, appointment on compassionate grounds is permissible where a Railway employee becomes

medically decategorised for the job he is holding and no alternative job with the same employee is but it is not accepted by the employee and he chooses to retire from service.

2. The question whether appointment on compassionate ground can be considered in the case of a medically decategorised employee who does not wait for the Administration to identify an alternative job for him but chooses to retire under consideration of the Board.

3. After careful consideration of the matter, Board have decided that in partial modification of Board's letter No. E(NG)III/78/RC-1/1 dated 03.09.1983, in the case of medically decategorised employee, compassionate appointment of an eligible ward may be considered also in cases where the employee concerned does not wait for the administration to identify an alternative job for him but chooses to retire and makes a request for (sic) such appointment."

5. It is also pertinent to mention here that on 29th April, 1999, the Railway Board issued a circular stating, inter alia, that in light of the mandate of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, employees who become incapacitated from holding the post they were currently holding, but found eligible for retention in service in posts corresponding to lower medical category, shall be offered alternative employment in the posts for which they are found suitable.

6. Appellant's father moved an application dated 1st September, 1999, before respondent No. 2 requesting that his son be given compassionate appointment as a Class IV employee. Since there was no response to the said request, the father of the appellant moved another application, dated 30th December, 1999, before respondent No. 3. On 18th January, 2000, the Railway Board issued a letter stating that

when an employee is declared as medically unfit to perform the work which he was performing but is found to be fit to perform work in a lower category, any request for giving compassionate employment to such employee's ward would not be considered if the employee opts for voluntary retirement after being de-categorized.

7. Thereafter, on 29th November, 2001, the General Manager (Personnel), Gorakhpur issued a letter stating that in case of employees who opted for voluntary retirement after 29th April, 1999, the cases of wards of only totally incapacitated employees would be considered for appointment on compassionate grounds. In pursuance of the same, respondent No. 3 issued a letter dated 15th February, 2002 to appellant's father stating that the application for appointment of his son on compassionate ground was not found fit for consideration by the competent authority.

8. Being aggrieved, the appellant preferred an Original Application before the Central Administrative Tribunal, Lucknow (for short "the Tribunal").

9. Vide order dated 31st December, 2002, the Tribunal dismissed the Original Application, observing thus:

"I have considered the facts of the case and submissions made on behalf of the parties, and I am of the view that the O.A. deserves to be dismissed on the basis of the circular letter dated 29.11.2001 which had the effect of superseding the earlier instructions on the subject. Since, the applicant's father was not totally incapacitated and retired on 30.8.99, the claim of the applicant for compassionate appointment has to be considered in the light of the instructions of the Railway Board letter dated 29.11.2001 according to which he is not eligible for compassionate appointment."

10. Still being aggrieved, the appellant filed a writ petition

before the High Court. As afore-mentioned, the High Court has, vide the impugned judgment, dismissed the petition, stating that:

> "The Tribunal has recorded clear-cut finding to the effect that the petitioner was not eligible for any compassionate appointment which (sic) could be offered as envisaged in the policy decision of the Railway Board as indicated in the Circular dated 29.11.2001, were not satisfied.
>
> .....
>
> Taking into consideration the facts and circumstances of the case as brought on record in their totality no justifiable ground for any interference by this Court can be said to have been made out while exercising the extraordinary jurisdiction under Article 226 of the Constitution."

11. Meanwhile, the appellant also preferred a review application before the Tribunal for reviewing its earlier order dated 31st December, 2002. Vide order dated 5th March, 2004, the said application was dismissed by the Tribunal on the ground that the same was barred by limitation.

12. Hence, the present appeal.

13. Mr. D.P. Chaturvedi, learned counsel appearing on behalf of the appellant, while assailing the impugned judgment, strenuously urged that having retired appellant's father without offering him a suitable alternative job, despite the fact that he was found medically fit in category B1, the respondents were obliged to appoint the appellant in terms of instructions dated 7th April, 1983 and 3rd September, 1983, which were reiterated in Circular dated 22nd September, 1995.

14. *Per contra,* Mr. Ashok Bhan, learned counsel appearing on behalf of the respondents, contended that appellant's father, having opted for voluntary retirement in terms

of the Railway Board's letter dated 18th January, 2000, could not seek appointment of his son on compassionate ground. Learned counsel urged that the appellant has not brought any material on record to substantiate his plea that his father was forced to retire.

15. Now, it is well settled that compassionate employment is given solely on humanitarian grounds with the sole object to provide immediate relief to the employee's family to tide over the sudden financial crisis and cannot be claimed as a matter of right. Appointment based solely on descent is inimical to our Constitutional scheme, and ordinarily public employment must be strictly on the basis of open invitation of applications and comparative merit, in consonance with Articles 14 and 16 of the Constitution of India. No other mode of appointment is permissible. Nevertheless, the concept of compassionate appointment has been recognized as an exception to the general rule, carved out in the interest of justice, in certain exigencies, by way of a policy of an employer, which partakes the character of the service rules. That being so, it needs little emphasis that the scheme or the policy, as the case may be, is binding both on the employer and the employee. Being an exception, the scheme has to be strictly construed and confined only to the purpose it seeks to achieve. We do not propose to burden this judgment with reference to a long line of decisions of this Court on the point. However, in order to recapitulate the factors to be taken into consideration while examining the claim for appointment on compassionate ground, we may refer to a few decisions.

16. In *Umesh Kumar Nagpal Vs. State of Haryana & Ors.*[1], while emphasising that a compassionate appointment cannot be claimed as a matter of course or in posts above Class III and IV, this Court had observed that:

> "The whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis.

1. (1994) 4 SCC 138.

The object is not to give a member of such family a post much less a post for post held by the deceased. What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The posts in Classes III and IV are the lowest posts in non-manual and manual categories and hence they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency. The provision of employment in such lowest posts by making an exception to the rule is justifiable and valid since it is not discriminatory. The favourable treatment given to such dependant of the deceased employee in such posts has a rational nexus with the object sought to be achieved, viz., relief against destitution. No other posts are expected or required to be given by the public authorities for the purpose. It must be remembered in this connection that as against the destitute family of the deceased there are millions of other families which are equally, if not more destitute. The exception to the rule made in favour of the family of the deceased employee is in consideration of the services rendered by him and the legitimate expectations, and the change in the status and affairs, of the family engendered by the erstwhile employment which are suddenly upturned."

17. Similarly, in *Steel Authority of India Limited Vs. Madhusudan Das & Ors.*[2], this Court has observed that:

"This Court in a large number of decisions has held that the appointment on compassionate ground cannot be

2. (2008) 15 SCC 560.

claimed as a matter of right. It must be provided for in the rules. The criteria laid down therefor viz. that the death of the sole bread earner of the family, must be established. It is meant to provide for a minimum relief. When such contentions are raised, the constitutional philosophy of equality behind making such a scheme be taken into consideration. Articles 14 and 16 of the Constitution of India mandate that all eligible candidates should be considered for appointment in the posts which have fallen vacant. Appointment on compassionate ground offered to a dependant of a deceased employee is an exception to the said rule. It is a concession, not a right." (See also: *General Manager, State Bank of India & Ors. Vs. Anju Jain*[3].)

18. In *V. Sivamurthy Vs. State of Andhra Pradesh & Ors.*[4], this Court while observing that although appointment in public service should be made strictly on the basis of open invitation of applications and comparative merit, having regard to Articles 14 and 16 of the Constitution, yet appointments on compassionate grounds are well recognized exception to the general rule, carved out in the interest of justice to meet certain contingencies, highlighted the following two well-recognised contingencies as exceptions to the general rule :

"(i) appointment on compassionate grounds to meet the sudden crisis occurring in a family on account of the death of the breadwinner while in service.

(ii) appointment on compassionate ground to meet the crisis in a family on account of medical invalidation of the breadwinner."

19. Thus, while considering a claim for employment on compassionate ground, the following factors have to be borne in mind:

3. (2008) 8 SCC 475.

4. (2008) 13 SCC 730.

(i) Compassionate employment cannot be made in the absence of rules or regulations issued by the Government or a public authority. The request is to be considered strictly in accordance with the governing scheme, and no discretion as such is left with any authority to make compassionate appointment dehors the scheme.

(ii) An application for compassionate employment must be preferred without undue delay and has to be considered within a reasonable period of time.

(iii) An appointment on compassionate ground is to meet the sudden crisis occurring in the family on account of the death or medical invalidation of the bread winner while in service. Therefore, compassionate employment cannot be granted as a matter of course by way of largesse irrespective of the financial condition of the deceased/ incapacitated employee's family at the time of his death or incapacity, as the case may be.

(iv) Compassionate employment is permissible only to one of the dependants of the deceased/incapacitated employee, viz. parents, spouse, son or daughter and not to all relatives, and such appointments should be only to the lowest category that is Class III and IV posts.

20. Tested on the touchstone of these broad guidelines governing appointment on compassionate ground, we are of the opinion that the appellant has made out a case for such appointment. It is manifest that in terms of circular dated 29th November, 2001 only those employees, who have been totally incapacitated from performing any service after 29th April, 1999 were entitled to seek compassionate employment for their wards. In the instant case, appellant's father retired on 30th August, 1999 i.e. after 29th April, 1999, but was not offered alternative employment in terms of the Circular dated 29th April, 1999.

21. The circular/letter dated 29th November, 2001, on which reliance was placed while rejecting appellant's claim has to be understood in its correct perspective. Evidently, it seeks to limit the benefit of compassionate employment to only those incapacitated employees who had been retired after 29th April, 1999, as in case of employees who were found fit for performing services in a lower category, Circular dated 29th April, 1999 would be applicable, and the Railways was bound to offer alternative employment to such employees. It flows therefrom that after 29th April 1999, those employees who did not accept the alternative employment, and opted for voluntary retirement could not be given the benefit of compassionate employment for their wards.

22. In the instant case, the respondents have not placed any material on record to establish that the appellant's father was offered any alternative employment in terms of Circular dated 29th April, 1999. On the contrary, it appears that the Standing Committee recommended his retirement. Having denied appellant's father the benefit of Circular dated 29th April 1999, the respondents cannot claim that Circular dated 29th November, 2001 was applicable to appellant's father, disentitling him from seeking employment on compassionate ground for his son as he was not totally incapacitated and had sought voluntary retirement. It is clear from the retirement order dated 30th August, 1999 that the appellant's father was retired from service pursuant to the recommendation of the Standing Committee.

23. In light of the fact that Circular dated 29th November, 2001 was not applicable in the case of appellant's father, inasmuch as the benefit of the 29th April, 1999 Circular was not extended to him, and he was made to retire from service, we are of the opinion that the earlier circular dated 22nd September, 1995 is applicable in the instant case. Consequently, the appellant would be entitled to employment on compassionate ground as the said Circular contemplates

compassionate employment for the wards of those employees who have been medically de-categorized, and have retired, without being offered an alternative suitable job. We are unable to accept the plea of the respondents that on being de-categorized, appellant's father had opted for voluntary retirement.

24. In light of the foregoing discussion, the appeal is allowed; the impugned judgment is set aside and it is directed that the appellant shall be granted employment on compassionate ground within three months of the receipt of copy of this judgment, subject to his complying with other eligibility conditions, as applicable on 1st September, 1999. However, for all intents and purposes, he shall be deemed to be in service from the date of actual joining.

25. In the facts and circumstances of the case, there shall be no order as to costs.

N.J. Appeal allowed.

BINOD KUMAR

v.

STATE OF JHARKHAND AND ORS.

(Civil Appeal No. 2689 of 2011)

MARCH 29, 2011

[DALVEER BHANDARI AND DEEPAK VERMA, JJ.]

Prevention of Corruption Act, 1988: ss.7, 10, 11, 13(2) r.w. s.13(1)(e); Penal Code, 1860 – ss.409, 420, 423, 424, 465 and 120-B – Multi-crore scam – Corruption in the matter of grant of iron ore mining lease – Various former minister including a former Chief Minister of the State involved – Allegation against the appellant also – Investment alleged to have been made in the property, shares etc. not only in India, but, also abroad – Basic investigation requiring determination as to whether the money was acquired by an abuse of the official position amounting to any offence under the 1988 Act and under IPC, the persons by whom this was done, the amount which was so earned and places where it was invested – No clear allegations as regards money laundering – High Court held that there was an area of overlap and the same cannot be allowed to form a tool in the hands of the accused to scuttle the investigation – Looking to the gravity and magnitude of the matter, High Court referred the matter to the Central Bureau of Investigation (CBI) and also observed that the Central Government should exercise the powers u/ s.45(1A) of the PMP Act for transferring investigation from the Enforcement Directorate (ED) to the CBI and if such an order is not passed by the Central Government, any material found by the CBI during investigation, which would lead to an inference of money laundering within the PML Act would be shared by the CBI with the ED from time to time to enable the ED to take such action as may be necessary – On appeal, held: It was categorically stated that the CBI was investigating

into the commission of offences under IPC and Prevention of Corruption Act alone and was not investigating any offence under the PML Act as the investigation under the PML Act was solely and exclusively within the jurisdiction and domain of the ED , which was of course subject to the exercise of powers by the Central Government u/s.45(1-A) – There is no provision restricting the investigation of offence other than that of money laundering by any appropriate investigating agency – On consideration of the totality of the facts and circumstances, no interference with the orders of the High Court called for – Prevention of Money Laundering Act, 2002 – s.45 (1A).

In the writ petition filed before the High Court, the basic allegation was amassing of illicit wealth by various former ministers, including a former Chief Minister of the State. The allegation was against the appellant also. The money alleged to have been so earned was of unprecedented amounts which were allegedly invested in property, shares etc. not only in India but also abroad. The basic investigation required determining whether money had been acquired by an abuse of the official position amounting to an offence under the Prevention of Corruption Act and under the Indian Penal Code, the persons by whom this had been done, the amount which had been so earned and places where it had been invested. The High Court in the impugned judgment held that it was neither possible nor desirable to give a positive finding about how much of the crime proceeds were projected as untainted and therefore, there was an area of overlap and same was not allowed to form a tool in the hands of the accused to scuttle the investigation. The High Court referred the matter to the CBI. The High Court also observed that the Central Government should exercise the powers under Section 45(1A) of the Prevention of Money Laundering Act, 2002 (PML Act) for

transferring the investigation from the Enforcement Directorate to CBI and if such an order is not passed by the Central Government, any material found by the CBI during investigation, which would lead to an inference of money laundering within the PML Act would be shared by the CBI with the Enforcement Directorate from time to time to enable the Enforcement Directorate to take such action as may be necessary. The instant appeal was filed challenging the orders of the High Court.

Dismissing the appeal, the Court

HELD: The matter on the face of it required a systematic, scientific and analysed investigation by an expert investigating agency, like the Central Bureau of Investigation. It was incorporated in the affidavit of the State Government that 32 companies were required to be investigated and the money acquired by illegal means was invested in Bangkok, Dubai, Jakarta, Sweden and Libya. It was also mentioned that there were several companies in other countries in which there were huge investments by the accused or with the help of their accomplices in foreign countries. The list of countries and companies indicated prima facie that the amount involved could not be mere a few crores but would be nearer a few hundred crores. In the written submission, it was categorically stated that the CBI was investigating into the commission of these offences alone and presently was not investigating any offence under the Prevention of Money Laundering Act, 2002 (PML Act) as the investigation under PML Act is solely and exclusively within the jurisdiction and domain of the Enforcement Directorate which is subject to the exercise of powers by the Central Government under Section 45(1A) of the PML Act. On consideration of totality of facts and circumstances, no interference with the order of the High Court is called for. [Paras 6, 46 and 47] [650-F-H; 662-C-E]

Maganbhai Ishwarhai Patel Etc. v. Union of India and Anr. **(1970) 3 SCC 400;** *S. Jagannath v. Union of India an Ors.* **(1997) 2 SCC 87;** *Central Bureau of Investigation v. State of Rajasthan and Ors.* **(1996) 9 SCC 735;** *Enforcement Directorate and Anr. v. M. Samba Siva Rao and Ors.* **(2000) 5 SCC 431 – referred to.**

Case Law Reference:

(1970) 3 SCC 400	**referred to**	**Para 13**
(1997) 2 SCC 87	**referred to**	**Para 13**
(1996) 9 SCC 735	**referred to**	**Para 17**
(2000) 5 SCC 431	**referred to**	**Para 18**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2689 of 2011.

From the Judgment & Order dated 04.08.2010 of the High Court Jharkhand at Ranchi in W.P. (PIL) No. 4700 of 2008.

K.K. Venugopal, R. Venkat Ramani, Gopal Shankar Narayanan, Alok Kumar, Santosh Kumar, Arvind Bansal, Anwesh Madhukar, Krishan Kumar, Pandey Neeraj Rai, Mushtaq Ahmad for the Appellant.

H.P. Raval, ASG, Ranjana Narayan, P.K. Dey, A.K. Sharma, T.A. Khan, B. Krishna Prasad, B.V. Balram Das, Anil Kumar Jha, Santosh Kumar for the Respondents.

The Judgment of the Court was delivered by

DALVEER BHANDARI, J. 1. Leave granted.

2. This appeal is directed against the judgment and order dated 04.08.2010 passed in Writ Petition (PIL) No.4700 of 2008 by the High Court of Jharkhand at Ranchi.

3. In the impugned judgment, it is mentioned that the basic

allegation is amassing of illicit wealth by various former Ministers, including a former Chief Minister of the State. The money alleged to have been so earned is of unprecedented amounts. However, there is no clear allegation so far about its laundering in the sense mentioned above, but there is an allegation of its investment in property, shares etc. not only in India but also abroad.

4. The basic investigation requires determining whether money has been acquired by an abuse of the official position amounting to an offence under the Prevention of Corruption Act and under the Indian Penal Code, the persons by whom this has been done, the amount which has been so earned and places where it has been invested.

5. The amount is alleged to run into several hundred crores. The investigations done so far allege that the amount unearthed so far in one case is about one and a half crore and in another case is about six and a half crores, which would appear to be merely the tip of the iceberg. The investments having been made not only in various States of the country outside the State of Jharkhand, but also in other countries means that the investigation called for is not only multi-state but also multi-national.

6. The matter on the face of it requires a systematic, scientific and analysed investigation by an expert investigating agency, like the Central Bureau of Investigation. It is incorporated in the affidavit that 32 companies have to be investigated and the money acquired by illegal means being invested in Bangkok (Thailand), Dubai (UAE), Jakarta (Indonesia), Sweden and Libya. It is also mentioned that there are several companies in other countries in which there are huge investments by the accused or with the help of their accomplices in foreign countries. The list of countries and companies indicate prima facie that the amount involved could not be a mere few crores, but would be nearer a few hundred crores.

7. The High Court in the impugned judgment has also mentioned that it is neither possible nor desirable at this stage to give a positive finding about how much of the crime proceeds have been 'projected as untainted'. Therefore, there is an area of overlap and the same cannot be allowed to form a tool in the hands of the accused to scuttle the investigation. Looking to the gravity and magnitude of the matter, after hearing learned counsel for the parties, the Division Bench of the High Court referred the matter to the Central Bureau of Investigation. The High Court also observed that the Central Government should exercise the powers under section 45(1A) of the Prevention of Money Laundering Act, 2002 (for short "the PML Act") for transferring investigation from the Enforcement Directorate to the CBI. If such an order is not passed by the Central Government, any material found by the CBI during investigation, which leads to an inference of money laundering within the PML Act will be shared by the CBI with the Enforcement Directorate from time to time, to enable the Enforcement Directorate to take such action, as may be necessary.

8. The appellant, aggrieved by the said judgment preferred this appeal before this court. Shri K.K. Venugopal, the learned senior counsel appearing on behalf of the appellant formulated following substantial questions of law concerning the impugned judgment and the interpretation of the PML Act.

"1. Whether the PML Act is a self-occupied Code while the Act constituting the CBI is limited?

2. Whether, in light of Section 45(1A) read with Sections 43 and 44 of the PML Act, the CBI has any authority to investigate offences which are the sole domain of the Enforcement Directorate?

3. Whether the High Court was right in brushing aside all the allegations against the PIL and directing investigation by the CBI?"

9. According to the learned counsel for the appellant, the offence of money laundering, under section 4 of the PML Act may be investigated only by the Enforcement Directorate and tried only by the Special Court under the Act.

10. Mr. Venugopal submitted that the PML Act is a self-contained Code while the Act constituting the CBI is limited.

11. Mr. Venugopal further submitted that the PML Act was enacted pursuant to the Political Declaration adopted by the Special Session of the United Nations General Assembly on 8th to 10th June, 1998, which called upon member States to adopt national money-laundering legislation and programmes. (Preamble to the PML Act).

12. Learned counsel for the appellant submitted that the Delhi Special Police Establishment Act, 1946 ('DPSE Act') is limited to investigating offences in Delhi and the Union Territories.

13. Mr. Venugopal submitted that the PML Act was enacted pursuant to Article 253 of the Constitution and would prevail over any inconsistent State enactment. Reliance has been placed on *Maganbhai Ishwarbhai Patel Etc. v. Union of India and Another* (1970) 3 SCC 400 at para 81 and *S. Jagannath v. Union of India and Others* (1997) 2 SCC 87 at para 48. This is however not the case with the DSPE Act.

14. Learned counsel for the appellant also submitted that the PML Act is a special legislation enacted by Parliament and not only sets out the 'Offences' (Chapter II) but also the 'manner of investigation', attachment and adjudication (Chapter III), the power to summon, search, seizure and arrest (Chapter V), establishment of Tribunals (Chapter VI), Special Courts (Chapter VII), Authorities and their powers (Chapter VIII) and International arrangements (Chapter IX).

15. Mr. Venugopal contended that the Act establishes a

specialized agency which consists of Police Officials, Revenue Officials, Income Tax Officials and various specialized officials drawn from various departments. It also empowers the Enforcement Directorate under Section 54 to call on assistance of officials from:

(a) Customs and Excise Department;

(b) Under the NDPS Act;

(c) Income Tax'

(d) Stock Exchange;

(e) RBI;

(f) Police;

(g) Under FEMA;

(h) SEBI; or

(i) Any Body Corporate established under an Act or by the Central Government

16. Learned counsel for the appellant also contended that the CBI is comprised only of the police officers and does not have the expertise or wherewithal to deal with the offences under the PML Act. In addition, as specifically defined in Section 55 (c) of the PML Act, the ED is empowered internationally to trace the proceeds of crime, with great freedom accorded to the ED when the nexus is established with a contracting state. The CBI does not possess such an advantage.

17. Mr. Venugopal placed reliance on the judgment of this Court in *Central Bureau of Investigation v. State of Rajasthan & Others* (1996) 9 SCC 735 where the identical issue arose of the CBI seeking to investigate offences under the FERA, which was the sole domain of the ED, the Court held as follows:

(i) The officers of the ED are empowered to exercise the powers under the FERA as per Sections 3 & 4, and no other authority has been empowered except as the Central Government may empower from time to time.

(ii) FERA is a special and a central legislation enacted later in time than the DSPE Act, and Section 4(2) of the Cr.P.C. makes it clear that only in the absence of any provision in any other law relating to investigation will a member of the police force be authorized to investigate the offence.

(iii) The FERA Act is a complete code in itself.

(iv) As the allegations in the case related to FERA offences outside India, and the DSPE under Sections 1 and 2 are authorized only to investigate offences inside India, the DSPE member is "not clothed with the authority to investigate offences committed outside India".

18. Learned counsel further submitted that in addition to the above, this court in *Enforcement Directorate and Another v. M. Samba Siva Rao and Others* (2000) 5 SCC 431 at para 5 reiterated that the provisions of the FERA constitute a complete code. The provisions of the PML Act are identical, and in some ways more wide-ranging.

19. Learned counsel for the appellant further submitted that as the allegations in the complaint against the appellant relate to so-called national and trans-national offences, the only authority which is legally and factually equipped to investigate the offences is the Enforcement Directorate.

20. Mr. Venugopal further submitted that in the light of section 45 (1A) read with sections 43 and 44 of the PML Act, the CBI has no authority to investigate the offences which are the sole domain of the Enforcement Directorate.

21. Mr. Venugopal referred various sections of the PML

Act to demonstrate that only the Enforcement Directorate can investigate the matter. He also submitted that the conduct of investigation by the CBI is therefore contrary to both the intent of the Legislature as well as the Executive and further if the plea of CBI is put to test it leads to absurdity. It is submitted that in order to convict a person of an offence punishable under section 4 of the PML Act, the Enforcement Directorate has to first rule that the scheduled offence is committed which can be an offence under the Indian Penal Code or the Prevention of Corruption Act or Narcotics, Drugs, Psychotropic Substances Act or any other offence given in any other Act in the schedule in the PML Act. Once this first part is proved then the Enforcement Directorate has to prove how much money or what property was derived from committing the scheduled offence and lastly how was it being projected as untainted. The appellant prayed that the investigation by the CBI of Vigilance FIR No.09/09 registered at Ranchi be set aside and the appellant be released from illegal detention forthwith.

22. The written submissions have also been filed on behalf of the CBI and the Directorate of Enforcement. It is mentioned in the written submissions that the Vigilance P.S. Case No.09/2009 dated 02.07.2009 is instituted inter alia alleging commission of offence under sections 409, 420, 423, 424, 465, 120-B of IPC and Sections 7, 10, 11, 13(2) read with Section 13(1)(e) of the Prevention of Corruption Act, 1988. The said complaint was registered on directions of the Special Judge, Vigilance, Ranchi, who exercised powers under Section 156(3) of the Cr.P.C. It named Shri Madhu Koda, former Chief Minister, Shri Kamlesh Singh, former Minister, Shri Bhanu Prasad Shah, former Minister and Bandhu Tirky, former Minister of Jharkhand.

23. During the course of investigation into the said complaint by the Vigilance, P.S., State of Jharkhand, involvement of the appellant Binod Kumar Sinha had surfaced. The FIR also contains clear allegations against the appellant. The Central Bureau of Investigation is investigating into the

commission of these offences alone and is not investigating any offence under the PML Act, 2002 since the investigation under the said Act is solely and exclusively within the jurisdiction and domain of the Enforcement Directorate, which is of course subject to the exercise of powers by the Central Government under section 45 (1-A) of the said Act.

24. In the written submissions, comprehensive information about investigation has been submitted. It is also incorporated that the appellant, who was an absconder and evaded arrest, is not entitled to any relief in exercise of discretionary jurisdiction of this court under Article 136 of the Constitution of India. It is also prayed that this appeal which challenges the order transferring investigation of Vigilance P.S. No. 09/2009 to the CBI deserves to be dismissed.

25. It is also incorporated that the appellant is involved in a multi crore scam – corruption in the matter of grant of iron ore mine leases and other acts as more particularly set out. It is incorporated in the affidavit that a perusal of various provisions of the Act would show that the said Act does not empower the Enforcement Directorate to investigate offences under IPC or Prevention of Corruption Act, 1988 or any of the scheduled offences. It is the PML Act which authorizes the Enforcement Directorate only to investigate offences of money laundering as defined under Section 3 and punishable under Section 4 thereof. It also provides attachment, adjudication and confiscation of the property involved in money laundering and setting up of Special Courts.

26. Section 2(p) defines Money Laundering as under:

> "money-laundering" has the meaning assigned to it in section 3"

27. Section 2(ra) defines offence of cross border implications and the same is reproduced hereunder:-

"offence of cross border implications", means--

(i) any conduct by a person at a place outside India which constitutes an offence at that place and which would have constituted an offence specified in Part A, Part B or Part C of the Schedule, had it been committed in India and if such person remits the proceeds of such conduct or part thereof to India; or

(ii) any offence specified in Part A, Part B or Part C of the Schedule which has been committed in India and the proceeds of crime, or part thereof have been transferred to a place outside India or any attempt has been made to transfer the proceeds of crime, or part thereof from India to a place outside India.

Explanation.-- Nothing contained in this clause shall adversely affect any investigation, enquiry, trial or proceeding before any authority in respect of the offences specified in Part A or Part B of the Schedule to the Act before the commencement of the Prevention of Money-laundering (Amendment) Act, 2009.

28. Section 2(u) defines proceeds of crime and the same is reproduced hereunder:

(u) "proceeds of crime" means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property;

29. Section 2(x) defines Schedule and the same is reproduced hereunder :

"Schedule" means the Schedule to this Act".

30. Section 2(y) defines Scheduled Offences and the same is reproduced hereunder :-

(2y) "scheduled offence" means--

(i) the offences specified under Part A of the Schedule; or

(ii) the offences specified under Part B of the Schedule if the total value involved in such offences is thirty lakh rupees or more; or

(iii) the offences specified under Part C of the Schedule.

31. Sections 3 and 4 are reproduced hereunder:-

"3. Offence of money-laundering.— Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime and projecting it as untainted property shall be guilty of offence of money-laundering.

"4. Punishment for money-laundering.— Whoever commits the offence of money-laundering shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine which may extend to five lakh rupees:

Provided that where the proceeds of crime involved in money-laundering relates to any offence specified under paragraph 2 of Part A of the Schedule, the provisions of this section shall have effect as if for the words "which may extend to seven years", the words "which may extend to ten years" had been substituted."

32. Mr. H.P. Raval, learned Additional Solicitor General appearing for the C.B.I. submitted that a bare perusal of the above provisions makes it clear that the offence of money laundering is a stand alone offence within the meaning of the said Act and its investigation alone is in the exclusive domain of the Enforcement Directorate.

33. He also submitted that the provisions of the said Act do not contemplate the investigation of any of the Indian Penal Code, Prevention of Corruption Act or any of the scheduled offences by the Enforcement Directorate.

34. Mr. Raval contended that having regard to the terminology of section 3, any process or activity connected with the proceeds of the crime and projecting it as untainted property is the offence of money laundering which is made punishable under section 4.

35. Mr. Raval submitted that section 5 (1) of the said Act provides that the Director or Authorised Officer has reason to believe, to record in writing on the basis of material in his possession that any person is in possession of any proceeds of crime, that such person has been charged of having committed the scheduled offence and such proceeds of crime are likely to be conceded, transfer or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under Chapter III of the said Act, then by an order in writing such property may be provisionally attached for a period not exceeding 150 days.

36. According to Mr. Raval, a bare reading of the said provision makes it clear that the jurisdiction to initiate action of attachment has to be founded on a reasonable belief of a person being in possession of any proceeds of the crime and not on a concluded investigation of the person being in possession of the proceeds of the crime. The distinction is clear and it follows from Section 5(1)(b) that the second condition for initiation of action of attachment of property involved in money laundering is that such person in respect of whom there is reason to believe that he is in possession of any proceeds of the crime, has been charged of having committed a scheduled offence.

37. Mr. Raval contended that if the contentions of the appellant were true, then the sections of the said Act would have been differently worded. He also submitted that the contention of the appellant on the basis of provisions of sections 43 to 45 that any of the scheduled offences can only be investigated exclusively by the Enforcement Directorate is not justified and tenable at law.

38. Mr. Raval submitted that the embargo from taking cognizance by the Special Court of any offence as provided in the second proviso of sub section (1) of section 45 is only with respect to an offence punishable under section 4. It is only in respect of an offence punishable under section 4 of the Prevention of Money Laundering Act that cognizance is barred to be taken by the Special Court except on a complaint in writing as provided in sub clause (1) and (2) thereof.

39. He also submitted that this provision cannot be construed to mean that the Enforcement Directorate has the exclusive jurisdiction to investigate any of the scheduled offences.

40. Mr. Raval contended that the contention of the appellant that merely because under section 44 of the PML Act, the Special Court constituted in the area in which the offence has been committed, has been authorized statutorily to try the scheduled offence and the offence punishable under section 4 is equally unsustainable in law since nothing in the said provision of section 44 of the said Act envisages the exclusive investigation of the scheduled offences by the Enforcement Directorate. Mr. Raval submitted that the trial of the scheduled offence is distinct and different from investigation under the PML Act.

41. The above contention of the respondent is buttressed having regard to provisions contained in Section 43(2) which provides that while trying an offence under the Prevention of Money Laundering Act (which means the offence of Money Laundering alone) the Special Court shall also try an offence other than referred to sub section (1) of section 43 with which

the accused under the Code of Criminal Procedure be charged at the same trial.

42. He contended that the scheme of the Act would, therefore, not construe the submission of the appellant that in case of there being an allegation of offence of money laundering, the scheduled offence also has to be exclusively investigated by the Enforcement Directorate. Such a contention is not supported by the provisions of the Act since there is no provision restricting the investigation of offence other than that of money laundering by any appropriate investigating agency.

43. Mr. Raval submitted that the money alleged to have been so earned is of unprecedented amounts. It is further recorded that, however, there is no clear allegation so far about its laundering in the sense mentioned in the PML Act. It is further observed that there is an allegation of his investment in the property, shares etc. not only in India, but, also abroad. Having so observed it is recorded that therefore the basic investigation requires determining whether money has been acquired by abuse of official position amounting to an offence under the Prevention of Corruption Act and under the Indian Penal Code and persons by whom the same has been done the amount of money which has been so earned and the places where it has been invested.

44. According to the learned counsel for the respondents, the High Court in the impugned order has recorded cogent reasons for directing the investigation by the Central Bureau of Investigation. Even this court while issuing notice vide order dated 01.09.2010 has directed the CBI to continue to investigate as directed by the High Court. Under the circumstances, the appellant is not entitled to any relief as contended.

45. Mr. Raval informed the Court that the charge sheet in fact has been filed on 12.11.2010 before the Court of Competent Jurisdiction alleging inter alia commission of

offence under section 120-B IPC, Section 9, Section 13 (2) read with section 13(1) (d) of the Prevention of Corruption Act, 1988 against various accused including the appellant Shri Binod Kumar Sinha. It is further submitted that the investigation is still on and subsequent charge sheets may be filed as and when during investigation sufficient material surfaces on other aspects.

46. In written submission it is categorically stated that the Central Bureau of Investigation is investigating into the commission of these offences alone and presently is not investigating any offence under the PML Act as the investigation under the PML Act is solely and exclusively within the jurisdiction and domain of the Enforcement Directorate, which is of course subject to the exercise of powers by the Central Government under Section 45 (1-A) of the said Act.

47. We have heard the learned counsel for the parties at length and perused the written submissions filed by them. On consideration of the totality of the facts and circumstances, we are clearly of the view that no interference is called for.

48. The appeal being devoid of any merit is accordingly dismissed.

49. In the facts and circumstances of the case, we direct the parties to bear their own costs.

D.G. Appeal dismissed.

ASSISTANT COMMERCIAL TAXES OFFICER
v.
M/S MAKKAD PLASTIC AGENCIES
(Civil Appeal No. 2692 of 2011)

MARCH 29, 2011

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

Rajasthan Sales Tax Act, 1994: s.37 – Rectification of error apparent on the face of the record – Exercise of power vested u/s.37 – Scope and ambit – Held: The scope and ambit of the power u/s.37 is circumscribed and restricted within the ambit of the power vested by the said Section – Such a power is neither a power of review nor is akin to the power of revision but is only a power to rectify a mistake apparent on the face of the record and for which re-appreciation of the entire records is neither possible nor called for – Rectification implies the correction of an error or removal of defects or imperfections – In the instant case, the Taxation Board passed an order against assessee whereby it upheld the demand of differential tax and imposition of penalty as done by assessing authority – Assessee filed rectification application u/s.37 before the Board – The Board modified its earlier order to the extent that as the assessee had declared all his sales in the books of accounts, imposition of penalty was not justified – While passing the subsequent order, the Board exceeded its jurisdiction by re-appreciating the evidence on record and holding that there was no mala fide intention on the part of assessee-respondent for tax evasion – Such re-appreciation of the evidence to come to a contrary finding was not available u/s.37 while exercising the power of rectification of error apparent on the face of the record – Thus, the subsequent order passed by the Board as also the judgment passed by the High Court upholding the said order

of the Board set aside and the original order passed by the Assessing Officer restored – Review.

Review: Maintainability of – Held: Review is a creature of the statute – An order of review could be passed only when an express power of review is provided in the statute – In the absence of any statutory provision for review, exercise of power of review under the garb of clarification/modification/ correction is not permissible.

Words and phrases: Rectification – Meaning of.

The assessing officer passed the assessment order that the articles sold by the assessee-respondent attracted the sales tax of 10% instead of 8% paid by assessee treating them as separate articles from plastic goods. The demand was made for the difference of tax at 2% alongwith surcharge, interest and penalty. The appellate authority set aside the assessment order. On appeal, the Taxation Board by its order dated 13.5.2008 restored the assessment order holding that "plastic goods" and "thermoware" were two different articles as was indicated from the invoice itself.

The assessee filed a rectification/amendment application under Section 37 of the Rajasthan Sales Tax Act, 1994. The Taxation Board decided the said application on 22.1.2009 and modified its earlier order to the extent that as the assessee had declared all his sales in the books of accounts, in order to levy penalty, the department could not show that there was a malafide intention on the part of the assessee. Accordingly, it held that the order of levying penalty was not justified. Aggrieved, the appellant filed revision before the High Court, which was also dismissed.

The question which arose for consideration in the

instant appeal was whether, while exercising power vested under Section 37 of the Act, the Taxation Board could re-appreciate the evidence on record and review its earlier order to hold that there was no mens rea on the part of the assessee and no penalty was leviable on it.

Allowing the appeal, the Court

HELD: 1.1. The exercise of power vested under Section 37 of the Rajasthan Sales Tax Act, 1994 by the Taxation Board in the instant case by interfering with its earlier order was a jurisdictional error and also an exercise of power in excess to what is provided in the statute. The scope and ambit of the power which could be exercised under Section 37 of the Act is circumscribed and restricted within the ambit of the power vested by the said Section. Such a power is neither a power of review nor is akin to the power of revision but is only a power to rectify a mistake apparent on the face of the record. Rectification implies the correction of an error or a removal of defects or imperfections. It implies an error, mistake or defect which after rectification is made right. It is also now an established proposition of law that review is a creature of the statute and such an order of review could be passed only when an express power of review is provided in the statute. In the absence of any statutory provision for review, exercise of power of review under the garb of clarification/modification/correction is not permissible. [Paras 13, 14, 17] [671-B-F; 673-C-E]

Commissioner of Income Tax, Bhopal v. Ralson Industries Ltd. **(2007) 2 SCC 326;** *Commissioner of Trade Tax, U.P. v. Upper Doab Sugar Mills Ltd.***(2000) 3 SCC 676 – relied on.**

1.2. Section 37 of the Act provides for a power to rectify any mistake apparent on the record. Such power is vested on the authority to rectify an obvious mistake

which is apparent on the face of the records and for which a re-appreciation of the entire records is neither possible nor called for. When the subsequent order dated 22.01.2009 passed by the Taxation Board is analysed and scrutinised, it would be clear/apparent that the Taxation Board while passing that order exceeded its jurisdiction by re-appreciating the evidence on record and holding that there was no mala fide intention on the part of assessee-respondent for tax evasion. Such re-appreciation of the evidence to come to a contrary finding was not available under Section 37 of the Act while exercising the power of rectification of error apparent on the face of the records. Thus, the orders passed by the Taxation Board on 22.01.2009 as also the impugned order and judgment passed by the High Court upholding the said order of the Taxation Board are set aside and quashed and the original order passed by the Assessing Officer is restored. [Paras 18, 19] [673-F-H; 674-A-B]

Kalabharati Advertising v. Hemant Vimalnath Narichania and Others **(2010) 9 SCC 437 – relied on.**

Case Law Reference:

(2007) 2 SCC 326	**relied on**	**Para 15**
(2000) 3 SCC 676	**relied on**	**Para 16**
(2010) 9 SCC 437	**relied on**	**Para 17**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2692 of 2011.

From the Judgment & Order dated 03.05.2010 of the High Court of Judicature for Rajasthan, Jodhpur Bench, in S.B. Civil (S.T.) Revision Petition No. 74 of 2010.

Abhishek Gupta, Milid Kumar for the Appellant.

The Judgment of the Court was delivered by

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

2. This appeal is directed against the judgment and order dated 03.05.2010 passed by the Rajasthan High Court, Jodhpur Bench, in S.B. Civil [Sales-Tax] Revision No. 74 of 2010, whereby the High Court dismissed the said Revision Petition preferred by the appellant herein and upheld the order dated 22.01.2009 passed by the Rajasthan Taxation Board, Ajmer, wherein the Taxation Board interfered and modified its earlier order dated 13.05.2008.

3. The assessment of the assessee-respondent for the Assessment Year 2001-02 was completed by the Assessing Officer under Section 29(7) of the Rajasthan Sales Tax Act, 1994 [for short "the Act of 1994"] holding that the tax on "thermo ware" and "vacuum ware", which were the articles sold by the assessee-respondent during the relevant assessment year, should be levied Sales Tax at 10 per cent instead of 8 per cent, treating them as separate articles from plastic goods/products. Consequently, the liability of difference of tax at 2 per cent along with surcharge, interest and penalty was also levied.

4. The aforesaid order of the Assessing Officer was challenged by the assessee-respondent before the Deputy Commissioner [Appeals], Commercial Tax Department, Bikaner under Section 84 of the Act of 1994, which was allowed by the Appellate Authority by order dated 29.03.2005 by setting aside the demand for difference of tax imposed at 2 per cent as also the penalty and interest.

5. Aggrieved by the aforesaid order dated 29.03.2005 of the Deputy Commissioner [Appeals], Bikaner the appellant herein preferred an appeal before the Rajasthan Taxation Board, Ajmer, which was heard and disposed of by the Taxation Board by allowing the same vide its order dated 13.05.2008. The Taxation Board considered various documents placed on

record including invoices and, thereafter, on appreciation thereof, it was held that "plastic goods" and "thermo ware" are two different articles as was indicated from the invoice itself. It was also held that the conclusion arrived at by the Tax Assessing Officer is well-considered and reasonable, whereas the order passed by the Deputy Commissioner [Appeals], Bikaner is contrary to facts and law. Having held thus, the Taxation Board allowed the appeal and order dated 29.03.2005 passed by the Deputy Commissioner [Appeals], Bikaner was set aside and order passed by the Tax Assessing Officer was restored.

6. The assessee-respondent thereafter filed a rectification/amendment application purportedly under Section 37 of the Act of 1994, which was decided by the Rajasthan Taxation Board, Ajmer by passing an order dated 22.01.2009. By the aforesaid order the Taxation Board modified its earlier order to the extent of holding that as the assessee-respondent had declared all his sales in the books of accounts, in that situation, in order to levy penalty, department has to also prove additionally, that there was a mala fide intention on the part of the assessee-respondent for tax evasion, which is not revealed in the present case. It was further held that as the mala fide intention of the assessee-respondent for tax evasion has not been proved and since no such evidence is available on record from which it could be established that the assessee-respondent had the mala fide intention behind recovering the tax at the rate of 8 per cent, the order of levying penalty is not justiciable. After recording the aforesaid findings, the Taxation Board passed an order dated 22.01.2009 to the extent of amending its previous order dated 13.05.2008 and set aside the order passed by the Deputy Commissioner [Appeals], Bikaner dated 29.03.2005 on the issue of tax evasion only, however, maintained the finding on the issue of penalt.

7. Being aggrieved by the aforesaid order passed by the Taxation Board a Revision Petition was preferred by the

appellant before the High Court of Rajasthan, Jodhpur Bench under Section 86 of the Act of 1994. The High Court, however, held that no question of law arises out of the order passed by the Taxation Board for consideration and, consequently, the Revision Petition was dismissed. The present appeal, as stated hereinbefore, is directed against the aforesaid two orders passed by the High Court as also by the Taxation Board.

8. From the aforesaid narration of facts it is crystal clear that the earlier order dated 13.05.2008 passed by the Taxation Board was interfered with and modified by the Taxation Board itself under its order dated 22.01.2009. The said order dated 22.01.2009 is practically challenged in the present case on the ground that the said order was passed by the Taxation Board in excess of its jurisdiction. The said order dated 22.01.2009 was passed on the basis of an Amendment Application filed by the assessee-respondent under Section 37 of the Act of 1994. In the said order dated 22.01.2009, the Taxation Board proceeded on the ground that the said application was in the nature of Amendment Application praying for amendment of its judgment and order dated 13.05.2008.

9. Contention raised on behalf of the appellant is that the Taxation Board committed a jurisdictional error in amending and reviewing its earlier order dated 13.05.2008 while exercising the power of rectification of a mistake apparent on the face of the record.

10. It may be stated herein that despite service of notice, none appears for the assessee-respondent and, therefore, we proceed to dispose of this appeal on the basis of the submissions made by the counsel appearing for the appellant and also on the perusal of the records placed before us.

11. In order to appreciate the aforesaid contention, we are required to extract the relevant part of Section 37 of the Act of 1994, which was the power exercised by the Taxation Board for passing the order dated 22.01.2009: -

"Section 37: Rectification of a Mistake –

(1) With a view to rectifying any mistake apparent from the record, any officer appointed or any authority constituted under the Act may rectify suo motu or otherwise any order passed by him.

Explanation: A mistake apparent from the record shall include an order which was valid when it was made and is subsequently rendered invalid by an amendment of the law having retrospective operation or by a judgment of the Supreme Court, the Rajasthan High Court or the Rajasthan Tax Board.

....."

12. The Taxation Board by its order dated 13.05.2008 was disposing of an appeal filed against the order dated 29.03.2005 passed by the Deputy Commissioner [Appeals]. By the aforesaid order dated 13.05.2008 the Taxation Board upheld and accepted the contention of the appellant herein that "thermo ware" is not similar to "plastic product" and that rather they are two different products/articles, which in fact is also proved and established from the documents on record. It was, therefore, held that the conclusion arrived at by the Assessing Officer is well-considered and reasonable. It was also held that, although, in the appellate judgment, given by the Deputy Commissioner [Appeals], reference was made to the use of "plastic granules" and "powder" as raw material for manufacturing "thermo ware" for treating "thermo ware" as covered under the category of plastic goods/products, but neither any evidence nor any reasonable and justifiable ground was given in the said order for doing the same. After recording the aforesaid findings, the Taxation Board set aside the judgment of the Deputy Commissioner [Appeals] and restored the order of the Tax Assessing Officer, who had by his order, held that the assessee-respondent is liable to pay tax at the rate of 10 per cent, as the product "thermo ware" and "vacuum

ware", which are the articles sold by the assessee-respondent, are assessable to tax at the rate of 10 per cent instead of 8 per cent to be levied on plastic wares.

13. The aforesaid well-reasoned order came to be interfered with by the Taxation Board itself while exercising the purported powers under Section 37 of the Act of 1994, which empowers the Board only to rectify a mistake apparent on the face of the record. The issue, therefore, is whether, while exercising such power vested under Section 37 of the Act of 1994, the Taxation Board could re-appreciate the evidence on record and review its earlier order by holding that there was no mens rea on the part of the assessee-respondent and, therefore, no penalty is leviable on them. The aforesaid exercise of power by the Taxation Board in the present case by interfering with its earlier order was submitted to be a jurisdictional error and also purportedly to be an exercise of power in excess to what is provided in the statute.

14. The scope and ambit of the power which could be exercised under Section 37 of the Act of 1994 is circumscribed and restricted within the ambit of the power vested by the said Section. Such a power is neither a power of review nor is akin to the power of revision but is only a power to rectify a mistake apparent on the face of the record. Rectification implies the correction of an error or a removal of defects or imperfections. It implies an error, mistake or defect which after rectification is made right.

15. In the case of *Commissioner of Income Tax, Bhopal v. Ralson Industries Ltd.* reported in (2007) 2 SCC 326 a similar situation arose for the interpretation of this Court regarding the scope and ambit of Section 154 of the Income Tax Act vesting the power of rectification as against the power vested under Section 263 of the Income Tax Act, which is a power of revision. While examining the scope of the power of rectification under Section 154 as against the power of revision

vested under Section 263 of the Income Tax Act, it was held by this Court as follows at Para 8: -

> "8. The scope and ambit of a proceeding for rectification of an order under Section 154 and a proceeding for revision under Section 263 are distinct and different. Order of rectification can be passed in certain contingencies. It does not confer a power of review. If an order of assessment is rectified by the Assessing Officer in terms of Section 154 of the Act, the same itself may be a subject matter of a proceeding under Section 263 of the Act. The power of revision under Section 263 is exercised by a higher authority. It is a special provision. The revisional jurisdiction is vested in the Commissioner. An order thereunder can be passed if it is found that the order of assessment is prejudicial to the Revenue. In such a proceeding, he may not only pass an appropriate order in exercise of the said jurisdiction but in order to enable him to do it, he may make such inquiry as he deems necessary in this behalf."

In paragraph 12 of the said judgment it was also held that when different jurisdictions are conferred upon different authorities, to be exercised on different conditions, both may not be held to be overlapping with each other. While examining the scope and limitations of jurisdiction under Section 154 of the Income Tax Act, it was held that such a power of rectification could only be exercised when there is an error apparent on the face of the record and that it does not confer any power of review. It was further held that an order of assessment may or may not be rectified and if an order of rectification is passed by the Assessing Authority, the rectified order shall be given effect to.

16. We may also at this stage appropriately refer to yet another decision of this Court in *Commissioner of Trade Tax, U.P. v. Upper Doab Sugar Mills Ltd.* reported in (2000) 3 SCC 676, in which the power and scope of rectification was

considered and pitted against the scope of review. The aforesaid decision was in the context of Section 39(2) of the U.P. Sales Tax (Amendment) Act, 1995 which provides the power of review. Section 22 of the said Act provides for rectification of mistake. In the said decision, it was held that when two specific and independent powers have been conferred upon the authorities, both powers can be exercised alternatively, but, it cannot be said that while exercising power of rectification, the authority can simultaneously exercise the power of review.

17. Both the aforesaid two decisions which were rendered while considering taxation laws are squarely applicable to the facts of the present case. It is also now an established proposition of law that review is a creature of the statute and such an order of review could be passed only when an express power of review is provided in the statute. In the absence of any statutory provision for review, exercise of power of review under the garb of clarification/modification/correction is not permissible. In coming to the said conclusion we are fortified by the decision of this Court in *Kalabharati Advertising v. Hemant Vimalnath Narichania and Others* reported in (2010) 9 SCC 437.

18. Section 37 of the Act of 1994 provides for a power to rectify any mistake apparent on the record. Such power is vested on the authority to rectify an obvious mistake which is apparent on the face of the records and for which a re-appreciation of the entire records is neither possible nor called for. When the subsequent order dated 22.01.2009 passed by the Taxation Board is analysed and scrutinised it would be clear/apparent that the Taxation Board while passing that order exceeded its jurisdiction by re-appreciating the evidence on record and holding that there was no mala fide intention on the part of assessee-respondent for tax evasion. Such re-appreciation of the evidence to come to a contrary finding was not available under Section 37 of the Act of 1994 while

exercising the power of rectification of error apparent on the face of the records.

19. Thus, the orders passed by the Taxation Board on 22.01.2009 as also the impugned order and judgment passed by the High Court upholding the said order of the Taxation Board are hereby set aside and quashed and the original order passed by the Assessing Officer is restored.

20. In terms of the aforesaid observations, the present appeal is allowed but without costs.

D.G. Appeal allowed.

REVANASIDDAPPA AND ANR.
v.
MALLIKARJUN AND ORS.
(Civil Appeal No. 2844 of 2011

MARCH 31, 2011

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

Hindu Marriage Act, 1955:

*s.16(3) – Right of illegitimate children in the coparcenary property of their parents – Whether illegitimate children are entitled to a share in the coparcenary property or whether their share is limited only to the self-acquired property of their parents u/s.16(3) – Held: s.16(3) makes it clear that a child of a void or voidable marriage can only claim rights to the property of his parents, and no one else – The legislature has advisedly used the word "property" and has not qualified it with either self-acquired property or ancestral property – It has been kept broad and general – The issues relating to the extent of property rights conferred on such children u/s.16(3) of the amended Act were discussed in detail in the case of Jinia Keotin case wherein it was held that in the light of express mandate of the legislature itself, there is no room for according upon such children, who but for s.16 would have been branded as illegitimate, any further rights than envisaged therein by resorting to any presumptive or inferential process of reasoning, having recourse to the mere object or purpose of enacting s.16 – Article 39 (f) must be kept in mind by the Court while interpreting the provision of s.16(3) of the Act – Apart from Article 39(f), Article 300A also comes into play while interpreting the concept of property rights – Supreme Court in the case of *Jinia Keotin and Bharatha Matha took narrow view of s.16(3) of the Act – Therefore, matter needs reconsideration and is referred to larger bench – Reference*

to larger bench – Hindu Law – Constitution of India, 1950 – Articles 300A, 39(f).

s.16 – Status of illegitimate children and their right in property of their parents – Effect of amendment of s.16 – Held: The amendment to s.16 of the Act was introduced by Act 60 of 76 – With the amendment of s.16(3), the common law view that the offsprings of marriage which is void and voidable are illegitimate 'ipso-jure' has changed completely – The status of such children which has been legislatively declared legitimate must be recognised and simultaneously law recognises the rights of such children in the property of their parents – This is a law to advance the socially beneficial purpose of removing the stigma of illegitimacy on such children who are as innocent as any other children.

Interpretation of statutes: Purposive interpretation – Held: Courts cannot interpret a socially beneficial legislation on the basis as if the words therein are cast in stone – Such legislation must be given a purposive interpretation to further and not to frustrate the eminently desirable social purpose – Hindu Marriage Act, 1955 – s.16(3).

Constitution of India, 1950: Articles 300A, 39(f) – Held: Right to property is no longer fundamental but it is a Constitutional right and Article 300A contains a guarantee against deprivation of property right save by authority of law.

The question which arose for consideration in the instant appeal was whether illegitimate children are entitled to a share in the coparcenary property or whether their share is limited only to the self-acquired property of their parents under Section 16(3) of the Hindu Marriage Act, 1955.

Referring the matter to Larger Bench, the Court

HELD: 1.1. Section 16(3) of the Hindu Marriage Act, 1955 makes it very clear that a child of a void or voidable

marriage can only claim rights to the property of his parents, and no one else. However, the legislature has advisedly used the word "property" and has not qualified it with either self-acquired property or ancestral property. It has been kept broad and general. The issues relating to the extent of property rights conferred on such children under Section 16(3) of the amended Act were discussed in detail in the case of Jinia Keotin case. It was held in that case that in the light of an express mandate of the legislature itself, there is no room for according upon such children, who but for Section 16 would have been branded as illegitimate, any further rights than envisaged therein by resorting to any presumptive or inferential process of reasoning, having recourse to the mere object or purpose of enacting Section 16 of the Act. Any attempt to do so would amount to doing not only violence to the provision specifically engrafted in sub-section (3) of Section 16 of the Act but also would attempt to court relegislating on the subject under the guise of interpretation, against even the will expressed in the enactment itself. This Court in *Jinia Keotin case took narrow view of Section 16(3) of the Act. [Paras 13, 21, 22] [685-F; 688-B-G]

Jinia Keotin & Ors. v. Kumar Sitaram Manjhi & Ors.* **(2003) 1 SCC 730 – referred to.

1.2. The legislature has used the word "property" in Section 16(3) and is silent on whether such property is meant to be ancestral or self-acquired. A careful reading of Section 16(3) of the Act would show that the amended Section postulates that such children would not be entitled to any rights in the property of any person who is not his parent if he was not entitled to them, by virtue of his illegitimacy, before the passing of the amendment. However, the said prohibition does not apply to the property of his parents. Clauses (1) and (2) of Section 16 expressly declare that such children shall be legitimate.

If they have been declared legitimate, then they cannot be discriminated against and they will be at par with other legitimate children, and be entitled to all the rights in the property of their parents, both self-acquired and ancestral. The prohibition contained in Section 16(3) would apply to such children with respect to property of any person other than their parents. [Paras 25, 26] [689-C-F]

2. With changing social norms of legitimacy in every society, what was illegitimate in the past may be legitimate today. The concept of legitimacy stems from social consensus, in the shaping of which various social groups play a vital role. Very often a dominant group loses its primacy over other groups in view of ever changing socio-economic scenario and the consequential vicissitudes in human relationship. Law takes its own time to articulate such social changes through a process of amendment. That is why in a changing society, law cannot afford to remain static. If one looks at the history of development of Hindu Law, it will be clear that it was never static and has changed from time to time to meet the challenges of the changing social pattern in different time. [Para 27] [689-G-H; 690-A-B]

Smt. Sarojamma & Ors. v. Smt. Neelamma & Ors., **ILR 2005 Kar 3293;** *Sri Kenchegowda v. K.B. Krishnappa & Ors.,* **ILR 2008 Kar 3453;** *Kamulammal (deceased) represented by Kattari Nagaya Kamarajendra Ramasami Pandiya Naicker v. T.B.K. Visvanathaswami Naicker (deceased) & Ors.,* **AIR 1923 PC 8;** *P.M.A.M. Vellaiyappa Chetty & Ors. v. Natarajan & Anr.,* **AIR 1931 PC 294;** *Raja Jogendra Bhupati Hurri Chundun Mahapatra v. Nityanund Mansingh & Anr.,* **1889-90 Indian Appeals 128;** *Gur Narain Das & Anr. v. Gur Tahal Das & Ors.,* **AIR 1952 SC 225;** *Singhai Ajit Kumar & Anr. v. Ujayar Singh & Ors.,* **AIR 1961 SC 1334;** *Neelamma & Ors. v. Sarojamma & Ors.* **(2006) 9 SCC 612;** *Bharatha*

Matha & Anr. v. R. Vijaya Renganathan & Ors. **AIR 2010 SC 2685 – referred to.**

3. The amendment to Section 16 of the Hindu Marriage Act was introduced by Act 60 of 76. This amendment virtually substituted the previous Section 16 of the Act with the present Section. From the relevant notes appended in the clause relating to this amendment, it appears that the same was done to remove difficulties in the interpretation of Section 16. With the amendment of Section 16(3), the common law view that the offsprings of marriage which is void and voidable are illegitimate 'ipso-jure' has to change completely. The status of such children which has been legislatively declared legitimate must be recognised and simultaneously law recognises the rights of such children in the property of their parents. This is a law to advance the socially beneficial purpose of removing the stigma of illegitimacy on such children who are as innocent as any other children. However, one thing must be made clear that benefit given under the amended Section 16 is available only in cases where there is a marriage but such marriage is void or voidable in view of the provisions of the Act. In the case of joint family property such children will be entitled only to a share in their parents' property but they cannot claim it on their own right. Logically, on the partition of an ancestral property, the property falling in the share of the parents of such children is regarded as their self acquired and absolute property. In view of the amendment, there is no reason why such children will have no share in such property since such children are equated under the amended law with legitimate offspring of valid marriage. The only limitation even after the amendment seems to be that during the life time of their parents such children cannot ask for partition but they can exercise this right only after the death of their parents. [Paras 29, 33-35] [690-D-E; 691-D-H; 692-A]

Parayankandiyal Eravath Kanapravan Kalliani Amma (Smt.) & Ors.v. K. Devi and Ors. **(1996) 4 SCC 76 – referred to.**

4. The Court has to remember that relationship between the parents may not be sanctioned by law but the birth of a child in such relationship has to be viewed independently of the relationship of the parents. A child born in such relationship is innocent and is entitled to all the rights which are given to other children born in valid marriage. This is the crux of the amendment in Section 16(3). However, some limitation on the property rights of such children is still there in the sense their right is confined to the property of their parents. Such rights cannot be further restricted in view. [Para 36] [692-C-D]

5. It is well known that this Court cannot interpret a socially beneficial legislation on the basis as if the words therein are cast in stone. Such legislation must be given a purposive interpretation to further and not to frustrate the eminently desirable social purpose of removing the stigma on such children. In doing so, the Court must have regard to the equity of the Statute and the principles voiced under Part IV of the Constitution, namely, the Directive Principles of State Policy. This flows from the mandate of Article 37 which provides that it is the duty of the State to apply the principles enshrined in Chapter IV in making laws. It is no longer in dispute that today State would include the higher judiciary in this country. Article 39 (f) must be kept in mind by the Court while interpreting the provision of Section 16(3) of Hindu Marriage Act. Apart from Article 39(f), Article 300A also comes into play while interpreting the concept of property rights. Right to property is no longer fundamental but it is a Constitutional right and Article 300A contains a guarantee against deprivation of property right save by authority of law. In the instant case, Section 16(3) as

amended, does not impose any restriction on the property right of such children except limiting it to the property of their parents. Therefore, such children will have a right to whatever becomes the property of their parents whether self acquired or ancestral. For the said reasons, this Court is constrained to take view different from the one taken in Jinia Keotin and Bhartha Matha on Section 16(3) of the Act. [Para 37 to 42] [692-E-H; 693-B, G-H; 694-A-C]

Kesavananda Bharati Sripadagalvaru v. State of Kerala and another **(1973) 4 SCC 225 – referred to.**

Case Law Reference:

ILR 2005 Kar 3293	**referred to**	**Para 6, 24, 32, 42**
ILR 2008 Kar 3453	**referred to**	**Para 9**
AIR 1923 PC 8	**referred to**	**Para 15**
AIR 1931 PC 294	**referred to**	**Para 16, 18, 19**
1889-90 I A 128	**referred to**	**Para 17, 19**
AIR 1952 SC 225	**referred to**	**Para 18**
AIR 1961 SC 1334	**referred to**	**Para 19**
[(2003) 1 SCC 730	**referred to**	**Para 21, 22,23,24,32,36,42**
(2006) 9 SCC 612	**referred to**	**Para 22**
AIR 2010 SC 2685	**referred to**	**Para 23, 24,32,36,42**
(1996) 4 SCC 76	**referred to**	**Para 29**
(1973) 4 SCC 225	**referred to**	**Para 37**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2844 of 2011.

From the Judgment & Order dated 07.11.2008 of the High Court of Karnataka, Circuit Bench at Gulbarga in R.S.A. No. 550 of 2006.

Kiran Suri, S.J. Smith for the Appellants.

Basava Prabhu S. Patil, V.N. Raghupathy for the Respondents.

The Judgment of the Court was delivered by

GANGULY, J. 1. Leave granted.

2. The first defendant had two wives- the third plaintiff (the first wife) and the fourth defendant (the second wife). The first defendant had two children from the first wife, the third plaintiff, namely, the first and second plaintiffs; and another two children from his second wife, the fourth defendant namely, the second and third defendant.

3. The plaintiffs (first wife and her two children) had filed a suit for partition and separate possession against the defendants for their 1/4th share each with respect to ancestral property which had been given to the first defendant by way of grant. The plaintiffs contended that the first defendant had married the fourth defendant while his first marriage was subsisting and, therefore, the children born in the said second marriage would not be entitled to any share in the ancestral property of the first defendant as they were not coparceners.

4. However, the defendants contended that the properties were not ancestral properties at all but were self-acquired properties, except for one property which was ancestral. Further, the first defendant also contended that it was the fourth defendant who was his legally wedded wife, and not the third plaintiff and that the plaintiffs had no right to claim partition. Further, the first defendant also alleged that an oral partition had already taken place earlier.

5. The Trial Court, by its judgment and order dated 28.7.2005, held that the first defendant had not been able to prove oral partition nor that he had divorced the third plaintiff. The second marriage of the first defendant with the fourth defendant was found to be void, as it had been conducted while his first marriage was still legally subsisting. Thus, the Trial Court held that the third plaintiff was the legally wedded wife of the first defendant and thus was entitled to claim partition. Further, the properties were not self-acquired but ancestral properties and, therefore, the plaintiffs were entitled to claim partition of the suit properties. The plaintiffs and the first defendant were held entitled to 1/4th share each in all the suit properties.

6. Aggrieved, the defendants filed an appeal against the judgment of the Trial Court. The First Appellate Court, vide order dated 23.11.2005, re-appreciated the entire evidence on record and affirmed the findings of the Trial Court that the suit properties were ancestral properties and that the third plaintiff was the legally wedded wife of the first defendant, whose marriage with the fourth defendant was void and thus children from such marriage were illegitimate. However, the Appellate Court reversed the findings of the Trial Court that illegitimate children had no right to a share in the coparcenary property by relying on a judgment of the Division Bench of the Karnataka High Court in *Smt. Sarojamma & Ors. v. Smt. Neelamma & Ors.,* [ILR 2005 Kar 3293].

7. The Appellate Court held that children born from a void marriage were to be treated at par with coparceners and they were also entitled to the joint family properties of the first defendant. Accordingly, the Appellate Court held that the plaintiffs, along with the first, second and third defendants were entitled to equal share of 1/6th each in the ancestral properties.

8. The plaintiffs, being aggrieved by the said judgment of the Appellate Court, preferred a second appeal before the High Court of Karnataka. The substantial questions of law before the High Court were:

"a) Whether the illegitimate children born out of void marriage are regarded as coparceners by virtue of the amendment to the Hindu Marriage Act, 1956?

b) At a partition between the coparceners whether they are entitled to a share in the said properties?"

9. The High Court stated that the said questions were no more res integra and had been considered in the judgment of *Sri Kenchegowda v. K.B. Krishnappa & Ors.,* [ILR 2008 Kar 3453]. It observed that both the lower courts had concurrently concluded that the fourth defendant was the second wife of the first defendant. Therefore, the second and third defendants were illegitimate children from a void marriage. Section 16(3) of the Hindu Marriage Act makes it clear that illegitimate children only had the right to the property of their parents and no one else. As the first and second plaintiffs were the legitimate children of the first defendant they constituted a coparcenary and were entitled to the suit properties, which were coparcenary properties. They also had a right to claim partition against the other coparcener and thus their suit for partition against the first defendant was maintainable. However, the second and third defendants were not entitled to a share of the coparcenary property by birth but were only entitled to the separate property of their father, the first defendant. The High Court observed that upon partition, when the first defendant got his share on partition, then the second and third defendants would be entitled to such share on his dying intestate, but during his lifetime they would have no right to the said property. Hence, the High Court allowed the appeal and held that the first plaintiff, second plaintiff and the first defendant would be entitled to 1/3rd share each in the suit properties. The claim of the third plaintiff and the second, third and fourth defendants in the suit property was rejected.

10. As a result, the second and third defendants (present appellants) filed the present appeal.

11. The question which crops up in the facts of this case is whether illegitimate children are entitled to a share in the coparcenary property or whether their share is limited only to the self-acquired property of their parents under Section 16(3) of the Hindu Marriage Act?

12. Section 16(3) of the Hindu Marriage Act, 1955 reads as follows:

> **"16. Legitimacy of children of void and voidable marriages-**
>
> (1) xxx
>
> (2) xxx
>
> (3) Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under section 12, any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.

13. Thus, the abovementioned section makes it very clear that a child of a void or voidable marriage can only claim rights to the property of his parents, and no one else. However, we find it interesting to note that the legislature has advisedly used the word "property" and has not qualified it with either self-acquired property or ancestral property. It has been kept broad and general.

14. Prior to enactment of Section 16(3) of the Act, the question whether child of a void or voidable marriage is entitled to self-acquired property or ancestral property of his parents was discussed in a catena of cases. The property rights of

illegitimate children to their father's property were recognized in the cases of Sudras to some extent.

15. In *Kamulammal (deceased) represented by Kattari Nagaya Kamarajendra Ramasami Pandiya Naicker v. T.B.K. Visvanathaswami Naicker (deceased) & Ors.,* [AIR 1923 PC 8], the Privy Council held when a Sudra had died leaving behind an illegitimate son, a daughter, his wife and certain collateral agnates, both the illegitimate son and his wife would be entitled to an equal share in his property. The illegitimate son would be entitled to one-half of what he would be entitled had he been a legitimate issue. An illegitimate child of a Sudra born from a slave or a permanently kept concubine is entitled to share in his father's property, along with the legitimate children.

16. In *P.M.A.M. Vellaiyappa Chetty & Ors. v. Natarajan & Anr.,* [AIR 1931 PC 294], it was held that the illegitimate son of a Sudra from a permanent concubine has the status of a son and a member of the family and share of inheritance given to him is not merely in lieu of maintenance, but as a recognition of his status as a son; that where the father had left no separate property and no legitimate son, but was joint with his collaterals, the illegitimate son was not entitled to demand a partition of the joint family property, but was entitled to maintenance out of that property. Sir Dinshaw Mulla, speaking for the Bench, observed that though such illegitimate son was a member of the family, yet he had limited rights compared to a son born in a wedlock, and he had no right by birth. During the lifetime of the father, he could take only such share as his father may give him, but after his death he could claim his father's self-acquired property along with the legitimate sons.

17. In *Raja Jogendra Bhupati Hurri Chundun Mahapatra v. Nityanund Mansingh & Anr.,* [1889-90 Indian Appeals 128], the facts were that the Raja was a Sudra and died leaving behind a legitimate son, an illegitimate son and a legitimate daughter and three widows. The legitimate son had died and the issue was whether the illegitimate son could succeed to the

property of the Raja. The Privy Council held that the illegitimate son was entitled to succeed to the Raja by virtue of survivorship.

18. In *Gur Narain Das & Anr. v. Gur Tahal Das & Ors.,* [AIR 1952 SC 225], a Bench comprising Justice Fazl Ali and Justice Bose agreed with the principle laid down in the case of *Vellaiyappa Chetty* (supra) and supplemented the same by stating certain well-settled principles to the effect that "firstly, that the illegitimate son does not acquire by birth any interest in his father's estate and he cannot therefore demand partition against his father during the latter's lifetime. But on his father's death, the illegitimate son succeeds as a coparcener to the separate estate of the father along with the legitimate son(s) with a right of survivorship and is entitled to enforce partition against the legitimate son(s) and that on a partition between a legitimate and an illegitimate son, the illegitimate son takes only one-half of what he would have taken if he was a legitimate son." However, the Bench was referring to those cases where the illegitimate son was of a Sudra from a continuous concubine.

19. In the case of *Singhai Ajit Kumar & Anr. v. Ujayar Singh & Ors.,* [AIR 1961 SC 1334], the main question was whether an illegitimate son of a Sudra vis-à-vis his self-acquired property, after having succeeded to half-share of his putative father's estate, would be entitled to succeed to the other half share got by the widow. The Bench referred to Chapter 1, Section 12 of the Yajnavalkya and the cases of *Raja Jogendra Bhupati* (supra) and *Vellaiyappa Chetty* (supra) and concluded that "once it is established that for the purpose of succession an illegitimate son of a Sudra has the status of a son and that he is entitled to succeed to his putative father's entire self-acquired property in the absence of a son, widow, daughter or daughter's son and to share along with them, we cannot see any escape from the consequential and logical position that he shall be entitled to succeed to the other half share when succession opens after the widow's death."

20. The amendment to Section 16 has been introduced and was brought about with the obvious purpose of removing the stigma of illegitimacy on children born in void or voidable marriage (hereinafter, "such children").

21. However, the issues relating to the extent of property rights conferred on such children under Section 16(3) of the amended Act were discussed in detail in the case of *Jinia Keotin & Ors. v. Kumar Sitaram Manjhi & Ors.* [(2003) 1 SCC 730]. It was contended that by virtue of Section 16(3) of the Act, which entitled such children's rights to the property of their parents, such property rights included right to both self-acquired as well as ancestral property of the parent. This Court, repelling such contentions held that "in the light of such an express mandate of the legislature itself, there is no room for according upon such children who but for Section 16 would have been branded as illegitimate any further rights than envisaged therein by resorting to any presumptive or inferential process of reasoning, having recourse to the mere object or purpose of enacting Section 16 of the Act. Any attempt to do so would amount to doing not only violence to the provision specifically engrafted in sub-section (3) of Section 16 of the Act but also would attempt to court relegislating on the subject under the guise of interpretation, against even the will expressed in the enactment itself." Thus, the submissions of the appellants were rejected.

22. In our humble opinion this Court in *Jinia Keotin* (supra) took a narrow view of Section 16(3) of the Act. The same issue was again raised in *Neelamma & Ors. v. Sarojamma & Ors.* [(2006) 9 SCC 612], wherein the court referred to the decision in *Jinia Keotin* (supra) and held that illegitimate children would only be entitled to a share of the self-acquired property of the parents and not to the joint Hindu family property.

23. Same position was again reiterated in a recent decision of this court in *Bharatha Matha & Anr. v. R. Vijaya Renganathan & Ors.* [AIR 2010 SC 2685], wherein this Court

held that a child born in a void or voidable marriage was not entitled to claim inheritance in ancestral coparcenary property but was entitled to claim only share in self-acquired properties.

24. We cannot accept the aforesaid interpretation of Section 16(3) given in *Jinia Keotin* (supra), *Neelamma* (supra) and *Bharatha Matha* (supra) for the reasons discussed hereunder:

25. The legislature has used the word "property" in Section 16(3) and is silent on whether such property is meant to be ancestral or self-acquired. Section 16 contains an express mandate that such children are only entitled to the property of their parents, and not of any other relation.

26. On a careful reading of Section 16 (3) of the Act we are of the view that the amended Section postulates that such children would not be entitled to any rights in the property of any person who is not his parent if he was not entitled to them, by virtue of his illegitimacy, before the passing of the amendment. However, the said prohibition does not apply to the property of his parents. Clauses (1) and (2) of Section 16 expressly declare that such children shall be legitimate. If they have been declared legitimate, then they cannot be discriminated against and they will be at par with other legitimate children, and be entitled to all the rights in the property of their parents, both self-acquired and ancestral. The prohibition contained in Section 16(3) will apply to such children with respect to property of any person other than their parents.

27. With changing social norms of legitimacy in every society, including ours, what was illegitimate in the past may be legitimate today. The concept of legitimacy stems from social consensus, in the shaping of which various social groups play a vital role. Very often a dominant group loses its primacy over other groups in view of ever changing socio-economic scenario and the consequential vicissitudes in human relationship. Law takes its own time to articulate such social

changes through a process of amendment. That is why in a changing society law cannot afford to remain static. If one looks at the history of development of Hindu Law it will be clear that it was never static and has changed from time to time to meet the challenges of the changing social pattern in different time.

28. The amendment to Section 16 of the Hindu Marriage Act was introduced by Act 60 of 76. This amendment virtually substituted the previous Section 16 of the Act with the present Section. From the relevant notes appended in the clause relating to this amendment, it appears that the same was done to remove difficulties in the interpretation of Section 16.

29. The constitutional validity of Section 16(3) of Hindu Marriage Act was challenged before this Court and upholding the law, this Court in *Parayankandiyal Eravath Kanapravan Kalliani Amma (Smt.) & Ors. v. K. Devi and Ors.,* [(1996) 4 SCC 76], held that Hindu Marriage Act, a beneficial legislation, has to be interpreted in a manner which advances the object of the legislation. This Court also recognized that the said Act intends to bring about social reforms and further held that conferment of social status of legitimacy on innocent children is the obvious purpose of Section 16 (See para 68).

30. In paragraph 75, page 101 of the report, the learned judges held that Section 16 was previously linked with Sections 11 and 12 in view of the unamended language of Section 16. But after amendment, Section 16(1) stands de-linked from Section 11 and Section 16(1) which confers legitimacy on children born from void marriages operates with full vigour even though provisions of Section 11 nullify those marriages. Such legitimacy has been conferred on the children whether they were/are born in void or voidable marriage before or after the date of amendment.

31. In paragraph 82 at page 103 of the report, the learned Judges made the following observations:

"In view of the legal fiction contained in Section 16, *the illegitimate children, for all practical purposes, including succession to the properties of their parents, have to be treated as legitimate.* They cannot, however, succeed to the properties of any other relation on the basis of this rule, which in its operation, is limited to the *properties of the parents.*"

32. It has been held in *Parayankandiyal* (supra) that Hindu Marriage Act is a beneficent legislation and intends to bring about social reforms. Therefore, the interpretation given to Section 16(3) by this Court in *Jinia Keotin* (supra), *Neelamma* (supra) and *Bharatha Matha* (supra) needs to be reconsidered.

33. With the amendment of Section 16(3), the common law view that the offsprings of marriage which is void and voidable are illegitimate 'ipso-jure' has to change completely. We must recognize the status of such children which has been legislatively declared legitimate and simultaneously law recognises the rights of such children in the property of their parents. This is a law to advance the socially beneficial purpose of removing the stigma of illegitimacy on such children who are as innocent as any other children.

34. However, one thing must be made clear that benefit given under the amended Section 16 is available only in cases where there is a marriage but such marriage is void or voidable in view of the provisions of the Act.

35. In our view, in the case of joint family property such children will be entitled only to a share in their parents' property but they cannot claim it on their own right. Logically, on the partition of an ancestral property, the property falling in the share of the parents of such children is regarded as their self acquired and absolute property. In view of the amendment, we see no reason why such children will have no share in such property since such children are equated under the amended law with legitimate offspring of valid marriage. The only limitation

even after the amendment seems to be that during the life time of their parents such children cannot ask for partition but they can exercise this right only after the death of their parents.

36. We are constrained to differ from the interpretation of Section 16(3) rendered by this Court in *Jinia Keotin* (supra) and, thereafter, in *Neelamma* (supra) and *Bharatha Matha* (supra) in view of the constitutional values enshrined in the preamble of our Constitution which focuses on the concept of equality of status and opportunity and also on individual dignity. The Court has to remember that relationship between the parents may not be sanctioned by law but the birth of a child in such relationship has to be viewed independently of the relationship of the parents. A child born in such relationship is innocent and is entitled to all the rights which are given to other children born in valid marriage. This is the crux of the amendment in Section 16(3). However, some limitation on the property rights of such children is still there in the sense their right is confined to the property of their parents. Such rights cannot be further restricted in view of the pe-existing common law view discussed above.

37. It is well known that this Court cannot interpret a socially beneficial legislation on the basis as if the words therein are cast in stone. Such legislation must be given a purposive interpretation to further and not to frustrate the eminently desirable social purpose of removing the stigma on such children. In doing so, the Court must have regard to the equity of the Statute and the principles voiced under Part IV of the Constitution, namely, the Directive Principles of State Policy. In our view this flows from the mandate of Article 37 which provides that it is the duty of the State to apply the principles enshrined in Chapter IV in making laws. It is no longer in dispute that today State would include the higher judiciary in this country. Considering Article 37 in the context of the duty of judiciary, Justice Mathew in *Kesavananda Bharati Sripadagalvaru v. State of Kerala and another* [(1973) 4 SCC 225] held:

"……I can see no incongruity in holding, when Article 37 says in its latter part "it shall be the duty of the State to apply these principles in making laws", that judicial process is 'State action' and that the judiciary is bound to apply the Directive Principles in making its judgment."

38. Going by this principle, we are of the opinion that Article 39 (f) must be kept in mind by the Court while interpreting the provision of Section 16(3) of Hindu Marriage Act. Article 39(f) of the Constitution runs as follows:

"39. Certain principles of policy to be followed by the State: The State shall, in particular, direct its policy towards securing-

(a) xxx

(b) xxx

(c) xxx

(d) xxx

(e) xxx

(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and *that childhood and youth are protected against exploitation and against moral and material abandonment.*"

39. Apart from Article 39(f), Article 300A also comes into play while interpreting the concept of property rights. Article 300A is as follows:

"300A. **Persons not to be deprived of property save by authority of law:** No person shall be deprived of his property save by authority of law."

40. Right to property is no longer fundamental but it is a

Constitutional right and Article 300A contains a guarantee against deprivation of property right save by authority of law.

41. In the instant case, Section 16(3) as amended, does not impose any restriction on the property right of such children except limiting it to the property of their parents. Therefore, such children will have a right to whatever becomes the property of their parents whether self acquired or ancestral.

42. For the reasons discussed above, we are constrained to take a view different from the one taken by this Court in *Jinia Keotin* (supra), *Neelamma* (supra) and *Bharatha Matha* (supra) on Section 16(3) of the Act.

43. We are, therefore, of the opinion that the matter should be reconsidered by a larger Bench and for that purpose the records of the case be placed before the Hon'ble the Chief Justice of India for constitution of a larger Bench.

D.G. Matter referred to Larger Bench.

M/S. SIDDACHALAM EXPORTS PRIVATE LTD.
v.
COMMISSIONER OF CENTRAL EXCISE DELHI-III
(Civil Appeal No. 810 of 2007)

APRIL 1, 2011

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

Customs Valuation (Determination of Price of Imported Goods) Rules, 1988: rr.4 to 8 – Valuation of goods – Allegation that value of goods entered for exportation was wrongly declared and thereby undue drawback amounts claimed by exporter – Department sought for market opinion regarding the value of goods – Held: The procedure prescribed u/s.14(1) of Customs Act and particularized in r.4 has to be adopted to determine the value of goods entered for exports – Ordinarily, the price received by the exporter in the ordinary course of business is to be taken to be transaction value for determination of value of goods under export, in absence of any special circumstances indicated u/s.14(1) and r.4(2) – The initial burden to establish that the value mentioned by the exporter in the bill of export or the shipping bill, as the case may be, is incorrect, lies on the Department – Therefore, once the transaction value u/r.4 is rejected, the value must be determined by sequentially proceeding through rr.5 to 8 – In the instant case, neither the adjudicating authority nor the CESTAT dealt with the matter as per the procedure prescribed under the Act – At the threshold, instead of first determining the value of the goods on the basis of contemporaneous exports of identical goods, the Department erroneously resorted to a market enquiry – Matter remitted to adjudicating authority for consideration afresh – Customs Act, 1962 – ss.14(1), and 114.

Customs Act, 1962: s.130E(b) –Scope of – Discussed.

The case of Revenue was that the appellant-exporter misdeclared the value of goods entered for exportation and claimed undue drawback amounts. The authorities drew samples of the goods and forwarded the same to one M/s. Skipper for their opinion regarding their market value. On 12.3.2003, one 'P' claiming to be an authorized representative of M/s. Skipper submitted the valuation letter opining that the goods in question were export surplus and export rejected garments having poor quality of fabric and market value of said goods ranged between Rs.40 to Rs. 70 per piece. Based on the said report, the custom authorities arrived at the total value of the consignments and the admissible drawback of Rs. 3,56,328 as against the claim of Rs. 49,57,536. The appellant was issued a notice to show cause as to why the drawback amount should not be reduced/disallowed and penalty under Section 114 of the Customs Act be not imposed on it. On 7.12.2004, 'P', the authorized signatory of M/s. Skipper submitted another letter to the Commissioner (Adjudication Bench) stating that their earlier letter dated 12.3.2003 should not be relied upon for any purpose in as much as the same was prepared by the Customs authorities, and he was merely asked to transcribe his signature on the same. It was further stated that he was neither shown any goods nor any documents. On 14.12.2004, the exporter replied to the show cause notice denying all the allegations contained therein. The exporter also questioned the authenticity of the report dated 12.3.2003 submitted by M/s Skipper. The Commissioner dropped the proceedings against the exporter, and allowed the drawback as claimed by the exporter. The CESTAT allowed the appeal of Revenue and also levied a penalty of Rs.5 lakh each on the exporter and its Director respectively. The instant appeal was filed challenging the order of the CESTAT.

Allowing the appeal and remitting the matter to the adjudicating authority, the Court

HELD: 1. It is trite law that the amplitude of an appeal under Section 130E(b) of the Customs Act, in relation to the rate of duty of customs or to the value of goods for the purposes of assessment, is very wide but it is equally well settled that where the CESTAT, a fact finding authority, has arrived at a finding by taking into consideration all material and relevant facts and has applied correct legal principles, the Supreme Court would be loathe to interfere with such a finding even when another view might be possible on same set of facts. Nevertheless, if it is shown that the conclusion under challenge is such as could not possibly have been arrived at by a person duly instructed upon the material before him i.e. the conclusion is perverse or that the CESTAT has failed to apply correct principles of law, the Supreme Court is competent to substitute its own opinion for that of the CESTAT. The decisions of both the authorities below were unsustainable. Neither the Commissioner nor the CESTAT has examined the issue before them in its correct perspective and as per the procedure contemplated in law for determination of the value of the goods for exportation. [Paras 14 and 15] [706-E-H; 707-A-B]

Nanya Imports and Exports Enterprises vs. Commissioner of Customs, Chennai **(2006) 4 SCC 765;** *Varsha Plastics Private Limited and Anr. vs. Union of India and Ors.* **(2009) 3 SCC 365;** *M/s. Builders'Association of India vs. State of Karnataka and Ors.* **(1993) 1 SCC 409 – referred to.**

2. It is settled that the procedure prescribed under Section 14(1) of the Act and particularized in Rule 4 of the Customs Valuation (Determination of Price of Imported Goods) rules, 1988 has to be adopted to determine the

value of goods entered for exports, irrespective of the fact whether any duty is leviable or not. It is also trite that ordinarily, the price received by the exporter in the ordinary course of business shall be taken to be the transaction value for determination of value of goods under export, in absence of any special circumstances indicated under Section 14(1) of the Act and Rule 4(2) of the 1988 Rules. The initial burden to establish that the value mentioned by the exporter in the bill of export or the shipping bill, as the case may be, is incorrect, lies on the Revenue. Therefore, once the transaction value under Rule 4 is rejected, the value must be determined by sequentially proceeding through Rules 5 to 8 of the 1988 Rules. [Para 16] [707-C-E]

Commissioner of Customs (Gen), Mumbai vs. Abdulla Koyloth **JT 2010 (12) SC 267 – relied on.**

3. In the instant case, neither the adjudicating authority i.e., the Commissioner of Central Excise nor the CESTAT has dealt with the matter as per the procedure prescribed under the Act. At the threshold, instead of first determining the value of the goods on the basis of contemporaneous exports of identical goods, the Revenue erroneously resorted to a market enquiry. If for any reason, data of contemporaneous exports of identical goods was not available, the procedure laid down in Rules 5 to 8 of the 1988 Rules was required to be followed and market enquiry could be conducted only as a last resort. It is evident that no such exercise was undertaken by the Commissioner and interestingly he, acting as an appellate authority, proceeded to test the evidentiary value of the report submitted by M/s Skipper International and rejected it on the ground that it does not depict if the identical garments had ever been purchased by the said concern. Observing that in the absence of any other independent evidence relating to market enquiry,

there was no other corroborating evidence to support the allegation of inflation in FOB value, he dropped the proceedings initiated by show cause notice. Similarly, it is manifest from the CESTAT's order that revenue's appeal was accepted mainly on the ground that report of M/s Skipper was worthy of credence and the exporter had failed to produce any evidence to establish that export value stated in the shipping bills was the true export value. Both the said authorities have failed to apply the correct principles of law and therefore, their orders cannot be sustained. [Para 19] [709-B-G]

Om Prakash Bhatia vs. Commissioner of Customs, Delhi **(2003) 6SCC 161;** *Bibhishan vs. State of Maharashtra* **(2007) 12 SCC 390 – referred to.**

Case Law Reference:

(2006) 4 SCC 765	**Referred to**	**Para 12**
(2009) 3 SCC 365	**Referred to**	**Para 12**
(1993) 1 SCC 409	**Referred to**	**Para 13**
JT 2010 (12) SC 267	**Relied on**	**Para 16**
(2003) 6 SCC 161	**Referred to**	**Para 17**
(2007) 12 SCC 390	**Referred to**	**Para 18**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 810 of 2007.

From the Judgment & Order dated 14.09.2006 of the Customs, Excise and Service Tax Appellate Tribunal, New Delhi in Appeal No. C/893/05.

Ramji Srinivasan, D.P. Mohanty, Somanadri Goud, Zeyaul Haque (for Parekh & Co.) for the Appellant.

Rashmi Malhotra, Sunita Rani Singh, B.V. Balaram Das for the Respondent.

The Judgment of the Court was delivered by

D.K. JAIN, J.: 1. Challenge in this civil appeal, under Section 130-E(b) of the Customs Act, 1962 (for short "the Act"), is to the judgment and order dated 14th September, 2006 delivered by the Customs, Excise & Service Tax Appellate Tribunal (for short "the CESTAT") whereby it allowed the appeal preferred by the revenue, the respondent herein. Consequently, the customs duty drawback (Rs. 49,75,536/-) claimed by the appellant under the scheme of duty drawback, incorporated in Chapter X of the Act, read with Customs and Central Excise Duties Draw-back Rules, 1995 (as amended) got disallowed on the ground of mis-declaration of value of the goods entered for exportation.

2. The facts, material for adjudication of the present appeal, may be stated thus:

The appellant viz. M/s Siddachalam Exports Pvt. Ltd., (hereinafter referred to as "the exporter") was engaged in the exports of ready-made garments, engineering goods, handicrafts, woollen garments, leather goods, etc. On 24th February, 2003, the exporter filed seven shipping Bills (Nos.J-903000127-129 and J-903000131-134) for export of goods declared as 'ladies tops' valued at Rs. 390/- per piece and 'denim shirts' valued at Rs.417/- per piece consigned to one M/s Zao Jainyo Overseas, Moscow, Russia at a total FOB value of Rs.4,14,63,360/-. The exporter claimed a duty drawback of Rs.49,75,536/-.

3. Based on secret information that the afore-mentioned goods had been over-valued with the intention of claiming undue draw-back amounts, customs authorities carried out 100% examination of the consignment on 26th February, 2003;

drew samples, and forwarded the same to one M/s Skipper International for their opinion regarding their market value.

4. On 27th February, 2003, Mr. Sanjeev Jain, director of the exporter company was also examined, and in his statement recorded under Section 108 of the Act he stated that the goods covered by the shipping bills were not manufactured by his company, but were supplied by one Mr. Gupta. Payments to Mr. Gupta in respect of the goods were made through cheques. He, however, did not remember the address or contact number of Mr. Gupta. Mr. Jain also stated that the goods covered by the seven shipping bills were purchased @ Rs.150/- to Rs.350/- per piece, however, he had not seen the invoices for the same.

5. Vide letter dated 5th March, 2003, the exporter requested for provisional release of the goods on execution of bond and bank guarantee. On 12th March, 2003, one Pankaj, claiming to be an authorised representative of the said M/s Skipper International submitted his valuation letter, opining that samples of 'ladies tops' and 'denim shirts' were export surplus and export rejected garments having poor quality of fabric and stitching, and the market value of the said goods ranged between Rs. 40/- to Rs. 70/- per piece. Based on the said report, the customs authorities formed the opinion that the total value of the consignments was Rs. 56,04,000/- as against the declared FOB value of Rs. 4,14,63,360/- and the admissible drawback should be Rs.3,56,328/- as against the claim of Rs.49,57,536/-. The consignments in question were seized under Section 110 of the Act. However, subsequently the goods were released provisionally on execution of bond and bank guarantee by the exporter.

6. On 11th September, 2003, Assistant Commissioner of Customs (SIIB), ICD, Tughlakabad, New Delhi issued a show cause notice to the exporter, inter-alia, alleging that the FOB value of the goods covered under the seven shipping bills had been grossly mis-declared by artificially inflating it, thereby

rendering them liable for confiscation under Sections 113(d) and/or (i) of the Act. The exporter was asked to show cause as to why the draw back on goods covered under shipping Bills No. J903000134 and J903000129 dated 24th February, 2003 should not be reduced to Rs. 3,56,328/-; draw back amounting to Rs. 29,90,280/- on goods covered under the remaining shipping bills should not be disallowed, and penalty under Section 114 of the Act should not be imposed on the exporter.

7. On 7th December, 2004, the said Pankaj, authorised signatory of M/s Skipper International submitted another letter to the Commissioner (Adjudication Bench) stating that their earlier letter dated 12th March, 2003 should not be relied upon for any purpose in as much as the same was prepared by the Customs authorities, and he was merely asked to transcribe his signature on the same. It was further stated that he was neither shown any goods nor any documents.

8. On 14th December, 2004, the exporter replied to the show cause notice denying all the allegations contained therein. The exporter also questioned the authenticity of the report dated 12th March, 2003 submitted by M/s Skipper International.

9. The Commissioner of Central Excise, Delhi-III adjudicated on said show cause notice vide Order-in-Original dated 31st January, 2005. Relying on the decisions of the CESTAT, wherein the market enquiries conducted by the revenue in the absence of and without notice to the exporter had been held to be invalid, the Commissioner dropped the proceedings against the exporter, and allowed the draw back as claimed by the exporter. The Commissioner held as follows:

> "In the light of above decisions of Hon'ble Tribunal, I find that the enquiry conducted from M/s Skipper International, in the absence of and without any notice to the exporter company or its Director, cannot be assigned any evidential weightage as it does not depict if the identical garments had ever been purchased by M/s Skipper International for

the given prices. So, being the evidence and the relevant law, it has to be held that there had been indeed no market enquiry to establish the present market value. Further, Mr. Pankaj, authorized signatory of M/s Skipper International, has retracted his statement he made in his certificate dated 12.03.2003 by which he had given present market value of the samples shown to him.

In view of this conclusion, and in the absence of any other independent evidence relating to market enquiry, I fail to find corroboration from any other independent evidence as far as the aspect relating to the present market price and inflating of FOB value are concerned."

10. Being aggrieved, the Revenue preferred an appeal before the CESTAT. As afore-mentioned, the CESTAT, vide the impugned judgment, has allowed the appeal filed by the Revenue, observing thus:

"9. We find merit in the appeal of the revenue. The basic issue in this case was whether the declared export prices were mis-declarations on account of being over-valuation of the goods under export. The second issue was whether the Present Market Value of the consignments were as indicated by M/s Skipper International, thereby denying draw back amount. While the defence of the respondent is that the export price has been realized, the declared value remains entirely unsubstantiated. The opinion of M/s Skipper International, who saw the samples is based on the observation that "these samples of Ladies Tops and Denims Shirts are export surplus and export rejected garments having poor Quality of fabric and stitching". There is no contest raised against the finding regarding poor quality of fabric and stitching. It is upon this finding that M/s. Skipper International reached the conclusion that the garments were 'export rejects'. The valuation was also on that basis. Instead of contesting the factual position noted about the samples, the exporter has chosen to attack the

competence of the opinion giver. This is not acceptable for two reasons. The first is that the quality of stitching and fabric would be evident to any one familiar with garment trade and cannot be ruled to be beyond the ken of an export surplus dealer. There is no rocket science involved in as certainly quality of fabric or stitching of a garment. Therefore, the attack on the opinion giver is entirely misplaced. It is also because the opinion itself is not flawed. Secondly, M/s Skipper International was dealing in (sic.) export surplus garments, therefore, it had expertise in the market valuation of such goods. If fabric and stitching are of poor quality, certainly, the items would not be having the price of prime quality export garments as declared by the exporter.

10. Another entirely unacceptable aspect in the appellant's conduct is that it has refused to place on record the material which it should be in possession of to substantiate the values declared. The appellant is a merchant exporter and has purchased the garments, valued over `4 crores from the market. It is to be expected that the appellant would have taken care to place the order for the goods on competent manufacturers or traders along with proper specification regarding material, make, and size and those manufacturers or traders would give the appellant proper invoices and other documents. Instead of producing such evidence, it has chosen to state that procurement is through one illusory Gupta, whose particulars are not known to the appellant. Such abnormal vagueness can only be attributed to an effort to cover up inconvenient facts. It is well settled that a person in the possession of clinching evidence on an issue in dispute cannot hope to succeed by withholding that evidence. Therefore, the Commissioner was clearly in error in faulting the revenue for relying upon the opinion of M/s Skipper International and not carrying out investigations on the lines indicated by Shri Jain. The particulars supplied by Shri Jain were not reliable at all and

was intended only to mislead. Further, issuance of some cheques is no satisfactory evidence about the correct value of the consignments."

Accordingly, the CESTAT confirmed the reduction of draw back claim in case of consignments covered by Shipping Bill Nos. J-903000134 and J-903000129 to Rs. 3,26,328/- and denial of draw back claim amounting to Rs.29,90,280/- in relation to other consignments as contemplated in the show cause notice dated 11th September, 2003. The CESTAT also levied a penalty of Rs. 5 lakhs each on the exporter and its Director, Mr. Sanjeev Jain, respectively.

11. Hence, the present appeal by the exporter.

12. Mr. Ramji Srinivasan, learned senior counsel appearing on behalf of the exporter, while assailing the impugned judgment, contended that the Revenue has failed to discharge the onus placed on it in as much as it has failed to establish that the exporter had mis-declared the value of the export goods as was held in *Nanya Imports & Exports Enterprises Vs. Commissioner of Customs, Chennai*[1]. Learned counsel contended that the show cause notice was vitiated as it was based solely on the opinion of the said Pankaj, authorised signatory of M/s Skipper International, who had not even examined the goods in question. Learned counsel asserted that the procedure for determining value of goods has to be in terms of Sections 2(41) and 14 of the Act, read with Rule 4 of the Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 (for short "the 1988 Rules"). Relying on *Varsha Plastics Private Limited & Anr. Vs. Union of India & Ors.*[2], learned counsel argued that the 1988 Rules having been framed to maintain uniformity and certainty in the matter of valuation of goods, which is a matter of procedure, these Rules have to be adhered to strictly. It was also contended that the

1. (2006) 4 SCC 765.
2. (2009) 3 SCC 365.

CESTAT has erred in law in levying penalty on Mr. Sanjeev Jain who was not even made a party to the appeal filed by the Revenue.

13. Per contra, Ms. Rashmi Malhotra, learned counsel appearing on behalf of the Revenue strenuously urged that the impugned judgment deserves to be affirmed, and the CESTAT rightly did not consider the effect of retraction by M/s Skipper International, as the same was not dealt with by the Commissioner as well. Learned counsel urged that the exporter cannot be allowed to urge this ground at this stage, as the same was not raised by it before the CESTAT. In support of the contention, decision of this Court in *M/s Builders' Association of India Vs. State of Karnataka & Ors*[3]. was pressed into service. According to the learned counsel, since the retraction was tendered after twenty one months of the submission of original report, it had lost its efficacy and, therefore, had no bearing on the authenticity of the report.

14. It is trite law that the amplitude of an appeal under Section 130E(b) of the Act, in relation to the rate of duty of customs or to the value of goods for the purposes of assessment, is very wide but it is equally well settled that where the CESTAT, a fact finding authority, has arrived at a finding by taking into consideration all material and relevant facts and has applied correct legal principles, this Court would be loathe to interfere with such a finding even when another view might be possible on same set of facts. Nevertheless, if it is shown that the conclusion under challenge is such as could not possibly have been arrived at by a person duly instructed upon the material before him i.e. the conclusion is perverse or that the CESTAT has failed to apply correct principles of law, this Court is competent to substitute its own opinion for that of the CESTAT.

15. Having bestowed our anxious consideration to the facts

3. (1993) 1 SCC 409.

at hand, we are constrained to observe that the decisions of both the authorities below are unsustainable. In our opinion, neither the Commissioner nor the CESTAT has examined the issue before them in its correct perspective and as per the procedure contemplated in law for determination of the value of the goods for exportation.

16. It is settled that the procedure prescribed under Section 14(1) of the Act and particularized in Rule 4 of the 1988 Rules has to be adopted to determine the value of goods entered for exports, irrespective of the fact whether any duty is leviable or not. It is also trite that ordinarily, the price received by the exporter in the ordinary course of business shall be taken to be the transaction value for determination of value of goods under export, in absence of any special circumstances indicated under Section 14(1) of the Act and Rule 4(2) of the 1988 Rules. The initial burden to establish that the value mentioned by the exporter in the bill of export or the shipping bill, as the case may be, is incorrect lies on the Revenue. Therefore, once the transaction value under Rule 4 is rejected, the value must be determined by sequentially proceeding through Rules 5 to 8 of the 1988 Rules. (See: *Commissioner of Customs (Gen), Mumbai Vs. Abdulla Koyloth*[4].)

17. In *Om Prakash Bhatia Vs. Commissioner of Customs, Delhi*[5], while dealing with a similar case of fraudulent drawback claim by deliberately over-invoicing ready-made garments, this Court rejected the plea of the exporter that Section 113(d) of the Act was not applicable to the facts of that case as the goods were not prohibited goods; (ii) the exporter was required to declare the value of the goods expected to be received from the overseas purchaser and not the market value of such goods in India and (iii) since in that case, no duty was payable on the export, Section 14 of the Act could not be applied to determine the value of the goods. It was, inter-alia, held that the definition of "prohibited goods" in Section 2(33) of the Act indicates that if the conditions prescribed for import

or export of the goods are not complied with, it would be considered to be "prohibited goods". It was held that for determining the export value of the goods, it is necessary to refer to the meaning of the word "value" as defined in Section 2(41) of the Act and the same must be determined in accordance with the provisions of sub-section (1) of Section 14 of the Act. The Court observed thus:

> "…For determining the export value of the goods, we have to refer to the meaning of the word "value" given in Section 2(41) of the Act, which specifically provides that value in relation to any goods means the value thereof determined in accordance with the provisions of sub-section (1) of Section 14.
>
> ….. ….. …..
>
> Section 14 specifically provides that in case of assessing the value for the purpose of export, value is to be determined at the price at which such or like goods are ordinarily sold or offered for sale at the place of exportation in the course of international trade, where the seller and the buyer have no interest in the business of each other and the price is the sole consideration for sale. No doubt, Section 14 would be applicable for determining the value of the goods for the purpose of tariff or duty of customs chargeable on the goods. In addition, by reference it is to be resorted to and applied for determining the export value of the goods as provided under sub-section (41) of Section 2. This is independent of any question of assessability of the goods sought to be exported to duty. Hence, for finding out whether the export value is truly stated in the shipping bill, even if no duty is leviable, it can be referred to for determining the true export value of the goods sought to be exported."

18. The opinion expressed in *Om Prakash Bhatia* (supra) has been reiterated by this Court in *Bibhishan Vs. State of*

Maharashtra[6]. It has been held that the definition of "prohibited goods" in the Act is a broad one and the said provision not only brings within its sweep an import or export of goods which is subject to any prohibition under the Act, but also any of the law for the time being in force.

19. In the present case, as stated above, neither the adjudicating authority i.e., the Commissioner of Central Excise nor the CESTAT has dealt with the matter as per the procedure prescribed under the Act. At the threshold, instead of first determining the value of the goods on the basis of contemporaneous exports of identical goods, the Revenue erroneously resorted to a market enquiry. If for any reason, data of contemporaneous exports of identical goods was not available, the procedure laid down in Rules 5 to 8 of the 1988 Rules was required to be followed and market enquiry could be conducted only as a last resort. It is evident that no such exercise was undertaken by the Commissioner and interestingly he, acting as an appellate authority, proceeded to test the evidentiary value of the report submitted by M/s Skipper International and rejected it on the ground that it does not depict if the identical garments had ever been purchased by the said concern. Observing that in the absence of any other independent evidence relating to market enquiry, there was no other corroborating evidence to support the allegation of inflation in FOB value, he dropped the proceedings initiated vide show cause notice dated 11th September 2003. Similarly, it is manifest from the CESTAT's order that revenue's appeal has been accepted mainly on the ground that report of M/s Skipper International was worthy of credence and the exporter had failed to produce any evidence to establish that export value stated in the shipping bills was the true export value. In our opinion, both the said authorities have failed to apply the correct principles of law and therefore, their orders cannot be sustained.

20. Resultantly, for the reasons as enumerated, the appeal

is allowed; the orders passed by the CESTAT and the Commissioner are set aside and the matter is remitted back to the adjudicating authority for fresh consideration in accordance with law, after affording adequate opportunity of hearing to the exporter. The entire exercise, in terms of this order, shall be completed within six months from the date of receipt of a copy of this judgment. Needless to add that we have not expressed any opinion on the merits of the opinion rendered by M/s Skipper International or on the conduct of the exporter in not adducing any evidence in support of the export value stated in the shipping bills in question.

21. In the facts and circumstances of the case, the parties are left to bear their own costs.

D.G. Appeal allowed.

RUKIA BEGUM

v.

STATE OF KARNATAKA

(Criminal Appeal No. 1519 of 2008)

APRIL 4, 2011

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

Penal Code, 1860: s.302, 201 r.w. s.34 – Murder and causing disappearance of evidence – Strained relations between the victims and the accused party – Assault on the victims resulting in their death – Trial court acquitted 'R' and 'N' and two other accused holding that circumstances did not point guilt towards them – However convicted 'I' and 'M' holding that the circumstantial evidence i.e. motive, presence of blood, recoveries and abscondence immediately after the occurrence pointed towards their guilt – High Court set aside the acquittal of appellants 'R' and 'N' and also upheld the conviction of appellants 'I' and 'M' – On appeal, held: The circumstantial evidence against appellants 'R' and 'N' were not such which would lead towards their guilt – Trial court, on appraisal of the evidence came to the conclusion that the prosecution was not able to prove its case beyond all reasonable doubt, so far as 'R' and 'N' were concerned – The view taken by trial court was justified in the facts and circumstances of the case and a possible view and, therefore, High Court erred in setting aside their acquittal – However, case of appellants 'I' and 'M' stood on an altogether different footing – Trial court had held them guilty – There was overwhelming evidence to prove beyond all reasonable doubt that they shared the motive with other accused persons – Recovery of wheel and tyre of the motorcycle belonging to the victim and knife was made on the statements made by appellants 'I' and 'M' – These two appellants were not found

at the normal place of their work and their abscondence was proved by the Manager of the firm where they were working – The trial court as also the High Court on the basis of the circumstantial evidence rightly came to the conclusion that the prosecution was able to prove its case beyond all reasonable doubt so far as 'I' and 'M' were concerned.

Evidence: Circumstantial evidence – Held: For bringing home the guilt on the basis of the circumstantial evidence, the prosecution has to establish that the circumstances proved lead to one and the only conclusion towards the guilt of the accused – In a case based on circumstantial evidence, the circumstances from which an inference of guilt is sought to be drawn are to be cogently and firmly established – It should form a chain so complete that there is no escape from the conclusion, that the crime was committed by the accused and none else – It has to be considered within all human probability and not in fanciful manner – In order to sustain conviction, circumstantial evidence must be complete and incapable of any explanation than the guilt of the accused.

Appeal against acquittal: Acquittal by trial court – Interference by High Court – Scope of – Held: Where two views on the evidence are reasonably possible and trial court has taken a view favouring acquittal, High Court in an appeal against acquittal should not disturb the same merely on the ground that if it was trying the case, it would have taken an alternative view and convicted the accused – High court while hearing appeal against the judgment of acquittal is possessed of all the power of appellate court and nothing prevents it to appraise evidence and come to a conclusion different than that of trial court but while doing so it shall bear in mind that presumption of innocence is further reinforced by acquittal of the accused by the trial court – The view of trial Judge as to the credibility of the witness must be given proper weight and consideration – There must be compelling and weighty

reason for the High Court to come to a conclusion different than that of trial court.

The prosecution case was that the victim-deceased had strained relations with his mother-accused and sisters-appellants 'R' and 'N' in relation to the ancestral property. On the fateful day, the accused persons obstructed the passage near the house of the victim. When the victim was coming on a motorcycle, he got hit against the obstruction and fell down from his motorcycle. His wife who was sitting behind also fell down. The appellants and other accused persons attacked the victim and his wife and caused their death and thereafter shifted their bodies and dismantled the motorcycle of the victim. The trial court acquitted appellants 'R' and 'N' and other two accused holding that the circumstances did not point guilt towards them. However, the trial court convicted appellants 'I' and 'M' under Sections 302 and 201 r.w. Section 34 IPC holding that the circumstantial evidence i.e. motive, presence of blood, recoveries and abscondence immediately after the occurrence pointed towards their guilt. The convict-accused and the State filed the appeals. The High Court dismissed the appeal filed by appellants 'I' and 'M'. The appeal filed by the State against the acquittal of the accused persons was partly allowed by the High Court and it set aside the acquittal of 'R' and 'N' and convicted them for the offence under Section 302 and 120-B, IPC and sentenced them to imprisonment for life.The instant appeals were filed by 'R', 'N', 'I' and 'M' challenging their conviction.

Disposing of the appeals, the Court

HELD: 1. The circumstantial evidence brought against appellants 'R' and 'N' were not such which would lead towards their guilt. The recovery from these appellants itself was discarded by the High Court. Motive

alone, in the absence of any other circumstantial evidence would not be sufficient to sustain the conviction of these two appellants. The trial court on appraisal of the evidence came to the conclusion that the prosecution was not able to prove its case beyond all reasonable doubt, so far as 'R' and 'N' were concerned. It is trite that where two views on the evidence are reasonably possible and the trial court has taken a view favouring acquittal, the High Court in an appeal against acquittal should not disturb the same merely on the ground that if it was trying the case, it would have taken an alternative view and convicted the accused. The High court while hearing appeal against the judgment of acquittal is possessed of all the power of appellate court and nothing prevents it to appraise evidence and come to a conclusion different than that of the trial court but while doing so it shall bear in mind that presumption of innocence is further reinforced by acquittal of the accused by the trial court. The view of the trial Judge as to the credibility of the witness must be given proper weight and consideration. There must be compelling and weighty reason for the High Court to come to a conclusion different than that of the trial court. The view taken by the trial court was justified in the facts and circumstances of the case and a possible view and, therefore, the High Court erred in setting aside their acquittal. [Para 8] [720-D-G; 721-A-B]

2. The case of appellant 'I' and 'M' however, stood on an altogether different footing. The trial court had held them guilty. There was overwhelming evidence to prove beyond all reasonable doubt that they shared the motive with other accused persons. Appellant 'I' during the course of investigation gave statement which led to the recovery of wheel and tyre of the motorcycle belonging to the deceased which was dismantled. It was seized and seizure list was prepared. This recovery was proved by

oral evidence as also the seizure list. Further, the statement given by appellant 'M' during the course of investigation led to recovery of the knife and it was proved by PW-25 and seizure memo. These two appellants were not found at the normal place of their work and their abscondence was proved by PW-7, the Manager of M/s. Habeeb Solvent Extract where they were working. He had further stated that 'I' was assigned duty for collection of money due to the company and such a duty was assigned on the 9th June, 1995, the day when the incident took place. PW-33 had also stated that the appellant 'I', as an employee of M/s. Habeeb Solvent Extract, approached him for collection of money and on 9th June, 1995 he paid a sum of ?10,000/- to him. PW-7 had further stated in his evidence that during the month of June, 1995 appellant 'M' left the factory and did not join the duty. From the said evidence, it is clear that the appellants 'I' and 'M' were employees of M/s. Habeeb Solvent Extract and absconded soon after the incident. No doubt, it is true that for bringing home the guilt on the basis of the circumstantial evidence, the prosecution has to establish that the circumstances proved lead to one and the only conclusion towards the guilt of the accused. In a case based on circumstantial evidence, the circumstances from which an inference of guilt is sought to be drawn are to be cogently and firmly established. The circumstances so proved must unerringly point towards the guilt of the accused. It should form a chain so complete that there is no escape from the conclusion, that the crime was committed by the accused and none else. It has to be considered within all human probability and not in fanciful manner. In order to sustain conviction, circumstantial evidence must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused. Such evidence should not only be consistent with the guilt of the accused but inconsistent with his innocence. No hard and fast rule can be laid to

say that particular circumstances are conclusive to establish guilt. It is basically a question of appreciation of evidence which exercise is to be done in the facts and circumstances of each case. Here in the instant case, the motive, the recoveries and abscondence of these appellants immediately after the occurrence pointed out towards their guilt. The trial court as also the High Court on the basis of the circumstantial evidence rightly came to the conclusion that the prosecution was able to prove its case beyond all reasonable doubt so far as these appellants were concerned. [Paras 9, 10] [721-C-H; 722-A-F]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1519 of 2008.

From the Judgment and Order dated 28.05.2007 of the High Court of Karnataka at Bangalore in Criminal Appeal No. 501 of 2004.

WITH

Criminal Appeal No. 698 of 2008.

Criminal Appeal No. 1808 of 2009.

Basava Prabhu S. Patil, B. Subrahmanya Prasad, Ajay Kumar M.R.D. Upadhyay, V.N. Raghupathy and S.N. Bhat for the Appellant.

Anitha Shenoy, Rashmi Nandakumar and B.S. Gautam for the Respondent.

The Judgment of the Court was delivered by

CHANDRAMAULI KR. PRASAD, J. 1. Altogether 8 persons were put on trial for commission of the offence under Section 302 and 201 read with Section 34 as also Section 379 of the Indian Penal Code. Accused Jaibunissa died during the

trial, whereas accused Rukiya Begum, Nasreen, Mansoor and Mohmmed Ghouse were acquitted of all the charges. However accused Issaq Sait, Nasarath and Mujahid were held guilty of the offence under Section 302 and 201 read with Section 34 of the Indian Penal Code and awarded life imprisonment and seven years imprisonment respectively. State of Karnataka, aggrieved by the acquittal of Rukia Begum Nasreen, Mansoor and Mohammed Ghouse preferred appeal whereas appellant Issaq Sait and Mujahid aggrieved by their conviction and sentence also preferred appeal. State also preferred appeal seeking enhancement of sentence. All the appeals were heard together and the High Court by its common judgment dated 28th of May, 2007 dismissed the appeal preferred by the appellants Issaq Sait and Mujahid. The appeal filed by the State against the acquittal of the accused persons was partly allowed by the High Court and it set aside the acquittal of Rukia Begum, Nasreen and Mohammed Ghouse and convicted them for the offence under Section 302 and 120-B of the Indian Penal Code and sentenced them to imprisonment for life.

2. Rukia Begum and Nasreen have filed separate appeals whereas Issaq Sait and Mujahid appealed with the leave of the court. In these appeals we are concerned with Rukia Begum, sole appellant in Criminal Appeal No. 1519 of 2008, Nasreen, appellant in Criminal Appeal No. 1808 of 2009 and Issaq Sait and Mujahid, appellants in Criminal Appeal No. 698 of 2008. It is relevant here to state that convict Mohammed Ghouse joined as Appellant No. 2 in the appeal filed by Nasreen and as he failed to surrender, his appeal stood dismissed.

3. Prosecution commenced on the basis of a written report given by PW-12 Thammaiah to PW-31 G.Jayaraj, the Sub-Inspector of Police in which he disclosed that while he was at his agricultural field near the land of accused Jaibunnisa, his brother-in-law PW-2 Chandrashekar @ Chandru informed him that while he was near Aralikatte, PW-1 Thandavamurthy and appellant Nasreen informed him that the dead bodies of

Rasheed Sait and his wife Sabeena Sait were lying in the field. The Sub-Inspector of Police G.Jayaraj came to the place of occurrence and found trace of blood from the place of occurrence to the gate of the deceased and the accused. During the course of investigation appellants Rukiya Begum and Nasreen were arrested and on their disclosure plastic bucket and plastic pot kept in the bathroom were seized. Appellant Issaq Sait was also arrested and his statement led to the recovery of wheel and tyre of the motorcycle belonging to the deceased. Appellant Mujahid surrendered before the Judicial Magistrate and he was taken on police remand for interrogation. During interrogation the statement given by him led to the recovery of the knife. The personal belongings of the deceased Sabeena Begum were also recovered from other accused persons.

4. According to the prosecution there was strained relationship between the deceased Rasheed Sait on one side and his mother accused Jaibunnisa, sisters i.e. appellants Rukia Begum and Nasreen and husband of the sister on the other side in relation to the ancestral property. The appellants, in fact, had admitted the strained relationship amongst themselves. Further case of the prosecution is that on 9th June, 1995 Rasheed Sait along with his wife Sabeena Begum and daughter Tamanna had gone to Mysore to meet PW-4, Rameeza and reached there at 5.30 P.M. After having meal at her house they left for their home. In order to trap the deceased the accused persons tied coconut leaves obstructing the passage near his house. Rasheed Sait while coming to his house hit against the obstruction and fell from his motorcycle. It is the case of the prosecution that all the appellants herein besides other accused persons attacked Rasheed Sait and his wife Sabeena Begum and caused their death. Prosecution has alleged that in order to shield themselves from punishment the accused persons shifted the dead bodies and dismantled the motorcycle used by the deceased.

5. Police after investigation submitted chargesheet and the

appellants besides four other accused persons, namely, Jaibunnisa, Mansoor, Mohammed Ghouse, and Nasarath @ Musarath @ Nasarathulla Shariff were committed to the Court of Sessions. Appellants denied to have committed any offence and claimed to be tried. There is no eye-witness to the occurrence and the prosecution sought to establish the guilt against all the accused persons, including the appellants by circumstantial evidence. It has brought on record oral evidence as also documentary evidence to prove that there was strained relationship between the deceased and the accused persons in regard to the share in the ancestral property. Presence of blood marks near the house of some appellants was another circumstance relied on by the prosecution to prove the guilt. Recovery of wheel and tyre of the motorcycle of the deceased from appellant Issaq Sait and recovery of knife from appellant Mujahid at their instances was another circumstance which, according to the prosecution pointed towards the guilt of these two appellants. The conduct of these appellants i.e., abscondence immediately after the occurrence was yet another circumstance brought by the prosecution to establish their guilt.

6. The trial court on the appraisal of the evidence came to the conclusion that motive and recovery of bucket and plastic pot at the instance of the appellants Rukia Begum and Nasreen do not pointedly lead towards their guilt and accordingly acquitted them of all the charges. However, the circumstantial evidence brought and proved by the prosecution, i.e. motive; presence of blood; recoveries and abscondence immediately after the occurrence persuaded the trial court to hold that the circumstantial evidence clearly lead towards the guilt of appellants Issaq Sait and Mujahid and accordingly convicted and sentenced them as above.

7. We have heard the learned counsel for the appellants as also the State. It has been submitted by the counsel representing appellants Rukia Begum and Nasreen that the circumstantial evidence brought against them do not

conclusively point towards their guilt and, therefore, the High Court erred in reversing the well considered judgment of acquittal of the trial court. They point out that the strained relationship between these appellants and their brother Rasheed Sait does not necessarily lead towards the guilt of these appellants. Recovery of day to day articles i.e., bucket and plastic pot also do not point out towards their guilt. It has been pointed out that the High Court while convicting these two appellants has not relied on the recovery. Ms. Anitha Shenoy, however, submits that two sisters, i.e., appellants Rukia Begum and Nasreen had very serious dispute with the deceased in regard to share of property. According to her this is a strong motive to commit the crime.

8. We have bestowed our consideration to the rival submissions and we are of the opinion that the circumstantial evidence brought against these appellants are not such which lead towards their guilt. As stated earlier, recovery from these appellants itself has been discarded by the High Court. In our opinion motive alone, in the absence of any other circumstantial evidence would not be sufficient to sustain the conviction of these two appellants. It is worthwhile mentioning here that the trial court on appraisal of the evidence came to the conclusion that the prosecution has not been able to prove its case beyond all reasonable doubt, so far as Rukia Begum and Nasreen are concerned. It is trite that where two views on the evidence are reasonably possible and the trial court has taken a view favouring acquittal, the High Court in an appeal against acquittal should not disturb the same merely on the ground that if it was trying the case, it would have taken an alternative view and convicted the accused. The High court while hearing appeal against the judgment of acquittal is possessed of all the power of appellate court and nothing prevents it to appraise evidence and come to a conclusion different than that of the trial court but while doing so it shall bear in mind that presumption of innocence is further reinforced by acquittal of the accused by the trial court. The view of the trial Judge as to the credibility of

the witness must be given proper weight and consideration. There must be compelling and weighty reason for the High Court to come to a conclusion different than that of the trial court. The view taken by the trial court was justified in the facts and circumstances of the case and a possible view and, therefore in our opinion, the High Court erred in setting aside their acquittal.

9. The case of appellant Issaq Sait and Mujahid in our opinion, however, stands on altogether different footing. The trial court has held them guilty. There is overwhelming evidence to prove beyond all reasonable doubt that they shared the motive with other accused persons. Appellant Issaq Sait during the course of investigation gave statement which led to the recovery of wheel and tyre of the motorcycle belonging to the deceased which was dismantled. It was seized and seizure list was prepared. This recovery has been proved by oral evidence as also the seizure list. Further, the statement given by appellant Mujahid during the course of investigation led to recovery of the knife and it has been proved by PW-25 Jakir Ahamad and seizure memo. These two appellants were not found at the normal place of their work and their abscondence has been proved by PW-7 Ashok Kumar, the Manager of M/s. Habeeb Solvent Extract. In his evidence he has stated that appellant Issaq Sait and appellant Mujahid were working in the factory. He has further stated that Issaq Sait was assigned duty for collection of money due to the company and such a duty was assigned on 9th of June, 1995. PW-33 Govindaraju had also stated that the appellant Issaq Sait, as an employee of M/s. Habeeb Solvent Extract, approached him for collection of money and on 9th of June, 1995 he paid a sum of Rs. 10,000/- to him. PW-7 has further stated in his evidence that during the month of June, 1995 appellant Mujahid left the factory and did not join the duty. From the aforesaid evidence it is clear that the appellants Issaq Sait and Mujahid were employees of M/s. Habeeb Solvent Extract and absconded soon after the incident.

10. No doubt it is true that for bringing home the guilt on the basis of the circumstantial evidence the prosecution has to establish that the circumstances proved lead to one and the only conclusion towards the guilt of the accused. In a case based on circumstantial evidence the circumstances from which an inference of guilt is sought to be drawn are to be cogently and firmly established. The circumstances so proved must unerringly point towards the guilt of the accused. It should form a chain so complete that there is no escape from the conclusion that the crime was committed by the accused and none else. It has to be considered within all human probability and not in fanciful manner. In order to sustain conviction circumstantial evidence must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused. Such evidence should not only be consistent with the guilt of the accused but inconsistent with his innocence. No hard and fast rule can be laid to say that particular circumstances are conclusive to establish guilt. It is basically a question of appreciation of evidence which exercise is to be done in the facts and circumstances of each case. Here in the present case the motive, the recoveries and abscondence of these appellants immediately after the occurrence point out towards their guilt. In our opinion, the trial court as also the High Court on the basis of the circumstantial evidence rightly came to the conclusion that the prosecution has been able to prove its case beyond all reasonable doubt so far as these appellants are concerned.

11. In the result Criminal Appeal No. 1519 of 2008 filed by Rukia Begum and Criminal Appeal No. 1808 of 2009 preferred by appellant Nasreen are allowed, the impugned judgment of the High Court is set aside. Appellant Rukia Begum is in jail, she be set at liberty forthwith.

Criminal Appeal No. 698 of 2008 stands dismissed.

D.G. Appeals disposed of.

PEPSICO INDIA HOLDINGS LTD.
v.
COMMISSIONER OF TRADE TAX, LUCKNOW, U.P.
(Civil Appeal No. 2926 of 2011)

APRIL 5, 2011

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

U.P. Trade Tax Act, 1948:

s.8(1) and its Explanation, s.8(1B) – Interest on delayed payment of tax – Whether payable as per s.8(1) or as per s.8(1B) – Held: If tax is admittedly payable and is not paid, the same becomes payable along with interest as mentioned in s.8(1) – Once it is confirmed by the Court that the tax is payable under the Act, it would be covered within the definition of the term "the tax admittedly payable" as defined in the explanation to s.8(1) and, in case, the tax had not been paid then the same becomes payable along with interest as mentioned in s.8(1) – Provisions of sub-section (1B) of s.8 would come into operation only if the case is not covered under sub-section (1) of s.8 – In the instant case, assessee disputed its liability to pay tax on the glass bottles and crates used for beverages sold by it – However, it had itself mentioned in its accounts the turnover in respect of rent charged by distributors of glass bottles and crates – The said issue was decided in the case of Asiatic Gases Ltd. wherein it was held that tax was payable on rentals charged in respect of containers for goods that cannot be sold without containers – Thus, interest is payable in terms of sub-section (1) of s.8 and not in terms of sub-section (1B) of s.8.

s.8(1) – Interest on delayed payment of tax – Whether payable from the date when the tax became due and payable or from the date of the assessment order – Held: Where a

dealer fails to pay tax at the correct rate because he claimed not to know the revision in the rate, the dealer remains liable to pay interest at a penal rate u/s.8 (1) from the date when the tax became due and payable – In such a case, the dealer cannot claim that he is liable only from the date of the assessment order fixing the correct rate of tax.

s.3-F – Rent charged in respect of glass bottles and crates used for beverages sold by assessee – Liability to pay sales tax on – Held: Glass bottles and crates constitute an integral part of the beverages and they together with the contents therein are a "composite personality" and constitute "goods" liable to sales tax – Sales tax.

Words and phrases: Expression "the tax admittedly payable" – Meaning of, in the context of s.8(1) of the U.P. Trade Tax Act.

The appellant was engaged in the manufacturing and selling of the beverages and owned bottling plants in the State of Uttar Pradesh. The dispute pertained to the trade tax payable on its turnover of ? 8.54 crores in respect of rentals by distributors of glass bottles and crates for the assessment year 1999-2000. The appellant disputed the tax liability on such turnover as well as the interest, as according to them no tax was payable on the rental of glass bottles and crates as the same did not amount to a transfer of right to use the goods for value or consideration under section 3-F of the U.P. Trade Tax Act. However, the said submission was negated by the first and second appellate authority as well as, on revision, by the High Court.

The issue as to whether there was transfer of rights of users by the assessee when he realized rental charges for glass bottles and crates was dropped by the assessee as, in the intervening period, the issue was finally settled

by judgment of Supreme Court in *Asiatic Gases Ltd. wherein it was held that the containers constituted an integral part of the commodities in question and the container together with the contents therein was a "composite personality" and constituted "goods" eligible to sales tax. The only issue which was under consideration in the instant appeal was whether the appellant was liable to pay interest on the delayed payment of tax under Section 8(1) of the U.P. Trade Tax Act i.e. @ 2% per mensem from the date the tax was due or under Section 8(1B) i.e. 1.5% per mensem from the date of the assessment order and demand notice.

Dismissing the appeal, the Court

HELD: 1. The explanation to the sub-section (1) to section 8 of the U.P. Trade Tax Act clearly defined the term "the tax admittedly payable" and illustrates the situations in which the tax would be deemed to be admittedly payable, which are: (i) The tax which is payable under this Act on the turnover of sales, as the case may be, the turnover of purchase, or both, as disclosed in the accounts maintained by the dealer; (ii) The tax admitted by the dealers in any return or proceeding under this act, whichever is greater; (iii) If no accounts were maintained, then according to the estimate of the dealer and includes the amount payable under section 3-B or sub-section (6) of section 4-B. Undisputedly in the instant case, the appellant had themselves mentioned in their accounts the turnover in respect of rentals by distributors of glass bottles and crates. However, the appellant had disputed that the said turnover was liable to tax under the Act. The issue was finally settled by judgment of Supreme Court in *Asiatic Gases Ltd. Once it is confirmed that the tax is payable under the Act, the same becomes payable from the date

when it was due and not from the date when the judicial verdict was pronounced (unless and until, in a case, the court specifies a particular date from which it shall be payable). Thus, once it has been confirmed by the Court that the tax is payable under the Act, it would be covered within the definition of the term "the tax admittedly payable" as defined in the explanation to section 8(1) and, in case, the tax had not been paid then the same becomes payable along with interest as mentioned in section 8 (1) of the Act. Provisions of sub-section (1B) of section 8 of the act will come into operation only if the case is not covered under sub-section (1) of section 8 of the Act. The opening words of the said sub-section (1B) states "if the tax, other than the tax referred to in sub-section 1, assessed by the assessing authority is not paid". As in the present case the tax becomes admittedly payable once it has been held that the tax is payable under the Act, the interest would be payable in terms of sub-section (1) of section 8 of the Act and not in terms of sub-section (1B) of Section 8 of the Act. [Paras 11, 12, 14,15,16] [730-G-H; 731-A-D; F-H; 732-A-B, D]

2. Where a dealer fails to pay tax at the correct rate because he claimed not to know the revision in the rate, the dealer remains liable to pay interest at a higher rate, penal rate under section 8 (1) from the date when the tax became due and payable. In such a case, the dealer cannot claim that he is liable only from the date of the assessment order fixing the correct rate of tax. Similarly, in case where the dealer has taken a chance and it has been held that the tax is payable under Act, the same becomes payable from the date when it was due. [Para 17] [732-E-G]

State of Orissa and another v. Asiatic Gases Ltd.* **(2007) 5 SCC 766; *Aggarwal Bros. v. State of Haryana* **(1999) 9 SCC**

182; *Commissioner of Sales Tax v. Qureshi Crucible Centre* **1993 Supp (3) SCC 495 – relied on.**

Case Law Reference:

(2007) 5 SCC 766	**relied on**	**Para 4**
(1999) 9 SCC 182	**relied on**	**Para 4**
1993 Supp (3) SCC 495	**relied on**	**Para 17**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2926 of 2011.

From the Judgment & Order dated dated 10.12.2007 of the High Court of Allahabad, Lucknow Bench, Lucknow in Trade Tax Revision No. 181 of 2007.

Shyam Divan, Ananya Kumar, Ankur Saigal, Gaurav Singh, Bina Gupta for the Appellant.

Krishna Venugopal, Gunnam Venkateswara Rao, Manoj Dwivedi for the Respondents.

The Judgment of the Court was delivered by

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

2. The present appeal arises out of the judgment dated 10.12.2007 passed by the learned Single Judge of the High Court of Allahabad (Lucknow Bench) whereby the learned Single Judge has dismissed the tax revision filed by the Appellant under section 11 of the U. P. Trade Tax Act (hereinafter referred to as "the Act") impugning the judgment dated 14.8.2007 passed by the Trade Tax Tribunal, Lucknow rejecting the second appeal of the appellant/assessee.

3. Various issues were raised before the Tribunal as well as the High Court with respect to the liability of the appellant/assessee to pay tax which, in nutshell, are as follows: -

(i) That there is no transfer of rights of users by the assessee when he realized rental charges for glass bottles and crates.

(ii) The forums did not consider the terms of the agreement/contract between the assessee and his selling agents/consumers.

(iii) The interest charge on the tax could not have been charged under Section 8(1) as the case falls under Section 8(1B).

4. However, in the present appeal the issues Nos. (i) and (ii) were dropped by the appellant as, in the intervening period, the above said two issues were finally settled by the judgment of this court in the case of *State of Orissa and another v. Asiatic Gases Ltd.* (2007) 5 SCC 766. In the said case this court held that the previous decision of this Court in *Aggarwal Bros. v. State of Haryana* (1999) 9 SCC 182, is fully applicable to rentals charged in respect of the containers for goods that cannot be sold without containers. This court held that the containers constitute an integral part of the commodities in question and the container together with the contents therein is a "composite personality" and constitutes "goods" eligible to sales tax.

5. Accordingly, the only issue which requires consideration in the present appeal is whether the appellant is liable to pay interest on the tax due under Section 8 (1) of the Act i.e. @ 2 % per mensem from the date the tax was due or under Section 8 (1B) i.e. @ 1.5 % per mensum from the date of the assessment order and demand notice.

6. The High Court and the other forums below, for the reasons mentioned therein, have held that the appellant is liable to pay interest on the delayed payment of tax under section 8 (1) of the Act (i.e. @ 2 % per mensem from the date of filing of returns). Whereas, it is the appellants case that the interest is payable as per section 8 (1B) of the Act (i.e. @ 1.5 % per mensum from the expiration of the date mentioned in the

assessment order which in the present case is March 15, 2002).

7. As a short question is involved we need not mention the facts of the case in great detail. In brief the facts leading to the filing of the present appeal are that the appellant is engaged in the manufacturing and selling of the beverages and is having bottling plants in the state of Uttar Pradesh. The dispute pertains to the trade tax payable on its turnover of Rupees 8.54 crores in respect of rentals by distributors of glass bottles and crates for assessment year 1999-2000. The appellant disputed the liability to pay tax on such turnover as well as the interest, as according to them no tax is payable on the rental of glass bottles and crates as the same did not amount to a transfer of right to use the goods for value or consideration under section 3-F of the Act. However, the said submission was negated by the first and second appellate authority as well as, on revision, by the High Court. As mentioned hereinabove, the challenge to the liability to pay tax was dropped by the appellant in the light of the judgment passed by this Hon'ble court in *Asiatic Gases Ltd.* case (supra).

8. We heard the learned counsel appearing for both the parties and perused the record. It was submitted by the learned senior counsel appearing for the Appellant that as it was the bonafide belief of the appellant/assessee that they were not liable to pay tax on the turnover realized as rental from the bottles and crates, therefore, the tax should be charged only from the date of the assessment order and not from the date of filing of the returns. It was further submitted that section 8 (1) of the Act only becomes applicable when the assessee had admitted its tax liability in its accounts or its return and as the appellant/assessee had disputed the liability to pay tax and raised a bonafide dispute they would not be liable to pay interest under Section 8 (1) of the Act. Resultantly, interest, if any, can only be charged under Section 8 (1B) which covers the cases which does not fall within the ambit of Section 8 (1) of the Act.

9. All the abovesaid contentions were negated by the counsel appearing for the respondent and it was submitted that after disclosing the turnover in its accounts a dealer cannot run away from his liability to pay tax by raising false and frivolous dispute. In case, if he does so then he will be liable to pay penal rate of interest under section 8 (1) of the Act.

10. Section 8 (1) of the act, prior to its amendment in 2002, is reproduced below:

"8. Payment and recovery of tax:

(1) The tax admittedly payable shall be deposited within the time prescribed or by the thirty-first day of August, 1975, whichever is later failing which simple interest at the rate of 2 per cent per mensem shall become due and be payable on the unpaid amount with effect from the day immediately following the last date prescribed or till the date of payment of such amount, whichever is later and nothing contained in section 7 shall prevent or have the effect of postponing the liability to pay such interest.

Explanation: - For the purposes of this sub-section, the tax admittedly payable means the tax which is payable under this Act on the turnover of sales or, as the case may be, the turnover or purchases, or of both, as disclosed in the accounts maintained by the dealer, or admitted by him in any return or proceeding under this Act, whichever is granted, or, if no accounts were maintained then according to the estimate of the dealer and includes the amount payable under Section 3B or sub-section (6) of section 4B."

11. The explanation to the said subsection clearly defines the term "the tax admittedly payable" and illustrates the situation in which the tax would be deemed to be admittedly payable, the same are as follows: -

(i) The tax which is payable under this Act on the

turnover of sales, as the case may be, the turnover of purchase, or both, as disclosed in the accounts maintained by the dealer.

(ii) The tax admitted by the dealers in any return or proceeding under this act, whichever is greater.

(iii) If no accounts were maintained, then according to the estimate of the dealer and includes the amount payable under section 3-B or subsection (6) of section 4-B.

12. It is not in dispute in the present case that the appellant has themselves mentioned in their accounts the turnover in respect of rentals by distributors of glass bottles and crates. However, the appellant has disputed that the said turnover is liable to tax under the Act.

13. The question that emerged for adjudication before forum and Court below was that whether the tax is payable under the Act on the turnover from rentals of glass bottles and crates. The Court has answered the question in affirmative and confirmed that on such turnovers the tax will be payable under the Act.

14. The appellant had taken the chance to get a judicial verdict on the said issue. Once it has been confirmed that the tax is payable under the Act, the same becomes payable from the date when it was due and not from the date when the judicial verdict was pronounced (unless and until, in a case, the court specifies a particular date from which it shall be payable). Thus, once it has been confirmed by the Court that the tax is payable under the Act it would be covered within the definition of the term "the tax admittedly payable" as defined in the explanation to section 8 (1) and, in case, the tax had not been paid then the same becomes payable along with interest as mentioned in section 8 (1) of the Act.

15. Provisions of subsection (1B) of section 8 of the act

will come into operation only if the case is not covered under subsection (1) of section 8 of the Act. The opening words of the said subsection (1B) states "if the tax, other than the tax referred to in subsection 1, assessed by the assessing authority is not paid". The said subsection is reproduced herein below for reference: -

"Section 8(1B) – If the tax, other than the tax referred to in sub-section (1), assessed by any Assessing Authority is not paid within the period specified in the notice of assessment and demand referred to in sub-section (1-A), simple interest at the rate of one and half per cent per mensem on the unpaid amount calculated from the date of expiration of the period specified in such notice shall become due and be payable."

16. As in the present case the tax becomes admittedly payable once it has been held that the tax is payable under the Act, the interest would be payable in terms of subsection (1) of section 8 of the Act and not in terms of subsection (1B) of Section 8 of the Act.

17. This court in the case of *Commissioner of Sales Tax v. Qureshi Crucible Centre,* 1993 Supp (3) SCC 495 has held that where a dealer fails to pay tax at the correct rate because he claimed not to know the revision in the rate, the dealer remains liable to pay interest at a higher rate, penal rate under section 8 (1) from the date when the tax became due and payable. In such a case, the dealer cannot claim that he is liable only from the date of the assessment order fixing the correct rate of tax. Similarly, in case where the dealer has taken a chance and it has been held that the tax is payable under Act, the same becomes payable from the date when it was due.

18. Accordingly, the present appeal dismissed but without any orders as to costs.

D.G. Appeal dismissed.

BILKIS AND OTHERS
v.
STATE OF MAHARASHTRA AND OTHERS
(Civil Appeal No(s). 2706-2707 of 2004)

APRIL 5, 2011

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

Land Acquisition Act, 1894:

Acquisition of land – Compensation – Land acquired for development of tourism – Reference court enhancing compensation from Rs.300/- to Rs.650/- per 'Aar' holding that the land was permitted to be converted to non-agricultural use – High Court reducing the compensation to Rs.500/- per Aar – HELD: The potential to which the land is reasonably capable of being used in future by the owner should be taken into account in assessing the compensation – In the instant case, the land has been converted to non-agricultural land and is also adjacent to the highway, only 6- 8 km. away from an internationally famous tourist destination – Judgment of High Court set aside and the award of the reference court restored.

The entire land of the predecessor-in-interest of the appellants was acquired pursuant to notification dated 16.4.1990 issued u/s 4 of the Land Acquisition Act, 1894 for the development of tourism. The award was made on 22.7.1993 awarding the compensation @ Rs.300/- per Aar. The reference court held that the Land Acquisition Officer had wrongly ignored the fact that the land under acquisition had been converted into non-agricultural land in 1993. It enhanced the compensation for the land to Rs.650/ per Aar. The High Court dismissed the appeal of the claimants and partly allowed the appeal of the State holding that while permission for non-agricultural use had been given for the acquired land, it should not be the

sole basis to treat the entire land as being non-agricultural or being used for commercial purpose. It, accordingly, reduced the compensation to Rs.500/- per Aar. Aggrieved, the claimants filed the instant appeals.

Partly allowing the appeals, the Court

HELD: 1.1. Though the claimant has been unable to prove the existence of a hotel, it has been found that some structures for the same existed. Therefore, there is some development on the acquired land. Further, admittedly, travellers would stop by and utilize the hotel services provided by the claimants. The land is also adjacent to the Aurangabad-Jalgaon highway and is only 6 to 8 km. away from the Ajantha caves, an internationally famous tourist destination. Thus, there is great future potential for development with respect to the acquired land. The potential to which the land is reasonably capable of being used in future by the owner should be taken into account in assessing the compensation. [Para 13] [739-C-E]

Smt. Kamlabai Jageshwar Joshi and others v. State of Maharashtra and others **AIR 1996 SC 981 and** *State of Maharashtra and others v. Digamber Bhimashankar Tandale and others* **1996 (2) SCC 583 - distinguished**

1.2. In the circumstances, the compensation awarded by the reference court appears to be just and reasonable, having been determined after correctly appreciating all the material evidence on record. There was no need for the High Court to reduce the same. Accordingly, the judgment of the High Court is set aside and the award of the reference court restored. [para 14] [739-F]

CIVIL APPELLATE JURISIDICTION : Civil Appeal Nos. 2706-2707 of 2004.

From the Judgment & Order dated 3.4.2003 of the High Court of Judicature at Bombay bench at Aurangabad in F.A. No. 1127 of 2002 & F.A. No. 3260 of 2002.

Vinay Navar for the Appellants.

Anantbhushan Kanade, Asha Gopalan Nair, Prashant R. Dahat for the Respondents.

The Judgment of the Court was delivered by

GANGULY, J. 1. Heard learned counsel for the parties.

2. The deceased Shaikh Rasheed Shaikh Latik was the owner of the land gut no. 29 adms. 80 Aar situated at Thana Tq. Soyegaon. His entire land was acquired by the Land Acquisition Officer (hereinafter 'LAO') for the development of tourism plan of Ajintha villages Fardapur and Thana, taluka Soyegaon, district Aurangabad. A notification was published under Section 4(1) of the Land Acquisition Act, 1894 (hereinafter 'the Act') on 16.4.1990. It was followed by the notification under Section 6 published on 12.9.1991.

3. The LAO passed an award dated 22.7.1993 wherein he classified the lands into two groups, and the group within which the land of the deceased was classified was given compensation at the rate of Rs.300/- per Aar and Rs.3,79,498/- towards structures and Rs.6,300/- towards fruit-bearing trees.

4. Aggrieved, the claimants filed references before the Reference Court. The Reference Court, vide order dated 27.6.2001, partly allowed the reference petitions. It found that the land under acquisition was converted into non-agricultural land in 1993 and the LAO was wrong to ignore the said fact while granting compensation and taking the acquired land to be agricultural land. Thus, it enhanced compensation to an amount of Rs.650/- per Aar as cost of land. The Reference Court also gave specific findings to the following effect:

1. The claimant was unable to prove that he had constructed a hotel of 2400 sq. ft. on the acquired land. Thus, it concluded that the evidence of the claimant was insufficient to prove that the value of the structure was more than the compensation awarded by the LAO.

2. The evidence of the claimant was also insufficient to prove that bore or well existed on the land. Thus, the claimant was held not entitled to enhanced compensation towards well or bore.

3. The LAO had granted compensation for sitaphal, bor, coconut, mango and jamun trees. The claimant was unable to prove the existence of any more trees or plants on his lands and therefore he was held not entitled to enhanced compensation towards trees and flower plants.

4. The claimant claimed to be earning annual income of Rs.24,000/- from his hotel business. On perusal of evidence, the Court concluded that there was definitely no hotel in existence and an inference could only be drawn that he was running a small hotel like a tea stall, and that such business had no future prospects. Thus, he was not entitled to any compensation for loss of business.

5. Being still aggrieved, the claimants filed appeals before the High Court for further enhancement of compensation. The State also appealed before the High Court for reduction of compensation awarded by the Reference Court.

6. The High Court, vide its judgment dated 3.4.2003 dismissed the appeal of the claimants and partly allowed the appeal of the State. It upheld all the findings of the Reference Court, except the computation with respect to market value of the land, which it reduced to Rs.500/- per Aar. The reasoning

High Court gave for the same was that while non-agricultural permission had been given for the acquired land, it could not be the sole basis to treat the entire land as being non-agricultural or being used for commercial purposes. The non-agricultural permission had been based on certain conditions, one of which was that the grantee would commence non-agricultural use of land within one year from the date of such order unless the same was extended, failing which the permission would be cancelled. According to the High Court, the construction of the hotel for which compensation had been granted was located on an area of 2400 sq. ft. and this by itself would not make the entire remaining land as non agricultural or used for commercial purposes. The High Court relied on *Smt. Kamlabai Jageshwar Joshi and others v. State of Maharashtra and others (AIR 1996 SC 981) and State of Maharashtra and others v. Digamber Bhimashankar Tandale and others [1996 (2) SCC 583].*

7. Further, the High Court held that the permission granted by the village Panchayat revealed that there was a structure standing on the acquired land, and even if benefit of doubt was given in favour of the claimants, the structure did not exceed 2400 sq. ft. The High Court also recorded a finding that village Thana was located on the Aurangabad-Jalgaon highway at a distance of 95 kms. from Aurangabad and about 50 kms. from Jalgaon. The Ajantha caves were located 6 to 8 kms. from the said village. The acquired land was adjacent to the State highway and in proximity of junction point on the approach road leading to the caves. On the land in front of it, i.e. Gut No. 28, there was another hotel by the name of Hotel Gazal. As per evidence, travellers on the said highway would stop and utilize the services of the restaurants either in Gut No. 28 or 29. However, there was nothing further to show that the land appurtenant to the lodging and boarding house was being used for any commercial purpose and it was by choice of the owners that it was not being used for agricultural purposes. Thus, the High Court took the view that the Reference Court erred in

treating the entire land as commercial/non-agricultural. Accordingly, it held that compensation of Rs.420/- per are for the agricultural land would be just and proper, however as the land was adjacent to the highway, market value of the land was fixed at Rs.500/- per are.

8. Aggrieved, the claimants approached this Court by way of appeal for further enhancement of compensation.

9. We have perused the material on record and heard the parties. We are of the opinion that the judgment of the Reference Court deserves to be restored and that of the High Court set aside.

10. The High Court has reduced compensation on the ground that the land, though was given non-agricultural permission, it could not be treated as a basis for treating the entire land as non-agricultural. We disagree with this view. The High Court has relied on the case of *Kamlabai Jageshwar Joshi* (supra) and *Digamber Bhimashankar Tandale* (supra).

11. In the case of *Kamlabai Jageshwar Joshi* (supra), it was found that at the time of acquisition, as per the report of the Land Acquisition Officer in the award, there was no development, though the lands were situated within the municipal limits. Sanction had been obtained for converting the lands into non-agricultural lands. In view of these circumstances, a bench of this court concluded that permission for conversion was obtained by the appellant with a view to inflate the market value, after becoming aware of the proposal for acquisition. This Court also found that except obtaining sanction for conversion no further action to develop the lands was taken. Accordingly, this Court proceeded to award compensation taking the land to be agricultural land.

12. In the case of *Digamber Bhimashankar Tandale* (supra), on the date of the notification the lands were agricultural lands though situated within the municipal limits. It is also in

evidence that the lands were converted for non-agricultural purpose. But as on the date of notification, there was no development in that area. The oral evidence was adduced in which it was shown that upto a distance of 3/4th km. of the lands there was development. Some illegal constructions were made on the lands. Under those circumtances, the court concluded that as on the date of the notification there was no potential value to the lands though converted into non-agricultural lands.

13. We believe that the present case can be distinguished from the abovementioned judgments. From evidence on record, though the claimant has been unable to prove the existence of a hotel, it has been found that some structures for the same existed. Therefore, unlike the abovementioned judgments, there is some development on the acquired land. Further, admittedly, travellers would stop by and utilize the hotel services provided by the claimants. The land is also adjacent to the Aurangabad-Jalgaon highway and is only 6 to 8 kms. away from the Ajantha caves, an internationally famous tourist destination. Thus, there is great future potential for development with respect to the acquired land. The potential to which the land is reasonably capable of being used in future by the owner should be taken into account in assessing compensation.

14. In light of these circumstances, the compensation awarded by the Reference Court appears us to be just and reasonable, having been determined after correctly appreciating all the material evidence on record. There was no need for the High Court to reduce the same. Accordingly, we set aside the judgment of the High Court and restore the award of the Reference Court.

15. The appeals are partly allowed and the award of the Reference Court is restored.

16. No order as to costs.

R.P. Appeals partly allowed.

REKHA

v.

STATE OF T NADU TR.SEC.TO GOVT. & ANR.

(Criminal Appeal No. 755 of 2011)

APRIL 05, 2011

[MARKANDEY KATJU, SURINDER SINGH NIJJAR AND GYAN SUDHA MISRA, JJ.]

Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug-Offenders, Forest Offenders, Goondas, Immoral Traffic Offenders, Sand Offenders, and Slum Grabbers and Video Pirates Act, 1982 – Charge against appellant's husband that he was selling expired drugs after changing their labels – Detention order under the 1982 Act – Writ petition challenging the detention order dismissed by High Court – On appeal, held: In the grounds of the detention it was only stated that in similar cases bails were granted by the courts and no details were given about the alleged bail order in similar cases – Detention order only contained ipse dixit regarding the alleged imminent possibility of the accused coming out on bail and there was no reliable material to this effect – Also, the relevant provisions in the Penal Code and the Drugs and Cosmetics Act were sufficient to deal with the said situation – Thus, the detention order was illegal and cannot be sustained, and is quashed.

Preventive detention law – Order under –Legality of – When ordinary law of the land such as Penal Code and other penal statutes, can deal with the situation – Held: In such a case, recourse to preventive detention law would be illegal.

Constitution of India, 1950 – Article 22(3)(b) – Preventive detention – Power of – Held: Must be confined to very narrow limits, otherwise the right to liberty would become nugatory –

Article 22(3)(b) cannot be read in isolation, but must be read along with Articles 19 and 21.

It is alleged that the appellant's husband was selling expired drugs after tampering with the labels and printing fresh labels showing them as non-expired drugs. He was detained by a detention order passed under the Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug-Offenders, Forest Offenders, Goondas, Immoral Traffic Offenders, Sand Offenders, and Slum Grabbers and Video Pirates Act, 1982. The appellant filed habeas corpus petition challenging the said detention order. The High Court dismissed the petition. Therefore, the appellant filed the instant appeals.

Allowing the appeals, the Court

HELD: 1.1 Article 22(3)(b) of the Constitution of India which permits preventive detention is only an exception to Article 21 of the Constitution. An exception is an exception, and cannot ordinarily nullify the full force of the main rule, which is the right to liberty in Article 21 of the Constitution. Fundamental rights are meant for protecting the civil liberties of the people, and not to put them in jail for a long period without recourse to a lawyer and without a trial. Thus, Article 22 cannot be read in isolation but must be read as an exception to Article 21. An exception can apply only in rare and exceptional cases, and it cannot override the main rule. Article 21 is the most important of the fundamental rights guaranteed by the Constitution of India. Right to liberty guaranteed by Article 21 implies that before a person is imprisoned a trial must ordinarily be held giving him full opportunity of hearing, and that too through a lawyer, because a layman would not be able to properly defend himself except through a lawyer. [Paras 13, 14, 15 and 16] [753-D-E; 753-G; 754-A-C-D]

A.S. Mohd. Rafi vs. State of Tamilnadu **AIR 2011 SC 308;** *Md.Sukur Ali vs. State of Assam* **JT 2011 (2) SC 527 – referred to.**

R vs. Secy. of State for the Home Dept., Ex Parte Stafford **(1998) 1 WLR 503 (CA)** *Powell v. Alabama* **287 U.S. 45 (1932) – referred to.**

1.2. Article 22(1) of the Constitution makes it a fundamental right of a person detained to consult and be defended by a lawyer of his choice. But Article 22(3) specifically excludes the applicability of clause (1) of Article 22 to cases of preventive detention. Therefore, the power of preventive detention must be confined to very narrow limits, otherwise the great right to liberty would become nugatory. Article 22(3)(b) cannot be read in isolation, but must be read along with Articles 19 and 21. [Paras 18 and 22] [754-F-G]

State of Maharashtra and Ors. vs. Bhaurao Punjabrao Gawande **(2008) 3 SCC 613;** *M. Nagaraj and Ors. vs. Union of India and Ors.* **(2006) 8 SCC 212;** *I.R. Coelho (dead) By LRs. vs. State of T.N.* **(2007) 2 SCC 1 – referred to.**

A.K. Roy vs. Union of India **(1982) 1 SCC 271 – followed.**

1.3. In cases of preventive detention no offence is proved and the justification of such detention is suspicion or reasonable probability, and there is no conviction which can only be warranted by legal evidence. Preventive detention is often described as a 'jurisdiction of suspicion'. The detaining authority passes the order of detention on subjective satisfaction. Since clause (3) of Article 22 specifically excludes the applicability of clauses (1) and (2), the detenu is not entitled to a lawyer or the right to be produced before a Magistrate within 24 hours of arrest. To prevent misuse

of this potentially dangerous power the law of preventive detention has to be strictly construed and meticulous compliance with the procedural safeguards, however, technical, is, mandatory and vital. [Paras 39 and 40] [760-D-G]

State of Maharashtra & Ors. vs. Bhaurao Punjabrao Gawande **(2008) 3 SCC 613;** *Kamleshkumar Ishwardas Patel vs. Union of India and Ors.* **(1995) 4 SCC 51;** *Rattan Singh vs. State of Punjab* **(1981) 4 SCC 1981;** *Abdul Latif Abdul Wahab Sheikh vs. B.K. Jha and Anr.* **(1987) 2 SCC 22 – referred to.**

Joint Anti-Fascist Refugee Committee vs. McGrath **341 US 123 – referred to.**

1.4. Procedural rights are not based on sentimental concerns for the detenu. The procedural safeguards are not devised to coddle criminals or provide technical loopholes through which dangerous persons escape the consequences of their acts. They are basically society's assurances that the authorities will behave properly within rules distilled from long centuries of concrete experiences. Personal liberty protected under Article 21 is so sacrosanct and so high in the scale of constitutional values that it is the obligation of the detaining authority to show that the impugned detention meticulously accords with the procedure established by law. [Paras 45 and 46] [761-H; 762-A-C]

Thomas Pacham Dale's **case (1881) 6 QBD 376 – referred to.**

2.1. There is a real possibility of release of a person on bail who is already in custody provided he has moved a bail application which is pending. It follows logically that if no bail application is pending, then there is no likelihood of the person in custody being released on bail,

and thus, the detention order would be illegal. However, there can be an exception to this Rule, that is, where a co-accused whose case stands on the same footing had been granted bail. In such cases, the detaining authority can reasonably conclude that there is likelihood of the detenu being released on bail even though no bail application of his is pending, since most courts normally grant bail on this ground. However, details of such alleged similar cases must be given, otherwise the bald statement of the authority cannot be believed. [Para 29] [757-G-H; 758-A-B]

2.2. In the instant case, a perusal of the grounds of the detention shows that no details have been given about the alleged similar cases in which bail was allegedly granted by the concerned court. Neither the date of the alleged bail orders was mentioned, nor the bail application number, nor whether the bail orders were passed in respect of the co-accused on the same case, nor whether the bail orders were passed in respect of other co- accused in cases on the same footing as the case of the accused. All that was stated in the grounds of detention is that 'in similar cases bails were granted by the courts.' If details are given by the respondent authority about the alleged bail orders in similar cases mentioning the date of the orders, the bail application number, whether the bail order was passed in respect of co-accused in the same case, and whether the case of the co-accused was on the same footing as the case of the petitioner, then, of course, it could be argued that there is likelihood of the accused being released on bail, because it is the normal practice of most courts that if a co-accused was granted bail and his case is on the same footing as that of the petitioner, then the petitioner is ordinarily granted bail. However, the respondent authority should have given details about the alleged bail order in similar cases, which was not done in the instant case. The

detention order only contains *ipse dixit* regarding the alleged imminent possibility of the accused coming out on bail and there was no reliable material to this effect. Thus, the detention order cannot be sustained. [Paras 6, 7, 10 and 11] [751-C-E; 752-D-H]

T.V. Sravanan alias S.A.R. Prasana Venkatachaariar Chaturvedi vs. State through Secretary and Anr. **(2006) 2 SCC 664;** *A. Shanthi (Smt.) vs. Govt. of T.N. and Ors.* **(2006) 9 SCC 711;** *Rajesh Gulati vs. S. Govt. of NCT of Delhi and Anr.* **(2002) 7 SCC 129;** *Haradhan Saha vs. State of West Bengal* **(1975) 3 SCC 198;** *A. Geetha vs. State of T.N. and Anr.* **(2006) 7 SCC 603;** *Ibrahim Nazeer vs. State of T.N. and Anr.* **(2006) 6 SCC 64 – referred to.**

2.3. There is nothing on the record to indicate whether the detaining authority was aware of the fact that the bail application of the accused was pending on the date when the detention order was passed. On the other hand, in the grounds of detention it was mentioned that 'TR' is in remand in crime No. 132/2010 and he has not moved any bail application so far'. Thus, the detaining authority was not even aware whether a bail application of the accused was pending when he passed the detention order, rather the detaining authority passed the detention order under the impression that no bail application of the accused was pending but in similar cases bail had been granted by the courts. No details of the alleged similar cases has been given. Thus, the detention order cannot be sustained. It cannot be said that an over technical view of the matter is taken and the preventive detention orders passed in cases where serious crimes have been committed should not be interfered with. [Paras 27 and 30] [757-C-E; 758-C]

Union of India vs. Paul Manickam and Anr. **(2003) 8 SCC 342 – referred to.**

2.4. If the ordinary law of the land (Penal Code and other penal statutes) can deal with a situation, recourse to a preventive detention law would be illegal. Whenever an order under a preventive detention law is challenged one of the questions the court must ask in deciding its legality is: Was the ordinary law of the land sufficient to deal with the situation? If the answer is in the affirmative, the detention order would be illegal. In the instant case, the charge against the detenu was of selling expired drugs after changing their labels. Surely the relevant provisions in the Penal Code and the Drugs and Cosmetics Act were sufficient to deal with this situation. Thus, the detention order was illegal. [Paras 31 and 32] [758-D-G; 759-A]

Biram Chand vs. State of Uttar Pradesh and Anr. **(1974) 4 SCC 573 – referred to.**

2.5. The observation in *Haradhan Saha's* case cannot be regarded as an unqualified statement that in every case where a person is liable to be tried, or is actually being tried, for a crime in a criminal court, a detention order can also be passed under a preventive detention law. [Para 38] [760-C]

Haradhan Saha vs. State of West Bengal **(1975) 3 SCC 198 – referred to.**

2.6. The impugned order is set aside and the impugned detention order is quashed. However, it is made clear that this would not affect the criminal cases pending against the alleged accused. [Para 47] [762-E]

Case Law Reference:

(2006) 2 SCC 664	**Referred to.**	**Para 8**
(2006) 9 SCC 711	**Referred to.**	**Para 8**
(2002) 7 SCC 129	**Referred to.**	**Para 8**

(1975) 3 SCC 198	**Referred to.**	**Para 9**
(2006) 7 SCC 603	**Referred to.**	**Para 9**
(2006) 6 SCC 64	**Referred to.**	**Para 9**
(1998) 1 WLR 503 (CA)	**Referred to.**	**Para 13**
AIR 2011 SC 308	**Referred to.**	**Para 17**
JT 2011 (2) SC 527	**Referred to.**	**Para 17**
287 U.S. 45 (1932)	**Referred to.**	**Para 17**
(2008) 3 SCC 613	**Referred to.**	**Para 19**
(2006) 8 SCC 212	**Referred to.**	**Para 20**
(2007) 2 SCC 1	**Referred to.**	**Para 21**
(1982) 1 SCC 27	**Followed.**	**Para 22**
(2003) 8 SCC 342	**Referred to.**	**Para 28**
(1974) 4 SCC 573	**Referred to.**	**Para 33**
(1995) 4 SCC 51	**Referred to.**	**Para 41**
(1981) 4 SCC 1981	**Referred to.**	**Para 42**
(1987) 2 SCC 22	**Referred to.**	**Para 43**
341 US 123	**Referred to.**	**Para 44**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 755 of 2011.

From the Judgment & Order dated 23.12.2010 of the High Court of Judicature at Madras in H.C.P. No. 792 of 2010.

WITH

Crl.A.Nos. 756, 757, 759, 760, 762, 763 & 764 of 2011.

K.K. Mani, Abhishek Krishna, S.J. Aristotle, A. Rohen Singh, Bob, Priya Aristotle, Prabhu Ramasubramanian, V.G. Pragasam, V. Mohana, V. Parshant, G. Ananda Selvam, Jaimon Andrews, A. Santha Kumaran, Ravindra Keshavrao Adsure, Guru Krishna Kumar, Abhay Kumar, Akshat Hansaria, Mamta Chandel for the Appellant.

Altaf Ahmed, Promila, S. Thananjayan for the Respondents.

The Judgment of the Court was delivered by

helddis Searched for dates from: 05/04/2011 to

MARKANDEY KATJU, J.

CRIMINAL APPEAL NO. 755 OF 2011

1. Heard learned counsel for the parties.

2. This Appeal has come up in a reference made by a two Judge Bench of this Court by order dated 15.03.2011.

3. The detenu in this Appeal Ramakrishnan (whose wife Rekha has filed this Appeal) has been detained by a detention order dated 08.04.2010 passed under the Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug-offenders, Forest Offenders, Goondas, Immoral Traffic Offenders, Sand Offenders, and Slum Grabbers and Video Pirates Act, 1982, on the allegation that he was selling expired drugs after tampering with the labels and printing fresh labels showing them as non-expired drugs. The habeas corpus petition filed by the wife of the detenu before the Madras High Court challenging the said detention order has been dismissed by the impugned order dated 23.12.2010. Hence, this Appeal.

4. Several grounds have been raised before us, but, in our opinion, this Appeal is liable to succeed on one ground itself, and hence we are not going into the other grounds.

The detention order reads as under :-

"No. 199/2010 Dated 08.04.2010

DETENTION ORDER

Whereas I, T. Rajendran, IPS., Commissioner of Police, Chennai Police, is satisfied that the person known as Tr. Ramakrishnan, male aged 35, S/O Devaraj, No. 82-B, South Mada Veethi, Villivakkam, Chennai-49 is a Drug Offender as contemplated under Section 2(e) of the Tamil Nadu Act 14 of 1982 and that with a view to preventing him from acting in any manner prejudicial to the maintenance of public order, it is necessary to make the following order.

Now therefore in exercise of the powers conferred on me by sub-section (1) of Section 3 of the Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug-offenders, Forest Offenders, Goondas, Immoral Traffic Offenders, Sand Offenders, and Slum Grabbers and Video Pirates Act, 1982 (Tamil Nadu Act 14 of 1982) read with orders issued by the Government in G.O. (D) No. 6, Home, Prohibition and Excise (XVI) Department dated 18th January, 2010 under sub- section (2) of Section 3 of the said Act, I hereby direct that the said Drug Offender Tr. Ramakrishnan, S/o Devaraj, be detained and kept in custody at the Central Prison, Puzhal, Chennai.

Given under my hand and seal of this office the 8th day of April, 2010."

5. The relevant part of the grounds on which the said detention order has been made is as follows :-

"Thiru. Elango, M. Pharm, male aged 43, S/O Ramasamy is working as a Drug Inspector, Drug Control Department, Perambur Range, Zone-II, D.M.S. Complex, Teynampet, Chennai-18. On 15.03.2010, Thiru. Elango appeared

before the Inspector of Police, Crimes P-6 Kodungaiyur Police Station and lodged a complaint against Thiruvalargal, Prabhakar @ Ravi, 2) Venkatesan, 3) Sanjay Kumar, 4) Sekar, 5) Baskar, 6) Pradeep Kumar Chordia and 7) Meenakshi Sundaram.

In his complaint, he has stated that expired drugs collected from the medical shops of Chennai city and Suburban used to be dumped at dump yard of Corporation ground at Ezhil Nagar, Kodungaiyur, Chennai. On 15.3.2010, Thiru, Elango received a secret information that expired drugs dumped at the dump yard at Corporation ground, Ezhil Nagar, Kodungaiyur, Chennai, were taken by Thiru. Prabhakar @ Ravi residing at the first floor of No. A-6/541, 151st Street, Muthamizh Nagar, Kodungaiyur, Chennai and by keeping the same with his associates tampered the same tampering the original labels and printing fresh labels to make it appear as though they are not expired drugs and redistribute the same for sale to the general public."

In para 4 of the grounds of detention, it is stated :-

"4. I am aware that Thiru. Ramakrishnan, is in remand in P.6, Kodungaiyur Police Station Crime No. 132/2010 and *he has not moved any bail application so far.* The sponsoring authority has stated that the relatives of Thiru. Ramakrishnan are taking action to take him on bail in the above case by filing bail applications before the Higher courts since in similar cases bails were granted by the Courts after a lapse of time. Hence, there is real possibility of his coming out on bail in the above case by filing a bail application before the higher courts. If he comes out on bail he will indulge in further activities, which will be prejudicial to the maintenance of public health and order. Further the recourse to normal criminal law would not have the desired effect of effectively preventing him from indulging in such activities, which are prejudicial to the maintenance of

public health and order. On the materials placed before me, I am fully satisfied that the said Thiru. Ramakrishnan is also a Drug Offender and that there is a compelling necessity to detain him in order to prevent him from indulging in such further activities in future which are prejudicial to the maintenance of public order under the provisions of Tamil Nadu Act 14 of 1982."

6. A perusal of the above statement in para 4 of the grounds of detention shows that no details have been given about the alleged similar cases in which bail was allegedly granted by the concerned court. Neither the date of the alleged bail orders has been mentioned therein, nor the bail application number, nor whether the bail orders were passed in respect of the co-accused on the same case, nor whether the bail orders were passed in respect of other co-accused in cases on the same footing as the case of the accused. All that has been stated in the grounds of detention is that "in similar cases bails were granted by the courts". In our opinion, in the absence of details this statement is mere ipse dixit, and cannot be relied upon.

7. In our opinion, this itself is sufficient to vitiate the detention order.

8. It has been held in T.V. Sravanan alias *S.A.R. Prasana Venkatachaariar Chaturvedi Vs. State through Secretary and Anr.,* (2006) 2 SCC 664; *A. Shanthi (Smt.) Vs. Govt. of T.N. and Ors.,* (2006) 9 SCC 711; *Rajesh Gulati Vs. Govt. of NCT of Delhi and Anr.* (2002) 7 SCC 129, etc. that if no bail application was pending and the detenue was already, in fact, in jail in a criminal case, the detention order under the preventive detention law is illegal. These decisions appear to have followed the Constitution Bench decision in *Haradhan Saha Vs. State of West Bengal,* (1975) 3 SCC 198, wherein it has been observed (vide para 34):

"Where the concerned person is actually in jail custody at

the time when an order of detention is passed against him and is not likely to be released for a fair length of time, it may be possible to contend that there could be no satisfaction on the part of the detaining authority as to the likelihood of such a person indulging in activities which would jeopardise the security of the State or public order."

9. On the other hand, Mr. Altaf Ahmed, learned senior counsel appearing for the State of Tamil Nadu, has relied on the judgments of this Court in *A. Geetha Vs. State of T.N. And Anr.* (2006) 7 SCC 603; and Ibrahim Nazeer Vs. State of T.N. and Anr., (2006) 6 SCC 64, wherein it has been held that even if no bail application of the petitioner is pending but if in similar cases bail has been granted, then this is a good ground for the subjective satisfaction of the detaining authority to pass the detention order.

10. In our opinion, if details are given by the respondent authority about the alleged bail orders in similar cases mentioning the date of the orders, the bail application number, whether the bail order was passed in respect of co-accused in the same case, and whether the case of the co-accused was on the same footing as the case of the petitioner, then, of course, it could be argued that there is likelihood of the accused being released on bail, because it is the normal practice of most courts that if a co-accused has been granted bail and his case is on the same footing as that of the petitioner, then the petitioner is ordinarily granted bail. However, the respondent authority should have given details about the alleged bail order in similar cases, which has not been done in the present case. A mere ipse dixit statement in the grounds of detention cannot sustain the detention order and has to be ignored.

11. In our opinion, the detention order in question only contains ipse dixit regarding the alleged imminent possibility of the accused coming out on bail and there was no reliable material to this effect. Hence, the detention order in question cannot be sustained.

12. Moreover, even if a bail application of the petitioner relating to the same case was pending in a criminal case the detention order can still be challenged on various grounds e.g. that the act in question related to law and order and not public order, that there was no relevant material on which the detention order was passed, that there was mala fides, that the order was not passed by a competent authority, that the condition precedent for exercise of the power did not exist, that the subjective satisfaction was irrational, that there was non-application of mind, that the grounds are vague, indefinite, irrelevant, extraneous, non-existent or stale, that there was delay in passing the detention order or delay in executing it or delay in deciding the representation of the detenu, that the order was not approved by the government, that there was failure to refer the case to the Advisory Board or that the reference was belated, etc.

13. In our opinion, Article 22(3)(b) of the Constitution of India which permits preventive detention is only an exception to Article 21 of the Constitution. An exception is an exception, and cannot ordinarily nullify the full force of the main rule, which is the right to liberty in Article 21 of the Constitution. Fundamental rights are meant for protecting the civil liberties of the people, and not to put them in jail for a long period without recourse to a lawyer and without a trial. As observed in *R Vs. Secy. Of State for the Home Dept., Ex Parte Stafford,* (1998) 1 WLR 503 (CA) :-

> "The imposition of what is in effect a substantial term of imprisonment by the exercise of executive discretion, without trial, lies uneasily with ordinary concepts of the rule of law."

14. Article 22, hence, cannot be read in isolation but must be read as an exception to Article 21. An exception can apply only in rare and exceptional cases, and it cannot override the main rule.

15. Article 21 is the most important of the fundamental rights guaranteed by the Constitution of India. Liberty of a citizen is a most important right won by our forefathers after long, historical, arduous struggles. Our Founding Fathers realised its value because they had seen during the freedom struggle civil liberties of our countrymen being trampled upon by foreigners, and that is why they were determined that the right to individual liberty would be placed on the highest pedestal along with the right to life as the basic right of the people of India.

16. Right to liberty guaranteed by Article 21 implies that before a person is imprisoned a trial must ordinarily be held giving him full opportunity of hearing, and that too through a lawyer, because a layman would not be able to properly defend himself except through a lawyer.

17. The importance of a lawyer to enable a person to properly defend himself has been elaborately explained by this Court in *A.S. Mohd. Rafi Vs. State of Tamilnadu,* AIR 2011 SC 308, and in *Md. Sukur Ali Vs. State of Assam,* JT 2011 (2) SC 527. As observed by Mr Justice Sutherland of the *U.S. Supreme Court in Powell Vs. Alabama,* 287 U.S. 45 (1932) "Even the intelligent and educated layman has small and sometimes no skill in the science of law", and hence, without a lawyer he may be convicted though he is innocent.

18. Article 22(1) of the Constitution makes it a fundamental right of a person detained to consult and be defended by a lawyer of his choice. But Article 22(3) specifically excludes the applicability of clause (1) of Article 22 to cases of preventive detention. Therefore, we must confine the power of preventive detention to very narrow limits, otherwise the great right to liberty won by our Founding Fathers, who were also freedom fighters, after long, arduous, historical struggles, will become nugatory.

19. In *State of of Maharashtra & Ors. Vs. Bhaurao*

Punjabrao Gawande, (2008) 3 SCC 613 (para 23) this Court observed :

> "...Personal liberty is a precious right. So did the Founding Fathers believe because, while their first object was to give unto the people a Constitution whereby a government was established, their second object, equally important, *was to protect the people against the government.* That is why, while conferring extensive powers on the government like the power to declare an emergency, the power to suspend the enforcement of fundamental rights or the power to issue ordinances, they assured to the people a Bill of Rights by Part III of the Constitution, protecting against executive and legislative despotism those human rights which they regarded as fundamental. The imperative necessity to protect these rights is a lesson taught by all history and all human experience. Our Constitution makers had lived through bitter years and seen an alien Government trample upon human rights which the country had fought hard to preserve. They believed like Jefferson that "an elective despotism was not the Government we fought for". And, therefore, while arming the Government with large powers to prevent anarchy from within and conquest from without, they took care to ensure that those powers were not abused to mutilate the liberties of the people. (vide *A.K. Roy Vs. Union of India* (1982) 1 SCC 271, nd *Attorney General for India Vs. Amratlal Prajivandas,* (1994) 5 SCC 54." [emphasis supplied]

20. In the Constitution Bench decision of this Court in *M. Nagaraj & Ors. Vs. Union of India & Ors.* (2006) 8 SCC 212, (para 20) this Court observed :

> "It is a fallacy to regard fundamental rights as a gift from the State to its citizens. Individuals possess basic human rights independently of any Constitution by reason of the basic fact that they are members of the human race."

21. In the 9 Judge Constitution Bench decision of this Court in *I.R. Coelho (dead) By LRs. Vs. State of T.N.,* (2007) 2 SCC 1 (vide paragraphs 109 and 49), this Court observed :

> "It is necessary to always bear in mind that fundamental rights have been considered to be the heart and soul of the Constitution.....Fundamental rights occupy a unique place in the lives of civilized societies and have been described in judgments as "transcendental", "inalienable", and primordial".

22. In our opinion, Article 22(3)(b) cannot be read in isolation, but must be read along with Articles 19 and 21, vide Constitution Bench decision of this Court in *A.K. Roy Vs. Union of India* (1982) 1 SCC 271 (para 70).

23. It is all very well to say that preventive detention is preventive not punitive. The truth of the matter, though, is that in substance a detention order of one year (or any other period) is a punishment of one year's imprisonment. What difference is it to the detenu whether his imprisonment is called preventive or punitive?

24. Mr. Altaf Ahmed, learned senior counsel for the respondents, submitted that there are very serious allegations against the detenu of selling expired drugs after removing the original labels and printing fresh labels to make them appear as though they are not expired drugs.

25. In this connection, criminal cases are already going on against the detenu under various provisions of the Indian Penal Code as well as under the Drugs and Cosmetics Act, 1940 and if he is found guilty, he will be convicted and given appropriate sentence. In our opinion, the ordinary law of the land was sufficient to deal with this situation, and hence, recourse to the preventive detention law was illegal.

26. Mr. Altaf Ahmed, learned senior counsel, further

submitted that the impugned detention order was passed on 08.04.2010, and the bail application of the detenu was also dismissed on the same date. Hence, he submitted that it cannot be said that no bail application was pending when the detention order in question was passed.

27. In this connection, it may be noted that there is nothing on the record to indicate whether the detaining authority was aware of the fact that the bail application of the accused was pending on the date when the detention order was passed on 08.04.2010. On the other hand, in para 4 of the grounds of detention it is mentioned that "Thiru. Ramakrishnan is in remand in crime No. 132/2010 and he has not moved any bail application so far". Thus, the detaining authority was not even aware whether a bail application of the accused was pending when he passed the detention order, rather the detaining authority passed the detention order under the impression that no bail application of the accused was pending but in similar cases bail had been granted by the courts. We have already stated above that no details of the alleged similar cases has been given. Hence, the detention order in question cannot be sustained.

28. It was held in *Union of India Vs. Paul Manickam and another,* (2003) 8 SCC 342, that if the detaining authority is aware of the fact that the detenu is in custody and the detaining authority is reasonably satisfied with cogent material that there is likelihood of his release and in view of his antecedent activities he must be detained to prevent him from indulging in such prejudicial activities, the detention order can validly be made.

29. In our opinion, there is a real possibility of release of a person on bail who is already in custody provided he has moved a bail application which is pending. It follows logically that if no bail application is pending, then there is no likelihood of the person in custody being released on bail, and hence the

detention order will be illegal. However, there can be an exception to this rule, that is, where a co-accused whose case stands on the same footing had been granted bail. In such cases, the detaining authority can reasonably conclude that there is likelihood of the detenu being released on bail even though no bail application of his is pending, since most courts normally grant bail on this ground. However, details of such alleged similar cases must be given, otherwise the bald statement of the authority cannot be believed.

30. Mr. Altaf Ahmed, learned senior counsel, further submitted that we are taking an over technical view of the matter, and we should not interfere with the preventive detention orders passed in cases where serious crimes have been committed. We do not agree.

31. Prevention detention is, by nature, repugnant to democratic ideas and an anathema to the rule of law. No such law exists in the USA and in England (except during war time). Since, however, Article 22(3)(b) of the Constitution of India permits preventive detention, we cannot hold it illegal but we must confine the power of preventive detention within very narrow limits, otherwise we will be taking away the great right to liberty guaranteed by Article 21 of the Constitution of India which was won after long, arduous, historic struggles. It follows, therefore, that if the ordinary law of the land (Indian Penal Code and other penal statutes) can deal with a situation, recourse to a preventive detention law will be illegal.

32. Whenever an order under a preventive detention law is challenged one of the questions the court must ask in deciding its legality is : Was the ordinary law of the land sufficient to deal with the situation ? If the answer is in the affirmative, the detention order will be illegal. In the present case, the charge against the detenu was of selling expired drugs after changing their labels. Surely the relevant provisions in the Indian Penal Code and the Drugs and Cosmetics Act

were sufficient to deal with this situation. Hence, in our opinion, for this reason also the detention order in question was illegal.

33. In this connection, it may be noted that it is true that the decision of the 2 Judge Bench of this Courtin Biram Chand Vs. State of Uttar Pradesh & Anr, (1974) 4 SCC 573, was overruled by the Constitution Bench decision in *Haradhan Saha's* case (supra) (vide para 34). However, we should carefully analyse these decisions to correctly understand the legal position.

34. In *Biram Chand's* case (supra) this Court held that the authorities cannot take recourse to criminal proceedings as well as pass a preventive detention order on the same facts (vide para 15 of the said decision). It is this view which was reversed by the Constitution Bench decision in *Haradhan Saha's* case (supra).˘

35. This does not mean that the Constitution Bench laid down that in all cases the authorities can take recourse to both criminal proceedings as well as a preventive detention order *even though in the view of the Court the former is sufficient to deal with the situation*.

36. This point which we are emphasizing is of extreme importance, but seems to have been overlooked in the decisions of this Court.

37. No doubt it has been held in the Constitution Bench decision in *Haradhan Saha's* case (supra) that even if a person is liable to be tried in a criminal court for commission of a criminal offence, or is actually being so tried, that does not debar the authorities from passing a detention order under a preventive detention law. This observation, to be understood correctly, must, however, be construed in the background of the constitutional scheme in Articles 21 and 22 of the Constitution (which we have already explained). *Articles 22(3)(b) is only an exception to Article 21 and it is not itself a fundamental right*.

It is Article 21 which is central to the whole chapter on fundamental rights in our Constitution. The right to liberty means that before sending a person to prison a trial must ordinarily be held giving him opportunity of placing his defence through his lawyer. It follows that if a person is liable to be tried, or is actually being tried, for a criminal offence, but the ordinary criminal law (Indian Penal Code or other penal statutes) will not be able to deal with the situation, then, and only then, can the preventive detention law be taken recourse to.

38. Hence, the observation in para 34 in *Haradhan Saha's* case (supra) cannot be regarded as an unqualified statement that in every case where a person is liable to be tried, or is actually being tried, for a crime in a criminal court a detention order can also be passed under a preventive detention law.

39. It must be remembered that in cases of preventive detention no offence is proved and the justification of such detention is suspicion or reasonable probability, and there is no conviction which can only be warranted by legal evidence. Preventive detention is often described as a jurisdiction of suspicion', (Vide *State of Maharashtra Vs.Bhaurao Punjabrao Gawande,* (supra) - para 63). The detaining authority passes the order of detention on subjective satisfaction. Since clause (3) of Article 22 specifically excludes the applicability of clauses (1) and (2), the detenu is not entitled to a lawyer or the right to be produced before a Magistrate within 24 hours of arrest.

40. To prevent misuse of this potentially dangerous power the law of preventive detention has to be strictly construed and meticulous compliance with the procedural safeguards, however, technical, is, in our opinion, mandatory and vital.

41. It has been held that the history of liberty is the history of procedural safeguards. (See : *Kamleshkumar Ishwardas Patel Vs. Union of India and others* (1995) 4 SCC 51, vide para 49). These procedural safeguards are required to be

zealously watched and enforced by the court and their rigour cannot be allowed to be diluted on the basis of the nature of the alleged activities of the detenu.

42. As observed in *Rattan Singh Vs. State of Punjab,* (1981) 4 SCC 1981 :-

> "May be that the detenu is a smuggler whose tribe (and how their numbers increase!) deserves no sympathy since its activities have paralysed the Indian economy. But the laws of preventive detention afford only a modicum of safeguards to persons detained under them, and if freedom and liberty are to have any meaning in our democratic set-up, it is essential that at least those safeguards are not denied to the detenus."

43. As observed in *Abdul Latif Abdul Wahab Sheikh Vs. B.K. Jha and another* (1987) 2 SCC 22, vide para 5,

> "...The procedural requirements are the only safeguards available to a detenu since the court is not expected to go behind the subjective satisfaction of the detaining authority. The procedural requirements are, therefore, to be strictly complied with if any value is to be attached to the liberty of the subject and the constitutional rights guaranteed to him in that regard...."

44. As observed by Mr. Justice Douglas of the United States Supreme Court in *Joint Anti-Fascist Refugee Committee Vs. McGrath,* 341 US 123 at 179, "It is procedure that spells much of the difference between rule of law and rule of whim or caprice. Steadfast adherence to strict procedural safeguards are the main assurances that there will be equal justice under law."

45. Procedural rights are not based on sentimental concerns for the detenu. The procedural safeguards are not devised to coddle criminals or provide technical loopholes

through which dangerous persons escape the consequences of their acts. They are basically society's assurances that the authorities will behave properly within rules distilled from long centuries of concrete experiences.

46. Personal liberty protected under Article 21 is so sacrosanct and so high in the scale of constitutional values that it is the obligation of the detaining authority to show that the impugned detention meticulously accords with the procedure established by law. The stringency and concern of judicial vigilance that is needed was aptly described in the following words in *Thomas Pacham Dale's* case, (1881) 6 QBD 376, :

> "Then comes the question upon the habeas corpus. It is a general rule, which has always been acted upon by the Courts of England, that if any person procures the imprisonment of another he must take care to do so by steps, all of which are entirely regular, and that if he fails to follow every step in the process with extreme regularity the court will not allow the imprisonment to continue."

47. For the reasons given above, this Appeal is allowed, the impugned order is set aside and the impugned detention order is quashed. However, we make it clear that this will not affect the criminal cases pending against the alleged accused.

48. We further direct that the concerned detenu in this Appeal shall be released forthwith if not required in any other case.

CRIMINAL APPEAL NO. 756 of 2011; CRIMINAL APPEAL NO. 757 of 2011; CRIMINAL APPEAL NO. 759 of 2011; CRIMINAL APPEAL NO. 760 of 2011; CRIMINAL APPEAL NO. 762 of 2011; CRIMINAL APPEAL NO. 763 of 2011; CRIMINAL APPEAL NO. 764 of 2011

49. The Order passed in CRIMINAL APPEAL NO. 755 OF 2011 will also govern these Appeals.

50. Accordingly, for the reasons given in the Order passed in CRIMINAL APPEAL NO. 755 OF 2011, these Appeals are allowed, the impugned common order is set aside and the impugned detention orders are quashed. However, we make it clear that this will not affect the criminal cases pending against the alleged accused persons.

51. We further direct that the concerned detenus in these Appeals shall be released forthwith if not required in any other case.

N.J. Appeals allowed.

PRADEEP OIL CORPORATION

v.

MUNICIPAL CORPORATION OF DELHI AND ANR.

(Civil Appeal Nos. 6546-6552 of 2003)

APRIL 6, 2011

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

DELHI MUNICIPAL CORPORATION, 1957:

ss. 2(3), 114 and 120(2) – "Buildings" – Oil tanks – Property tax – Under the Government Grant Act, grantee in terms of the agreement, given possession of certain land and the grantee erected 'petroleum installation buildings' consisting of petroleum tanks, buildings, etc. for receiving and storing therein petroleum in bulk – The constructions were subjected to property tax by MCD – Plea of grantee that it was a licensee and not a tenant and, therefore, not liable to the tax – Held: The grantee being in exclusive possession of the buildings since 1958, there is a strong presumption in favour of tenancy – It is for the grantee to show that despite the right to possess the demised premises exclusively, a right or interest in the property has not been created – The burden has not been discharged – On the other hand, in the proceedings under the Public Premises Unauthorized Occupants Eviction Act, the grantee has termed the arrangement as a tenancy by describing the fee as rentals – The document in question constitutes a lease – Oil tanks are buildings for the purposes of tax – Grantee is, therefore, liable to pay tax, which becomes payable from the date of accrual of the liability – Constitution of India, 1950 –Article 285 – Government Grant Act, 1895 – s.2.

TRANSFER OF PROPERTY ACT, 1882

s. 105 –"Lease" – Connotation of – Explained.

EASEMENTS ACT, 1882

s.52 –"License" – Connotation – Explained.

DEEDS AND DOCUMENTS

A deed must be read in its entirety – A document if to be construed a "lease" or "licence" –Determinative factors, summarized.

WORDS AND PHRASES

"Lease" and "License" – Connotation of.

The appellant was granted, under the Government Grant Act, separate licenses for the purpose of maintaining depot for storage of petroleum products at yearly license fees of Rs. 20,640/- and Rs. 31,000/-. In terms of the grant, the appellant erected 'petroleum installation buildings' consisting of petroleum tanks, buildings and other conveniences for receiving and storage therein petroleum in bulk. The respondent-Municipal Corporation of Delhi by its order dated 17.8.1984, assessed the said property to property tax, which was challenged before appellate court/MCD Tribunal, which set aside the order holding that no property tax could be levied on the grantee u/s 20(2) of the Delhi Municipal Corporation Act, 1957. The writ petition filed by the MCD was dismissed by the Single Judge of the High Court. The LPA was ultimately heard by the Full Bench of the High Court, which held that the petroleum tanks were 'building' and the grantee was a lessee and not licensee in the property. Aggrieved, the grantee filed the appeals.

Dismissing the appeals, the Court

HELD: 1.1 A license may be created on deal or parole and it would be revocable. However, when it is

accompanied with grant it becomes irrevocable. A mere license does not create interest in the property to which it relates. License may be personal or contractual. A license without the grant creates a right in the licensor to enter into a land and enjoy it. Lease on the other hand, would amount to transfer of property. It is quite clear that the distinction between lease and license is marked by the last clause of s. 52 of the Easements Act as by reason of a license, no estate or interest in the property is created. [para 13-15] [781-F-G; 782-E-F]

Associated Hotels of India Ltd. v. R.N. Kapoor, **[1960] 1 SCR 368; and** *Qudrat Ullah v. Municipal Board, Bareilly,* **1974 (2) SCR 530 = (1974) 1 SCC 202 – relied on.**

Halsbury's Laws of England, 4th Edition, Vol. 27 at page 21 – referred to.

1.2 A license, inter alia, (a) is not assignable; (b) does not entitle the licensee to sue the stranger in his own name; (c) it is revocable and (d) it is determined when the grantor makes subsequent assignment. The rights and obligations of the lessor as contained in the Transfer of Property Act, 1882 are also subject to the contract to the contrary. Even the right of assignment of leasehold property may be curtailed by an agreement. [para 16] [782-H; 783-A-B]

1.3 In the instant case, grant has been made by the President of India in terms of s. 2 of the Government Grants Act, 1895 and the Transfer of Property Act, 1882 may have little bearing on the matter. The former, i.e. the Government Grants Act, being a special statute would prevail over the general statute, i.e. the Transfer of Property Act. Accordingly, the rights and obligations of the parties would be governed by the terms of the provisions of Government Grants Act whereunder the Government is entitled to impose limitations and

restrictions upon the grants and other transfer made by it or under its authority. [para 17] [782-H; 783-B-D]

1.4 A bare perusal of the grant in question reveals that in the grant, the appellant i.e. grantee has been described as licensee. But, in the considered view of the Court, the mere use of the word "licensee" would not be sufficient to hold the grant in question as a license. Simply using the word "licensee" would neither be regarded as conclusive nor determinative. In terms of Clause (1) of the indenture the licensee was to have the use of a piece of land for maintaining a depot for petroleum goods received through railways but thereby his rights to deal with the property and the goods brought thereon had not been taken away. Clearly, an embargo has been placed as regards the user of the construction made thereon to the extent that the same would be used solely for the storage of petroleum products but such restriction by itself can also be imposed in a case of lease. The grant in question clearly states that the constructions are to be made as per specifications approved by the Chief Inspector of Explosives which condition was also otherwise governed by the provisions of Explosives Act. Further, the pipelines are required to be laid at railway levels or demised in favor of the grantee, wherefor expenses are to be paid by it. [para 19] [783-F-G; 784-A-B]

1.5 The appellant, i.e. the licensee, is required to pay the sum specified in the grant which has been described as 'rent' in terms of Clause 7. It further reveals that the licensee is also required to pay all taxes payable in respect of the said land for the time being found to be payable and proportionately and all cesses, and taxes in respect of the premises applicable to the land, tanks, works and conveniences if the same be not separately assessed in respect thereof. It further stipulates that the

licensee shall not be entitled to assign, mortgage, sub-let or otherwise transfer the privileges without previously obtaining the consent in writing of the Administration. The licensee shall not use the said land or any part thereof or permit the same to be used for worship, or religious or educational purposes or for any other purpose not specified in Clause 1 thereof but such a claim is not determinative. Clause (9) of the said indenture stipulates that either party would be entitled to terminate the license without assigning any reasons by giving to the other party at any time three calendar months' notice in writing. It is to be noted that even u/s. 106 of the Transfer of Property Act, 1882 no reason is required to be assigned for determining the lease. [para 20] [784-C-F]

1.6 Although, Clause 11 of the indenture in question provides that nothing contained therein be construed to create a tenancy in favor of the licensee of the said land, but again in the considered view of the Court, the mere description of the grant in question is not decisive. Under the grant in question, the Administration has been given power under Clause 12 to re-enter upon and retake and absolutely retain the possession of the said land but the same could be permissible in law only upon determination of grant which would require 3 months' prior notice. It is to be noted that Clause 12 further stipulates that the licensee shall at all times keep the Administration indemnified against and shall reimburse it towards all claims, demands, suits, losses, damages, costs etc. which it may sustain or incur by reason of inconsequence of any injury to any person or to any property resulting from any explosion or leakage of any petroleum kept or placed by the licensee upon the said land. [para 21] [784-G-H; 785-A-C]

1.7 Clause 14 of the indenture in question provides that the licensee shall follow all petroleum rules and

regulations applicable to the construction, maintenance of petrol pump or stores and for public safety. It is significant to note that the said clause clearly provides that all taxes in respect of the said patrol pump, stores, buildings under the control of the licensee shall be paid by the licensee. However, the rights of the parties on determination of the grant have been specified. [para 22] [785-D]

1.8 Thus, the clauses of the indenture in question clearly show that a bundle of rights have been conferred upon the grantee i.e. the appellant. [para 23] [785-E]

1.9 It is well settled legal position that a deed must be read in its entirety and reasonably. The intention of the parties must also as far as possible be gathered from the expression used in the document itself. [para 24] [785-F]

1.10 Whether a particular document will constitute "lease" or "license" would inter alia depend upon certain factors which can be summarized as follows: (a) whether a document creates a license or lease, the substance of the document must be preferred to the form; (b) the real test is the intention of the parties — whether they intended to create a lease or a license; (c) if the document creates an interest in the property, it is a lease; but if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a license; and (d) if under the document a party gets exclusive possession of the property, prima facie, he is considered to be a tenant; but circumstances may be established which negative the intention to create a lease. [para 29] [787-F-H; 788-A-B]

Union Bank of India v. Chandrakant Gordhandas Shah, **1994 (3) Suppl. SCR 542 = (1994) 6 SCC 271;** *Vayallakath Muhammedkutty v. Illikkal Moosakutty* **JT 1996 (6) 665;** *Om Parkash v. Dr. Ravinder Kumar Sharma,* **1995**

Supp.(4) SCC 115; *Swarn Singh v. Madan Singh,* **1995 Supp.(1) SCC 306 and** *Lilawati H. Hiranandani v. Usha Tandon,* **AIR 1996 SC 44 – referred to.**

1.11 In the instant case, admittedly, the appellant is in possession of the buildings in question since 1958. They have been permitted to raise huge constructions and the nature of construction is of wide range. An administration block along with tanks for storing petroleum had been constructed. A boundary wall around installations and administrative block had also been constructed. Admittedly, the grantee is in exclusive possession over the lands in question along with construction thereon without any let or hindrance from the Administration. Further, the appellant had been continuously carrying on their business without any interference from any quarter whatsoever since 1962. As in the instant case, exclusive possession has been granted, there is a strong presumption in favour of tenancy. That being the case, it is for the appellant to show that despite the right to possess the demised premises exclusively, a right or interest in the property has not been created. The burden, therefore, would be on the appellant/grantee to prove *contra*. [para 30] [788-B-E]

1.12 The burden is not discharged, in the instant case rather for the purposes of resisting its eviction from the suit land in the proceeding initiated under the Public Premises Unauthorized Occupants Eviction Act, the appellant has taken the stand pleading non-applicability of the Easements Act and has themselves termed the arrangement as a tenancy by describing the fee as rentals. The said factor is also a vital factor, as on the own showing of the appellant the arrangement was nothing but a lease. The appellant, therefore, cannot take up a plea by which they approbate and reprobate at the same time. [para 31] [788-F-G]

1.13 In the instant case, the Administration has also the option to revise the rent. Had it been a case of mere right to use the property, such provision would not have been there. Further, the manner in which the rent is to be paid is also important. It is to be paid annually; in a case of license pure and simple, the indenture would not normally contain a claim that rent would be paid annually. [para 32] [789-A-B]

Capt. B. V. D'Souza v. Antonio Fausto Fernandes, **[1989] 3 SCR 626 – relied on**

Street v. Mountford, **1985 Appeal Cases 809 – referred to.**

1.14 It is true that there are indeed certain restrictions which have been imposed by the Administration with regard to the construction of the building storage tank, etc., but, such restrictions are not decisive for the purpose of determining as to whether a document is a lease or license as such restrictions could also be imposed in case of a lease as well. [para 34] [789-G-H]

Glenwood Lumber Co. Ltd. v. Philips, **1904-1907 All ER (Reprint) 203 - relied on.**

1.15 The undisputed fact may also be noticed that the parties have agreed that for the purpose of determination of the agreement three calendar months' notice had to be given. Undoubtedly, such clause in the document in question has a significant role to play in the matter of construction of document. Clearly, if the parties to the agreement intended that by reason of such agreement merely a license would be created such a term could not have been inserted. It is well settled legal position that a license can be revoked at any time at the pleasure of the licensor. Even otherwise, unless the parties to the agreement had an intention to enter into a deed of lease,

the Administration would not have agreed to demise the premises on payment of rent in lieu of grant of exclusive possession of the demised land. In view of the same, it cannot be said that a stipulation having been made in the agreement itself by reasons thereof the grantee shall not be a tenant and thus the deed must be construed to be a license. In the considered view of the Court, such a clause may at best be one of the factors for construction of the document in question but the same by itself certainly would not be a decisive factor. [para 35-36] [790-C-G]

1.16 Thus, the document in question constitutes lease in favour of the appellant-grantee and as such, the appellant-grantee is liable to pay the tax. [para 43] [793-E]

2.1 By reason of the provisions of the DMC Act, the MCD is required to render several services as specified therein for the purpose whereof, tax is required to be imposed both on land as also on building. The definition of "land" and '"building" as provided in the DMC Act must be given its full effect. As has been held by this Court in the case of *Municipal Corporation of Greater Bombay* **, even an oil tanker has been held to be building. The tax is imposed upon the holders of land and building by the MCD which is compensatory in nature. The word "letting out" in the context of the grant, therefore, must receive its purposive meaning. The MCD renders services and the benefits of such services are being taken by all concerned, viz., the owner of the land or building. Even a person who is in possession of a land or building, whether legal or illegal, takes benefits of such services rendered by the MCD. The MCD for the purpose of realization of tax is not concerned with the relationship of the parties. It is concerned only with imposition and recovery of tax which is payable on all lands and**

buildings in accordance with law. The exceptions thereof have been enumerated in the Act itself. Section 119 of the MCD Act is one of such provisions. Such an exemption clause, as is well known, must be construed strictly. Section 119 of the MCD Act would apply if the lands and buildings are the properties of Union of India. The MCD has the right to levy the property tax in terms of s. 114 of the MCD Act in the manner as specified therein. [para 38-39] [791-B-F]

Municipal Corporation of Greater Bombay v. Indian Oil Corporation, **AIR 1991 SC 686 – relied on.**

2.2 By reason of the agreement in question, the buildings in question do not belong to the Administration. Admittedly, it belongs to the grantee i.e. the appellant. Therefore, s. 119 of the MCD Act would not apply to the building in question. That being the case, the grantee/ appellant is liable to pay tax although the ownership of the land may belong to the Administration. Section 115 of the MCD Act clearly provides that the general tax shall be payable in respect of lands and buildings. Once it is held that the grantee were liable to pay tax, the same becomes payable from the date of accrual of the liability. The said position is also fortified from specific stipulation in the agreement that the liability to pay all taxes including municipal taxes is on the grantee. [para 40] [791-G-H; 792-A-D]

HUDCO v. MCD; **2000 (5) Suppl. SCR 666 = (2001) 1 SCC 455 - Distinguished.**

2.3 Incidence to pay tax u/s. 120(2) DMC Act is with regard to a composite assessment of land and buildings as s. 120(2) talks of a composite assessment only. In the instant case, vacant land or property of Railways is not sought to be taxed u/s. 120(1) DMC Act, but property tax/ Composite Assessment is sought to be made on the

installations/storage depots having been constructed by the appellant-by virtue of s. 120(2) DMC Act. [para 42] [793-C-D]

Case Law Reference:

AIR 1991 SC 686	**relied on**	**para 9**
[1960] 1 SCR 368	**relied on**	**para 14**
1974 (2) SCR 530	**relied on**	**para 15**
1994 (3) Suppl. SCR 542	**referred to**	**para 25**
JT 1996 (6) 665	**referred to**	**para 25**
1995 Supp.(4) SCC 115	**referred to**	**para 26**
1995 Supp.(1) SCC 306	**referred to**	**para 27**
AIR 1996 SC 441	**referred to**	**para 28**
1985 Appeal Cases 809	**referred to**	**para 32**
[1989] 3 SCR 626	**relied on**	**para 33**
1904-1907 All ER (Reprint) 203	**relied on**	**para 34**
2000 (5) Suppl. SCR 666	**distinguished**	**para 41**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. : 6546-6552 of 2003.

From the Judgment & Order dated 17.09.2002 of the High Court of Delhi at New Delhi in L.P.A. Nos. 52-58 of 1987.

Ajit Sinha, Sanjay Grover, Meenakshi Grover, K.V. Mohan for the Appellant.

H.P. Rawal, ASG T.S. Doabia, Madhu Tewatia, Sidhi Arora, Chander Shekhar Ashri, Krishna Kumar, A.K. Sharma for the Respondents.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. Whether an agreement for erection of oil storage tank together with pump house, chowkidar cabins, switch room, residential rooms and verandah for storing oil decanted from the railway tankers, which bring petroleum products to the site at which they are decanted, would amount to lease or license, is one of the several questions which falls for consideration in these appeals, which has arisen out of a Full Bench decision rendered by the High Court of Delhi at New Delhi while disposing a batch of petitions bearing Nos. LPA 53, 54, 55, 57 and 58/1987.

2. Before dwelling into the question of law involved hereinabove and in order to appreciate the contentions raised by the parties hereto, we may notice few basic fact which has resulted into filing of these appeals.

3. The appellant herein had been granted under the Government Grant Act separate and distinct licenses by the President of India acting through Superintendent of Northern Railway, Delhi for the purpose of maintaining depot for storage of petroleum products at a yearly license fee of Rs. 20,640/- and Rs. 31,000/- per annum respectively.

4. Under the aforesaid grant, the appellant had been given the right to erect/construct 'petroleum installation buildings' consisting of petroleum tanks, buildings and other conveniences for receiving and storing therein petroleum in bulk, and consequently possession of land has been given.

5. Consequent to the said agreement the administration granted 'exclusive possession' of the said land to the appellant who entered the land for the purpose and the terms mentioned therein in the aforesaid agreement/grant. Consequently, the appellant submitted layout building plans for the construction of the oil depot and the standing committee of the Municipal Corporation of Delhi (in short "MCD") approved the layout plan for the construction of 10 oil storage tanks of petroleum products.

6. Subsequent to that the appellant raised various constructions comprising of an administration block etc. along with huge petroleum storage tanks for storing petroleum products. A boundary wall around the installations and the administrative block was also constructed. The nature of the construction which is stated to be wide range and extensive user, is more than 40 years old now.

7. The respondent MCD vide its Order dated 17.08.1984 passed an assessment order with regard to the property tax qua the aforesaid property and confirmed the rateable value proposed by it. The said assessment order was challenged by the appellant before the appellate Court/MCD Tribunal which vide its Order dated 12.7.1985 set aside the assessment order passed by the respondent MCD and held that the appellant is only a licensee in the property and is not a tenant, therefore, no property tax can be levied on the appellant under Section 20(2) of the Delhi Municipal Corporation Act, 1957 (in short "MCD Act"). Aggrieved by the aforesaid order of the appellate Court, the respondent MCD filed a writ petition. However, the said writ petition was dismissed by the Ld. Single Judge of the Delhi High Court on 05.08.1986 holding that the petroleum storage tanks do not fall within the definition of building under the MCD Act. It was further held by the Ld. Single Judge that the grant in favour of the petitioner was a license and hence the petitioner is not liable for the payment of any property tax in respect of the land or the petroleum storage tanks. Challenging the aforesaid order of Ld. Single Judge, an LPA was filed and subsequently, the same was referred to a Full Bench of High Court. The Full Bench of the High Court vide its impugned judgment and order dated 17.09.2002 held that the petroleum storage tanks are a building and the petitioner was a lessee and not a licensee in the property in question.

8. It was forcefully argued before us by the learned counsel appearing for the appellant that no property tax is payable qua the property in question under the provisions of section 119 of

the DMC Act read with Article 285 of the Constitution of India, as the property in question is a government property. It was further contended that the incidence to pay property tax qua the petroleum installations including the tanks cannot fall upon the appellant under section 120(2) of the DMC Act because the appellant is a mere licencee of government land having permission to construct and consequently having constructed thereupon is neither a tenant nor a lessee and the agreement in question does not create any leasehold right or tenancy in the favour of the appellant. In other words, the submission was that the agreement in question is a licence deed. It was further contended that the petroleum storage tanks/depots are not "buildings" and therefore not subject to property tax. It was also argued that the petroleum storage tanks/depots being plant and machinery are liable to be exempted under the provisions of section 116(3) of the DMC Act.

9. On the other hand, the learned counsel appearing for the respondent MCD submitted that the indentures in question are indeed a lease and not a licence. It was argued that the question as to whether such an oil storage tank would be building or not is no longer *res integra* in view of judgment of the Supreme Court in the case of *Municipal Corporation of Greater Bombay* v. *Indian Oil Corporation*, AIR 1991 SC 686. It has been further contended that that the question as to whether the indentures in question constitute lease or license so as to attract the provisions of Section 120 of the MCD Act would depend upon the construction thereof. It was urged that having regard to the nature of the interest conveyed, it would be erroneous to construe the instrument as a license as the land having been used for the purpose of construction of a building, the object thereof being clear, it could not have been construed to be a license and must be construed to be a lease. It was further argued that it is not a case where it could be said that no interest in the land had been created by reason of the instruments in question.

10. Before addressing the rival contentions, it would be useful to reiterate few relevant provisions of the MCD Act.

"2(3) "building" means a house, out-house, stable, latrine, urinal, shed, hut wall (other than a boundary wall) or any other structure, whether of masonry, bricks, wood, mud, metal or other material but does not include any portable shelter".

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"2(24). "land" includes benefits to arise out of land, things attached to the each or permanently fastened to anything attached to the earth and rights created by law over any street:

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"119. Taxation of Union properties.—(1) Notwithstanding anything contained in the foregoing provisions of this chapter, lands and buildings being properties of the union shall be exempt from the property taxes specified in Section 114:

Provided that nothing in this sub-section shall prevent the Corporation from levying any of the said taxes on such lands and buildings to which immediately before the 26th January, 1950 they were liable or treated as liable so long as that tax continues to be levied by the Corporation on other lands and buildings.

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"120(2). If any land has been let for a term exceeding one year to a tenant and such tenant has built upon the land, the property taxes assessed in respect of that land and the building erected thereon shall be primarily livable upon the said tenant, whether the land and building are in the occupation of such tenant or a sub- tenant of such tenant.

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"123. Property taxes a first charge on premises on which they are assessed.—Property taxes due under this Act in respect of any land or building shall, subject to the prior payment of the land revenue if any, due to the Government thereon be a first charge-

(a) in the case of any land or building held immediately from the Government, upon the interest in such land or building of the person liable for such taxes and upon the goods and other movable properties if any found within or upon such land or building and belonging to such person; and

(b) in the case of any other land or building upon such land or building and upon the goods and other movable properties/ if any, found within or upon such land or building and belonging to the person liable for such taxes."

11. We may also notice the language of Article 285 of the Constitution of India which reads as follows: -

"285. Exemption of property of the Union from State taxation

(1) The property of the Union shall, save insofar as Parliament may by law otherwise provide, be exempt from all taxes imposed by a State or by any authority within a State.

(2) Nothing in clause (1) shall, until Parliament by law otherwise provides, prevent any authority within a State from levying any tax on any property of the Union to which such property was immediately before the commencement of this Constitution liable or treated as liable, so long as that tax continues to be levied in that State."

12. It would be useful to examine at this stage the definition of "lease" and "license" as envisaged under Section 105 of the Transfer of Property Act, 1882 and section 52 of the Indian Easements Act, 1882 respectively.

Section 105 of the Transfer of Property Act, 1882 reads: -

"105. Lease Defined.—A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms."

On the other hand, Section 52 of the Indian Easements Act, 1882 reads as:

"License, defined.—Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called, a license."

13. A license may be created on deal or parole and it would be revocable. However, when it is accompanied with grant it becomes irrevocable. A mere license does not create interest in the property to which it relates. License may be personal or contractual. A licensee without the grant creates a right in the licensor to enter into a land and enjoy it. In *Halsbury's Laws of England*, 4th Edition, Vol. 27 at page 21 it is stated: -

"license coupled with grant of interest: A license coupled with a grant of an interest in property is not revocable. Such a license is capable of assignment, and covenants

may be made to run with it. A right to enter on land and enjoy a profit a prendre or other incorporeal hereditament is a license coupled with an interest and is irrevocable. Formerly it was necessary that the grant of the interest should be valid; thus, if the interest was an incorporeal hereditament, such as a right to make and use a watercourse, the grant was not valid unless tinder seal, and the license, unless so made, was therefore a mere license and was revocable but since 1873 the Court has been bound to give effect to equitable doctrines and it will restrain the revocation of a license coupled with a grant which should be, but is not, under seal."

14. Lease on the other hand, would amount to transfer of property. In *Associated Hotels of India Ltd.* v. *R.N. Kapoor*, [1960] 1 SCR 368, the following well established proposition were laid down by a Constitution Bench for ascertaining whether a transaction amounts to a lease or a license: -

"27. There is a marked distinction between a lease and a license. Section 105 of the Transfer of Property Act defines a lease of immovable property as a transfer of a right to enjoy such property made for a certain time in consideration for a price paid or promised. Under Section 108 of the said Act, the lessee is entitled to be put in possession of the property. A lease is thereforee a transfer of an interest in land. The interest transferred is called the leasehold interest. The Lesser parts with his right to enjoy the property during the term of the lease, and it follows from it that the lessee gets that right to the exclusion of the Lesser. Whereas Section 52 of the Indian Easement Act defines a license.

Under the aforesaid section, if a document gives only a right to use the property in a particular way or under certain terms while it remains in possession and control of the owner thereof, it will be a license. The legal possession,

thereforee, continues to be with the owner of the property, but the licensee is permitted to make use of the premises for a particular purpose. But for the permission his occupation would be unlawful. It does not create in his favor any estate or interest in the property. There is, therefore, clear distinction between the two concepts. The dividing line is dear through sometimes it becomes very thin or even blurred. Alone time it was thought that the test of exclusive possession was infallible and if a person was given exclusive possession of a premises, it would conclusively establish that he was a lessee. But there was a change and the recent trend of judicial option is reflected in Errington v. Errington 1952 (1) All ER 149, wherein Lord Denning reviewing the case law on the subject summarises the result of his discussion thus at p. 155:

"The result of all these cases is that, although a person who is let into exclusive possession is, prima facie to be considered to be tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy."

15. It is quite clear that the distinction between lease and license is marked by the last clause of Section 52 of the Easement Act as by reason of a license, no estate or interest in the property is created. In the case of *Qudrat Ullah* v. *Municipal Board, Bareilly,* (1974) 1 SCC 202 it was observed at p. 398 thus: -

"... If an interest in immovable property, entitling the transferors to enjoyment is created, it is a lease; *if permission to use land* without right to exclusive possession *is alone granted, a license is the legal result.*"

(emphasis underlined)

16. A license, inter alia, (a) is not assignable; (b) does not entitle the licensee to sue the stranger in his own name; (c) it

is revocable and (d) it is determined when the grantor makes subsequent assignment. The rights and obligations of the lessor as contained in the Transfer of Property Act, 1882 are also subject to the contract to the contrary. Even the right of assignment of leasehold property may be curtailed by an agreement.

17. In the present case grant has been made by the President of India in terms of Section 2 of the Government Grants Act, 1895 and the Transfer of Property Act, 1882 may have little bearing in the instant case. The former, i.e. the Government Grants Act, 1895 being a special statute would prevail over the general statute, i.e. the Transfer of Property Act, 1882. Accordingly, the rights and obligations of the parties would be governed by the terms of the provisions of Government Grants Act, 1895 whereunder the Government is entitled to impose limitations and restrictions upon the grants and other transfer made by it or under its authority.

18. In view of the aforesaid legal position with regard to the applicability of the Government Grants Act, we have considered the grant in question after hearing both the parties at length and perused the entire record.

19. A bare perusal of the grant in question reveals that in the grant, the appellant herein i.e. grantee has been described as licensee. But in our considered view the mere use of the word "licensee" would not be sufficient to hold the grant in question as a license. Simply using the word "licensee" would neither be regarded as conclusive nor determinative. In terms of Clause (1) of the said indenture the licensee was to have the use of a piece of land for maintaining a depot for petroleum goods received through railways but thereby his rights to deal with the property and the goods brought thereon had not been taken away. Clearly, an embargo has been placed as regards the user of the construction made thereon to the extent that the same would be used solely for the storage of petroleum products but such restriction by itself can also be imposed in

a case of lease. The grant in question clearly states that the constructions are to be made as per specifications approved by the Chief Inspector of Explosives which condition was also otherwise governed by the provisions of Explosives Act. Further, the pipelines are required to be laid at railway levels or demised in favor of the grantee, where for expenses are to be paid by it. It further sates that the pipelines are to be laid underground in such a manner that vehicles can pass over that.

20. The present appellant i.e. licensee is required to pay the sum specified therein which has been described as 'rent' in terms of Clause 7. It further reveals that the licensee is also required to pay all taxes payable in respect of the said land for the time being found to be payable and proportionately and all cesses, and taxes in respect of the premises applicable to the land, tanks, works and conveniences if the same be not separately assessed in respect thereof. It further stipulates that the licensee shall not be entitled to assign, mortgage, sub-let or otherwise transfer the privileges without previously obtaining the consent in writing of the Administration. The licensee shall not use the said land or any part thereof or permit the same to be used for worship, or religious or educational purposes or for any other purpose not specified in Clause 1 thereof but such a claim is not determinative. Clause (9) of the said indenture stipulates that either party would be entitled to terminate the license without assigning any reasons by giving to the other party at any time three calendar months' notice in writing. It is to be noted that even under Section 106 of the Transfer of Property Act, 1882 no reason is required to be assigned for determining the lease.

21. Further, Clause 11 of the indenture in question provides that nothing contained herein be construed to create a tenancy in favor of the licensee of the said land but again in our considered view, the mere description of the grant in question is not decisive. Under the grant in question, the Administration has been given power under Clause 12 to re-

enter upon and retake and absolutely retain the possession of the said land but the same could be permissible in law only upon determination of grant which would require 3 months' prior notice. It is to be noted that Clause 12 further stipulates that the licensee shall at all times keep the Administration indemnified against and shall reimburse it towards all claims, demands, suits, losses, damages, costs etc. which it may sustain or incur by reason of inconsequence of any injury to any person or to any property resulting from any explosion or leakage of any petroleum kept or placed by the licensee upon the said land.

22. Clause 14 of the indenture in question provides that the licensee shall follow all petroleum rules and regulations applicable to the construction, maintenance of petrol pump or stores and for public safety. It is significant to note that the aforesaid clause clearly provides that all taxes in respect of the said patrol pump, stores, buildings under the control of the licensee shall be paid by the licensee. However, the rights of the parties on determination of the grant have been specified.

23. The aforesaid clauses of the indenture in question clearly shows that a bundle of rights have been conferred upon the grantee i.e. the appellant herein.

24. It is well settled legal position that a deed must be read in its entirety and reasonably. The intention of the parties must also as far as possible be gathered from the expression used in the document itself.

25. In *Union Bank of India* v. *Chandrakant Gordhandas Shah*, (1994) 6 SCC 271, an instrument was held to be a deed of lease as the lessee was conferred right to exclusive possession where for various terms of the indenture which were taken into consideration for finding out whether the same was lease or a license. Similarly, In *Vayallakath Muhammedkutty* v. *Illikkal Moosakutty* JT 1996 (6) 665, where the defendant was given exclusive possession of the disputed premises for

running a hotel but was not given the permission to sub-lease the property, the document was held to be a license.

> "9. .... this Court has indicated that for a consideration as to whether a document creates a license or lease, the substance of the document must be preferred to the form. It is not correct to say that exclusive possession of a party is irrelevant but at the same it is also not conclusive. The other tests, namely, intention of the parties and whether the document creates any interest in the property or not are important considerations."

26. In *Om Parkash v. Dr. Ravinder Kumar Sharma,* 1995 Supp.(4) SCC 115, a deal was held to be a license where the keys of the premises was to be taken in the morning and returned in the evening and a portion thereof was occupied by the mother of the licensor.

27. In *Swarn Singh v. Madan Singh,* 1995 Supp.(1) SCC 306 it was held: -

> "3. On a careful consideration of the above arguments, we feel that there is no substance in any one of them. To our mind it is very clear that the right granted under the above document is nothing but a license. Our reasons are as under:
>
> (1) the nomenclature of the document is license. Of course, we hasten to add that nomenclature is not always conclusive;
>
> *(2) the document in question in no unambiguous terms says that the possession and control shall remain with the owner. This is a clear indication of the fact that no interest in immovable property has been conferred on the grantee. If it were to be a case of lease under Section* 105 *of the Transfer of Property Act, there must be an interest in the immovable property. On the contrary, if it were to*

be a license under Section 52 *of the Easements Act, no such interest in immovable property is created. The case on hand is one of such.*

(4) No doubt there is a statement in the document that "I shall not sublet it to further anybody else. This is nothing more than an affirmation of the requirement that the licensee must use the property. No doubt under Section 52 *of the Easements Act, license is personal but where an affirmation is made that such an affirmation cannot alter the relationship of the parties as Lesser and lessee. In this view factually the case Capt. BVD' Douza v. Antonio Fausto Fernandes, Quoted from the judgment and order dated 3.5.1993 of Andhra Pradesh Admn. Tribunal at Hyderabad in OA No. 47322/91 and 5668/92, is distinguishable."*

28. In *Lilawati H. Hiranandani v. Usha Tandon,* AIR 1996 SC 441, an assignment made to the effect that the owner permitted the licensee to occupy a portion with no right or interest created in his favor and also undertaken to vacant the premises within one month, was held to be a case of license.

29. In view of the aforesaid well settled legal position, whether a particular document will constitute "lease" or "license" would inter alia depend upon certain factors which can be summarized as follows: -

(a) whether a document creates a license or lease, the substance of the document must be preferred to the form;

(b) the real test is the intention of the parties — whether they intended to create a lease or a license;

(c) if the document creates an interest in the property, it is a lease; but if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a license; and

(d) if under the document a party gets exclusive possession of the property, prima facie, he is considered to be a tenant; but circumstances may be established which negative the intention to create a lease.

30. Reverting back to the factual situation of the case at hand, admittedly, the appellant is in possession of the buildings in question since 1958. They have been permitted to raise huge constructions and the nature of construction is of wide range. An administration block along with tanks for storing petroleum had been constructed. A boundary wall around installations and administrative block had also been constructed. Admittedly, the grantee is in exclusive possession over the lands in question along with construction thereon without any let or hindrance from the Administration. Further, the appellant had been continuously carrying on their business without any interference from any quarter whatsoever since 1962. As in the instant case, exclusive possession has been granted, as discussed hereinbefore, there is a strong presumption in favour of tenancy. That being the case, it is for the appellant to show that despite the right to possess the demised premises exclusive; a right or interest in the property has not been created. The burden therefore would be on the appellant/grantee to prove *contra*.

31. The aforesaid burden is not discharged in the present case rather for the purposes resisting its eviction from the suit land in the proceeding initiated under the Public Premises Unauthorized Occupants Eviction Act, the appellant has taken the stand pleading non-applicability of the Indian Easement Act and has themselves termed the arrangement as a tenancy by describing the fee as rentals. The said factor is also a vital factor as on the own showing of the appellant the arrangement was nothing but a lease. The appellant therefore cannot take up a plea by which they approbate and reprobate at the same time.

32. In *Street* v. *Mountford*, 1985 Appeal Cases 809, it was

held that when exclusive possession is granted in lieu of only rent payable therefore, the presumption that the instrument is that of a lease becomes stronger. In the present case the Administration has also option to revise the rent. Had it been a case of mere right to use the property, such provision would not have been there. Further, the manner in which the rent is to be paid is also important. It is to be paid annually in a case of a license pure and simple, the indenture would not normally contain a claim that rent would be paid annually.

33. In *Capt. B. V. D'Souza* v. *Antonio Fausto Fernandes*, [1989] 3 SCR 626, this Court observed:

> "However, this cannot answer the disputed issue as it creates a license or lease, the substance of the document must be referred to the form, As was observed by this Court in Associated Hotels of India Ltd. v. R.N. Kapoor, [1960] 1 SCR 368 , the real test is the intention of the parties — whether they intended to create a lease or license. If an interest in the property is created by the deed it is a lease but if the document only permits another person to make use of the property "of which the legal possession continues with the owner" it is a license. If the party in whose favor the document is executed gets exclusive possession of the property prima facie he must be considered to be a tenant: although this factor by itself will not be decisive. Judged in this light, there does not appear to be any scope for interpreting Ex. 20 as an agreement of leave and license."

34. It is true that there are indeed certain restrictions which have been imposed by the Administration with regard to the construction of the building storage tank, etc., but in our considered view such restrictions are not decisive for the purpose of determining as to whether a document is a lease or license as such restrictions could also be imposed in case of a lease as well. In *Glenwood Lumber Co. Ltd. v. Philips,* 1904-1907 All ER (Reprint) 203, it was held:

> "In the so-called license itself it is called indifferently a license and a demise, but in the Act it is spoken of as a lease, and the holder of it is described as the lessee. It is not, however, a question of words, but of substance. If the effect of the instrument is to give the holder an exclusive right of occupation of the land though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself."

35. We may also notice the undisputed fact that in the present case the parties have agreed that for the purpose of determination of the agreement three calendar months' notice had to be given. Undoubtedly, such clause in the document in question has a significant role to play in the matter of construction of document. Clearly, if the parties to the agreement intended that by reason of such agreement merely a license would be created such a term could not have been inserted.

36. It is well settled legal position that a license can be revoked at any time at the pleasure of the licensor. Even otherwise, unless the parties to the agreement had an intention to enter into a deed of lease the Administration would not have agreed to demise the premises on payment of rent in lieu of grant of exclusive possession of the demised land and further stipulated service of three months' notice calling upon either party to terminate the agreement. In view of the same, the argument advanced by the learned counsel of the appellant that a stipulation having been made in the agreement itself that by reasons thereof the grantee shall not be a tenant and thus the deed must be construed to be a license cannot be accepted. In our considered view, such a clause may at best be one of the factors for construction of the document in question but the same by itself certainly be a decisive factor.

37. The next question which needs to be addressed in view of the aforesaid well settled legal position is whether the agreement in question should be interpreted as lease or license

having regard to the object sought to be achieved by the provisions of DMC Act.

38. By reason of the provisions of the DMC Act, the MCD is required to render several services as specified therein for the purpose whereof, tax is required to be imposed both on land as also on building. The definition of "land" and '"building" as provided in the DMC Act must be given its full effect. As mentioned hereinbefore in the case of *Municipal Corporation of Greater Bombay* case (supra), even an oil tanker has been held to be building.

39. The tax is imposed upon the holders of land and building by the MCD which is compensatory in nature. The word "letting out" in the context of the grant therefore must receive its purposive meaning. The MCD renders services and the benefits of such services are being taken by all concerned, viz., the owner of the land or building. Even a person who is in possession of a land or building, whether legal or illegal, takes benefits of such services rendered by the MCD. The MCD for the purpose of realization of tax is not concerned with the relationship of the parties. It is concerned only with imposition and recovery of tax which is payable on all lands and buildings in accordance with law. The exceptions thereof have been enumerated in the Act itself. Section 119 of the MCD Act is one of such provisions. Such an exemption clause, as is well known, must be construed strictly. Section 119 of the MCD Act would apply if the lands and buildings are the properties of Union of India. The MCD has the right to levy the property tax in terms of Section 114 of the MCD Act in the manner as specified therein.

40. By reason of the agreement in question, the buildings in question do not belong to the Administration. Admittedly, it belongs to the grantee i.e. appellant herein. As discussed hereinbefore, the Oil tanks has been construed as buildings for the purposes of tax. Therefore, Section 119 of the MCD Act would not apply to the building in question. That being the case,

the grantee/appellant is liable to pay tax although the ownership of the land may belong to the Administration. Section 115 of the MCD Act clearly provides that the general tax shall be payable in respect of lands and buildings. Such lands and buildings may be in lawful occupation of the owner. The occupation of the said building may be lawful or unlawful. Even in a case where apartments are constructed on the land belonging to the Government or a statutory body but the occupier of the apartment is liable to pay tax. If a person encroaches upon somebody's lands and constructs buildings thereupon, he would also be liable to pay tax. Once it is held that the grantee were liable to pay tax, the same becomes payable from the date of accrual of the liability. The said position is also fortified from specific stipulation in the agreement that the liability to pay all taxes including municipal taxes is on the grantee.

41. The learned counsel for the appellant has placed strong reliance on the decision of this Court in *HUDCO v. MCD;* (2001) 1 SCC 455 to contend that land belonging to the government is immune from the payment of property tax by virtue of section 119(1) of the DMC Act and Article 285 of the Constitution of India. In the HUDCOs case vacant land of the government, prior to execution of the lease deed in favour of HUDCO, was sought to be taxed and that no building had been constructed by HUDCO. HUDCOs own case was that interest in land could pass only on execution of lease and construction thereon under section 120(2) of the MCD Act. MCD had invoked Section 120(1) DMC Act to fasten liability on HUDCO and not under Section 120(2) DMC Act after construction was made by HUDCO and lease deed executed bythe government. In that case, this Court has held that vacant land belonging to the Government was not taxable by virtue of section 119 DMC Act and Article 285 of the Constitution of India. However, in our considered view, the case at hand is totally different. The HUDCO judgment dealt with the case where vacant land belonging to the lessor/Government and in regard whereto no

lease deed had been executed and no construction had been made by the lessee/HUDCO. The land belonging to the central government was sought to be taxed under section 120(1) of the DMC Act which fastens liability on the lessor. Since land belonged to UOI the same was exempted from payment of tax until the lease deed was executed and construction made thereon by HUDCO-under Section 120(2).

42. Incidence to pay tax under section 120(2) DMC Act is with regard to a composite assessment of land and buildings as section 120(2) talks of a composite assessment only. In the present case vacant land or property of Railways is not sought to be taxed as was in the case of HUDCO Vs. MCD under section 120(1) DMC Act, but property tax/Composite Assessment is sought to be made on the installations/stotage depots having been constructed by the appellant-by virtue of Section 120(2) DMC Act. It is important to notice that w.e.f. the date of execution of lease deed and construction made thereon by HUDCO, HUDCO has been paying the property tax. HUDCOs case is therefore not applicable.

43. In view of the aforesaid discussion, we are of the considered view that the document in question constitutes lease in favor of the appellant-grantee; and accordingly liable to pay taxes.

44. In view of the same, we find no merit in the present appeal, accordingly, the same is liable to be dismissed and hence dismissed. No order as to costs.

R.P. Appeals dismissed.

COMMNR., CENTRAL EXCISE , BANGALORE
v.
M/S. MEYER HEALTH CARE PVT. LTD. & ORS.
(Civil Appeal No(s). 4052-4054 of 2003)

APRIL 07, 2011

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

Excise laws:

Exemption – Assignment Deed – Case registered under the Excise law against assessee – Assignment of trade mark in favour of assessee subsequent to registration of the case – Assessee claiming benefit under Exemption Notification on the basis of Assignment Deed – Whether or not the Assignment Deed which was entered into between the assessee and the owner of the trade mark on 6.10.1998 would date back to period prior to 19.9.1998 when the trade mark was assigned and whether the assessee is entitled to take benefit of Assignment Deed to avail the benefit of Exemption Notification – Held: The effect of making the registration certificate applicable from retrospective date is based on the principle of deemed equivalence to public user of trade mark – This deeming fiction is applicable to provisions of Trade Mark Act and cannot be extended to the excise laws – As to whether or not the said Assignment Deed would relate back prior to a date of 19.9.1998 and consequence thereof was a matter which was not decided by the Tribunal – Matter remitted to the Tribunal for consideration of the said issue by recording an effective and reasoned decision – Trade Marks Act.

CCE, Ahmedabad v. Vikshara Trading & Invest P. Ltd. & Anr. **2003(58)RLT 604(SC);** *Meghraj Biscuits Industries Ltd. v. Commissioner of C. Ex., U.P.* **2007 (210) ELT 161 (SC) – referred to.**

Case law reference:

2003(58) RLT 604(SC)	**referred to**	**Para 2**
2007 (210) ELT 161 (SC)	**referred to**	**Para 2**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 4052-4054 of 2003.

From the Judgment & Order dated 22.11.2002 of the Customs, Central Excise and Gold (Control) Appellate Tribunal, South Zonal Bench, Bangalore in Appeal No. E/1873/99, E/1874/99, E/1875/99.

Arijit Prasad, Arti Singh, D.D. Kamat, B.K. Prasad, Anil Katiyar for the Appellant.

Alok Yadav, Pavan Agarwal, Rajesh Kumar for the Respondents.

The following Order of the Court was delivered

ORDER

1. These appeals are directed against the judgment and order of the Custom, Excise and Gold (Control) Appellate Tribunal (CEGAT), South Zone Bench allowing the appeal filed by the Appellant before the Tribunal and holding that since there is an Assignment Deed in favour of the respondent in the present case, therefore, the respondent shall be entitled to the benefit of the Exemption Notification. The aforesaid findings of the Tribunal are under challenge in this appeal on which we have heard the learned counsel appearing for the parties.

2. Counsel appearing for the appellant has submitted that on the date when the case was registered against the respondent, there was no Assignment Deed executed in favour of the respondent and, therefore, the respondent is not entitled to take benefit of the aforesaid Assignment Deed to avail benefit under the exemption notificaton. The counsel appearing

for the respondent, however, refutes the aforesaid submission contending, *inter alia*, that so far the brand name is concerned, the owner of the brand name has assigned the trade mark in favour of the respondent and, therefore, in view of the decision of the Supreme Court in *CCE, Ahmedabad Vs. Vikshara Trading & Invest P. Ltd. & Anr.* Reported in 2003(58) RLT 604(SC) the respondent is entitled to avail the benefit of the Exemption Notification. However, our attention is drawn to another decision of this Court by the counsel appearing for the appellant in *Meghraj Biscuits Industries Ltd. Vs. Commissioner of C. Ex., U.P.* Reported in 2007 (210) ELT 161 (SC) wherein almost a similar issue came to be considered by this Court and while dealing with the same, this Court observed thus:

> "On reading the above quoted paragraphs from the above judgment, with which we agree, it is clear that the effect of making the registration certificate applicable from retrospective date is based on the principle of deemed equivalence to public user of such mark. This deeming fiction cannot be extended to the Excise Law. It is confined to the provisions of the Trade Marks Act. In a given case like the present case where there is evidence with the Department of the trade mark being owned by M/s. Kay Aar Biscuits (P) Ltd. and where there is evidence of the appellants trading on the reputation of M/s. Kay Aar Biscuits (P) Ltd. which is not rebutted by the appellants (assessee), issuance of registration certificate with retrospective effect cannot confer the benefit of exemption notification to the assessee. In the present case, issuance of registration certificate with retrospective effect from 30-9-91 will not tantamount to conferment of exemption benefit under the Excise Law once it is found that the appellants had wrongly used the trade mark of M/s. Kay Aar Biscuits (P) Ltd."

3. According to the provisions of the Trade Marks Act, for

getting registration of a trade mark, an application is required to be filed in accordance with the provisions incorporated in the said Act. Such an application is required to be advertised and a detailed procedure is required to be followed before grant of a registration in favour of a claimant. Since a variety of procedural steps are required to be taken like issuing an advertisement, hearing objections, if any filed, it becomes a lengthy procedure and, therefore, time consuming for grant of a registration in matters of trade mark. But once registration is granted in respect of a particular trade mark in terms of the application according to the provisions of the Trade Marks Act, the registration dates and relates back to the date of application. However, the position appears to be different as has been held by this Court so far excise law is concerned. This Court has already held in the aforementioned decision that effect of making the registration certificate applicable from retrospective date under the trade mark law is based on the principle of deemed equivalence to public user of such mark whereas such deeming fiction cannot be extended to the excise law and that the same is only confined to the provisions of the Trade Marks Act.

4. Admittedly, in the present case, the assignment of the trade mark in question granted in terms of the agreement entered into between the parties was on 6.10.1998, which is subsequent to the date of registration of the case by the Department, which was done on 19.9.1998. As to whether or not the effect and in fact, the aforesaid Assignment Deed which is granted in favour of the respondent would relate back prior to a date of 19.9.1998 and consequence thereof is a matter which is not decided by the Tribunal. Since the same is an issue which is relevant and relates to determination of the factual aspects, it would be appropriate to have a decision of the Tribunal on the said issue.

5. We consider that it may not be proper for us to decide such a disputed question of fact by ourselves. We, therefore,

remit back this matter to the Tribunal for consideration of the aforesaid issue as to whether or not the Assignment Deed which was entered into between the respondent and the owner of the trade mark on 6.10.1998 would also be applicable to the case in hand and would date back prior to a period of 1998 to be considered and decided by the Tribunal by recording an effective and reasoned decision. Therefore, we set aside the order of the Tribunal to the aforesaid extent and remit back the matter to the Tribunal for *de novo* consideration of the aforesaid issue as expeditiously as possible, preferably within a period of six months.

6. The appeal is allowed to the aforesaid extent.

7. In view of the aforesaid order, IAs are also disposed of. We make it clear that this order is confined only to the aforesaid issue and nothing more at this stage.

D.G. Appeal allowed.

SUBHANKAR BISWAS

v.

SANDEEP META

(Criminal Appeal No. 1129 of 2006)

APRIL 07, 2011

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

Standards of Weights and Measures Act, 1976 – s. 19 – Complaint under, against Chairman of the Company and appellant, then Deputy General Manager, alleging violation of rr. 2, 4, 6, 8, 9 and 23 of the Rules – However, the averments in the complaint not identifying as to who was the person responsible and incharge of the affairs of the Company – Meanwhile, application filed for the compounding of the offence – Appropriate authority directing compounding of offence but the order could not be carried out – Application u/s. 482 Cr.P.C. filed by the Chairman of the Company and the appellant, then Deputy General Manager – High Court quashing the proceedings qua the Chairman – On appeal, held: There is no distinction between the case of the Chairman and the appellant – High Court did not bring out any distinction between the two – In prosecutions in such like cases no roving enquiry is permissible and an obligation rests on the prosecution to give details so that the trial can be proceeded against the persons responsible – Therefore, direction issued to quash the proceedings against the appellant in all cases – Standards of Weights and Measures (Packaged Commodities) Rules, 1977 – rr. 2, 4, 6, 8, 9 and 23.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1129 of 2006 etc.

From the Judgment & Order dated 24.03.2005 of the High

Court at Calcutta in CRR No. 2086 of 2004.

WITH

Crl. A. Nos. 1086, 1087, 1088 & 1089 of 2008.

Pradeep Ghosh, Parijat Sinha, Reshmi Rea Singh, Mrinal Kanti Mandal, Vikram Ganguly, S.C. Ghosh for the Appellant.

Avijit Bhattacharjee, Sarbani Kar for the Respondent.

The following Order of the Court was delivered

O R D E R

This order will dispose of all the appeals referred to above.

The facts have been taken from criminal appeal No. 1129/2006. The matter arises out of a complaint under Section 19 of the Standards of Weights and Measures Act, 1976. In the complaint it has been urged that Rules 2,4,6, 8, 9 and 23 of the Standards of Weights and Measures (Packaged Commodities) Rules 1977 had been violated. In the meantime the appellant also filed an application for the compounding of the offence and the appropriate authority directed that the offence be compounded. This however could not go through for the reason that as per the allegation several similar offences had been committed by the Company within three years. An application under Section 482 was thereafter filed by the Chairman of the Company Mr. H.B.Lal and the appellant Subhankar Biswas the then Deputy General Manager raising several pleas, one of being based on Section 74 of the Act and the averments made in the complaint which did not identify as to who was the person responsible and incharge of the affairs of the Company. It was pointed out that in the complaint the bare language of Section 74 had been reproduced without naming any body as being responsible for the day-to-day affairs of the Company. The averment made in the complaint which is relevant to the matter is reproduced below:

"That the persons committed this offence are companies. So every person at the time of offence was in charge of and was responsible to the companies for the business of the companies as well as the companies shall be liable to be proceeded against the punished accordingly as per section 74 of the Standards of Weights and Measures Act, 1976."

It was accordingly argued in the High Court that the complaint itself was not maintainable as it did not indicate as to who was responsible for the day-to-day affairs of the Company. After hearing both sides the High Court by its order of 24th March 2005 quashed the proceedings qua the Chairman Mr. H.B.Lal with the following observations:

"Therefore in the absence of any specific averment regarding the role played by petitioner No.1 M.B.Lal, who is the Chairman of the Corporation and there is nothing to indicate that he was in charge of and responsible to the Corporation relating to its day-to-day affairs of the Corporation at the time of commission of the alleged offence, the present application deserves to be allowed in part and the proceeding against the said petitioner No.1 M.B.Lal is to be quashed."

Today, before us, Mr. Pradeep Ghosh, the learned senior counsel for the appellant, has argued that the allegations against the Chairman of the Company and theappellant before us were identical and there was no distinction whatsoever between the two and the High Court having quashed the proceedings against the Chairman, a similar order ought to have followed for the appellant as well.

Mr. Avijit Bhattacharjee, the learned counsel for the respondent-State, has however pointed out that the question as to the identity of the person(s) in charge of the day-to-day affairs of the Company was a matter of evidence and it was therefore imperative that the trial go on.

We have considered the arguments advanced by the learned counsel for the parties. We find absolutely no distinction between the case of the Chairman and the appellant and the High Court has not brought out any distinction between the two. It has to be borne in mind that in prosecutions in such like cases no roving enquiry is permissible and an obligation rests on the prosecution to give details so that the persons responsible so that the trial can proceed against them. We are therefore of the opinion that the appeal qua the present appellant ought to succeed.

We accordingly allow these appeals; set aside the order of the High Court insofar it goes against the appellant and direct that the proceedings against the appellant shall also stand quashed in all cases.

N.J. Appeals allowed.

COMMISSIONER OF TRADE TAX, U.P.
v.
VARUN BEVERAGES LIMITED
(Civil Appeal No. 3186 of 2011)

APRIL 11, 2011

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

Uttar Pradesh Trade Tax Act, 1948: s.4-A(4) – Fixed capital investment – Bottles and crates used by the respondent in its factory for the manufacture of soft drinks and beverages – Inclusion of value of bottles and crates in the fixed capital investment – Held: Bottles are essential part of components and equipments necessary for the running of the factory of the respondent and, therefore, its value would form part of the fixed capital investment and would be entitled to exemption – Crates are used only for the purpose of marketing and their use is necessary only for taking out the bottled beverages out of the factory – Crates having no user so far as running of the factory of the respondent is concerned, therefore, value of crates cannot be deemed to be investment for the purpose of including it within the meaning of expression "Fixed Capital Investment" as per sub-section (4) of s. 4-A of the Act.

The question which arose for consideration in the instant appeal was whether the bottles and crates used by the respondent in its factory for the manufacture of soft drinks and beverages were to be treated as part of "Fixed Capital Investment" as being essential apparatus for the manufacture of soft drinks and, therefore, covered within the meaning of sub-section (4) of Section 4-A of the Uttar Pradesh Trade Tax Act.

Partly allowing the appeal, the Court

HELD: 1.1. Section 4A of the U.P. Trade Tax Act which lays down that where the State Government is of the opinion that it is necessary so to do for increasing the production of any goods or for promoting the development of any industry in the State, it may on the application or otherwise declare that the turnover of sales in respect of such goods by the manufacturer thereof shall, during such period not exceeding fifteen years is exempted from payment of trade tax provided that goods manufactured in the new unit has a fixed capital investment of five crore rupees or more. The said section further provided in sub-section (4) of Section 4-A of the Act as to what is the meaning of the expression "Fixed Capital Investment". It is provided therein that "Fixed capital investment" means value of land and building and such plants including captive power plant, machinery, equipment, apparatus, components, moulds, dyes, jigs and fixtures. Sub-clause (b) inserted in the proviso to sub-section (4) of Section 4-A of the Act stated that for the purposes of determining value of plant including captive power plant, machinery, equipment, apparatus, components, moulds, dyes, jigs and fixtures only investment, whether by means of purchases, hire or lease in such plant, equipment, apparatus, components and machinery, as is necessary for the establishment or running of the factory or workshop shall be taken into account. The object of the relevant provision in the light of other provisions of the Act, made it crystal clear that the value of investment for equipments, apparatus and components for running the factory and workshop has also to be considered as investment and such value is required to be included within the ambit of fixed capital investment. [Paras 12, 17] [809-E-F; 810-A-B; 812-G-H]

CST v. Industrial Coal Enterprises **(1999) 2 SCC 607 – relied on.**

State of Bihar and Others v. Steel City Beverage Limited and another **(1999) 1 SCC 10– referred to.**

1.2. Considering the wording of the provision itself, it is quite necessary to give full and complete effect to the provision in a purposive manner so as to advance the objective of the provision. The respondents were engaged in the manufacture of soft drink and beverages which were required to be bottled and thereafter sealed, which were essential part of running of the factory and, therefore, the same would have to be included within the said extended meaning of the word 'investment' as appearing from the words 'fixed capital investment'. In the facts and circumstances, so far bottles are concerned, they are essential part of components and equipments necessary for the running of the factory and, therefore, such value of the investment would form part of the fixed capital investment and would be entitled to exemption as provided for. But so far crates are concerned they are used by the respondent only for the purpose of marketing. Use of crates is necessary for taking out the bottled beverages out of the factory and while doing the marketing of the sealed bottled beverages. The said view also receiveds support from the contents of the eligibility certificate given by the appellant and, therefore, crates have no user so far as running of the factory of the respondent. Therefore, the value of crates cannot be deemed to be investment for the purpose of including it within the meaning of expression "Fixed Capital Investment" as per sub-section (4) of Section 4-A of the Act. The order passed by the High Court so far bottles are concerned is upheld but the same so far crates are concerned is set aside. [Paras 21, 22, 23, 24] [815-A, D-H; 816-A-B]

CIT v. Straw Board Mfg. Co. Ltd. **1989 Suppl. (2) SCC 523 – relied on.**

State of Bihar v. Steel City Beverages Ltd. **(1999) 1 SCC 10 – distinguished.**

Case Law Reference:

(1999) 1 SCC 10	**referred to**	**Para 13, 17**
(1999) 2 SCC 607	**relied on**	**Para 16**
(1999) 1 SCC 10	**distinguished**	**Para 18, 22**
1989 Suppl. (2) SCC 523	**relied on**	**Para 21**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3186 of 2011.

From the Judgment & Order dated 19.01.2010 of the High Court of Judicature at Allahabad in Trade Tax Revision No. 337 of 2002.

Sunil Gupta, Shail Kumar, Dwivedi, AAG, G. Venkateswara Rao, Tanmay Agarwal, A. Shukla, Manoj Kumar, Dwivedi, Gunnam Venkateswara Rao for the Appellant.

Dhruv Agarwal, Praveen Kumar for the Respondent.

The Judgment of the Court was delivered by

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

2. This appeal is directed against the Judgment and Order dated 19.01.2010 passed by the Allahabad High Court whereby the High Court allowed the revision petition preferred by the respondent holding that values of "bottles" and "crates" are to be treated as part of "Fixed Capital Investment" as they are essential apparatus for manufacture of Soft Drinks and therefore could be governed and covered within the meaning of explanation 4(b)(i) to Section 4-A of the U.P. Trade Tax Act (hereinafter referred to as 'the Act').

3. The issue, therefore, which falls for our consideration is as to whether or not bottles and crates used by the respondent could be said to be essential apparatus or equipments or components for the establishment and running of the factory of the respondent.

4. The respondent is engaged in manufacturing and sale of soft drink and beverages. The assessee – respondent applied for the grant of eligibility certificate under Section 4A of the U.P. Trade Tax Act read with notification No. 640 dated 21.02.1997. Pursuant to the aforesaid request, the respondent/ assessee was granted an eligibility certificate on 26.5.2000 by the Divisional Level Committee constituted under section 4A of the Act. The exemptions were granted to the assessee for a period of ten years running from 15.4.1999 to 14.4.2009 or to the extent of 200% of the fixed capital investment of Rs.53,79,49,612/-, whichever was earlier. The exemption certificate granted on 26.5.2000 stipulates that it was granted for the goods, which were manufactured by the assessee as mentioned in the eligibility certificate. Towards the end of the eligibility certificate the goods manufactured by the respondent are described, which are as under: -

1. Carbonate Soft Drinks/Aerated Drinks, including syrups and beverages packed in a sealed container.

2. Sealed and no unsealed soft drinks packed in sealed glass containers carbonated drinks and aerated water including sweated and non sweated drinks, mineral water packed in pet bottles and pet pre forms to be used in fillings of beverages and liquids articles.

5. Subsequently the assessee applied for a review of the eligibility certificate and sought extension of the period from ten years to fifteen years. In the said review application, the assessee also sought exemptions for fixed capital investment

made by it in glass bottles and crates claiming that these items were essential for the manufacture of soft drinks and for running a beverage unit. In that application it was also stated that while computing the fixed capital investment, an amount equal to Rs. 5,73,62,277/- invested by the assessee towards purchases of bottles and crates should also be included in the fixed capital investment.

6. The Divisional Level Committee vide its order dated 10.04.2001 allowed the review application and ordered that the aforesaid amount of Rs. 5,73,62,277/- be included while computing the fixed capital investment of the assessee. By the aforesaid order dated 10.04.2001 the eligibility certificate was also granted to the assessee for a period of 15 years.

7. Being aggrieved by the aforesaid order dated 10.04.2001 the appellant filed an appeal before the UP Tribunal, Trade, Tax, Lucknow. The Tribunal by its order dated 14.05.2002 allowed the said appeal filed by the appellant holding that the bottles and crates are neither directly nor indirectly used in the manufacture of beverages and therefore the same cannot be treated as "Apparatus" as used in the said entry in explanation (4) to Section 4-A of the Act.

8. Being aggrieved by the said order passed by the UP Tribunal, Trade, Tax, Lucknow, the respondent assessee filed a revision petition before the Allahabad High Court which was registered as Trade Tax Revision No. 337 of 2002. The High Court by its order dated 19.01.2010 allowed the said revision petition holding that for the manufacture of soft drink, the bottles and crates are essential apparatus especially in a captive industry where the liquid which is prepared and collected by way of a continuous process in the bottles and thereafter kept it in crates and therefore both bottles and crates are to be accepted as "apparatus" within the meaning of Explanation (4) (b) (i) to section 4-A of the U.P. Trade Tax Act.

9. The question of law that was framed by the High Court was answered in favour of the assessee holding that such bottles and crates are to be treated as fixed capital investment. It was also held that the period of exemption was for 15 years.

10. The aforesaid order passed by the High Court was challenged by the appellant by filing the present appeal in which we heard learned counsel appearing for the parties. By way of clarification it has to be stated at this stage that in the present appeal what is specifically challenged is first part of the order with regard to bottles and crates forming part of fixed capital investment and not that part of the order granting exemption for a period of 15 years. The appeal, therefore, is restricted to the aforesaid limited issue.

11. The counsel appearing for the appellant during the course of his arguments had taken us through the provisions of Section 4-A of the Act. He submitted that in the light of aforesaid provisions, the State Government granted exemption from payment of trade tax in certain cases.

12. The aforesaid provision relied upon is Section 4A of the Act which lays down that where the State Government is of the opinion that it is necessary so to do for increasing the production of any goods or for promoting the development of any industry in the State, it may on the application or otherwise declare that the turnover of sales in respect of such goods by the manufacturer thereof shall, during such period not exceeding fifteen years is exempted from payment of trade tax provided that goods manufactured in the new unit has a fixed capital investment of five crore rupees or more. The said section further provides in sub-section (4) of Section 4-A of the Act as to what is the meaning of the expression "Fixed Capital Investment". It is provided therein that "Fixed capital investment" means value of land and building and such plants including captive power plant, machinery, equipment, apparatus, components, moulds, dyes, jigs and fixtures. It is mentioned in sub-clause (b) inserted

in the proviso to sub-section (4) of Section 4-A of the Act that for the purposes of determining value of plant including captive power plant, machinery, equipment, apparatus, components, moulds, dyes, jigs and fixtures only the following shall be taken into account:-

> (i) investment, whether by means of purchases, hire or lease in such plant, equipment, apparatus, components and machinery, as is necessary for the establishment or running of the factory or workshop.

13. Relying on the aforesaid provisions the counsel appearing for the appellant submitted that bottles and crates cannot be held to be 'Fixed Capital Investment' either for establishment or running of the factory or workshop of the respondent and therefore the value of the same cannot be included within the expression "fixed capital investment" and, therefore, the High Court was not justified in directing for inclusion of the value of the aforesaid bottles and crates to be read within the expression of "fixed capital investment". Counsel appearing for the appellant further submitted that the impugned order is contrary to the ruling of this Court in *State of Bihar and Others vs. Steel City Beverage Limited and another* reported in (1999) 1 SCC 10. It was held by this Court that in respect of an industry manufacturing soft drinks and beverages, it can be said that plant would mean that apparatus which is used for manufacturing soft drinks or beverages and not articles like crates and bottles used for storing the manufactured goods. It was also submitted by the counsel that the High Court erred in enlarging the scope of the definition of the word "Fixed Capital Investment" ignoring the specific words used in the said definition. It was also submitted that the use of word "Apparatus" in the definition of "Fixed Capital Investment" is restricted to such apparatus which are actually used in the manufacture of finished product and that it cannot be extended to such apparatus which are used for storing of finished products.

14. Counsel appearing for the respondent, however, not only refuted the aforesaid submissions but also submitted that the above referred decision of this Court is clearly distinguishable from the facts of the present case in view of the clear distinction between the provision of law upon which the above referred decision was rendered by this Court and the provision of law which is applicable to the facts of the present case. He also submitted that the definition of fixed capital investment as per sub-section (4) of Section 4-A of the Act would indicate that respondent is entitled to exemption for all the fixed capital investment which not only include within its ambit the value of the land and building but also such apparatus, components and equipments, which are necessary for the establishment or running of the factory or workshop. He further submitted that provisions of the Act includes not only plants, machinery but also includes apparatus, components, moulds, dyes, jigs and fixtures. He also submitted that the glass bottles and creates are absolutely necessary for the unit of soft drink as without the use of these apparatus, the manufacture of soft drink would not be complete.

15. In the light of the submissions made by counsel appearing for the parties, we heard learned counsel appearing for the parties and considered the scope and ambit of the question which falls for our determination.

16. This Court in the case of *CST v. Industrial Coal Enterprises,* reported at *(1999) 2 SCC 607*, observed that as under**:** -

> "6. Admittedly the provisions for exemption from sales tax have been introduced in the Act for the purpose of increasing the production of goods and for promoting the development of industries in the State. In fact, when the scheme called "Grant of Sales Tax Exemption Scheme 1982 to industrial units under Section 4-A of the Sales Tax Act" was originally framed, it was expressly stated that the Government granted the facility of exemption in order to

> encourage the capital investment and establishment of industrial units in the State. The Scheme contained various rules for grant of such exemption.....
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> 11. In *CIT v. Straw Board Mfg. Co. Ltd.* this Court held that in taxing statutes, provision for concessional rate of tax should be liberally construed. So also in *Bajaj Tempo Ltd. v. CIT* it was held that provision granting incentive for promoting economic growth and development in taxing statutes should be liberally construed and restriction placed on it by way of exception should be construed in a reasonable and purposive manner so as to advance the objective of the provision.
>
> 12**.** We find that the object of granting exemption from payment of sales tax has always been for encouraging capital investment and establishment of industrial units for the purpose of increasing production of goods and promoting the development of industry in the State. If the test laid down in Bajaj Tempo Ltd. case is applied, there is no doubt whatever that the exemption granted to the respondent from 9-8-1985 when it fulfilled all the prescribed conditions will not cease to operate just because the capital investment exceeded the limit of Rs 3 lakhs on account of the respondent becoming the owner of land and building to which the unit was shifted....."

17. The aforesaid object of the relevant provision in the light of other provisions of the Act, makes it crystal clear that the value of investment for equipments, apparatus and components for running the factory and workshop has also to be considered as investment and such value is required to be included within the ambit of fixed capital investment. The

wordings of the provision of law which call for our interpretation are not identical and similar which were considered and interpreted by this court in the decision in *State of Bihar and Others* (supra).

18. This Court in the case of *State of Bihar v. Steel City Beverages Ltd.,* reported as (1999) 1 SCC 10, observed that as under**:** -

> "8. It is also relevant to refer to the two notifications of the Government of India in the Ministry of Industry (Department of Industrial Development) dated 2-4-1991 and 1-1-1993 issued under Section 11-B of the Industries (Development & Regulation) Act, 1951. Notification No. 232 dated 2-4-1991 while stating what has to be included under fixed assets while ascertaining whether a small-scale industrial unit's investment has exceeded the limit of Rs 60 lakhs has clarified that the cost of storage tanks which store raw material or finished products is to be excluded. The 1993 notification has amended the notification of 2-4-1991 and clarified by adding Note 2 that in calculating the value of plant and machinery, the cost of storage tanks which store raw materials/finished products only and which are not linked with the manufacturing process shall be excluded. On 8-5-1995, the Government of India again issued a circular, after having received representations from the industry seeking clarification whether bottles and crates are to be taken into account for determining the SSI status of the units engaged in manufacture of soft drinks/ concentrates, clarifying that investment in bottles and crates in such units is in the nature of storage of finished products and, therefore, such investment has to be excluded while computing the value of plant and machinery.
>
> 9. As pointed out in the affidavit-in-rejoinder, the Company had applied for an Eligibility Certificate claiming the status of a small-scale industry. It is, in fact, registered as a small-scale industrial unit. While declaring its investment at the

> time of seeking registration as a small-scale industrial unit, it did not include investment in bottles and crates under the head "Plant and Machinery". The investment in bottles and crates was shown under a separate head. It is further pointed out in the said affidavit that if the investment of the Company in bottles and crates is included under the head "Plant" then its total fixed capital investment will reach the level of 137.36 lakhs and it can no longer be regarded as a small-scale industrial unit. As the Company had applied as a SSI unit, the District Level Committee had to verify the status of the Company as SSI unit and, therefore, it was bound to take into account the above-referred two notifications of the years 1991 and 1993. If under these circumstances, the District Level Committee came to the conclusion that the Company is not entitled to the benefit of deferment in respect of its investment in bottles and crates, it cannot be said that it has acted contrary to law."

19. A careful reading of the ratio of the aforesaid decision would reveal that expression plant and machinery in the said case was intended to take such articles which are required for the purpose of manufacture and not for storage. Besides, the said decision was rendered in the context of the two notifications which specifically excluded value of bottles and crates to be included in the expression "plant and machinery" as the same are used for the purpose of storage of finished products and not used for the purpose of manufacture of finished products.

20. However, in this case, not only the wordings of the Act are wider but there is also no such notification issued by the State Government giving a restricted meaning to the expression "fixed capital investment" which as per provision enacted also includes all such investment made for equipment, apparatus, components and machinery which are necessary for running of the factory or workshop.

21. In that view of the matter and considering the wording of the provision itself, it is quite necessary to give full and complete effect to the provision in a purposive manner so as to advance the objective of the provision. So in the instant case all those apparatus, equipments and components which are necessary for running of the factory would also be considered as investment and would therefore be part of the definition of fixed capital investment. Besides, as laid down in the decision of this Court in *CIT v. Straw Board Mfg. Co. Ltd.* reported as 1989 Suppl. (2) SCC 523, in taxing statutes, provisions for concessional rate of tax should be liberally construed.

22. The respondents are engaged in the manufacture of soft drink and beverages which are required to be bottled and thereafter sealed, which are essential part of running of the factory and therefore the same will have to be included within the aforesaid extended meaning of the word 'investment' as appearing from the words 'fixed capital investment'. To that extent, facts of the present case are distinguishable from the facts of *State of Bihar and Others* (supra) on which reliance was placed by the counsel appearing for the appellant.

23. Considering the facts and circumstances, we hold that so far bottles are concerned, they are essential part of components and equipments necessary for the running of the factory and therefore such value of the investment would form part of the fixed capital investment and would be entitled to exemption as provided for. But so far crates are concerned they are used by the respondent only for the purpose of marketing. Use of crates is necessary for taking out the bottled beverages out of the factory and while doing the marketing of the sealed bottled beverages. The aforesaid view taken by us also receives support from the contents of the eligibility certificate given by the appellant and therefore crates have no user so far as running of the factory of the respondent. Therefore, the value of crates in our considered opinion cannot be deemed to be

investment for the purpose of including it within the meaning of expression "Fixed Capital Investment" as per sub-section (4) of Section 4-A of the Act.

24. Having held thus, we allow this appeal partly to the aforesaid extent. We uphold the order passed by the High Court so far bottles are concerned but set aside the same so far crates are concerned. In terms of the aforesaid order and observations, this appeal stands disposed of but there will be no order as to costs.

D.G. Appeal partly allowed.

KULVINDER SINGH & ANR.
v.
STATE OF HARYANA
(Criminal Appeal Nos. 916 of 2005)

APRIL 11, 2011

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

PENAL CODE 1960:

s. 302/34 – Murder – Circumstantial evidence – Conviction and sentence of imprisonment for life awarded by trial court – Affirmed by High Court – HELD: In the facts and circumstances of the case, motive proved distinctly – Further, recovery of weapon at the instance of the accused, the medical report, both the accused seen at the place of incident immediately before the incident and the victim reaching there shortly thereafter, accused seen running from the place of occurrence, extra-judicial confession by the accused, all complete the chain of circumstances pointing out to the guilt of the accused – There is no cogent reason to interfere with the finding recorded by the two courts below – Criminal law – Motive – Evidence – Circumstantial evidence – Prosecution case close to the circumstances of the accused and the deceased being last seen together – Extra-judicial confession.

The appellants (A-1 and A-2) were prosecuted for causing the death of one 'AD', the son of PW-2. The prosecution case was that when at about 7 P.M. on 9.10.1997, PW-2 was going to his fields in order to keep watch on the crop and relieve his son 'AD', on the way he saw the two appellants at the tubewell of one 'SR'. PW-2 after reaching his fields, relieved his son. On the following morning at about 6. A.M., dead body of 'AD' was found lying near the paddy field. PW-11, went to lodge the FIR. Sub-Inspector of Police (PW-14) conducted the

investigation. PW-2, told him that about 8-10 days before he saw A-2 grappling with his son, 'AD' and when asked A-2 disclosed that 'AD' was teasing his sister and wife. On 13.10.1997 PW-10 produced the accused before PW-14 and told him that they made extra-judicial confession before him about killing of 'AD'. The trial court convicted the accused u/s 302 IPC and sentenced them to imprisonment for life. Their appeals were dismissed by the High Court. Aggrieved, the accused filed the appeal.

Dismissing the appeal, the Court

HELD: 1.1 The courts below have examined the entire evidence on record and reached the conclusion that chain of circumstances stood completed and all the circumstances pointed towards the guilt of the accused. Such findings stand fully substantiated by the depositions of the witnesses in the court. [para 6] [828-C-D]

1.2 PW.2, the father of deceased deposed that about 8-10 days prior to the incident while he was returning home with his son, he saw A-2 playing Kabaddi with his son 'AD' and suddenly they started quarreling with each other and on being asked A-2 told him that 'AD' was teasing his sister and wife though the latter protested and told him that he was telling a lie. The statement of PW.2 in respect of motive also gets corroborated by the statement of PW.13, an independent witness to the extent that a month prior to the murder, A-2 made a complaint to 2-3 persons about 'AD' teasing his sister. The statement of PW.13 has been scrutinised by both the courts below and had been found trustworthy. Thus, it stood established that A-2 has been harbouring in his mind the suspicion that deceased was teasing his sister and wife. If the finding recorded by the courts below on the issue of motive is examined in the light of the law laid

down by this Court, no fault can be found with the same.[Para 6 and 8]. [828-E-H; 829-A-B; E-F]

State of Uttar Pradesh v. Kishanpal & Ors., **2008 (11) SCR 1048 = *(2008) 16 SCC 73,*** *Pannayar v. State of Tamil Nadu by Inspector of Police,2009 (13) SCR 367=**(2009) 9 SCC 152;*** *Babu v. State of Kerala,* ***2010(9) SCR 239=(2010) 9 SCC 189;*** and *Bipin Kumar Mondal v. State of West Bengal, 2010(8) SCR 1036**=AIR 2010 SC 3638 - relied on.***

1.3 The offence was committed in the evening of 9.10.1997 and in respect of the same, an FIR was lodged on 10.10.1997 and the extra-judicial confession has been made on 13.10.1997. Thus, for three days, the appellants remained wanted in the case. [para 6] [828-D-E]

1.4 On the issue of extra-judicial confession, PW.10 has deposed that he was the Ex-Sarpanch and both the accused approached him on 13.10.1997 and disclosed that they had committed the murder of 'AD' and he should take them to the police. PW.10 in his statement recorded u/s 161 Cr.P.C. has stated that the accused had told him on 13.10.1997 that due to the fear of police they were running from pillar to post; that he had a good understanding with the police being the Ex-Sarpanch and, thus, he should help and produce them before the police. Undoubtedly, both the accused had been arrested by the police only on 13.10.1997. The accused have not challenged the deposition of PW.10 that he produced them before the police. PW.10 faced the gruelling cross-examination but defence could not elucidate anything to discredit him and the courts below have found that the deposition of PW.10 in respect of the extra-judicial confession made to him by the accused remained a trustworthy piece of evidence. PW-10 is an independent witness and by no means could be held to be biased or inimical to the accused. There is no reason not to accept his deposition in respect of the extra-judicial confession

made by the appellants as his deposition stands the test of credibility. [Para 9 and 11]. [829-F-H; 830-A-C; 831-C-D]

State of Rajasthan v. Raja Ram, **2003(2) Suppl. SCR 445=(2003) 8 SCC 180, relied on.**

1.5 Not a single witness has deposed that the accused were last seen with the deceased. However, the courts below have found that the prosecution case has been very close to the circumstances of the accused and deceased being last seen together. PW.2 has deposed that the tubewell of 'SR' is on the passage connecting his fields with the abadi of the village, where he saw both the appellants at about 7.00 p.m. Immediately thereafter, his son, 'AD' started for the village between 7.30 and 7.45 p.m. PW.3 who heard the cries from the place of occurrence, saw the appellants running towards the village. The trial court has examined the statement of PW.3 minutely and rejected the defence version that in such a circumstance it was unnatural on the part of this witness not to go to the source of shrieks, giving explanation that after hearing the shrieks he stopped on his way to the village and immediately thereafter he saw both the accused running fast and crossing him. On being stopped and asked by PW.3, the accused told him that they were running without any specific purpose. Immediately thereafter, he could not hear any cry. Therefore, he did not inspect the place from where the cries seem to be coming. The trial court has given cogent reasons for beliving PW-3 while observing that he was an independent witness and only 1.1/2 killa away from the tubewell of 'SR' wherefrom he heard the cries. He did not go to the place wherefrom the shrieks had been coming, assuming that the same had been made by the accused and such course could not be unnatural. There is no cogent reason to interfere with such a finding of fact. [Para 12 and 14] [831-F-H; 832-A-C, F-G]

1.6 The trial court reached the conclusion that though it was not a case where the accused had been last seen together with the deceased, however, in a case when the accused had the opportunity to commit the crime and they had the motive on their part to do so, such a circumstance can also be taken note of. [Para 12] [832-B-C]

State of U.P. v. Satish, **2005(2) SCR 1132=(2005) 3 SCC 114,** *Mohd. Azad alias Samin v. State of West Bengal,* **2008(15) SCR 468=(2008) 15 SCC 449 - referred to.**

1.7 The 'barchha' used as a weapon in the crime had been recovered from the sugarcane field at the instance of A-2. It had blood stains on it and had been thrown at a place where it was not visible. It is a circumstance which can safely be relied upon for the conviction of the appellants-accused. [Para 15] [832-G-H; 833-A-B]

2.1 It is a settled legal proposition that conviction of a person in an offence is generally based solely on evidence that is either oral or documentary, but in exceptional circumstances conviction may also be based solely on circumstantial evidence. The prosecution has to establish its case beyond reasonable doubt and cannot derive any strength from the weakness of the defence put up by the accused. However, a false defence may be called into aid only to lend assurance to the court where various links in the chain of circumstantial evidence are in themselves complete. The circumstances from which the conclusion of guilt is to be drawn should be fully established. The same should be of a conclusive nature and exclude all possible hypothesis except the one to be proved. Facts so established must be consistent with the hypothesis of the guilt of the accused and the chain of evidence must be so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused

and must show that in all human probability the act must have been done by the accused. [Para 16] [833-D-G]

Sharad Birdhichand Sarda v. State of Maharashtra, **1985 (1) SCR 88 = AIR 1984 SC 1622;** and *Paramjeet Singh @ Pamma v. State of Uttarakhand,* **2010 (11) SCR 1064 = AIR 2011 SC 200 - relied on.**

2.2 In a case like this, where all circumstances stand proved against the appellants, their defence may be examined to test the circumstances stood proved against them. A-1 is a resident of another district. He did not take the plea of alibi, nor did he lead any evidence to support the hypothesis that he was not present at the place of occurrence on the date of incident. His only plea has been that he had falsely been implicated without saying anything further. [Para 17] [833-H; 834-A-B]

2.3 The age of the accused at the time of occurrence had been shown on the record as 19 and 23 years respectively and the deceased was 5 ft.10 inch tall and 25 years of age. It is difficult to imagine that one person could cause 22 injuries on such a well-built person unless the other persons had caught hold of him. All the injuries were found to be antemortem in nature and sufficient to cause death in the ordinary course of nature. The injuries look as if received by a person whilst trying to save himself. All the injuries found on the person of the deceased are on front side of the body and not a single injury has been found on the back. Such injury could not have been caused unless somebody had caught hold of the deceased from the back. It is a case of circumstantial evidence and in the facts and circumstances of the case it cannot be said that as injuries were found to have been caused by single weapon, involvement of A-1 was doubtful. [Para 20-21] [835-A-B; 837-E-G]

Case Law Reference:

2008 (11) SCR 1048	**relied on**	**para 7**
2009 (13) SCR 367	**relied on**	**para 7**
2010(9) SCR 239	**relied on**	**para 7**
2010(8) SCR 1036	**relied on**	**para 7**
2003(2) Suppl. SCR 445	**relied on**	**para 10**
2005(2) SCR 1132	**referred to**	**para 13**
2008(15) SCR 468	**referred to**	**para 13**
1985(1) SCR 88	**relied on**	**para 16**
2010(11) SCR 1064	**relied on**	**para 16**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.916 of 2005.

From the Judgment & Order dated 31.08.2004 of the High Court of Punjab & Hayrana at Chandigarh in Crl. Appeal No. 167-DB of 1999.

S.P. Laler, Neeraj Mor, R.C. Kaushik for the Appellants.

Rajeev Gaur Naseem, Kamal Gupta, Satish Hooda for the Respondent.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This appeal has been preferred against the judgment and order dated 31.8.2004 passed by the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 167-DB of 1999, by which it has affirmed the judgment and order of the Trial Court in Sessions Case No. 5 of 1998 dated 22.2.1999 convicting the appellants for the offence punishable under Section 302 of Indian Penal Code, 1860 (hereinafter referred to as 'IPC') and awarding the

sentence of life imprisonment and imposing a fine of Rs.2,000/- each.

2. **FACTS**:

(A) That on 9.10.1997, some labourers were working in the fields of Ishwar Singh (PW.2) and his son Amardeep was also with them. On that date at about 7.00 PM, Ishwar Singh (PW.2) started from his house for his fields in order to keep watch on the crop, relieving Amardeep from the fields. On his way, Ishwar Singh (PW.2) saw Kulvinder Singh and Jasvinder Singh/appellants at the tubewell of Singh Ram. Kulvinder Singh was sitting on a cot outside the tubewell while Jasvinder Singh was inside the tubewell. On being asked by Ishwar Singh (PW.2), Kulvinder Singh replied that they were there in a routine manner as it was the tubewell of Singh Ram, the father of Jasvinder Singh. Kulvinder Singh is the son of the maternal uncle of Jasvinder Singh. After reaching his fields, Ishwar Singh (PW.2) relieved his son Amardeep of his duties. The next morning i.e., on 10.10.1997, at about 6.00 AM, the labourers of Mange Ram, Sarpanch, (PW.11) of the same village came and told him that a dead body was lying near the paddy field in the water channel. Mange Ram (PW.11) reached the spot with his labourers. By that time several other villagers had also collected there and they identified the dead body as being that of Amardeep. They also found a large number of wounds caused by a sharp-edged weapon on the body. They immediately called Ishwar Singh (PW.2), father of the deceased to the spot.

(B) Mange Ram (PW.11) then started for Police Station Radaur to make the report, however, he met Roop Chand SI/SHO, Police Station Radaur (PW.14) on the way and informed him that Amardeep had been murdered by some unknown person by assaulting him with sharp edged weapons. Roop Chand, SI, (PW.14) asked Mange Ram (PW.11) to go to the Police Station to lodge the complaint formally. Thus, the FIR was lodged. Roop Chand, SI, (PW.14) reached the place of

occurrence and examined the dead body as well as the place where it was lying. He prepared the inquest report and sent the dead body of Amardeep for postmortem examination. Roop Chand, SI, (PW.14) also got the spot photographed, prepared a rough site plan of the place of occurrence and recorded the statements of the witnesses in which Ishwar Singh (PW.2) told him that about 8 to 10 days before the date of occurrence, he saw Jasvinder Singh/appellant grappling with his son Amardeep while they were playing kabaddi. He intervened and asked the reason for the same and Jasvinder Singh had disclosed that Amardeep was teasing his sister and wife. Ishwar Singh (PW.2) reprimanded his son Amardeep for the alleged misconduct, however, Amardeep protested and told him that the accusation was false. During the course of the investigation, Roop Chand, SI, (PW.14) also came to know that on 9.10.1997 at about 7.30 PM, Ranbir Singh (PW.3) had started for his fields and when he was by the side of bund of the village, he heard shrieks from the place where the dead body of Amardeep was found lying the next morning. He also saw both the appellants running fast and they crossed him and on being asked as to why they were running, they did not give any reason but rather told him that they were running fast without any purpose. However, Ranbir Singh (PW.3) came to know only next morning that Amardeep had been murdered.

(C) On 13.10.1997, Phool Singh (PW.10) produced the accused before Roop Chand, SI (PW.14) and told him that they had made extra-judicial confession before him about the killing of Amardeep, because the latter was teasing the wife and sister of Jasvinder Singh. Both the appellants were arrested and interrogated. On their disclosure, the clothes they had put on at the time of occurrence, which had already been washed, were recovered. On disclosure of Jasvinder Singh-appellant, the barchha used for committing the crime was recovered on 14.10.1997. After conducting the postmortem examination, Dr. Vijay Mohan Atreja (PW.9) gave a report stating that there were 22 injuries on the person of Amardeep and the same could

have been caused by a barchha. The barchha recovered on the disclosure of the appellant-Jasvinder Singh had blood stains on it at the time of recovery. Roop Chand, SI, (PW.14) recovered the blood stained chappals and the blood stained earth from the spot and sent all those items alongwith barchha and clothes to the Forensic Science Laboratory. After completing the investigation, a chargesheet was submitted against the appellants. The court after completing the formalities committed the case to the Sessions Court vide order dated 20.1.1998. They were charged under Sections 302 read with 34 IPC vide order dated 20.2.1998 to which the appellants pleaded not guilty and claimed trial.

(D) The prosecution examined 14 witnesses at the trial including Ishwar Singh, (PW.2); Ranbir Singh (PW.3), who saw the accused running fast and crossing him on the evening of 9.10.1997 and heard the shrieks from the place of occurrence; Dr. Vijay Mohan Atreja (PW.9), who conducted the postmortem examination alongwith Dr. Ashwani Bhatnagar on the dead body of Amardeep; Phool Singh, (PW.10) before whom the extra-judicial confession was made by the appellants; Mange Ram, Sarpanch, (PW.11) complainant/informant in the case; Mam Chand (PW.12), witness to the recovery of barchha on the disclosure statement of the appellant Jasvinder Singh; and Roop Chand (PW.14), the investigating officer. The reports of the Serologist were tendered in evidence. On closure of the prosecution case, the Trial Court examined the appellants/accused under Section 313 of Code of Criminal Procedure, 1973 (hereinafter called 'Cr.P.C.'). Both the accused denied their participation and pleading that they had been falsely implicated.

(E) After considering the entire evidence on record, the Trial Court vide judgment and order dated 22.2.1999 convicted both the appellants for the offence punishable under Section 302 IPC and awarded the sentence of life imprisonment and a fine of Rs.2,000/- each.

(F) Being aggrieved, the appellants preferred Criminal Appeal No. 167-DB of 1999 which has been dismissed by the High Court vide judgment and order dated 31.8.2004. Hence, this appeal.

3. Shri S.P. Laler, learned counsel appearing for the appellants, submitted that it is a case of circumstantial evidence; that there was no motive for committing the murder of Amardeep; that there had been material contradictions in the evidence of the witnesses; the chain of circumstances could not be completed; in the facts of the case the extra-judicial confession could not be relied upon by any means; the theory of the deceased being last seen with the appellants cannot be applied. Involvement of both the appellants in the commission of the offence is doubtful as the injuries found on the person of the deceased had been caused only by one weapon. The courts below have erred in convicting the appellants and, therefore, the judgments and orders of the courts below are liable to be set aside.

4. Shri Rajeev Gaur "Naseem", learned counsel appearing for the respondent-State, has opposed the appeal contending that both the courts below have recorded concurrent findings of fact after appreciating the entire evidence on record. Earlier there had been a fight between Jasvinder Singh-appellant and Amardeep- deceased. Jasvinder Singh-appellant had a grudge against Amardeep, as Amardeep had teased his wife and sister and this fact had come to the notice of Ishwar Singh (PW.2), father of the deceased. Thus, motive stood fully established. Evidence of Phool Singh (PW.10) regarding the extra-judicial confession is to be believed for the reason that he was the Ex-Sarpanch of the village and the appellants/ accused had gone to him, so that he could produce them before the police. In fact, the appellants/accused were produced by Phool Singh (PW.10) before the police and they had disclosed to him that they had murdered Amardeep. Appellants were seen together with the deceased just before the

commission of the crime. Twenty two injuries were found on the person of Amardeep-deceased, and even if they had been caused by one weapon, it is not possible for a single person to cause so many injuries, as the deceased was a young man of 25 years and of 5 ft. 10 inch height, while the appellants were at that time 19 and 23 years of age respectively. Even if there is any contradiction in the statements of the witnesses, it is so trivial that it cannot be taken note of. The appeal lacks merit and is liable to be dismissed.

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

6. The courts below have examined the entire evidence on record and reached the conclusion that chain of circumstances stood completed and all the circumstances pointed towards the guilt of the accused. Such findings stand fully substantiated by the depositions of the witnesses in the court. The offence was committed in the evening of 9.10.1997 and in respect of the same, an FIR was lodged on 10.10.1997 and the extra-judicial confession has been made on 13.10.1997. Thus, for three days, the appellants remained wanted in the case. Ishwar Singh (PW.2), the father of Amardeep-deceased deposed that about 8/10 days prior to the incident while he was returning home with his son Kuldeep, he saw Jasvinder Singh, appellant/accused playing Kabaddi with his son Amardeep-deceased and suddenly they started quarrelling with each other and on being asked Jasvinder Singh-accused had told him that Amardeep-deceased was teasing his sister and wife though Amardeep-deceased protested and told him that he was telling a lie. The statement of Ishwar Singh (PW.2) in respect of motive also gets corroborated by the statement of Saheb Singh (PW.13), an independent witness to the extent that a month prior to the murder of Amardeep, Jasvinder Singh-accused made a complaint to two-three persons about Amardeep-deceased teasing his sister. The statement of Saheb Singh (PW.13) has been scrutinised by both the courts below and had been found trustworthy on the ground that he did not depose anything about

the incident of quarrel between Jasvinder Singh-accused and Amardeep-deceased while playing Kabaddi. Thus, the Trial Court had found that he was fair and did not depose falsely. Thus, it stood established that Jasvinder Singh-accused had been harbouring in his mind the suspicion that Amardeep-deceased was teasing his sister and wife.

7. In *State of Uttar Pradesh v. Kishanpal & Ors.,* (2008) 16 SCC 73, this Court examined the issue of motive in a case of circumstantial evidence and observed that motive is a thing which is primarily known to the accused themselves and it is not possible for the prosecution to explain what actually prompted or excited them to commit the particular crime and thus, motive may be considered as a circumstance which is relevant for assessing the evidence and becomes an issue of importance in a case of circumstantial evidence. Thus, absence of motive in a case depending on circumstantial evidence is a factor that weighs in favour of the accused. (See also: *Pannayar v. State of Tamil Nadu by Inspector of Police,* (2009) 9 SCC 152; *Babu v. State of Kerala,* (2010) 9 SCC 189; and *Bipin Kumar Mondal v. State of West Bengal,* AIR 2010 SC 3638).

8. If the finding recorded by the courts below on the issue of motive is examined in the light of the law laid down by this Court in the above cases, no fault can be found with the same.

9. On the issue of extra-judicial confession, Phool Singh (PW.10) has deposed that he was the Ex-Sarpanch and both the appellants/accused approached him on 13.10.1997 and disclosed that they had committed the murder of Amardeep-deceased and he should take them to the police. He deposed that both the accused came to him at about 1.00 p.m. and he produced them before the police at about 3.30/4.00 p.m. Undoubtedly, both the appellants/accused had been arrested by the police only on 13.10.1997, as it is not the defence version that they had been arrested earlier to 13.10.1997, neither have they challenged the deposition of Phool Singh (PW.10) that he did not produce them before the police, nor it had been their

case that they had been arrested from somewhere else. Phool Singh (PW.10) faced the gruelling cross-examination but defence could not elucidate anything to discredit him and the courts below have found that the deposition of Phool Singh (PW.10) in respect of the extra-judicial confession made to him by the accused remained a trustworthy piece of evidence as rightly been relied upon.

Phool Singh (PW.10) in his statement recorded under Section 161 Cr.P.C. has stated that the appellants had told him on 13.10.1997 that due to the fear of police they were running from the pillar to post. He had a good understanding with the police being the Ex-Sarpanch and thus, he should help and produce them before the police.

10. In *State of Rajasthan v. Raja Ram,* (2003) 8 SCC 180, this Court held as under:

> "An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made. The value of the evidence as to the confession depends on the reliability of the witness who gives the evidence. It is not open to any court to start with a presumption that extra-judicial confession is a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession was made and the credibility of the witnesses who speak to such a confession. Such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused, the words spoken to by the witness are clear, unambiguous and

unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it. After subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, the extra-judicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility."

11. After going through the evidence of Phool Singh (PW.10), we reach the inescapable conclusion that Phool Singh (PW.10) is an independent witness and by no means could be held to be biased or inimical to the accused. There is nothing on record to indicate that he had any motive to falsely implicate the accused or that there was any motive for attributing an untruthful statement to the accused. He had made a crystal clear statement conveying that the accused had disclosed to him that they had committed the murder of Amardeep-deceased. Thus, we do not find any reason not to accept his deposition in respect of the extra-judicial confession made by the appellants as his deposition stands the test of credibility.

12. Not a single witness has deposed that the appellants/accused were last seen with the deceased. However, the courts below have found that the prosecution case has been very close to the circumstances of the appellants and deceased being last seen together. Ishwar Singh (PW.2) has deposed that the tubewell of Singh Ram is on the passage connecting his fields with the abadi of the village, where he saw both the appellants at about 7.00 p.m. Immediately thereafter, his son, Amardeep started for the village between 7.30 and 7.45 p.m. Ranbir Singh (PW.3) who heard the cries from the place of occurrence and saw the appellants running towards the village and the deceased was found to have an empty stomach at the time of occurrence as per the post mortem report had indicated that Amardeep had been murdered before he could take his evening meal. The Trial Court has examined the statement of Ranbir Singh (PW.3) minutely and rejected the defence version that in such a circumstance it was unnatural on the part of this

witness not to go to the source of shrieks, giving explanation that after hearing the shrieks he stopped on his way to the village and immediately thereafter he saw both the accused running fast and crossing him. On being stopped and asked by Ranbir Singh (PW.3), the appellants told him that they were running without any specific purpose. Immediately thereafter, he could not hear any cry. Therefore, he did not inspect the place from where the cries seem to be coming. Thus, the Trial Court reached the conclusion that though it was not a case where the accused had been last seen together with the deceased, however, in a case when the accused had the opportunity to commit the crime and they had the motive on their part to do so, such a circumstance can also be taken note of.

13. In *State of U.P. v. Satish,* (2005) 3 SCC 114, this Court held that the last seen theory comes into play where the time gap between the point of time when the accused and deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. Similar view has been reiterated in *Mohd. Azad* alias *Samin v. State of West Bengal,* (2008) 15 SCC 449.

14. The Trial Court has given cogent reasons for believing Ranbir Singh (PW.3) observing that Ranbir Singh (PW.3) was an independent witness and only 1-1/2 killa away from the tubewell of Singh Ram wherefrom he heard the cries. He did not go to the place wherefrom the shrieks had been coming assuming that the same had been made by the accused and such a course could not be unnatural. In spite of the fact that Shri Laler, learned counsel appearing for the appellants has taken us through the evidence on record, we do not find any cogent reason to interfere with such a finding of fact.

15. The barchha used as a weapon in the crime had been recovered from the sugarcane field. It had blood stains on it and had been thrown at a place where it was not visible to all. In the instant case, as the motive stood proved distinctly, recovery

of a blood stained barchha from the sugarcane field at the disclosure of Jasvinder Singh-accused is a circumstance which can safely be relied upon for the conviction of the appellants-accused. As both the appellants had been seen immediately before the occurrence at the place of occurrence and the deceased had come there shortly thereafter, they had an opportunity to kill Amardeep. After the occurrence, they were seen running together from the place of occurrence by Ranbir Singh (PW.3). Such a conduct, if examined, with another circumstance i.e. the extra-judicial confession made by the appellants before Phool Singh (PW.10), completes the chain of circumstances pointing to the guilt of the appellants-accused.

16. It is a settled legal proposition that conviction of a person in an offence is generally based solely on evidence that is either oral or documentary, but in exceptional circumstances conviction may also be based solely on circumstantial evidence. The prosecution has to establish its case beyond reasonable doubt and cannot derive any strength from the weakness of the defence put up by the accused. However, a false defence may be called into aid only to lend assurance to the Court where various links in the chain of circumstantial evidence are in themselves complete. The circumstances from which the conclusion of guilt is to be drawn should be fully established. The same should be of a conclusive nature and exclude all possible hypothesis except the one to be proved. Facts so established must be consistent with the hypothesis of the guilt of the accused and the chain of evidence must be so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. (vide: *Sharad Birdhichand Sarda v. State of Maharashtra,* AIR 1984 SC 1622; and *Paramjeet Singh @ Pamma v. State of Uttarakhand,* AIR 2011 SC 200).

17. In a case like this, where all circumstances stand proved against the appellants, their defence may be examined to test

the circumstances stood proved against them. In the instant case, Kulvinder Singh, appellant No.1 is a resident of another district. He had not taken the plea of alibi, nor led any evidence to support the hypothesis that he was not present at the place of occurrence on the date of incident. His only plea has been that he had falsely been implicated without saying anything further.

18. Shri Laler, learned counsel appearing for the appellants has challenged the statement made by Ranbir Singh (PW.3) that he went to the place of occurrence in the morning on 10.10.1997 at 9.00 AM. The police had reached there. "Police remained there till the accused were arrested" stating that it cannot be true as, admittedly, the appellants had been arrested on 13.10.1997 on being produced by Phool Singh (PW.10). Ranbir Singh (PW.3) did not remain present for three days at the place of occurrence. The relevant part of the cross-examination has to be read as a whole in order to examine the correctness of the submissions so advanced on behalf of the appellants. The relevant part reads as under:

> *"I reached the tubewell of Singh Ram on the next morning at 9.00 a.m. Police had reached the place by that time. Police did not record statement of anyone else in my presence. Police remained at the spot till the accused were arrested. I cannot tell when the accused were arrested."*

19. By reading the aforesaid part of the statement it cannot be held that Ranbir Singh (PW.3) had deposed that the appellants had been arrested in his presence, as he was not even aware when they had been arrested. So his statement has to be understood in the following way: That the police remained at the place of occurrence for several days and may also mean till 13.10.1997 when the accused were arrested. Thus, no case is made out for interference on this count also.

20. The last submission advanced by Shri Laler had been

that if injuries had been caused by one weapon as deposed by Dr. Vijay Mohan Atreja (PW.9), the involvement of Kulvinder Singh-appellant No.1 becomes doubtful and he should be acquitted giving him the benefit of doubt. According to the post mortem report, the following injuries were found on the body of Amardeep-deceased, aged 25 years.

1. Incised wound on the left palm on the thenar eminence placed obliquely 4 cm x 1 cm tapering downwards and laterally towards the left thumb 2 cm deep at the medial side.

2. Incised wound 2 cm x 1 cm each on the palmer aspect of lower phalanx of left index and middle finger and upper phalanx of the left little finger.

3. Incised wound 9 cm in length x 1 cm on the medial aspect of the mid left forearm place obliquely, 7 cm below the left elbow.

4. Incised wound 3.5 cm x 1 cm placed obliquely on the right forehead starting from the medial side of the right eyebrow and extending upward and laterally 4 cm above the lateral border of right eyebrow.

5. Incised wound 5 cm x 1 cm on right eye lid just below the right eyebrow and extending laterally and over the skin 2 cm lateral to the lateral angle of the right eye.

6. Incised wound 14 cm x 2.5 cm on the front of the face starting from the right cheek bone's prominence traversing obliquely towards the left on the left cheek.

7. Incised wound 5.5. cm x 1 cm on the face just below the tip of the nose placed horizontally parallel to the upper lip.

8. Incised wound 4 cm x 1 cm on the right side of the chin starting from the right angle of the lower lip and extending downward and medially towards the chin.

9 Stab wound tapering at both ends 2 cm x 1 cm on the right side of the neck placed obliquely 3 cm below from the right angle of the mandible going medially and downwards.

10. `Stab wound 2 cm x 2 cm placed on the anterior aspect of the middle of the neck transversely.

11. Stab wound 4 cm x 2 cm on the left side of the neck 2 cm below the right angle of mandible.

12. Stab wound 2.5 cm x 2 cm placed vertically placed lateral to injury no.1 (3 cm) and 6 cm from the left mastoid.

13. Stab wound 4 cm x 3 cm on left axillary fold (anterior) place vertically spindle shape tapering upwards.

14. Stab wound 4 cm x 2 cm elliptical at lower border of left axilla placed vertically.

15. Stab wound 7 cm x 3 cm elliptical, placed obliquely starting from 5 cm lateral to left nipple and extending upto 3 cm medial to injury no.14.

16. Stab wound 4 cm x 3 cm elliptical placed obliquely on the left chest, 15 cm from the midline and 7 cm below the injury no.15.

17. Incised wound 6 cm x 2 cm placed obliquely on left side of chest 3 cm below and lateral to injury no.16.

18. Stab wound 4 cm medial to left iliac crest placed transversely 5 cm x 2 cm. The loops of small intestine were coming out of the wound.

19. Incised wound 4.5 cm x 2 cm placed obliquely on the right inguinal ligament.

20. Incised wound 8 cm x 5 cm placed transversely parallel to the upper border of left scapula in the supra scapular region.

21. Incised wound 1.5 cm x 1 cm placed transversely on the interior side of left leg in the middle.

22. Incised wound 3 cm x 2 cm on the left posterior axillary line 12 cm below left axilla placed vertically going upto the left chest wall.

According to Dr. Vijay Mohan Atreja (PW.9), the cause of death in this case was shock and hemorrhage due to extensive injuries to the vital organs. All these injuries were found to be anti-mortem in nature and sufficient to cause death in the ordinary course of nature.

The injuries look as if received by a person whilst trying to save himself.

21. The age of the appellants at the time of occurrence had been shown on the record as 19 and 23 years respectively and the deceased was 5 ft.10 inch tall and 25 years of age. It is difficult to imagine that one person could cause 22 injuries on such a well-built person unless the other persons had caught hold of him. All the injuries found on the person of the deceased are on front side of the body and not a single injury has been found on the back. Such injury could not have been caused unless somebody had caught hold of the deceased from the back. It is a case of circumstantial evidence and in the facts and circumstance of the case, the submission made by Shri Laler is merely worth taking note of and not worth consideration.

22. In view of the above, we do not find any force in the appeal and is, accordingly, dismissed.

R.P. Appeal dismissed.

THIRUMALAI CHEMICALS LIMITED
v.
UNION OF INDIA & ORS.
(Civil Appeal Nos. 3191-3194 of 2011)

APRIL 11, 2011

[R.V. RAVEENDRAN AND K.S. RADHAKRISHNAN, JJ.]

Foreign Exchange Management Act, 1999 – ss. 19(2) and 49 – Cause of action arose when FERA was in force, but show cause notices and impugned orders issued when FEMA was in force – Appeal filed u/s. 19 of FEMA – Rejection of, by Appellate Tribunal constituted under FEMA, applying the first proviso to sub section (2) of s. 52 of FERA instead of following the proviso to sub section (2) to s. 19 of FEMA – Held: Limitation for filing appeal has to be considered u/s. 19(2) of FEMA – Provision relating to limitation is procedural – In absence of any provision to contrary, the law in force on date of initiation of appeal irrespective of the date of accrual of the cause of action for the original order, would govern the period of limitation – Section 52(2) can apply only to an appeal to the Appellate Board and not to any Appellate tribunal – Therefore, irrespective of the fact that the adjudicating officer had passed the orders with reference to the violation of the provisions of FERA, as the appeal against such order was to the appellate tribunal constituted under FEMA, necessarily s. 19(2) of FEMA alone would apply and it is not possible to import the provisions of s. 52(2) of FERA – Tribunal and High Court misdirected themselves in assuming that the period of limitation was governed by s. 52(2) of FERA – Appellate Tribunal can entertain the appeal after the prescribed period of 45 days if it is satisfied, that there was sufficient cause for not filing the appeal within the said period – Matter is remitted back to the Tribunal for fresh

consideration – Foreign Exchange Regulation Act, 1973 – ss. 52(2), 8(3) and 8(4) – General Clauses Act – s. 6.

Substantive law and procedural law – Distinction between – Held: Substantive law refers to body of rules that creates, defines and regulates rights and liabilities – Right of appeal may be a substantive right but the procedure for filing the appeal including the period of limitation cannot be called a substantive right – Aggrieved person cannot claim any vested right claiming that he should be governed by the old provision pertaining to period of limitation – Procedural law establishes a mechanism for determining those rights and liabilities and a machinery for enforcing them – Procedural law is retrospective meaning thereby that it would apply even to acts or transactions under the repealed Act – Right of appeal conferred u/s. 19(1) of FEMA is a substantive right – Procedure for filing an appeal under sub-section (2) of s. 19 as also the proviso to sub-section (2) of s. 19 conferring power on the Tribunal to condone delay in filing the appeal if sufficient cause is shown, are procedural rights.

Appellant Company imported various consignments for home consumption and opened letters of credit in the year 1996. Thereafter, the Company forwarded the Exchange Control Copies of bills of entry (ECC-bills of entry) to banks (authorized dealers) for submitting to Reserve Bank of India. The authorized dealers did not forward the ECC bills of entry to RBI. The Directorate of Enforcement passed orders imposing penalty on the Company for contravention of Section 8(3), Section 8(4) of FERA read with sub-sections (3) and (4) of Section 49 of FERA and issued show cause notices to the Company as the Company had failed to furnish the required bills/ information/documents and also held that an appeal would lie before the Appellate Tribunal after depositing the amount of penalty imposed within 45 days from the

date on which the order was served. The Company informed the Enforcement Directorate that it was due to the mistake of the authorized dealer that the bills of entry were not forwarded to them in time. Subsequently RBI carried out necessary corrections and deleted the entries from their records and regularized the transactions and requested the Directorate of Enforcement to drop the proceedings initiated against the Company. However, the Company did not hear anything from the Directorate, thus, filed appeals against the said orders in 2004 before the Appellate Tribunal for Foreign Exchange with an application under Section 5 of the Limitation Act read with Section 19 and Section 49(5) (a) of FEMA for condonation of delay. The Tribunal applying the first proviso to sub section (2) of s. 52 of FERA, dismissed the appeals on the ground of delay. The appellant filed writ petitions before the High Court for quashing the order and the same were dismissed. Therefore, the appellant Company filed the instant appeal.

Disposing of the appeals, the Court

HELD: 1.1 In the instant case, the cause of action arose when Foreign Exchange Regulation Act, 1973 was in force, but show cause notices and impugned orders were issued when Foreign Exchange Management Act, 1999 was in force and the appeals were also preferred under sub section (1) of Section 19 of FEMA. [Para 11] [852-G-H; 853-A]

1.2 Substantive law refers to body of rules that creates, defines and regulates rights and liabilities. Right conferred on a party to prefer an appeal against an order is a substantive right conferred by a statute which remains unaffected by subsequent changes in law, unless modified expressly or by necessary implication. Procedural law establishes a mechanism for determining those rights and liabilities and a machinery for enforcing

them. Right of appeal being a substantive right always acts prospectively. Every statute is prospective unless it is expressly or by necessary implication made to have retrospective operation. Right of appeal may be a substantive right but the procedure for filing the appeal including the period of limitation cannot be called a substantive right, and aggrieved person cannot claim any vested right claiming that he should be governed by the old provision pertaining to period of limitation. Procedural law is retrospective meaning thereby that it would apply even to acts or transactions under the repealed Act. Unless the language used plainly manifests in express terms or by necessary implication a contrary intention a statute divesting vested rights is to be construed as prospective, a statute merely procedural is to be construed as retrospective and a statute which while procedural in its character, affects vested rights adversely is to be construed as prospective. [Paras 14 and 16] [855-E-H; 856-D-E]

Garikapati Veeraya vs. N. Subbiah Choudhry and Ors. **AIR 1957 SC 540;** *New India Insurance Company Limited Vs. Smt. Shanti Mishra* **(1975) 2 SCC 840;** *Hitendra Vishnu Thakur and Ors. vs. State of Maharashtra and Ors.* **(1994) 4 SCC 602;** *Maharaja Chintamani Saran Nath Shahdeo vs. State of Bihar and Ors.* **(1999) 8 SCC 16;** *Shyam Sundar and Ors. vs. Ram Kumar and Anr.* **(2001) 8 SCC 24 – relied on.**

1.3 Right of appeal conferred under Section 19(1) of FEMA is a substantive right. The procedure for filing an appeal under sub-section (2) of Section 19 as also the *proviso* to sub-section (2) of Section 19 conferring power on the Tribunal to condone delay in filing the appeal if sufficient cause is shown, are procedural rights. The *proviso* to sub-section (2) of Section 19 operates retrospectively. [Paras 17 and 18] [856-F-H]

1.4 Law of limitation is generally regarded as

procedural and its object is not to create any right but to prescribe periods within which legal proceedings be instituted for enforcement of rights which exist under substantive law. On expiry of the period of limitation, the right to sue comes to an end and if a particular right of action had become time barred under the earlier statute of limitation the right is not revived by the provision of the latest statute. Statutes of limitation are, thus, retrospective insofar as they apply to all legal proceedings brought after their operation for enforcing cause of action accrued earlier, but they are prospective in the sense that neither have the effect of reviving the right of action which is already barred on the date of their coming into operation, nor do they have effect of extinguishing a right of action subsisting on that date. [Para 19] [857-B-D]

THE YDUN (1899) Probate Division p 236; *The King vs. Chandra Dharma* **(1905) 2 KB 335;** *Yew Bon Tew v. Kenderaan Bas Mara* **(1982) 3 All E.R. 833 – referred to.**

Bennion **on Statutory Interpretation 5th Edn.(2008) 321 – referred to.**

1.5 An accrued right to plead a time bar, which is acquired after the lapse of the statutory period, is nevertheless a right, even though it arises under an Act which is procedural and a right which is not to be taken away pleading retrospective operation unless a contrary intention is discernible from the statute. Therefore, unless the language clearly manifests in express terms or by necessary implication, a contrary intention a statute divesting vested rights is to be construed as prospective. A statute, merely procedural is to be construed as retrospective and a statute while procedural in nature affects vested rights adversely is to be construed as prospective. The manner of filing an appeal, under sub

section (2) of Section 19 of FEMA and the time within which such an appeal has to be preferred and the power conferred on the Tribunal to condone delay under the proviso to sub-section (2) of Section 19 are matters of procedure and act retrospectively, so as to cover causes of action which arose under FERA. Since the appeal was filed under FEMA with an application for condonation of delay such an appeal has to be considered by the Tribunal under the proviso to sub-section (2) of Section 19 FEMA and if the Company shows sufficient cause for not filing the appeal in time then the Tribunal can condone the delay and entertain the appeal, especially when there is no accrued right to the respondent to plead a time bar. [Para 20] [858-C-H]

Principles of Statutory Interpretation **12th Edition p 541 – referred to.**

1.6 The appellate Board under FERA, stood dissolved and ceased to function when FEMA was enacted. Therefore, any appeal against the order of the adjudicating officer made under FERA, after FEMA came into force, had to be filed before the Appellate Tribunal constituted under FEMA and not to the Appellate Board under FERA. Section 52 of FERA stipulates the limitation for an appeal against the orders of the adjudicating officer to the Appellate Board. It provides the period of limitation as 45 days but the Board may entertain an appeal after the expiry of 45 days but not beyond 90 days. Under FEMA, an appeal lies to the appellate tribunal constituted under that Act and Section 19(2) provides that every appeal shall be filed within 45 days from the date on which a copy of the order of the adjudicating authority is received. The appellate tribunal is however, empowered to entertain appeals filed after the expiry of 45 days if it is satisfied that there was sufficient cause for the delay in filing the appeal. Though both Section 52(2)

of FERA and Section 19(2) of FEMA provide a limitation of 45 days and also give the discretion to the appellate authority to entertain an appeal after the expiry of 45 days, if the appellant was prevented by sufficient cause from filing an appeal in time, the appellate authority under FERA could not condone the delay beyond 45 days whereas under FEMA, if the sufficient cause is made out, the delay can be condoned without any limit. Any provision relating to limitation is always regarded as procedural and in the absence of any provision to the contrary, the law in force on the date of the institution of the appeal, irrespective of the date of accrual of the cause of action for the original order, would govern the period of limitation. [Para 25] [864-B-G]

1.7 Section 52(2) can apply only to an appeal to the appellate Board and not to any appellate tribunal. Therefore, irrespective of the fact that the adjudicating officer had passed the orders with reference to the violation of the provisions of FERA, as the appeal against such order was to the appellate tribunal constituted under FEMA, necessarily Section 19(2) of FEMA alone would apply and it is not possible to import the provisions of Section 52(2) of FERA. The concern is with the appeals to the Appellate Tribunal, limitation being a matter of procedure, only that law that is applicable at the time of filing the appeal, would apply. Therefore, Section 19(2) of FEMA and not Section 52(2) of FERA would apply. Under Section 19(2), there is no ceiling in regard to the period of delay that could be condoned by the appellate tribunal. If sufficient cause is made out, delay beyond 45 days can also be condoned. The tribunal and the High Court misdirected themselves in assuming that the period of limitation was governed by Section 52(2) of FERA. [Para 26] [864-H; 865-A-D]

1.8 Clause (b) of sub-section (5) of Section 49 refers

to appeal preferred and pending before the Appellate Board under FERA at the time of repeal. The said clause does not specifically refer to appeals preferred against adjudication orders passed under FEMA with reference to causes of action which arose under FERA. The right of appeal under FEMA has already been saved in respect of cause of action which arose under FERA however, subject to the proviso to sub-section (2) of Section 19, in the case of belated appeals. Section 49 of FEMA does not seek to withdraw or take away the vested right of appeal in cases where proceedings were initiated prior to repeal of FERA on 01.06.2000 or after. On a combined reading of Section 49 of FEMA and Section 6 of General Clauses Act, it is clear that the procedure prescribed by FEMA only would be applicable in respect of an appeal filed under FEMA though cause of action arose under FERA. In fact, the time limit prescribed under FERA was taken away under the *proviso* to sub-section (2) of Section 19 and the Tribunal has been conferred with wide powers to condone delay if the appeal is not filed within forty-five days prescribed, provided sufficient cause is shown. Therefore, the findings rendered by the Tribunal as well as the High Court that the Tribunal does not have jurisdiction to condone the delay beyond the date prescribed under FERA is not a correct understanding of the law on the subject. Therefore, the Appellate Tribunal can entertain the appeal after the prescribed period of 45 days if it is satisfied, that there was sufficient cause for not filing the appeal within the said period. Therefore, the orders passed by the Tribunal and the High Court are set aside and the matter is remitted back to the Tribunal for fresh consideration in accordance with law on the basis of the findings recorded. [Paras 27 to 29] [865-E-H; 866-A-D]

Anant Gopal Sheorey v. State of Bombay **AIR 1958 SC 915;** *Rao Shiv Bahadur Singh and Anr. vs. State of Vindhya*

Pradesh **AIR 1953 SC 394;** *State of Punjab v. Mohar Singh S/o Pratap Singh* **AIR 1955 SC 84;** *T.S. Baliah v. T.S. Rangachari, ITO* **AIR 1969 SC 701;** *Gajraj Singh and Ors. vs. State Transport Appellate Tribunal and Ors.* **(1997) 1 SCC 650;** *Gammon India Ltd. vs. Special Chief Secretary and Ors.* **(2006) 3 SCC 354;** *Harbanslal Sahnia and Anr. vs. IOC Ltd. and Ors.* **(2003) 2 SCC 107;** *L.K. Verma vs. HMT Ltd. and Anr.* **(2006) 2 SCC 269 – referred to.**

Case Law Reference:

(2003) 2 SCC 107	**Referred to**	**Para 9**
(2006) 2 SCC 269	**Referred to**	**Para 9**
AIR 1957 SC 540	**Referred to**	**Para 15**
(1975) 2 SCC 840	**Referred to**	**Para 15**
(1994) 4 SCC 602	**Referred to**	**Para 15**
(1999) 8 SCC 16	**Referred to**	**Para 15**
(2001) 8 SCC 24	**Referred to**	**Para 15**
(1899) Probate Division 236	**Referred to**	**Para 20**
(1905) 2 KB 335	**Referred to**	**Para 20**
(1982) 3 ALLER	**Referred to**	**Para 20**
AIR 1958 SC 915	**Referred to**	**Para 24**
AIR 1953 SC 394	**Referred to**	**Para 24**
AIR 1955 SC 84	**Referred to**	**Para 24**
AIR 1969 SC 701	**Referred to**	**Para 24**
(1997) 1 SCC 650	**Referred to**	**Para 24**
(2006) 3 SCC 354	**Referred to**	**Para 24**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3191-3194 of 2011.

From the Judgment & Order dated 24.07.2008 of the High Court of Judicature at Bombay in Writ Petition Nos. 692, 1528, 1531 & 693 of 2008.

Mohan Jayakar, Uma, Javaid Muzaffar, Umesh Kumar Khaitan for the Appellant.

Vivek Tankha, ASG, T.V. Ratnam, Rahul Kaushik, B.K. Prasad, Anil Katiyar for the Respondents.

The Judgment of the Court was delivered by

K. S. RADHAKRISHNAN, J. 1. Leave granted.

2. The question that has come up for consideration in this case is whether the Appellate Tribunal constituted under the Foreign Exchange Management Act 1999 (in short FEMA) was right in rejecting a belated appeal filed under Section 19 of FEMA, applying the first *proviso* to sub section (2) of Section 52 of Foreign Exchange Regulation Act 1973 (in short FERA), instead of following the *proviso* to sub section (2) to Section 19 of FEMA.

3. M/s Tirumalai Chemicals Limited (in short 'the Company') had imported various consignments of benezene, orthoxalene etc. for home consumption. For the said purpose, the Company had opened Letters of Credit bearing No.MLCO 4359096 and No.529/960487 on 28.09.96 and 07.08.96 respectively on their bankers ICICI Bank and Standard Chartered Bank (authorized dealers). By letters dated 07.12.96 and 18.01.97 Exchange Control Copies of bills of entry (in short, ECC – bills of entry) in relation to those imports were forwarded by the Company to the above mentioned Banks. As per the provisions of Exchange Control Manual (in short ECM), the

authorized dealers had to submit the ECC-bills of entry submitted by the importers (the Company) to the Reserve Bank of India (in short RBI). The Company was under the bonafide impression that the documents submitted by it were forwarded by the authorized dealers to the RBI and that the RBI in turn had given due intimation to the Enforcement Directorate. The Company on 22.04.2004 received a telephonic communication from the office of the 3rd respondent viz., Directorate of Enforcement, stating that it had passed various orders on 27.01.04 imposing a total penalty of Rs.9,33,63,453/- on the Company on the ground that it had contravened the provisions of Sections 8(3), 8(4) of FERA read with sub-sections (3) and (4) of Section 49 of FEMA. Copies of the orders dated 27.01.04 were then received by the Company on 22.04.04 on request. From those orders the Company came to know that the Directorate of Enforcement had issued four show cause notices dated 14.05.02 stating that the Company had contravened Section 8(3), Section 8(4) of FERA read with para 7A.20 (Chapter 7) of ECM and was required to show cause why adjudication proceedings be not initiated against the Company under Section 49 of FEMA for contravention of the above mentioned provisions. Further, it was also stated that the Company had failed to furnish the required bills/information/ documents and did not avail of the opportunity of hearing in spite of notices issued to them on 29.08.02, 27.10.03 and 01.12.03. Orders dated 27.01.04 also indicated that an appeal would lie before the Appellate Tribunal after depositing the amount of penalty imposed within 45 days from the date on which the order was served. Reference was also made to Section 19 read with Section 49(5)(a) of FEMA.

4. The Company on receipt of the above mentioned orders dated 27.01.04 approached the authorized dealers and enquired whether they had forwarded the ECC of bills of entry to the RBI as required under the provisions of ECM. The ICICI Bank vide their letters dated 12.05.04 informed the Company

that it had received ECC of bills of entry on 20.01.97 with difference of value. The ICICI Bank then forwarded a letter dated 15.05.04 to the RBI seeking its permission to accept the bills of entry stating that the Company had submitted the relevant documents on 20.01.97 with shortfall of value. The Standard Chartered Bank also *vide* their letter dated 12.05.04 informed the RBI that they had also received the Exchange Control Copy of bills of entry for the import in question from the appellant Company on 09.12.96, but due to an inadvertent mistake had reported in their BEF Return that bills of entry were not submitted. The RBI *vide* letter dated nil of May, 2004 sent by registered AD informed the Enforcement Directorate as follows:-

> "……..Please refer to the outstanding entries reported in their respective BEF Statement by the captioned banks in respect of M/s Tirumalai Chemicals Ltd., which was forwarded to you by us. In this connection we advise that, based on the documents and evidence submitted by authorized dealer, we have deleted the entries from our records and regularized the transactions at our end as under :-
>
> (i) ICICI Bank confirmed that they had received EC copies of Bill of Entry in respect of the transactions reported at Sr.No.40 and Sr.No.1 of their BEF Statement referred to above and the entry at Sr. No.28 of their BEF Statement was a repetition of entry at Sr.No.40 of the same statement.
>
> (ii) Standard Chartered Bank has also confirmed to us that the relative EC copy of the Bill of Entry in respect of the transaction reported in their BEF Statement was received by them….".

5. The Company had also sent a letter dated 17.05.04 to the Enforcement Directorate stating that it was not due to the mistake of the Company that the ECC of bills of entry were not

forwarded to the Directorate of Enforcement in time, but due to the mistake of the authorized dealer (Bank). RBI had subsequently carried out necessary corrections and deleted the entries from their records and regularized the transactions and requested to drop the proceedings initiated against the Company.

6. The Company stated that it was under the bonafide impression that respondents would drop the proceedings since RBI had deleted the entries from the records and informed the same to the Enforcement Directorate but nothing was heard from the Directorate and hence the Company was constrained to file appeals against those orders on 02.08.04 before the Appellate Tribunal for Foreign Exchange (in short the Tribunal) *vide* Appeal nos. 787, 788, 789 and 790 of 2004 with an application under Section 5 of the Limitation Act read with Section 19 and Section 49(5) (a) of FEMA for condonation of delay.

7. The Tribunal, however, without going into the merits of the case dismissed the appeals on the ground of delay by its order dated 25.10.2007. The operative portion of the said order reads as follows:-

> "…..Therefore, these appeals when filed after 90 days from the date of receipt of the order has to be dismissed and the exceeding period cannot be condoned by this Tribunal because of legislative mandate couched in clear language.
>
> For the reasons stated herein above, these appeals are dismissed because these appeals have been filed after a total period of 90 days from the date of receipt of impugned order beyond which this Tribunal is not empowered to condone the delay."

8. The Company aggrieved by the above mentioned order preferred writ petitions nos. 692, 1528, 1531 and 693 of 2008

before the Bombay High Court for quashing the order dated 25.10.2007 of the Tribunal as also the order dated 27.01.04 passed by the third respondent contending that the Tribunal was not justified in dismissing the appeals on the ground of delay. The High Court, however, dismissed all the writ petitions by the following order dated 24.07.2008:-

> "There is no dispute that the appeal was filed beyond the period of 90 days. Therefore, the tribunal did not have jurisdiction to condone the delay. The learned counsel, then, submitted that we should consider these petitions as the petitions against the original order.
>
> In our opinion, it will not be appropriate to entertain these petitions as petitions against the original order. The Parliament has provided remedy of an appeal against the original order and has provided for period of limitation for filing that appeal. The Parliament has also provided that delay beyond a certain period cannot be condoned by the Tribunal/Appellate authority. The Petitioners have allowed that remedy of appeal to be barred, therefore, now to entertain these petitions as petitions against the original order would amount to permitting the Petitioners to frustrate the scheme of the Legislation. The scheme of the statute is that a challenge to the original order is to be raised by an appeal which is to be filed within a particular period. The extra ordinary jurisdiction of this court under the Constitution cannot be permitted to be used by the Petitioners, who have allowed their ordinary remedy to be barred. Petitions are, therefore, rejected."

9. Mr. Harish Salve, learned senior counsel appearing on behalf of the appellants submitted that the authorized dealer (Bank) had owned up their mistake and had informed the RBI accordingly and hence there was no reason to penalize the Company for no fault of it. Learned counsel also submitted that the Tribunal had committed a mistake in holding that it had no power to condone the delay beyond 90 days. He also submitted

that even if the Tribunal has no power to condone the delay the High Court could have entertained the writ petitions under Article 226 of the Constitution of India when the impugned order of the Tribunal was manifestly illegal. Learned counsel further submitted that in any view of the matter High Court under Article 226 of the Constitution of India has the power to condone delay in exercise of its extra ordinary jurisdiction and then direct the Tribunal to consider the appeal on merits. Reference was made to the judgments of this Court in *Harbanslal Sahnia & Anr. vs. IOC Ltd. & Ors.* (2003) 2 SCC 107, *L.K. Verma vs. HMT Ltd. & Anr.* (2006) 2 SCC 269.

10. Shri Vivek Tankha, Learned Additional Solicitor General, appearing for the respondents referred to the first proviso to sub section (2) of Section 52 of FERA and submitted that the Tribunal was justified in holding that it had no power to condone the delay beyond a period of 90 days. Ld. ASG also submitted that when a party has availed of the statutory remedy of appeal and lost on the ground of delay the High Court can not exercise its extraordinary jurisdiction under Article 226 / 227 of the Constitution of India.

11. We are in this case called upon to decide the question whether the Tribunal was right in dismissing the appeals preferred under Section 19(1) of FEMA, by applying the first *proviso* to sub section (2)of Section 52 of FERA holding that it had no power to condone the delay beyond 90 days from the date on which the order was served on the person committing the contravention. The Tribunal and the High Court proceeded on the premises that since the cause of action arose when FERA was in force the period of limitation for filing an appeal before the Tribunal even after coming into force of FEMA is as provided under the first *proviso* to sub section (2) of Section 52 of FERA. Admittedly, in this case the cause of action arose when FERA was in force, but show cause notices and impugned orders were issued when FEMA was in force and the appeals were also preferred under sub section (1) of

Section 19 of FEMA. Therefore, the important question that arises for consideration is whether limitation for filing the appeal has to be considered under the *proviso* to sub section (2)of Section 19 of FEMA or under the first proviso to sub section (2) of Section 52 of FERA. In order to answer the above question, it is necessary to examine the scope and ambit of Section 52 of FERA, Section 19 , 49 of FEMA and Section 6 of the General Clauses Act, 1897.

12. FERA was enacted to consolidate and amend the law relating to certain payments dealing in foreign exchange and securities, transactions indirectly affecting the foreign exchange and import and export and import of currency, for conservation of foreign exchange resources of the country and proper utilization thereof in the interest of economic development of the country. Sections 50 and 51 of FERA were the penal provisions which empowered the authority to impose penalty on persons who had contravened some of the provisions of the Act. An appeal was provided under FERA against the order of adjudication before the Foreign Exchange Regulation Appellate Board (in short the 'Board') under Section 52 of that Act within a period of 45 days from the date on which the order was served on the person committing the contravention. The Board was also empowered to entertain any appeal after the expiry of the said period of 45 days but not after 90 days from the date on which the order was served on the person if it was satisfied that the person was prevented by sufficient cause in not filing the appeal in time. It is useful to extract that provision for easy reference :-

> **52. Appeal to Appellate Board** —(1) The Central Government may, by notification in the Official Gazette, constitute an Appellate Board to be called the Foreign Exchange Regulation Appellate Board consisting of a Chairman [being a person who has for at least ten years held a civil judicial post or who has been a member of the Central Legal Service (not below Grade I) for at least three years or who has been in practice as an advocate for at least ten years] and such number of other members, not exceeding four, to be appointed by the Central Government for hearing appeals against the orders of the adjudicating officer made under Section 51.
>
> (2) Any person aggrieved by such order may, [on payment of such fee as may be prescribed and] after depositing the sum imposed by way of penalty under Section 50 and within 45 days from the date on which the order is served on the person committing the contravention, prefer an appeal to the Appellate Board:
>
> Provided that the Appellate Board may entertain any appeal after the expiry of the said period of 45 days, but not after 90 days, from the date aforesaid if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time:
>
> Provided further that where the Appellate Board is of opinion that the deposit to be made will cause undue hardship to the appellant, it may, in its own discretion, dispense with such a deposit either unconditionally or subject to such conditions as it may deem fit.
>
> ……. ……. ……..."

13. FERA was repealed by FEMA which came into force with effect from 01.06.2000. Chapter IV of FEMA deals with contravention of penalties. Section 13 of FEMA empowers the authorized officers to impose penalties for contravention of certain provisions of the Act. Failure to make full payment of penalty, may attract civil imprisonment subject to the provisions of sub section (2) of Section 19. Chapter V of the Act deals with adjudication and appeal. Section 19 deals with the appeal to the Appellate Tribunal. Sub section (2) of Section 19 says that every appeal under sub-section(1) shall be filed within a period of 45 days from the date on which the copy of the order

made by the adjudicating authority or the Special Director (Appeals) is received by the aggrieved person. The Appellate Tribunal is also empowered to entertain the appeals filed after the expiry of the said period of 45 days if it is satisfied that there was sufficient cause for not filing the appeal within that period. Law is well settled that the manner in which the appeal has to be filed, its form and the period within which the same has to be filed are matters of procedure, while the right conferred on a party to file an appeal is a substantive right. The question is, while dealing with a belated appeal under Section 19(2) of FEMA, the application for condonation of delay has to be dealt with under the first *proviso* to sub- section (2) of Section 52 of FERA or under the *proviso* to sub section (2) of Section 19 of FEMA. For answering that question it is necessary to examine the law on the point.

Substantive and Procedural Law:

14. Substantive law refers to body of rules that creates, defines and regulates rights and liabilities. Right conferred on a party to prefer an appeal against an order is a substantive right conferred by a statute which remains unaffected by subsequent changes in law, unless modified expressly or by necessary implication. Procedural law establishes a mechanism for determining those rights and liabilities and a machinery for enforcing them. Right of appeal being a substantive right always acts prospectively. It is trite law that every statute prospective unless it is expressly or by necessary implication made to have retrospective operation. Right of appeal may be a substantive right but the procedure for filing the appeal including the period of limitation cannot be called a substantive right, and aggrieved person cannot claim any vested right claiming that he should be governed by the old provision pertaining to period of limitation. Procedural law is retrospective meaning thereby that it will apply even to acts or transactions under the repealed Act.

15. Law on the subject has also been elaborately dealt with by this Court in various decisions and reference may be made to few of those decisions. This Court in *Garikapati Veeraya vs. N. Subbiah Choudhry & Ors.* AIR 1957 SC 540, *New India Insurance Company Limited* Vs. *Smt. Shanti Mishra* (1975) 2 SCC 840, *Hitendra Vishnu Thakur & Ors.* vs. *State of Maharashtra & Ors.* (1994) 4 SCC 602; *Maharaja Chintamani Saran Nath Shahdeo vs. State of Bihar & Ors.* (1999) 8 SCC 16; Shyam Sundar & Ors. vs. Ram Kumar & Anr. (2001) 8 SCC 24, has elaborately discussed the scope and ambit of an amending legislation and its retrospectivity and held that every litigant has a vested right in substantive law but no such right exists in procedural law. This court has held the law relating to forum and limitation is procedural in nature whereas law relating to right of appeal even though remedial is substantive in nature.

16. Therefore, unless the language used plainly manifests in express terms or by necessary implication a contrary intention a statute divesting vested rights is to be construed as prospective, a statute merely procedural is to be construed as retrospective and a statute which while procedural in its character, affects vested rights adversely is to be construed as prospective.

17. Right of appeal conferred under Section 19(1) of FEMA is therefore a substantive right. The procedure for filing an appeal under sub-section (2) of Section 19 as also the *proviso* to sub-section (2) of Section 19 conferring power on the Tribunal to condone delay in filing the appeal if sufficient cause is shown, are procedural rights.

18. We have already indicated that the *proviso* to sub-section(2) of Section 19 operates retrospectively, but the question is in that process, whether it impairs or takes away any accrued right, to plead a time bar and on facts whether the Company has lost its right of appeal to the Tribunal under FEMA.

Law of Limitation

19. Law of limitation is generally regarded as procedural and its object is not to create any right but to prescribe periods within which legal proceedings be instituted for enforcement of rights which exist under substantive law. On expiry of the period of limitation, the right to sue comes to an end and if a particular right of action had become time barred under the earlier statute of limitation the right is not revived by the provision of the latest statute. Statutes of limitation are thus retrospective insofar as they apply to all legal proceedings brought after their operation for enforcing cause of action accrued earlier, but they are prospective in the sense that neither have the effect of reviving the right of action which is already barred on the date of their coming into operation, nor do they have effect of extinguishing a right of action subsisting on that date. *Bennion* on Statutory Interpretation 5th Edn.(2008) Page 321 while dealing with retrospective operation of procedural provisions has stated that provisions laying down limitation periods fall into a special category and opined that although *prima facie* procedural, they are capable of effectively depriving persons of accrued rights and therefore they need be approached with caution.

20. Learned author in order to establish the above proposition referred to the decision of the Court of Appeal in *The Ydun* case [THE YDUN (1899) Probate Division at page 236 (The Court of Appeal) where the Court held that the amending legislation dealt with procedure only and therefore applied to all actions whether commenced before or after the passing of the Act and even in respect of previously accrued rights. The principle laid down in '*The Ydun'* was applied in *The King vs. Chandra Dharma* (1905) 2 KB 335 and it was held that if a statute shortening the time within which proceedings can be taken is retrospective then it is impossible to give good reason, why a statute extending the time within which proceedings be taken, should not be held to be retrospective. The Judicial Committee of Privy Council in *Yew Bon Tew v.*

Kenderaan Bas Mara (1982) 3 All E.R. 833, opined that whether statute has retrospective effect, cannot in all cases safely be applied by classifying statute as procedural or substantive and pointed out in certain situation the Court would rule against a retrospective operation. Limitation provisions therefore can be procedural in the context of one set of facts but substantive in the context of different set of facts because rights can accrue to both the parties. In such a situation, test is to see whether the statute, if applied retrospectively to a particular type of case, would impair existing rights and obligations. An accrued right to plead a time bar, which is acquired after the lapse of the statutory period, is nevertheless a right, even though it arises under an Act which is procedural and a right which is not to be taken away pleading retrospective operation unless a contrary intention is discernible from the statute Therefore, unless the language clearly manifests in express terms or by necessary implication, a contrary intention a statute divesting vested rights is to be construed as prospective. A statute, merely procedural is to be construed as retrospective and a statute while procedural in nature affects vested rights adversely is to be construed as prospective. The manner of filing an appeal, under sub section (2) of Section 19 of FEMA and the time within which such an appeal has to be preferred and the power conferred on the Tribunal to condone delay under the proviso to sub-section (2) of Section 19 are matters of procedure and act retrospectively, so as to cover causes of action which arose under FERA. Since the appeal was filed under FEMA with an application for condonation of delay such an appeal has to be considered by the Tribunal under the proviso to sub-section(2) of Section 19 FEMA and if the Company shows sufficient cause for not filing the appeal in time then the Tribunal can condone the delay and entertain the appeal, especially when there is no accrued right to the respondent to plead a time bar. The legal position is summarized thus by Justice G.P. Singh in Principles of Statutory Interpretation (12th Edition-Page 541) thus:-

"Statutes of Limitation are thus retrospective in so far as they apply to all legal proceedings brought after their operations for enforcing causes of action accrued earlier…."

21. We may also examine whether Section 49 of FEMA, which is the repealing and saving clause, has in any way taken away the right of appeal under FEMA for cause of action which arose under FERA expressly or by necessary implication and also whether it has any effect on the retrospectivity of the procedural provision under the proviso to sub-section (2) of section 19. For easy reference we may extract Section 49 of FEMA and Section 6 of the General Clauses Act, 1897.

"**49. Repeal and Saving** —(1) The Foreign Exchange Regulation Act, 1973 (46 of 1973) is hereby repealed and the Appellate Board constituted under sub-section (1) of section 52 of the said Act (hereinafter referred to as the repealed Act) shall stand dissolved.

(2) On the dissolution of the said Appellate Board, the person appointed as Chairman of the Appellate Board and every other person appointed as Member and holding office as such immediately before such date shall vacate their respective offices and no such Chairman or other person shall be entitled to claim any compensation for the premature termination of the term of his office or of any contract of service.

(3) Notwithstanding anything contained in any other laws for the time being in force, no court shall take cognizance of an offence under the repealed Act and no adjudicating officer shall take notice of any contravention under section 51 of the repealed Act after the expiry of a period of two years from the date of the commencement of this Act.

(4) Subject to the provisions of sub-section (3) all offences committed under the repealed Act shall continue to be

governed by the provisions of the repealed Act as if that Act had not been repealed.

(5) Notwithstanding such repeal, —-

(a) anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any licence, permission, authorization or exemption granted or any document or instrument executed or any direction given under the Act hereby repealed shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act;

(b) any appeal preferred to the Appellate Board under sub-section (2) of section 52 of the repealed Act but not disposed of before the commencement of this Act shall stand transferred to and shall be disposed of by the Appellate Tribunal constituted under this act;

(c) every appeal from any decision or order of the Appellate Board under sub-section (3) or sub-section (4) of section 52 of the repealed Act shall, if not filed before the commencement of this act, be filed before the High Court within a period of sixty days of such commencement;

Provided that the High Court may entertain such appeal after the expiry of the said period of sixty days if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period.

(6) save as otherwise provided in sub-section(3), the mention of particular matters in sub-sections (2), (4) and (5) shall not be held to prejudice or affect the general application of section 6 of the General Clauses Act, 1897 (10 of 1897), with regard to the effect of repeal."

Section 6 of the General Clauses Act reads as under:-

> 6. Effect of repeal — Where this Act, or any [Central Act] or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not —
>
> (a) revive anything not in force or existing at the time at which the repeal takes effect; or
>
> (b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or
>
> (c) affect any right, privilege obligation or liability acquired, accrued or incurred under any enactment so repealed; or
>
> (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or
>
> (e) affect any investigation legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and
>
> any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

Repealing and saving clause is a residuary provision which envisages that notwithstanding such repeal of FERA there would be application of Section 6 of the General Clauses Act with regard to the effect of repeal which is discernible from sub section (6) of Section 49 of the Act.Sub-section (1) of Section 49 of FEMA states that FERA stands repealed and the

Appellate Board constituted under sub-section (1) of Section 52 of the said Act stands dissolved. Sub-section (3) of Section 49 incorporates a sunset clause. The said sub-section begins with a non-obstante clause overriding any other enactment and states that no court shall take notice of any contravention under Section 51 of the repealed Act after the expiry of two years from the date of commencement of FEMA on 1.6.2000. Sub-section (4) of Section 49 stipulates that subject to the provisions of sub-section(3) all offences committed under the repealed Act shall continue to be governed by the provisions of the repealed Act as if that Act had not been repealed.

22. Sub-section (5) of Section 49 of FEMA consists of three clauses (a), (b) and (c). Clause (a) states that anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any license, permission, authorization or exemption granted or any document or instrument executed under the repealed act i.e. FERA to the extent they are not inconsistent with the provisions of this Act, are deemed to be done or taken under the corresponding provisions of this Act. The said provision has the effect of incorporating or making a general declaration that the existing rules, notifications, declarations, authorization and exemptions granted under FERA will continue to apply in spite of repeal of FERA and after enactment of FEMA as long as they are not in consistent with FEMA. Clause (b) of sub-section (5) of Section 49 states that any appeal preferred before the Appellate Board under sub-section (2) of Section 52 of FERA but not disposed of before the commencement of this Act shall stand transferred to and shall be disposed of by the Appellate Tribunal constituted under this Act. Sub-section (6) to Section 49 of FEMA deals with the application of Section 6 of the General Clauses Act. The first part of the said sub-section protects the sunset clause and the two year limitation period for commencement of proceedings. The expression "save as otherwise provided in sub-section (3)"

protects the sunset clause in spite of second portion of sub-Section 6 and the second portion of sub-section (6) of Section 49 expressly makes Section 6 of the General Clauses Act, 1897 applicable in spite of repeal of FERA.

23. Section 6 of the General Clauses Act, 1897 which protects the rights, obligations and actions and liabilities applies in spite of repeal of FERA subject to two years limitation period specified in sub-section (3) of Section 49 for initiation of proceedings. Therefore, in view of Section 6 of the General Clauses Act read with sub-section (3) of Section 49 of FEMA, proceedings for violation of FERA can be instituted within the sunset period of two years with effect from 1.6.2000 till 31.5.2002. But for sub-section(3) there will be no limitation period of two years in view of Section 6 of General Clauses Act, 1897 read with sub-section (4) of Section 49 of FEMA.

24. We have dealt with the above mentioned repeal and saving clause to highlight the application of Section 6 of the General Clauses Act, 1897 which provides that where an Act is repealed then unless a different intention appears, the repeal shall not affect any right or liability acquired or incurred under the repealed enactment or any legal proceeding initiated in respect of such right or liability and the legal proceedings may continue as if the repealing Act has not been passed. The saving clause thus aimed to preserve the legal effect and consequence of things done though those effects and consequences projected at the time when FERA was in force. The scope and ambit of such repeal and saving clauses have been considered by this Court in various decisions. Reference may be made to the decisions of this Court reported in *Anant Gopal Sheorey v. State of Bombay,* AIR 1958 SC 915, *Rao Shiv Bahadur Singh & Anr. vs. State of Vindhya Pradesh,* AIR 1953 SC 394, *State of Punjab v. Mohar Singh S/o Pratap Singh,* AIR 1955 SC 84, *T.S. Baliah v. T.S. Rangachari, ITO,* AIR 1969 SC 701; *Gajraj Singh & Ors. vs. State Transport*

Appellate Tribunal & Ors. (1997) 1 SCC 650; *Gammon India Ltd. vs. Special Chief Secretary & Ors.* (2006) 3 SCC 354.

25. The appellate Board under FERA, it may be noted stood dissolved and ceased to function when FEMA was enacted. Therefore, any appeal against the order of the adjudicating officer made under FERA, after FEMA came into force, had to be filed before the Appellate Tribunal constituted under FEMA and not to the Appellate Board under FERA. Section 52 of FERA stipulates the limitation for an appeal against the orders of the adjudicating officer to the Appellate Board. It provides the period of limitation as 45 days but the Board may entertain an appeal after the expiry of 45 days but not beyond 90 days. Under FEMA, an appeal lies to the appellate tribunal constituted under that Act and Section 19(2) provides that every appeal shall be filed within 45 days from the date on which a copy of the order of the adjudicating authority is received. The appellate is however empowered to entertain appeals filed after the expiry of 45 days if it is satisfied that there was sufficient cause for the delay in filing the appeal. Though both Section 52(2) of FERA and Section 19(2) of FEMA provide a limitation of 45 days and also give the discretion to the appellate authority to entertain an appeal after the expiry of 45 days, if the appellant was prevented by sufficient cause from filing an appeal in time, the appellate authority under FERA could not condone the delay beyond 45 days whereas under FEMA, if the sufficient cause is made out, the delay can be condoned without any limit. The question we have already pointed out is whether Section 52(2) of FERA or Section 19(2) of FEMA will govern the appeal. As noticed above, any provision relating to limitation is always regarded as procedural and in the absence of any provision to the contrary, the law in force on the date of the institution of the appeal, irrespective of the date of accrual of the cause of action for the original order, will govern the period of limitation.

26. Section 52(2) can apply only to an appeal to the

appellate Board and not to any appellate tribunal. Therefore, irrespective of the fact that the adjudicating officer had passed the orders with reference to the violation of the provisions of FERA, as the appeal against such order was to the appellate tribunal constituted under FEMA, necessarily Section 19(2) of FEMA alone will apply and it is not possible to import the provisions of Section 52(2) of FERA. As we are not concerned with the appeals to Appellate Board, but appeals to the Appellate Tribunal, limitation being a matter of procedure, only that law that is applicable at the time of filing the appeal, would apply. Therefore, Section 19(2) of FEMA and not Section 52(2) of FERA will apply. As noticed above, under Section 19(2), there is no ceiling in regard to the period of delay that could be condoned by the appellate tribunal. If sufficient cause is made out, delay beyond 45 days can also be condoned. The tribunal and the High Court misdirected themselves in assuming that the period of limitation was governed by Section 52(2) of FERA.

27. We have already indicated that clause (b) of sub-section (5) of Section 49 refers to appeal preferred and pending before the Appellate Board under FERA at the time of repeal. The said clause does not specifically refer to appeals preferred against adjudication orders passed under FEMA with reference to causes of action which arose under FERA. We have already noticed the right of appeal under FEMA has already been saved in respect of cause of action which arose under FERA however subject to the proviso to sub-section (2) of Section 19, in the case of belated appeals.

28. Above discussion will clearly demonstrate that Section 49 of FEMA does not seek to withdraw or take away the vested right of appeal in cases where proceedings were initiated prior to repeal of FERA on 01.06.2000 or after. On a combined reading of Section 49 of FEMA and Section 6 of General Clauses Act, it is clear that the procedure prescribed by FEMA only would be applicable in respect of an appeal filed under

FEMA though cause of action arose under FERA. In fact, the time limit prescribed under FERA was taken away under the *proviso* to sub-section (2) of Section 19 and the Tribunal has been conferred with wide powers to condone delay if the appeal is not filed within forty-five days prescribed, provided sufficient cause is shown. Therefore, the findings rendered by the Tribunal as well as the High Court that the Tribunal does not have jurisdiction to condone the delay beyond the date prescribed under FERA is not a correct understanding of the law on the subject.

29. We, therefore, hold that the Appellate Tribunal can entertain the appeal after the prescribed period of 45 days if it is satisfied, that there was sufficient cause for not filing the appeal within the said period. We are therefore inclined to set aside the orders passed by the Tribunal and the High Court and remit the matter back to the Tribunal for fresh consideration in accordance with law on the basis of the findings recorded by us. We order accordingly.

30. The appeals stand disposed of accordingly.

N.J. Appeals disposed of.

DEVINDER SINGH
v.
MUNICIPAL COUNCIL, SANAUR
(Civil Appeal No. 3190 of 2011)

APRIL 11, 2011

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

INDUSTRIAL DISPUTES ACT, 1947:

ss. 2.(s), 2(oo) and 25-F—'Workman' engaged on contract basis – Termination of services of workman without complying with the provisions of s. 25-F – Labour Court ordering reinstatement without back wages – High Court setting aside reinstatement holding that the appointment was made without following recruitment rules and that it would not be in public interest to approve award of reinstatement after long lapse of time – HELD: The source of employment, the method of recruitment, the terms and conditions of employment/contract of service, the quantum of wages/pay and the mode of payment are not at all relevant for deciding whether or not a person is a workman within the meaning of s. 2(s) of the Act – Further, the definition of workman also does not make any distinction between full time and part time employee or a person appointed on contract basis – Once the test of employment for hire or reward for doing the specified type of work is satisfied, the employee will fall within the definition of 'workman' – Delay in adjudication of dispute by Labour Court or the writ petition filed by employer cannot be made a ground to justify the gross illegalities committed by the employer in terminating the services of the workman – Delay/Laches.

s.25-F read with ss.2(s) and 2(oo) – HELD: Provisions contained in s. 25-F (a) and (b) are mandatory and termination of service of a workman which amounts to retrenchment u/s. 2(oo) without complying with the mandates

of s.25-F would be null and void – There was no material to show that the engagement of the workman was discontinued by relying upon the terms and conditions of the employment – Judgment of High Court set aside – Award of reinstatement passed by Labour Court restored with wages for the period between the date of award and date of reinstatement.

The appellant was engaged by the respondent-Municipal Council for doing the work of clerical nature w.e.f.1.8.1994 at a consolidated salary of Rs. 1,000/-per month. His services were discontinued w.e.f.30.9.1996, without giving him any notice or compensation as required by s.25-F of the Industrial Disputes Act, 1947. On an Industrial Dispute being raised, the State Government referred the matter to the Labour Court, which passed an award for reinstatement of the workman without back wages. However, the High Court allowed the appeal of the employer holding that the Labour Court should not have ordered reinstatement of the appellant as his appointment was contrary to the recruitment rules and Articles 14 and 16 of the Constitution and it would not be in public interest to sustain the award of reinstatement after long lapse of time. The High Court, however, declared that the appellant would be entitled to wages in terms of s.17-B of the Act. Aggrieved, the workman filed the appeal.

Allowing the appeal, the Court

HELD: 1.1 Section 2(s) of the Industrial Disputes Act, 1947 contains an exhaustive definition of the term 'workman'. The source of employment, the method of recruitment, the terms and conditions of employment/ contract of service, the quantum of wages/pay and the mode of payment are not at all relevant for deciding whether or not a person is a workman within the meaning of s. 2(s) of the Act. The definition of workman also does not make any distinction between full time and part time

employee or a person appointed on contract basis. There is nothing in the plain language of s. 2(s) from which it can be inferred that only a person employed on regular basis or a person employed for doing whole time job is a workman and the one employed on temporary, part time or contract basis on fixed wages or as a casual employee or for doing duty for fixed hours is not a workman. [Para 12 to 14] [880-E-H; 881-A-C]

1.2 Whenever an employer challenges the maintainability of industrial dispute on the ground that the employee is not a workman within the meaning of s. 2(s) of the Act, what the Labour Court/Industrial Tribunal is required to consider is whether the person is employed in an industry for hire or reward for doing manual, unskilled, skilled, operational, technical or clerical work in an industry. Once the test of employment for hire or reward for doing the specified type of work is satisfied, the employee would fall within the definition of 'workman'. [Para 15] [881-D-E]

Birdhichand Sharma v. First Civil Judge,Nagpur **1961 (3) SCR 161;** *Silver Jubilee Tailoring House v. Chief Inspector of Shops and Establishments* **1974 (1) SCR 747 = 1974 (3) SCC 498,** *L. Robert D'souza v. Executive Engineer* **(1982) 1 SCC 645, relied on.**

2.1 Definition of the term "retrenchment" in s.2(oo) of the Act is quite comprehensive. It covers every type of termination of the service of a workman by the employer for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action. The cases of voluntary retirement of the workman, retirement on reaching the age of superannuation, termination of service as a result of non-renewal of the contract of employment or of such contract being terminated under a stipulation contained therein or termination of the

service of a workman on the ground of continued ill health also do not fall within the ambit of retrenchment. [Para 10] [879-E-H]

Punjab Land Development And Reclaimation Corporation Ltd., Chandigarh v. Presiding Officer Labour Court, Chandigarh **1990 (3) SCR 111 = (1990) 3 SCC 682,** *State Bank of India v. N. Sundara Money* **1976 (3) SCR 160 = (1976) 1 SCC 822 – referred to.**

2.2. Section 25-F is couched in negative form. It imposes a restriction on the employer's right to retrench a workman. This Court has repeatedly held that the provisions contained in s. 25-F (a) and (b) are mandatory and termination of the service of a workman, which amounts to retrenchment within the meaning of s. 2(oo) without giving one month's notice or pay in lieu thereof and retrenchment compensation, is null and void/illegal/ inoperative. [Para 19 to 20] [882-D-E; G-H; 883-A]

State of Bombay v. Hospital Mazdoor Sabha **1960 SCR 866 = AIR 1960 SC 610,** *Bombay Union of Journalists v. State of Bombay* **1964 SCR 22 =AIR 1964 SC 1617,** *State Bank of India v. N. Sundara Money (supra), Santosh Gupta v. State Bank of Patiala* **1980 (3) SCR 884 = (1980) 3 SCC 340,** *Mohan Lal v. Bharat Electronics Ltd.* **1981 (3) SCR 518 = (1981) 3 SCC 225,** *L. Robert D'Souza v. Southern Railway* **(1982) 1 SCC 645;** *Surendra Kumar Verma v. Central Government Industrial Tribunal-cum-Labour Court* **1981 (1) SCR 789 = (1980) 4 SCC 443,** *Gammon India Ltd. v. Niranjan* Dass **1984 (1) SCR 959 = (1984) 1 SCC 509,** *Gurmail Singh v. State of Punjab* **1990 (2) Suppl. SCR 367 = (1991) 1 SCC 189** and *Pramod Jha v. State of Bihar* **2003 (2) SCR 512 = (2003) 4 SCC 619 – relied on**

2.3 In *Anoop Sharma's case, the Court considered the effect of violation of s.25-F, referred to various**

precedents on the subject and held that termination of service of a workman without complying with the mandatory provisions contained in s.25-F(a) and (b) should ordinarily result in his reinstatement. [para 21] [883-D]

Anoop Sharma vs. Executive Engineer, Public Health Divison, Haryana* **(2010) 5 SCC 497 – relied on.

3.1 A careful analysis of the impugned order reveals that the High Court neither found any jurisdictional infirmity in the award of the Labour Court nor did it come to the conclusion that the same was vitiated by an error of law apparent on the face of the record. Notwithstanding this, the High Court set aside the direction given by the Labour Court for reinstatement of the appellant by assuming that his initial appointment/ engagement was contrary to law and that it would not be in public interest to approve the award of reinstatement after long lapse of time. The approach adopted by the High Court in dealing with the award of the Labour Court was *ex facie* erroneous and contrary to the law laid down by this Court. [Para 22] [883-E-G]

Syed Yakoob v. K.S. Radhakrishnan **1964 SCR 64 = AIR (1964) SC 477,** *Swaran Singh v. State of Punjab* **(1976) 2 SCC 868** *P.G.I. of Medical Education & Research, Chandigarh v. Raj Kumar* **2000 (4) Suppl. SCR 350 = (2001) 2 SCC 54,** *Surya Dev Rai v. Ram Chander Rai* **2003 (2) Suppl. SCR 290 = (2003) 6 SCC 675** and *Shalini Shyam v. Rajendra Shankar Path* **2010 (8) SCR 836 = (2010) 8 SCC 329, relied on.**

3.2. The reasons assigned by the High Court for setting aside the award of reinstatement are legally untenable. It is true that the engagement of the appellant was not preceded by an advertisement and consideration of the competing claims, but it deserves to be noticed,

that the respondent had engaged the appellant in the back drop of the ban imposed by the State Government on the filling up of the vacant posts. The respondent had started a water supply scheme and for ensuring timely issue of the bills and collection of water charges, it needed the service of a clerk. However, on account of the restriction imposed by the State Government, regular recruitment was not possible. Therefore, resolution dated 27.04.1995 was passed for engaging the appellant on contract basis. This exercise was repeated and in 1996 and the appellant's term was extended for six months from 1.5.1996. However, his engagement was discontinued w.e.f. 30.9.1996 without giving any notice or pay in lieu thereof and compensation as per the requirement of clauses (a) and (b) of s. 25-F of the Act. Failure of the Director, Local Self Government, to convey his approval to the resolution of the respondent could not be made a ground for bringing an end to the engagement of the appellant and that too without complying with the mandate of s. 25-F(a) and (b). Further, the appellant could hardly be blamed for the delay, if any, in the adjudication of the dispute by the Labour Court or the writ petition filed by the respondent. The delay of four to five years in the adjudication of disputes by the Labour Court/ Industrial Tribunal is a normal phenomena. If what the High Court has done is held to be justified, gross illegalities committed by the employer in terminating the services of workman will acquire legitimacy in majority of cases. Therefore, the approach adopted by the High Court in dealing with the appellant's case is disapproved. [Para 24 to 26] [886-C-E; 887-E-H; 888-A-D]

4.1. The plea of the respondent that the action taken by it is covered by s. 2(oo)(bb) was clearly misconceived and was rightly not entertained by the Labour Court because no material was produced by the respondent to

show that the engagement of the appellant was discontinued by relying upon the terms and conditions of the employment. [Para 27] [888-E-F]

4.2. The impugned order is set aside and the award passed by the Labour Court for reinstatement of the appellant is restored. If the respondent shall reinstate the appellant, the appellant shall also be entitled to wages for the period between the date of award and the date of actual reinstatement. [Para 28] [888-F-G]

Secy., State of Karnataka v. Umadevi **(2006) 1 SCC 1;** *State of M.P. v. Lalit Kumar Verma* **(2007) 1 SCC 575;** *Uttranchal Forest Development Corporation v M.C. Joshi* **(2007(2) SCC (L&S) 813;** *M.P. Administration v. Tribhuban* **(2007) 9 SCC 748;** *Mahboob Deepak v. Nagar Panchayat, Gajraula* **(2008) 1 SCC 575;** *Ghaziabad Development Authority v. Ashok Kumar* **(2008) 4 SCC 261; and** *Harjinder Singh v. Punjab State Warehousing Corporation* **(2010) 3 SCC 192 – cited.**

Case Law Reference:

(2006) 1 SCC 1	**cited**	**para 6**
(2007) 1 SCC 575	**cited**	**para 6**
2007(2) SCC (L&S) 813	**cited**	**para 6**
(2007) 9 SCC 748	**cited**	**para 6**
(2008) 1 SCC 575	**cited**	**para 6**
(2008) 4 SCC 261	**cited**	**para 6**
(2010) 3 SCC 192	**cited**	**para 7**
(2010) 5 SCC 497	**relied on**	**para 7**
1976 (3) SCR 160	**referred to**	**para 11**
1990 (3) SCR 111	**referred to**	**para 11**
1961 (3) SCR 161	**relied on**	**para 16**
1974 (1) SCR 747	**relied on**	**para 17**
(1982) 1 SCC 645	**relied on**	**para 18**
1960 SCR 866	**relied on**	**para 20**
1964 SCR 22	**relied on**	**para 20**
1980 (3) SCR 884	**relied on**	**para 20**
1981 (3) SCR 518	**relied on**	**para 20**
1981 (1) SCR 789	**relied on**	**para 20**
1984 (1) SCR 959	**relied on**	**para 20**
1990 (2) Suppl. SCR 367	**relied on**	**para 20**
2003 (2) SCR 512	**relied on**	**para 20**
1964 SCR 64	**relied on**	**para 22**
(1976) 2 SCC 868	**relied on**	**para 22**
2000 (4) Suppl. SCR 350	**relied on**	**para 22**
2003 (2) Suppl. SCR 290	**relied on**	**para 22**
2010 (8) SCR 836	**relied on**	**para 22**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3190 of 2011.

From the Judgment & Order dated 19.11.2008 of the High Court of Punjab & Haryana at Chandigarh in C.W.P. No. 11111 of 2006.

Roshan Lal Batta, Shikha Roy Pabbi, Ajit Kumar, S.K. Sabharwal for the Appellant.

Sanjay Jain for the Respondent.

The Judgment of the Court was delivered by

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

2. This appeal is directed against the order passed by the

Division Bench of the Punjab and Haryana High Court in the writ petition filed by the respondent whereby the award passed by Labour Court, Patiala (for short, "the Labour Court") for reinstatement of the appellant was set aside and it was declared that he shall be entitled to wages in terms of Section 17-B of the Industrial Disputes Act, 1947 (for short, "the Act").

3. The appellant was engaged by the respondent with effect from 1.8.1994 for doing the work of clerical nature. He was paid consolidated salary of Rs.1,000/- per month. He continued in the service of the respondent till 29.09.1996. His service was discontinued with effect from 30.9.1996 without giving him notice and compensation as per the requirement of Section 25-F of the Act.

4. The appellant challenged the termination of his service by raising an industrial dispute, which was referred by the State Government to the Labour Court. In the statement of claim filed by him, the appellant pleaded that he had continuously worked in the employment of the respondent from 1.8.1994 to 29.9.1996; that his service was terminated without holding any enquiry and without giving him notice and compensation and that persons junior to him were retained in service. In the written statement filed on behalf of the respondent, it was pleaded that the appellant was engaged on contract basis and his service was terminated because the Director, Local Self Government did not give approval to the resolution passed for his employment. According to the respondent, the resolution passed for engaging the appellant was sent to the Deputy Director for approval, but the same was returned with the remark that the approval may be obtained from the Director, Local Self Government. Thereafter, the resolution was sent to the Director, Local Self Government but no response was received from the concerned authority and, therefore, it became necessary to discontinue the service of the appellant.

5. After considering the pleadings of the parties and the evidence produced by them, the Labour Court passed an award

for reinstatement of the appellant without back wages. The Labour Court held that the appellant had worked for more than 240 days in a calendar year preceding the termination of his service and that his service was terminated with effect from 30.9.1996 without complying with the mandatory provisions contained in Section 25F of the Act. The Labour Court rejected the plea that the termination of the appellant's service is covered by Section 2(oo)(bb) of the Act by observing that no evidence was produced by the respondent to prove that it was a case of termination of service in accordance with the terms of the contract of employment.

6. The Division Bench of the High Court entertained and allowed the writ petition filed by the respondent by relying upon the judgments of this Court in *Secy., State of Karnataka v. Umadevi* (2006) 1 SCC 1; *State of M.P. v. Lalit Kumar Verma* (2007) 1 SCC 575; *Uttranchal Forest Development Corporation v M.C. Joshi* (2007(2) SCC (L&S) 813; *M.P. Administration v. Tribhuban* (2007) 9 SCC 748; *Mahboob Deepak v. Nagar Panchayat, Gajraula* (2008) 1 SCC 575 and *Ghaziabad Development Authority v. Ashok Kumar* (2008) 4 SCC 261. The Division Bench was of the view that the Labour Court should not have ordered reinstatement of the appellant because his appointment was contrary to the recruitment rules and Articles 14 and 16 of the Constitution and it would not be in public interest to sustain the award of reinstatement after long lapse of time. Simultaneously, the Division Bench declared that the appellant shall be entitled to wages in terms of Section 17-B of the Act.

7. Shri R.L.Batta, learned senior counsel for the appellant argued that the impugned order is liable to be set aside because while interfering with the award of the Labour Court, the Division Bench of the High Court ignored the judicially recognised parameters for the exercise of power under Article 226 of the Constitution. Learned senior counsel further argued that the High Court was not justified in upsetting the award of reinstatement simply because there was some time gap

between reference of the dispute by the State Government and adjudication thereof by the Labour Court. Learned senior counsel then relied upon the judgments of this Court in *Harjinder Singh v. Punjab State Warehousing Corporation* (2010) 3 SCC 192 and *Anoop Sharma v. Public Health Division, Haryana* (2010) 5 SCC 497 and argued that the Labour Court did not commit any illegality by ordering reinstatement of the appellant because his service was terminated in clear violation of Sections 25-F and 25-G of the Act.

8. Shri Sanjay Jain, learned counsel for the respondent argued that the High Court did not commit any error by setting aside the award of reinstatement because initial appointment of the appellant was not sanctioned by law. Learned counsel submitted that the action taken by the respondent was legally correct and justified because the Director, Local Self Government did not approve the resolution passed by the respondent for engaging the appellant. Shri Jain further submitted that service of the appellant was terminated in accordance with the conditions stipulated in the contract of employment and, as such, it cannot be termed as retrenchment within the meaning of Section 2(oo) of the Act.

9. We have considered the respective submissions and carefully perused the record. Sections 2(oo), 2(s) and 25F of the Act which have bearing on the decision of this appeal read as under:

> "2. (oo) "retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action, but does not include –
>
> (a) voluntary retirement of the workman; or
>
> (b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or

> (bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or
>
> (c) termination of the service of a workman on the ground of continued ill-health;
>
> 2 (s) "workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person—
>
> (i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or
>
> (ii) who is employed in the police service or as an officer or other employee of a prison; or
>
> (iii) who is employed mainly in a managerial or administrative capacity; or who, being employed in a supervisory capacity, draws wages exceeding ten thousand rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.
>
> **25F. Conditions precedent to retrenchment of workmen.–**No workman employed in any industry who has been in continuous service for not less than one year

under an employer shall be retrenched by that employer until–

(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;

(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette."

10. The definition of the term "retrenchment" is quite comprehensive. It covers every type of termination of the service of a workman by the employer for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action. The cases of voluntary retirement of the workman, retirement on reaching the age of superannuation, termination of service as a result of non-renewal of the contract of employment or of such contract being terminated under a stipulation contained therein or termination of the service of a workman on the ground of continued ill health also do not fall within the ambit of retrenchment.

11. In *State Bank of India v. N. Sundara Money* (1976) 1 SCC 822, a three Judge Bench of this Court analysed Section 2(oo) and held:

"……Termination ... for any reason whatsoever' are the key words. Whatever the reason, every termination spells retrenchment. So the sole question is, has the employee's service been terminated? Verbal apparel apart, the

substance is decisive. A termination takes place where a term expires either by the active step of the master or the running out of the stipulated term. To protect the weak against the strong this policy of comprehensive definition has been effectuated. Termination embraces not merely the act of termination by the employer, but the fact of termination howsoever produced. Maybe, the present may be a hard case, but we can visualise abuses by employers, by suitable verbal devices, circumventing the armour of Section 25-F and Section 2(*oo*). Without speculating on possibilities, we may agree that "retrenchment" is no longer *terra incognita* but area covered by an expansive definition. It means "to end, conclude, cease"……."

The ratio of the aforementioned judgement was approved by the Constitution Bench in *Punjab Land Development And Reclaimation Corporation Ltd., Chandigarh v. Presiding Officer Labour Court, Chandigarh* (1990) 3 SCC 682.

12. Section 2(s) contains an exhaustive definition of the term 'workman'. The definition takes within its ambit any person including an apprentice employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward and it is immaterial that the terms of employment are not reduced into writing. The definition also includes a person, who has been dismissed, discharged or retrenched in connection with an industrial dispute or as a consequence of such dispute or whose dismissal, discharge or retrenchment has led to that dispute. The last segment of the definition specifies certain exclusions. A person to whom the Air Force Act, 1950, or the Army Act, 1950, or the Navy Act, 1957, is applicable or who is employed in the police service as an officer or other employee of a prison or who is employed mainly in managerial or administrative capacity or who is employed in a supervisory capacity and is drawing specified wages per mensem or exercises mainly managerial functions does not fall within the definition of the term 'workman'.

13. The source of employment, the method of recruitment, the terms and conditions of employment/contract of service, the quantum of wages/pay and the mode of payment are not at all relevant for deciding whether or not a person is a workman within the meaning of Section 2(s) of the Act.

14. It is apposite to observe that the definition of workman also does not make any distinction between full time and part time employee or a person appointed on contract basis. There is nothing in the plain language of Section 2(s) from which it can be inferred that only a person employed on regular basis or a person employed for doing whole time job is a workman and the one employed on temporary, part time or contract basis on fixed wages or as a casual employee or for doing duty for fixed hours is not a workman.

15. Whenever an employer challenges the maintainability of industrial dispute on the ground that the employee is not a workman within the meaning of Section 2(s) of the Act, what the Labour Court/Industrial Tribunal is required to consider is whether the person is employed in an industry for hire or reward for doing manual, unskilled, skilled, operational, technical or clerical work in an industry. Once the test of employment for hire or reward for doing the specified type of work is satisfied, the employee would fall within the definition of 'workman'.

16. In *Birdhichand Sharma v. First Civil Judge,Nagpur* 1961 (3) SCR 161 this Court considered the question whether bidi rollers were workmen within the meaning of the term used in the Factories Act, 1948. The factual matrix of the case reveals that the workers who used to roll the bidis had to work at the factory and were not at liberty to work at their houses. Their attendance was noted in the factory and they had to work within the factory, though there was freedom of doing work for particular hours. They could be removed from service on the ground of absence for eight days. The wages were paid on piece-rate basis. After considering these facts, the Court held that the bidi rollers were workmen. The Court observed that when the operation was of a simple nature and did not require

supervision, the control could be exercised at the end of the day by the method of rejecting bidis which did not meet the required standard and such supervision was sufficient to establish the employer employee relationship.

17. In *Silver Jubilee Tailoring House v. Chief Inspector of Shops and Establishments* 1974 (3) SCC 498 the three Judge Bench held that the tailors employed in a tailoring shop, who were paid according to their skill and work and the quality of whose work was regularly checked were employees covered by the Andhra Pradesh (Tilengana Area) Shops and Establishments Act, 1951.

18. In *L. Robert D'souza v. Executive Engineer* (1982) 1 SCC 645 the Court held that even a daily rated worker would be entitled to protection of Section 25-F of the Act if he had continuously worked for a period of one year or more.

19. Section 25 couched in negative form. It imposes a restriction on the employer's right to retrench a workman and lays down that no workman employed in any industry who has been in continuous service for not less then one year under an employer shall be retrenched until he has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired or he has been paid wages for the period of notice and he has also been paid, at the time of retrenchment, compensation equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months and notice in the prescribed manner has been served upon the appropriate Government or the authority as may be specified by the appropriate Government by notification in the Official Gazette.

20. This Court has repeatedly held that the provisions contained in Section 25F (a) and (b) are mandatory and termination of the service of a workman, which amounts to retrenchment within the meaning of Section 2(oo) without giving one month's notice or pay in lieu thereof and retrenchment

compensation is null and void/illegal/inoperative—*State of Bombay v. Hospital Mazdoor Sabha* AIR 1960 SC 610, *Bombay Union of Journalists v. State of Bombay* AIR 1964 SC 1617, *State Bank of India v. N. Sundara Money* (supra), *Santosh Gupta v. State Bank of Patiala* (1980) 3 SCC 340, *Mohan Lal v. Bharat Electronics Ltd.*(1981) 3 SCC 225, *L. Robert D'Souza v. Southern Railway* (supra), *Surendra Kumar Verma v. Central Government Industrial Tribunal-cum-Labour Court* (1980) 4 SCC 443, *Gammon India Ltd. v. Niranjan Dass* (1984) 1 SCC 509, *Gurmail Singh v. State of Punjab* (1991) 1 SCC 189 and *Pramod Jha v. State of Bihar* (2003) 4 SCC 619.

21. In *Anoop Sharma v. Executive Engineer, Public Health Division, Haryana* (supra), the Court considered the effect of violation of Section 25F, referred to various precedents on the subject and held the termination of service of a workman without complying with the mandatory provisions contained in Section 25-F (a) and (b) should ordinarily result in his reinstatement.

22. We may now advert to the impugned order. A careful analysis thereof reveals that the High Court neither found any jurisdictional infirmity in the award of the Labour Court nor it came to the conclusion that the same was vitiated by an error of law apparent on the face of the record. Notwithstanding this, the High Court set aside the direction given by the Labour Court for reinstatement of the appellant by assuming that his initial appointment/engagement was contrary to law and that it would not be in public interest to approve the award of reinstatement after long lapse of time. In our view, the approach adopted by the High Court in dealing with the award of the Labour Court was *ex facie* erroneous and contrary to the law laid down in *Syed Yakoob v. K.S. Radhakrishnan* AIR (1964) SC 477, *Swaran Singh v. State of Punjab* (1976) 2 SCC 868 *P.G.I. of Medical Education & Research, Chandigarh v. Raj Kumar* (2001) 2 SCC 54, *Surya Dev Rai v. Ram Chander Rai* (2003) 6SCC 675 and *Shalini Shyam v. Rajendra Shankar Path*

(2010) 8 SCC 329.

23. In *Syed Yakoob v. K.S. Radhakrishnan* (supra), this Court identified the limitations of certiorari jurisdiction of the High Court under Article 226 of the Constitution in the following words:

> "The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Article 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or tribunals: these are cases where orders are passed by inferior courts or tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the court or tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the court exercising it is not entitled to act as an appellate court. This limitation necessarily means that findings of fact reached by the inferior court or tribunal as result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law

which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the tribunal, and the said points cannot be agitated before a writ court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised."

In the second judgment – *Swaran Singh v. State of Punjab* (supra), this Court reiterated the limitations of certiorari jurisdiction indicated in *Syed Yakoob v. Radhakrishnan* (supra) and observed:

"In regard to a finding of fact recorded by an inferior tribunal, a writ of certiorari can be issued only if in recording such a finding, the tribunal has acted on evidence which is legally inadmissible, or has refused to admit admissible evidence, or if the finding is not supported by any evidence at all, because in such cases the error amounts to an error of law. The writ jurisdiction extends only to cases where orders are passed by inferior courts or tribunals in excess of their jurisdiction or as a result of their refusal to exercise jurisdiction vested in them or they act illegally or improperly in the exercise of their jurisdiction causing grave miscarriage of justice."

In *Surya Dev Rai v. Ram Chander Rai* (supra), the two-Judge Bench noticed the distinction between the scope of Articles 226 and 227 of the Constitution and culled out several propositions including the following:

"(3) Certiorari, under Article 226 of the Constitution, is

issued for correcting gross errors of jurisdiction i.e. when a subordinate court is found to have acted (i) without jurisdiction—by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction—by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice."

24. We are also convinced that the reasons assigned by the High Court for setting aside the award of reinstatement are legally untenable. In the first, it deserves to be noticed that the respondent had engaged the appellant in the back drop of the ban imposed by the State Government on the filling up of the vacant posts. The respondent had started a water supply scheme and for ensuring timely issue of the bills and collection of water charges, it needed the service of a clerk. However, on account of the restriction imposed by the State Government, regular recruitment was not possible. Therefore, resolution dated 27.04.1995 was passed for engaging the appellant on contract basis. The relevant portions of the resolution are extracted below:

"MUNICIPAL COUNCIL,SANAUR,(PATIALA).

COPY OF RESOLUTION NO.30 DATED 27.04.1995

It has been informed by the office to the house that one vacancy of Clerk in the office of Municipal Council, Sanaur is being vacant to the water supply branch. Due to ban imposed by the Punjab Government vacancy cannot be filed in at present. Municipal Council is operating two tubewells and is directly supplying water to the- general public. At present Municipal Council is operating two tubewells and is directly supplying water to the general public. Municipal Council has given about 1500 water connections. In respect of issuance of water bills and their respective deposit there is need of one Clerk. This

vacancy can be filled in after receiving sanction from the government. Therefore at present for the working of the office business as per the instruction of the Government, sanction may kindly be accorded for employing a person as Clerk on contract basis on the consolidated salary of Rs. One thousand per month. This matter was discussed seriously by the house because to provide water to the general public in the summer season is very essential. Therefore, to run smoothly - the work of water supplying Shri Devinder Singh son of .Shjri Hazura Singh of Mohalla kanian, Sanaur is hereby engaged for a period of six months on contract basis on a consolidated salary of Rs. One thousand with effect from 02.05.1995. Resolution was unanimously passed.

Sd/- President

Minicipal Council, Sanaur

Patiala

25. In furtherance of the aforesaid resolution, the respondent engaged the appellant, who was already in its employment, as a Clerk for a period of six months on contract basis on consolidated salary of Rs. 1,000/- per month. At the end of six months, the respondent passed another resolution dated 30.11.1995 and again employed the appellant for a period of six months from 1.11.1995 to 20.4.1996. This exercise was repeated in 1996 and the appellant's term was extended for six months from 1.5.1996. However, his engagement was discontinued w.e.f. 30.9.1996 without giving any notice or pay in lieu thereof and compensation as per the requirement of clauses (a) and (b) of Section 25-F of the Act. It is true that the engagement of the appellant was not preceded by an advertisement and consideration of the competing claims of other eligible persons but that exercise could not be undertaken by the respondent because of the ban imposed by the State Government. It is surprising that the Division Bench of the High Court did not notice this important facet of the employment of

the appellant and decided the writ petition by assuming that his appointment/engagement was contrary to the recruitment rules and Articles 14 and 16 of the Constitution. We may also add that failure of the Director, Local Self Government, Punjab to convey his approval to the resolution of the respondent could not be made a ground for bringing an end to the engagement of the appellant and that too without complying with the mandate of Section 25-F(a) and (b).

26. The other reason given by the High Court is equally untenable. The appellant could hardly be blamed for the delay, if any, in the adjudication of the dispute by the Labour Court or the writ petition filed by the respondent. The delay of four to five years in the adjudication of disputes by the Labour Court/ Industrial Tribunal is a normal phenomena. If what the High Court has done is held to be justified, gross illegalities committed by the employer in terminating the services of workman will acquire legitimacy in majority of cases. Therefore, we have no hesitation to disapprove the approach adopted by the High Court in dealing with the appellant's case.

27. The plea of the respondent that the action taken by it is covered by Section 2(oo)(bb) was clearly misconceived and was rightly not entertained by the Labour Court because no material was produced by the respondent to show that the engagement of the appellant was discontinued by relying upon the terms and conditions of the employment.

28. In the result, the appeal is allowed. The impugned order is set aside and the award passed by the Labour Court for reinstatement of the appellant is restored. If the respondent shall reinstate the appellant within a period of four weeks from today, the appellant shall also be entitled to wages for the period between the date of award and the date of actual reinstatement. The respondent shall pay the arrears to the appellant within a period of three months from the date of receipt/production of the copy of this order.

R.P. Appeal allowed.