RADHEYSHYAM KEJRIWAL
v.
STATE OF WEST BENGAL AND ANR.
(Criminal Appeal No. 1097 of 2003)

FEBRUARY 18, 2011

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

Foreign Exchange Regulation Act, 1973 – ss. 50, 51 and 56 – Scope and applicability of – Charges against the appellant for contravening the provisions of s.9(1)(f)(i) and s.8(2) r/w s.64(2) – Enforcement Directorate (ED) sought to prosecute appellant in a proceeding u/s.56 though on the self-same facts and cause of action, respondent-adjudicating authority had dropped charges framed against the appellant u/s.50 – Plea of appellant that standard of proof required to bring home the charge in a criminal case is much higher than the adjudication proceeding and once the appellant was exonerated in the adjudication proceeding, his prosecution was an abuse of the process of Court – Held (per majority): The yardstick would be to judge as to whether allegation in the adjudication proceedings and the proceedings for prosecution was identical and exoneration of the person concerned in the adjudication proceeding was on merits – In case it is found on merit that there was no contravention of the provisions of the Act in the adjudication proceedings, the trial of the person concerned shall be an abuse of the process of the court – In the instant case, in the adjudication proceeding on merit the adjudicating authority had categorically held that the charges against the appellant for contravening the provisions of s.9(1)(f)(i) and s.8(2) r/w s.64(2) were not sustainable – In the face of the finding by the Enforcement Directorate in adjudication proceeding that there was no contravention of any of the provisions of the Act, it

would be unjust and an abuse of the process of the court to permit the Enforcement Directorate to continue with the criminal prosecution – Resultantly the appellant's prosecution is quashed – Held (per minority): The scheme of the Act makes it clear that adjudication by the concerned authorities and prosecution are distinct and separate – The two proceedings are independent and irrespective of the outcome of the decision u/s.50, there cannot be any bar in initiating prosecution u/s.56 – In the light of the mandate of s.56, it is the duty of the Criminal Court to discharge the functions vested with it and give effect to the legislative intention, particularly, in the context of the scope and object of FERA which was enacted for economic development of the country and augmentation of revenue.

The Enforcement Directorate alleged that the appellant had contravened the provisions of Section 8(2) and 9(1)(f)(i) of the Foreign Exchange Regulation Act, 1973 and accordingly rendered himself liable to imposition of penalty under Section 50 of the Act. Accordingly, adjudication proceeding as contemplated under Section 51 of the Act were instituted against him for the aforesaid contraventions. The adjudication officer (the Special Director) came to the conclusion that the allegation made against the appellant of contravention of the provisions of Section 8, 9(1)(f)(i) and Section 8(2) read with Section 64(2) of the Act were not sustainable. The Enforcement Directorate did not challenge this order and it attained finality.

The Enforcement Directorate on the same allegation which was the subject matter of adjudication proceeding laid complaint against the appellant for prosecution under Section 56 of the Act before the Metropolitan Magistrate. After the issuance of process and exoneration in the adjudication proceeding, the appellant filed

application for dropping the proceedings, inter alia, contending that on the same allegation the adjudication proceedings having been dropped and the appellant exonerated, his continued prosecution is an abuse of the process of the Court. The Metropolitan Magistrate rejected his prayer. Aggrieved, the appellant preferred criminal revision application which was dismissed by the High Court by the impugned order.

In the instant appeal, dispute arose as to whether the Enforcement Directorate (ED) could prosecute the appellant in a proceeding under Section 56 of the FERA when on the self-same facts and cause of action, the respondent-adjudicating authority had dropped the charges framed against the appellant under Section 50 of the FERA.

It was contended on behalf of the appellant that standard of proof required to bring home the charge in a criminal case is much higher than the adjudication proceeding and once the appellant was exonerated in the adjudication proceeding, his prosecution was an abuse of the process of Court.

Allowing the appeal (per majority),

Per Chandramauli Kr. Prasad, J. (for Harjit Singh Bedi, J. and himself):

HELD: 1. Section 50 of the Foreign Exchange Regulation Act, 1973 (FERA) provides for mandatory penalty and fixes the outer limit of such penalty on any person contravening the provisions of the Act which is to be adjudged by the Director of Enforcement or any other officer of the Enforcement not below the rank of an Assistant Director empowered by the Central Government. The procedure and the power to adjudicate penalty has

been provided under Section 51 of the Act. From a plain reading of Section 51 of the Act it is evident that for adjudging the penalty under Section 51 of the Act for contravention of the provisions of the Act or any rule, direction or order made thereunder the adjudicating officer is to be satisfied that the person has committed the contravention after holding an inquiry in the prescribed manner and after giving the person concerned a reasonable opportunity of making representation. Thus besides the procedural requirement the sine qua non for imposition of penalty under Section 51 of the Act is that the adjudicating officer has to record its satisfaction that the person concerned has committed the contravention of any of the provisions of the Act or of any rule, direction or order made thereunder. [Paras 8, 9] [903-E-H; 904-A-G]

2. As would be evident from the preamble of the FERA, it was enacted for the conservation of foreign exchange resources of the Country and the proper utilization thereof in the economic development of the Country. The proceedings under Section 51 and 56 of the Act are independent of each other and the finding in an adjudication proceeding under Section 51 of the Act is not binding in the proceeding for prosecution under Section 56 of the Act and both can go hand in hand. Further, the prosecution can be launched even before conclusion of adjudication proceeding under Section 51 of the Act. [Paras 10, 11] [904-H; 905-H; 906-A-C]

3. The standard of proof in a criminal case is much higher than that of the adjudication proceeding. The Enforcement Directorate has not been able to prove its case in the adjudication proceeding and the appellant has been exonerated on the same allegation. The appellant is facing trial in the criminal case. Therefore, the determination of facts in the adjudication proceeding

cannot be said to be irrelevant in the criminal case. However, the finding in an adjudication proceeding is not binding in the proceeding for criminal prosecution. A person held liable to pay penalty in adjudication proceeding cannot necessarily be held guilty in criminal trial. Adjudication proceedings are decided on the basis of preponderance of evidence of a little higher degree whereas in a criminal case entire burden to prove beyond all reasonable doubt lies on the prosecution. [Paras 15, 16] [909-H; 910-A-B; 911-F-G]

4. The yardstick would be to judge as to whether allegation in the adjudication proceeding as well as proceeding for prosecution is identical and the exoneration of the person concerned in the adjudication proceeding is on merits. In case it is found on merit that there is no contravention of the provisions of the Act in the adjudication proceeding, the trial of the person concerned shall be in abuse of the process of the court. [Para 19] [916-A-B]

5. In the instant case, in the adjudication proceeding on merit the adjudicating authority has categorically held that "the charges against Shri Radheshyam Kejriwal for contravening the provisions of Section 9(1)(f)(i) and Section 8(2) read with Section 64(2) of the Foreign Exchange Regulation Act, 1973 cannot be sustained". In the face of the aforesaid finding by the Enforcement Directorate in adjudication proceeding that there is no contravention of any of the provisions of the Act, it would be unjust and an abuse of the process of the court to permit the Enforcement Directorate to continue with the criminal prosecution. [Para 23] [919-F-H; 910-A]

6. In the result the impugned judgment of the Metropolitan Magistrate and the order affirming the same

by the High Court are set aside and appellant's prosecution is quashed. [Para 24] [920-B]

Standard Chartered Bank and others vs. Directorate of Enforcement and others **(2006) 4 SCC 278;** *Assistant Collector of Customs, Bombay and another vs. L.R. Melwani and another* **AIR 1970 SC 962 and** *Iqbal Singh Marwah v. Meenakshi Marwah* **(2005) 4 SCC 370 – distinguished.**

Uttam Chand and others vs. Income Tax Officer, Central Circle, Amritsar **(1982) 2 SCC 543;** *G.L. Didwania and Another vs. Income Tax Officer and Another* **1995 Supp (2) SCC 724 and** *K.C. Builders and Another vs. Assistant Commissioner of Income Tax* **(2004) 2 SCC 731 – relied on.**

Hemendra M. Kothari v. Shri W.S. Vaigankar, Asstt. Director, Enforcement Directorate **(FERA),** *Govt. of India and State of Maharashtra [decided by Bombay High Court on 25-04-2007] and Sunil Gulati & Anr. V. R.K. Vohra* **145 (2007) DLT 612 – approved.**

B.N. Kashyap vs. Emperor **AIR (32) 1945 Lahore 23 Full Bench;** *K.G. Premshanker v. Inspector of Police* **(2002) 8 SCC 87 – referred to.**

Case Law Reference:

(2006) 4 SCC 278	**distinguished**	**Para 11, 20**
AIR 1970 SC 962	**distinguished**	**Para 12, 13**
AIR (32) 1945 Lahore 23	**referred to**	**Para 15**
(2002) 8 SCC 87	**referred to**	**Para 15**
(2005) 4 SCC 370	**distinguished**	**Para 16**
(1982) 2 SCC 543	**relied on**	**Para 17**

1995 Supp (2) SCC 724	**relied on**	**Para 17**
(2004) 2 SCC 731	**relied on**	**Para 17**
145 (2007) DLT 612	**approved**	**Para 22**

PER SATHASIVAM, J. (dissenting):

HELD: 1. The Foreign Exchange Regulation Act, 1973 (FERA) being a statute relating to economic offences, there is no reason to restrict the scope of any provisions of the Act. These provisions ensure that no economic loss is caused by the alleged contravention by the imposition of an appropriate penalty after adjudication under Section 51 of the Act and to ensure that the tendency to violate is guarded by imposing appropriate punishment after due transaction in terms of Section 56 of the Act. In fact, Section 23D of the Foreign Exchange Regulation Act, 1947 had a proviso, which indicates that the adjudication for the imposition of penalty should precede making of complaint in writing to the court concerned for prosecuting the offender. The absence of a similar proviso to Section 51 or to Section 56 of the 1973 Act is a clear indication that the Legislature intended to treat the two proceedings as independent of each other. There is nothing in the present Act to indicate that a finding in adjudication is binding on the Court in a prosecution under Section 56 of the Act or that the prosecution under Section 56 depends upon the result of adjudication under Section 51 of the Act. The two proceedings are independent and irrespective of the outcome of the decision under Section 50, there cannot be any bar in initiating prosecution under Section 56. The scheme of the Act makes it clear that the adjudication by the concerned authorities and the prosecution are distinct and separate. No doubt, the conclusion of the adjudication, in the case on hand, the decision of the

Special Director, may be a point for the appellant and it is for him to put forth the same before the Magistrate. Inasmuch as FERA contains certain provisions and features which cannot be equated with the provisions of Income Tax Act or the Customs Act and in the light of the mandate of Section 56 of the FERA, it is the duty of the Criminal Court to discharge its functions vest with it and give effect to the legislative intention, particularly, in the context of the scope and object of FERA which was enacted for the economic development of the country and augmentation of revenue. Though the Act has since been repealed and not available at present, those provisions cannot be lightly interpreted taking note of the object of the Act. [Para 23] [942-D-H; 943-A-D]

2. In view of the above, the conclusion arrived at by the Metropolitan Magistrate, Calcutta as well as the decision of the High Court are upheld. [Para 24] [943-E]

G.L. Didwania and Another v. Income Tax officer and Another **1995 Supp (2) SCC 724;** *K.C. Builders and Another v. Assistant Commissioner of Income-Tax* **(2004) 2 SCC 731;** *P.S. Rajya vs. State of Bihar* **(1996) 9 SCC 1;** *Uttam Chand and Others v. Income Tax Officer, Central Circle, Amritsar* **(1982) 2 SCC 543 – distinguished.**

Standard Chartered Bank and Others vs. Directorate of Enforcement and Others **(2006) 4 SCC 278;** *K.G. Premshanker vs. Inspector of Police and Another* **(2002) 8 SCC 87;** *Assistant Collector of Customs vs. L.R. Malwani,* **1969 (2) SCR 438;** *Iqbal Singh Marwah and Another vs. Meenakshi Marwah and Another* **(2005) 4 SCC 370 – relied on.**

Asstt. Commr. vs. Velliappa Textiles Ltd. **(2003) 11 SCC 405;** *ANZ Grindlays Bank Ltd. vs. Directorate of Enforcement* **(2004) 6 SCC 531;** *Standard Chartered Bank vs. Directorate*

of Enforcement **(2005) 4 SCC 530 – referred to.**

B.N. Kashyap vs. Emperor **AIR (32) 1945 Lahore 23 Full Bench – referred to.**

Case Law Reference:

1995 Supp (2) SCC 724	**distinguished**	**Para 9, 10, 11, 16, 19, 22**
(2004) 2 SCC 731	**distinguished**	**Para 9 , 11**
(1996) 9 SCC 1	**distinguished**	**Para 9 , 12**
(1982) 2 SCC 543	**distinguished**	**Para 9 , 13**
(2006) 4 SCC 278	**relied on**	**Para 15, 22**
(2002) 8 SCC 87	**relied on**	**Para 15, 17**
1969 (2) SCR 438	**relied on**	**Para 15, 18, 19, 22**
(2005) 4 SCC 370	**relied on**	**Para 15, 20**
AIR (32) 1945 Lahore 23 Full Bench	**referred to**	**Para 15, 21**
(2003) 11 SCC 405	**referred to**	**Para 16**
(2004) 6 SCC 531	**referred to**	**Para 16**
(2005) 4 SCC 530	**referred to**	**Para 16**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1097 of 2003.

From the Judgment & Order dated 10.08.2001 of the High Court of Calcutta in C.R.R. No. 3593 of 1997.

A. Sharan, Punet Jain, Sushil Kr. Jain, Pramod Sharma, Anil K. Verma, Pratibha Jain for the Appellant.

P.P. Malhotra, ASG, P.K. Dey, Ranjana Narayan, B. Krishna Prasad. Tara Chandra Sharma, Neelam Sharma for the Respondents.

The Judgement of the Court was delivered by

CHANDRAMAULI KR. PRASAD, J. 1. We have gone through the draft judgment prepared by our noble and learned Brother Sathasivam, J. and we find ourselves unable to subscribe to the view taken by him.

2. Shorn of unnecessary details facts giving rise to the present appeal are that on 22nd May, 1992 various premises in occupation of the appellant Radheshyam Kejriwal besides other persons were searched by the officers of the Enforcement Directorate. The appellant was arrested on 3rd May, 1992 by the officers of the Enforcement Directorate in exercise of the power under Section 35 of the Foreign Exchange Regulation Act, 1973 (hereinafter referred to as the 'Act') and enlarged on bail on the same day. Further the appellant was summoned by the officers of the Enforcement Directorate to give evidence in exercise of the power under Section 40 of the Act and in the light thereof his statement was recorded on various dates, viz. 22nd May, 1992, 10th March, 1993, 16th March, 1993, 17th March, 1993 and 22nd March, 1993. On the basis of materials collected during search and from the statement of the appellant it appeared to the Enforcement Directorate that the appellant, a person resident in India, without any general or specific exemption from Reserve Bank of India made payments amounting to Rs.24,75,000/- to one Piyush Kumar Barodia in March/April, 1992 as consideration for or in association with the receipt of payment of U.S. $ 75,000 at the rate of Rs.33/- per U.S. Dollar by the appellant's nominee abroad in Yugoslavia. It further appeared to the Enforcement Directorate that transaction involved conversion of Indian currency into foreign currency at rates of exchange other than the rates for the time being authorised by the Reserve Bank of India. In the

opinion of the Enforcement Directorate the act of the appellant in making the aforesaid payment of Rs.24,75,000/- in Indian currency for foreign currency at the rate of Rs.33/- per US Dollar against the official rate of Dollar i.e. Rs.30/- per Dollar (approximately), contravened the provision of Section 8(2) of the Act. Further the Said payment having been made without any general or special exemption from Reserve Bank of India, the appellant had contravened the provisions of Section 9(1)(f)(i) of the Act and accordingly rendered himself liable to imposition of penalty under Section 50 of the Act. Enforcement Directorate was further of the opinion that by abetting in contravening the provisions of Sections 9(1)(f)(i) and 8(2) of the Act read with the provisions of the Section 64(2) of the Act the appellant has rendered himself liable for penalty under Section 50 of the Act.

3. Accordingly, a show cause notice dated 7th May, 1993 was issued by the Special Director of the Directorate of Enforcement calling upon the appellant to show cause as to why adjudication proceeding as contemplated under Section 51 of the Act be not held against him for the contraventions pointed above. Show cause notice dated 7th May, 1993 referred to above led to institution of proceeding under Section 51 of the Act (hereinafter referred to as the 'adjudication proceedings'). The adjudication officer came to the conclusion that the allegation made against the appellant of contravention of the provisions of Section 8, 9(1)(f)(i) and Section 8(2) read with Section 64(2) of the Act cannot be sustained. While doing so the Special Director observed as follows:

> The payment alleged to have been made by Shri Radheshyam Kejriwal amounting to Rs.24,75,000/- has to be examined in the context of Section 9(1)(f)(i) and Section 8(2) r/w Section 64(2) of Foreign Exchange Regulation Act, 1973. The important ingredients for sustaining the conviction under the above provisions would require the proof of payment having been made to the credit of any person @ exchange other than the rate which has been

> authorized by the Reserve Bank of India. In the case before me, it has not been proved beyond reasonable doubt whether a sum of Rs.24,75,000/- has actually been paid or not. There is no documentary evidence except the statement of Shri Piyush Kumar Barodia and the retracted statement of Shri Radheshyam confirming the fact that Rs.24,75,000/- was exchanged @ of Rs.33/- per dollar. Therefore, it is very relevant to take the above facts and circumstances into consideration before coming to a conclusion as to the correctness of the statements given by S/Shri Radheshyam Kejriwal and Piyush Kumar Barodia. The documentary evidence available and the statements of the other co-accused will definitely throw further light in the matter.
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> After considering all the above facts, I find that the only evidence available against Shri Radheshyam Kejriwal is the fact that his telephone number and name are mentioned in the documents seized from Shri Piyush Kumar Barodia and the fact that some transactions have been noted against his name which do not match the sum of Rs.24,75,000/- which was alleged to have been transferred. Secondly, there is no evidence to show that he was indulging in any foreign exchange transaction to transfer money abroad. In conclusion, the benefit of doubt will have to be given to Shri Radheshyam Kejriwal in the absence of any further evidence and also the fact that both Raju Poddar and Babubhai Umaidmal have denied having taken part in any such transaction. Significantly, on enquiry, it was found that Shri Sirish Kumar Barodia, brother of Shri Piyush Kumar Barodia staying at Bombay, was not available for the past year during which these transactions took place. Shri Piyush Kumar Barodia is absconding, therefore, his case is being decided on merits. However, since the charges against Shri Radheshyam Kejriwal for contravening the provisions of Section 9(1)(f)(i) and Section 8(2) read with Section 64(2) of the Foreign

Exchange Regulation Act, 1973 cannot sustained, the charges against Shri Piyush Kumar Barodia can also not be sustained. Therefore, the charges against S/Shri Raju Poddar, Sirish Kumar Barodia and Babubhai Umaidmal Jain @ Babubhai Bhansali, are not sustainable for contravening the provisions of Section 9(1)(f)(i) and 8(2) read with Section 64(2) of the Foreign Exchange Regulation Act, 1973.

In view of the foregoing, the proceedings initiated against S/Shri Piyush Kumar Barodia, Radheshyam Kejriwal, Raju Poddar, Sirish Kumar Barodia and Babubhai Umaidmal Jain and Babubhai Bhansali, vide the impugned Memorandum, are hereby dropped."

It is common ground that the Enforcement Directorate has not challenged this order and it has attained finality.

4. It is relevant to state that any person contravening the provisions of Sections 8 and 9 of the Act besides other provisions is also liable to be prosecuted under Section 56 of the Act without prejudice to any award of penalty by the adjudicating officer under Section 51 of the Act. However, before launching such prosecution for contravening such provisions of the Act which prohibits the doing of an act without permission, the proviso to Section 61(2) of the Act mandates giving an opportunity to the person concerned to show that he had such permission. Accordingly, by notice dated 29th December, 1994 the appellant was given an opportunity to show permission granted by the Reserve Bank of India. Appellant replied to that but did not produce any permission.

5. The Enforcement Directorate on the same allegation which was the subject matter of adjudication proceeding laid complaint against the appellant for prosecution under Section 56 of the Act before the Metropolitan Magistrate. After the issuance of process and exoneration in the adjudication proceeding appellant filed application for dropping the

proceedings, inter alia, contending that on the same allegation the adjudication proceedings having been dropped and the appellant exonerated, his continued prosecution is an abuse of the process of the Court. The Metropolitan Magistrate by order dated 2nd September, 1997 rejected his prayer. Aggrieved by the same appellant preferred criminal revision application and reiterated the same submission but it did not find favour with the Calcutta High Court and by the impugned order dated 10th August, 2001, it rejected the revision application. While doing so it observed as follows:

> "Therefore, the contention of Mr. Ghosh is unacceptable that in the adjudication proceedings being held by the department concerned the allegations against the petitioner having not been found established the prosecution against him before a Court of law cannot have any legs to stand upon, since the same departmental authority which held the enquiry against him and found no materials for establishing his guilt cannot be expected to lodge the prosecution on the self-same allegations against that person before a Court and cannot be expected to take a different stand on the self-same materials as available against him on the record. As we have noted above, the Enforcement Officer who has investigated into the case is a different agency from that of the adjudicating officer and, what is more important, it cannot be taken for granted that the Court will take the same view on the materials on record which have prompted the departmental authority to find the allegations not substantiated. As it has been already pointed out, the procedure according to which the trial of such an accused by the Court it held has some special features and the two testing processes are so divergent that there is ample scope for the two parallel authorities to hold even diametrically opposite views so far as the question of proof of the charge against the accused is concerned. The most of decisions relied upon by Mr. Ghosh and discussed above in respect of his above

contention cannot be attracted to our present case for the simple reason that none of those judicial pronouncements are relating to a case under the Foreign Exchange Regulation Act the provisions of which cannot be equated with those of the Income Tax Act or Customs Act."

6. Being aggrieved, the appellant is before us with the leave of the Court.

7. Mr. Amarendra Sharan, Senior Counsel appearing on behalf of the appellant submits that standard of proof required to bring home the charge in a criminal case is much higher than the adjudication proceeding and once the appellant has been exonerated in the adjudication proceeding, his prosecution is an abuse of the process of Court. Mr. P.P. Malhotra, Additional Solicitor General, however, contends that from the scheme of the Act as reflected from Sections 50, 51, 56 of the Act, the plea put forth by the appellant is unsustainable.

8. The submissions made necessitate examination of the scheme of the Act. Section 50 of the Act which is relevant for the purpose reads as follows:

> **50. Penalty.—** If any person contravenes any of the provisions of this Act other than section 13, clause (a) of sub-section (1) of section 18, section 18A and clause (a) of sub-section (1) of Section 19 or of any rule, direction or order made thereunder, he shall be liable to such penalty not exceeding five times the amount or value involved in any such contravention or five thousand rupees, whichever is more, as may be adjudged by the Director of Enforcement or any other officer of Enforcement not below the rank of an Assistant Director of Enforcement specially empowered in this behalf by order of the Central Government in either case hereinafter referred to as the adjudicating officer.

The aforesaid provision provides for mandatory penalty

and fixes the outer limit of such penalty on any person contravening the provisions of the Act which is to be adjudged by the Director of Enforcement or any other officer of the Enforcement not below the rank of an Assistant Director empowered by the Central Government. The procedure and the power to adjudicate penalty have been provided under Section 51 of the Act, which reads as follows:

> 51. Power to adjudicate.— For the purpose of adjudicating under section 50 whether any person has committed a contravention of any of the provisions of this Act other than those referred to in that section or of any rule, direction or order made thereunder, the adjudicating officer shall hold an inquiry in the prescribed manner after giving that person a reasonable opportunity for making a representation in the matter and if, on such inquiry, he is satisfied that the person has committed the contravention, he may impose such penalty as he thinks fit in accordance with the provisions of that section.

9. From a plain reading of Section 51 of the Act it is evident that for adjudging the penalty under Section 51 of the Act for contravention of the provisions of the Act or any rule, direction or order made thereunder the adjudicating officer is to be satisfied that the person has committed the contravention after holding an inquiry in the prescribed manner and after giving the person concerned a reasonable opportunity of making representation. Thus besides the procedural requirement the sine qua non for imposition of penalty under Section 51 of the Act is that the adjudicating officer has to record its satisfaction that the person concerned has committed the contravention of any of the provisions of the Act or of any rule, direction or order made thereunder.

10. As would be evident from the preamble of the Act, it was enacted for the conservation of foreign exchange resources of the Country and the proper utilization thereof in the economic development of the Country. It is relevant here to

mention that the Forty Seventh Report of the Law Commission of India on the Trial and Punishment of Social and Economic Offences quoted the following portion from the Report of the Study Team on Leakage of Foreign Exchange through Invoice Manipulation:

> "…like the Customs Act, there should be a provision that for an offence in the Foreign Exchange Regulation Act, both adjudication by the Director of Enforcement and conviction by a Court of law are possible. The two should not be alternatives as at present. We would also suggest that in more and more cases, prosecution should also be launched apart from adjudication so as to have a deterrent effect."

Bearing in mind aforesaid the Legislature in order to ensure that no economic loss is caused by the contravention provided for an appropriate penalty under Section 51 of the Act and to prevent the tendency to violate is curbed by inserting Section 56 of the Act providing for imposing appropriate punishment after due prosecution, relevant portion whereof reads as follows:

> **"56. Offences and prosecutions.—** (1) Without prejudice to any award of penalty by the adjudicating officer under this Act, if any person contravenes any of the provisions of this Act other than section 13, clause (a) of sub- section (1) of section 18, section 18 A, clause (a) of sub- section (1) of section 19, sub- section (2) of section 44 and sections 57 and 58, or of any rule, direction or order made thereunder, he shall, upon conviction by a court, be punishable,-
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> xxx xxx xxx xxx

11. With deepest respect we are entirely in agreement with the conclusion of our learned Brother Sathasivam, J. that the proceedings under Section 51 and 56 of the Act are

independent of each other and the finding in an adjudication proceeding under Section 51 of the Act is not binding in the proceeding for prosecution under Section 56 of the Act and both can go hand in hand. Further, the prosecution can be launched even before conclusion of adjudication proceeding under Section 51 of the Act. In fact, it has explicitly been said by this Court in the case of *Standard Chartered Bank and others vs. Directorate of Enforcement and others* (2006) 4 SCC 278 which is as follows :

> "24.There is nothing in the Act to indicate that a finding in an adjudication is binding on the court in a prosecution under Section 56 of the Act. There is no indication that the prosecution depends upon the result of the adjudication. We have already held that on the scheme of the Act, the two proceedings are independent. The finding in one is not conclusive in the other. In the context of the objects sought to be achieved by the Act, the elements relied on by the learned Senior Counsel, would not justify a finding that a prosecution can be launched only after the completion of an adjudication under Section 51 of the Act."

12. However, in a case like the present one in which the penalty proceeding under Section 51 of the Act and the prosecution under Section 56 of the Act though launched together but the penalty proceeding culminated earlier exonerating the person, the question would arise as to whether continuance of the prosecution would be permissible or not. In other words, the question with which we are concerned is the impact of the findings which are recorded on the culmination of adjudication proceeding on criminal proceeding and in case in the adjudication proceeding person concerned is exonerated can he ask for dropping of the criminal proceeding on that ground alone. Mr. Malhotra submits that finding in the adjudication proceeding cannot either operate as estoppel or res judicata in case of prosecution under Section 56 of the Act and in this connection, he has drawn our attention to a

Constitution Bench judgment of this Court in the case of *the Assistant Collector of Customs, Bombay and another vs. L.R. Melwani and another* AIR 1970 SC 962, wherein in paragraph 8, it has been held as follows :

> "8. We shall now take up the contention that the finding of the Collector of Customs referred to earlier operated as an issue estoppel in the present prosecution. The issue estoppel rule is but a facet of the doctrine of autre fois acquit."
>
> xxxx xxxx xxxx xxxx
>
> But before an accused can call into aid the above rule, he must establish that in a previous lawful trial before a competent court, he has secured a verdict of acquittal which verdict is binding on his prosecutor. In the instant case for the reasons already mentioned, we are unable to hold that the proceeding before the Collector of Customs is a criminal trial. From this it follows that the decision of the Collector does not amount to a verdict of acquittal in favour of accused Nos. 1and 2."

We do not find any substance in the submission of Mr. Malhotra and the decision relied on has no bearing in the facts and circumstances of the case.

13. In *L.R. Melwani's* case (supra), the accused persons resisted their prosecution on the ground that the Collector of Customs having given the benefit of doubt, in view of the guarantee granted under Article 20 (2) of the Constitution for the same offence they can not be tried more than once. It was also contended that that person once convicted or acquitted can not be tried for same offence again in view of the safeguard provided under Section 403 of Code of Criminal Procedure, 1898, which corresponds to Section 300 of the Code of Criminal Procedure, 1973. In order to get benefit of Section 300

of the Code of Criminal Procedure, 1973, it is necessary for an accused person to establish that not only he had been tried by a Court of competent jurisdiction for an offence but convicted or acquitted of that offence and the said conviction or acquittal is in force. In the aforesaid background the question which fell for consideration before this Court was as to whether the proceeding before the Collector of Customs is a criminal trial by a court of competent jurisdiction for trial of offence. On analysis of the various authorities of this Court, the Constitution Bench came to the conclusion that the Collector of Customs was not a Court of competent jurisdiction for criminal trial. This would be evident from the following passage from the said judgment :-

> "..... Hence the question is whether that prosecution is barred under Article 20 (2) of the Constitution which says that no person shall be prosecuted and punished for the same offence more than once. This Article has no direct bearing on the question at issue. Evidently those accused persons want to spell out from this Article the rule of autre fois acquit embodied in S.403, Criminal Procedure Code. Assuming we can do that, still it is not possible to hold that a proceeding before the Collector of Customs is a prosecution for an offence. In order to get the benefit of Section 403, Criminal Procedure Code or Article 20 (2), it is necessary for an accused person to establish that he had been tried by a "Court of competent jurisdiction" for an offence and he is convicted or acquitted of that offence and the said conviction or acquittal is in force....."

14. In the present case, it is not the case of the appellant that they were tried by the Enforcement Directorate and therefore further trial by the criminal court is not permissible but their contention is that in the face of the finding in the adjudication proceeding, their continued prosecution is an abuse of the process of the court. In view of what we have

observed above, the contention of Mr. Malhotra is without merit and the decision relied on in no way supports his contention.

15. Mr. Malhotra, then contends that finding of the Enforcement Directorate in the adjudication proceedings is not binding or relevant in the criminal court where the appellant is facing the trial. In support of the contention, reliance has been placed on a full Bench decision of the Lahore High Court in the case of *B.N. Kashyap vs. Emperor* AIR (32) 1945 Lahore 23 and our attention has been drawn to the following passage:

> "There is no reason in my judgment as to why the decision of the civil Court particularly in an action in personam should be allowed to have that sanctity. There appears to be no sound reason for that view. To hold that when a party has been able to satisfy a civil court as to the justice of his claim and has in the result succeeded in obtaining a decree which is final and binding upon the parties, it would not be open to criminal Courts to go behind the findings of the civil Court is to place the latter without any valid reason in a much higher position than what it actually occupies in the system of administration in this country and to make it master not only of cases which it is called upon to adjudicate but also of cases which it is not called upon to determine and over which it has really no control. The fact is that the issues in the two cases although based on the same facts (and strictly speaking even parties in the two proceedings) are not identical and there appears to be no sufficient reason for delaying the proceedings in the criminal Court, which unhampered by the civil Court, is fully competent to decide the questions that arise before it for its decision and where in the nature of things there must be a speedy disposal."

We do not find any substance in this submission of Mr. Malhotra also. We may observe that standard of proof in a criminal case is much higher than that of the adjudication proceeding. The Enforcement Directorate has not been able

to prove its case in the adjudication proceeding and the appellant has been exonerated on the same allegation. The appellant is facing trial in the criminal case. Therefore, in our opinion, the determination of facts in the adjudication proceeding cannot be said to be irrelevant in the criminal case. In the case of *B.N. Kashyap* (Supra), the full Bench had not considered as to the effect of a finding of fact in a civil case over the criminal cases and that will be evident from the following passage from the said judgment :

> "I must, however, say that in answering the question, I have only referred to civil cases where the actions are in personam and not those where the proceedings or actions are in rem. Whether a finding of fact arrived at in such proceedings or actions would be relevant in criminal cases, it is unnecessary for me to decide in this case. When that question arises for determination, the provisions of Section 41, Evidence Act, will have to be carefully examined."

This Court had the occasion to consider this question in the case of *K.G. Premshanker v. Inspector of Police* (2002) 8 SCC 87, wherein it has been held as follows :-

> "**30.** What emerges from the aforesaid discussion is — (1) the previous judgment which is final can be relied upon as provided under Sections 40 to 43 of the Evidence Act; (2) in civil suits between the same parties, principle of res judicata may apply; (3) in a criminal case, Section 300 CrPC makes provision that once a person is convicted or acquitted, he may not be tried again for the same offence if the conditions mentioned therein are satisfied; (4) if the criminal case and the civil proceedings are for the same cause, judgment of the civil court would be relevant if conditions of any of Sections 40 to 43 are satisfied, but it cannot be said that the same would be conclusive except as provided in Section 41. Section 41

provides which judgment would be conclusive proof of what is stated therein."

Hence, we reject this submission of Mr. Malhotra.

16. Mr. Malhotra submits that finding recorded in the adjudication proceeding is not binding on the criminal proceeding as both the cases have to be decided on the basis of the evidence therein. Reliance has been placed on a decision of this Court in the case of *Iqbal Singh Marwah v. Meenakshi Marwah* (2005) 4 SCC 370, relevant portion whereof reads as follows :-

> **"32.** Coming to the last contention that an effort should be made to avoid conflict of findings between the civil and criminal courts, it is necessary to point out that the standard of proof required in the two proceedings are entirely different. Civil cases are decided on the basis of preponderance of evidence while in a criminal case the entire burden lies on the prosecution and proof beyond reasonable doubt has to be given. There is neither any statutory provision nor any legal principle that the findings recorded in one proceeding may be treated as final or binding in the other, as both the cases have to be decided on the basis of the evidence adduced therein...."

We do not have the slightest hesitation in accepting the broad submission of Mr. Malhotra that finding in an adjudication proceeding is not binding in the proceeding for criminal prosecution. A person held liable to pay penalty in adjudication proceeding can not necessarily be held guilty in criminal trial. Adjudication proceedings are decided on the basis of preponderance of evidence of a little higher degree whereas in a criminal case entire burden to prove beyond all reasonable doubt lies on the prosecution. In the case of *Iqbal Singh Marwah* (supra) relied on by Mr. Malhotra, the question which fell for consideration was as to whether bar under Section 195 (1) (b) (i) and (ii) operates for taking cognizance when a

complaint is filed alleging that will filed by the accused in a probate case is forged and while holding that the bar would not operate if the will is forged before its filing in the court, hence the aforesaid observation of this court has no bearing in the facts and circumstances of this case.

17. It is trite that standard of proof required in criminal proceedings is higher than that required before adjudicating authority and in case accused is exonerated before the adjudicating authority whether his prosecution on same set of facts can be allowed or not is the precise question which falls for determination in this case. There are authorities of this Court in relation to the Income-tax Act in this regard. The first in the series is the judgment of this Court in the case of *Uttam Chand and others vs. Income Tax Officer, Central Circle, Amritsar* (1982) 2 SCC 543 in which registration of firm was cancelled on the ground that it was not genuine and prosecution initiated for filing false return. However, in appeal, the Income Tax Appellate Tribunal reversed the finding and held the firm to be genuine. Relying on that, this court quashed the prosecution inter alia observing as follows :

> "1. Heard counsel, special leave granted In view of the finding recorded by the Income Tax Appellate Tribunal that it was clear on the appraisal of the entire material on the record and Shrimati Janak Rani was a partner of the assessee firm and that the firm was a genuine firm, we do not see how the assessee can be prosecuted for filing false returns. We, accordingly, allow this appeal and quash the prosecution.
>
> 2. There will be no order as to costs."

In the case of *G.L. Didwania and Another vs. Income Tax Officer and Another* 1995 Supp (2) SCC 724, on setting aside the order of the assessing authority which led to the prosecution of the assessee by the Income-Tax Appellate Tribunal, this Court

held the prosecution not permissible and while doing so observed as follows :

> "4. In the instant case, the crux of the matter is attracted and whether the prosecution can be sustained in view of the order passed by the tribunal. As noted above, the assessing authority held that the appellant-assessee made a false statement in respect of income of M/s. Young India and Transport Company and that finding has been set aside by the Income Tax Appellate Tribunal. If that is the position then we are unable to see as to how criminal proceedings can be sustained."

Similar view has been taken by this Court in the case of *K.C. Builders and Another vs. Assistant Commissioner of Income Tax* (2004) 2 SCC 731, in which it has been held as follows:

> "26. In our view, once the finding of concealment and subsequent levy of penalties under Section 271(1)(c) of the Act has been struck down by the Tribunal, the assessing officer has no other alternative except to correct his order under Section 154 of the Act as per the directions of the Tribunal. As already noticed, the subject-matter of the complaint before this Court is concealment of income arrived at on the basis of the finding of the assessing officer. If the Tribunal has set aside the order of concealment and penalties, there is no concealment in the eye of the law and, therefore, the prosecution cannot be proceeded with by the complainant and further proceedings will be illegal and without jurisdiction. The Assistant Commissioner of Income Tax cannot proceed with the prosecution even after the order of concealment has been set aside by the Tribunal. When the Tribunal has set aside the levy of penalty, the criminal proceedings against the appellants cannot survive for further consideration. In our view, the High Court has taken the view that the charges have been framed and the matter is

> in the stage of further cross-examination and, therefore, the prosecution may proceed with the trial. In our opinion, the view taken by the learned Magistrate and the High Court is fallacious. In our view, if the trial is allowed to proceed further after the order of the Tribunal and the consequent cancellation of penalty, it will be an idle and empty formality to require the appellants to have the order of the Tribunal exhibited as a defence document inasmuch as the passing of the order as aforementioned is unsustainable and unquestionable."

18. Mr. Sharan contends that aforesaid principle shall apply with equal force in the prosecution under the Act as the basic principle which these judgments take note of to quash the prosecution is the higher standard of proof required in a criminal case than the adjudication proceeding and no reference at all has been made to the provisions of the Income-tax Act to come to that conclusion. The decisions referred to above pertain to prosecution under the Income-tax Act and obviously had not adverted to any of the provisions of the Act, particularly Sections 50, 51 and 56 of the Act points out Mr. P.P. Malhotra, the Additional Solicitor General and therefore these decisions in his submission shall have no bearing on the facts of the present case.

19. We find substance in the submission of Mr. Sharan. There may appear to be some conflict between the views in the case of *Standard Charted Bank* (supra) and *L.R. Melwani* (supra) holding that adjudication proceeding and criminal proceeding are two independent proceedings and both can go on simultaneously and finding in the adjudication proceeding is not binding on the criminal proceeding and the judgments of this Court in the case of *Uttam Chand* (supra), *G.L. Didwania* (supra) and *K.C. Builders* (supra) wherein this Court had taken a view that when there is categorical finding in the adjudication proceeding exonerating the person which is binding and conclusive, the prosecution cannot be allowed to stand.

Judgments of this Court are not to be read as statute and when viewed from that angle there does not seem any conflict between the two sets of decisions. It will not make any difference on principle that latter judgments pertain to cases under the Income Tax Act. The ratio which can be culled out from these decisions can broadly be stated as follows :-

(i) Adjudication proceeding and criminal prosecution can be launched simultaneously;

(ii) Decision in adjudication proceeding is not necessary before initiating criminal prosecution;

(iii) Adjudication proceeding and criminal proceeding are independent in nature to each other;

(iv) The finding against the person facing prosecution in the adjudication proceeding is not binding on the proceeding for criminal prosecution;

(v) Adjudication proceeding by the Enforcement Directorate is not prosecution by a competent court of law to attract the provisions of Article 20 (2) of the Constitution or Section 300 of the Code of Criminal Procedure;

(vi) The finding in the adjudication proceeding in favour of the person facing trial for identical violation will depend upon the nature of finding. If the exoneration in adjudication proceeding is on technical ground and not on merit, prosecution may continue; and

(vii) In case of exoneration, however, on merits where allegation is found to be not sustainable at all and person held innocent, criminal prosecution on the same set of facts and circumstances can not be allowed to continue underlying principle being the higher standard of proof in criminal cases.

In our opinion, therefore, the yardstick would be to judge as to whether allegation in the adjudication proceeding as well as proceeding for prosecution is identical and the exoneration of the person concerned in the adjudication proceeding is on merits. In case it is found on merit that there is no contravention of the provisions of the Act in the adjudication proceeding, the trial of the person concerned shall be in abuse of the process of the court.

20. In the submission of Mr. Malhotra the matter stands squarely covered by the decision of this Court in the case of *Standard Chartered Bank* (supra) which submission has found favour with learned Brother Sathasivam, J. We deem it expedient to consider the ratio and background of the said case in little detail. In the said case alleging violation of some of the provisions of the Act the Enforcement Directorate issued notices to the Standard Chartered Bank and its officers as to why proceedings for imposition of penalty under Section 50 of the Act be not initiated against them. Further notices under Section 61 of the Act were also issued to them calling upon them to produce the necessary permission from the concerned authority for the transaction involved. The Standard Chartered Bank and its officers filed writ petitions in the Bombay High Court challenging the constitutional validity of Sections 50, 51 and 68 of the Act. The Bombay High Court upheld the constitutional validity of the aforesaid provisions of the Act but at the same time observed that Section 68(1) of the Act shall not be applicable to adjudication proceeding and it is confined to prosecution under the Act. The Bank and its officers aggrieved by the judgment of the Bombay High Court upholding the constitutional validity of the impugned provisions of the Act and the Union of India dissatisfied with the observation of the Court whereby it restricted the application of Section 68(1) of the Act to only criminal prosecution filed separate appeals before the Supreme Court. This Court upheld the decision of the Bombay High Court so far as the constitutional validity of the aforesaid provisions of the Act is concerned and accordingly

dismissed the appeals filed by the Bank and its officers. However, this Court reversed the view of the Bombay High Court in regard to the applicability of Section 68(1) of the Act and held that it shall be applicable to both adjudication proceeding as well as proceeding for prosecution under the Act. In the case in hand we are not concerned with either of the issue.

21. Another contention which was raised in the aforesaid case was that criminal proceeding under Section 56 of the Act could not be initiated before culmination of adjudication proceeding under Section 51 of the Act. It was contended in the said case that there has to be finding in the adjudication proceeding about the violation of the provision of the Act and consequential imposition of a penalty and only thereafter in the light of those findings prosecution under Section 56 of the Act could be launched. It was resisted by the Union of India relying on the words "Without prejudice to any award of penalty by the Adjudicating Officer" in Section 56 of the Act and submission was made that criminal action cannot wait till outcome of the adjudication proceeding. In the context of the aforesaid argument this Court observed that proceedings under Section 51 and 56 of the Act are proceedings independent of each other and can be initiated simultaneously and finding in an adjudication proceeding is not binding on the Court in a proceeding for prosecution under Section 56 of the Act. The effect of finding of exoneration in the adjudication proceeding on criminal proceeding was not an issue and, therefore, the judgment under consideration cannot be said to have decided this question with which we are concerned in the present appeal.

22. A learned Single Judge of the Bombay High Court had the occasion to consider this question in a case under the Foreign Exchange Regulation Act in Criminal Application No. 1070 of 1999 (Hemendra M. Kothari vs. Shri W.S. Vaigankar, Assistant Director, Enforcement Directorate (FERA), Govt. of

India and State of Maharashtra), decided on 25.04.2007 and on a review of large number of decisions of this Court and other courts it came to the following conclusion :-

> "21. It may be noted that in the present case the applicant was exonerated by the Dy. Director of Enforcement, who was adjudicating authority, in the adjudication proceedings. Admittedly that order was not challenged in appeal by the respondent and thus that order has become final. I have already noted the facts and findings of the adjudicating authority in detail. The adjudicating authority had clearly come to the conclusion that there was no material to hold the present applicant guilty for contravention of the provisions of FERA and he was completely exonerated. When in the departmental proceedings before the adjudicating authority, the department could not establish the charges, it is difficult to imagine how the department could prove the same charges before the criminal Court when the standard of proof may be much higher and stringent than the standard of proof required in departmental proceedings."

The Delhi High Court also considered this question arising out of a case under Foreign Exchange Regulation Act, in detail in the case of *Sunil Gulati & Anr. V. R.K. Vohra* 145 (2007) DLT 612, and held as follows :-

> "In case of converse situation namely where the accused persons are exonerated by the competent authorities/Tribunal in adjudication proceedings, one will have to see the reasons for such exoneration to determine whether these criminal proceedings should still continue. If the exoneration in departmental adjudication is on technical ground or by giving benefit of doubt and not on merits or the adjudication proceedings were on different facts, it would have no bearing on criminal proceedings. If, on the other hand, the exoneration in the adjudication

proceedings is on merits and the concerned person(s) is/are innocent, and the criminal prosecution is also on the same set of facts and circumstances, the criminal prosecution cannot be allowed to continue. The reason is obvious criminal complaint is filed by the departmental authorities alleging violation/contravention of the provisions of the Act on the part of the accused persons. However, if the departmental authorities themselves, in adjudication proceedings, record a categorical and unambiguous finding that there is no such contravention of the provisions of the Act, it would be unjust for such departmental authorities to continue with the criminal complaint and say that there is sufficient evidence to foist the accused persons with criminal liability when it is stated in the departmental proceedings that ex facie there is no such violation. The yardstick would, therefore, be to see as to whether charges in the departmental proceedings as well as criminal complaint are identical and the exoneration of the concerned person in the departmental proceedings is on merits holding that there is no contravention of the provisions of any Act."

We respectfully endorse the view taken by the Bombay High Court in the case of *Hemendra M. Kothari* (supra) and Delhi High Court in *Sunil Gulati* (supra).

23. Bearing in mind the principles aforesaid we proceed to consider the case of the appellant. In the adjudication proceeding on merit the adjudicating authority has categorically held that "the charges against Shri Radheshyam Kejriwal for contravening the provisions of Section 9(1)(f)(i) and Section 8(2) read with Section 64(2) of the Foreign Exchange Regulation Act, 1973 cannot be sustained". In the face of the aforesaid finding by the Enforcement Directorate in adjudication proceeding that there is no contravention of any of the provisions of the Act, it would be unjust and an abuse of

the process of the court to permit the Enforcement Directorate to continue with the criminal prosecution.

24. In the result the appeal is allowed, the impugned judgment of the learned Metropolitan Magistrate and the order affirming the same by the High Court are set aside and appellant's prosecution is quashed.

P. SATHASIVAM, J. 1. This appeal is filed against the final judgment and order dated 10.08.2001 passed by the High Court of Calcutta in C.R.R. No. 3593 of 1997 whereby the learned single Judge of the High Court dismissed the application filed by the appellant herein under Sections 401 and 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code') for quashing the criminal proceedings initiated against him vide Complaint Case No. 965 of 1995 under Section 56 of the Foreign Exchange Regulation Act, 1973 (hereinafter referred to as "the FERA") pending in the Court of 9th Metropolitan Magistrate, Calcutta.

2. BRIEF FACTS:

(a) On 07.05.1993, a show cause notice bearing No. T-4/2-C/93 was issued by the Special Director, Enforcement Directorate, FERA, Government of India, New Delhi to five persons including the appellant herein for holding inquiry under Section 51 of the FERA for the purpose of adjudicating the penalty under Section 50 for contravening the provisions of Sections 8(2) and 9(1)(f)(i) of the FERA which provides that no person shall make or receive any payment except with the special permission of the Reserve Bank of India. A search was conducted in the premises of one Shri Piyush Kumar Barodia at Calcutta wherefrom certain documents were found including the telephone diary. Apart from certain incriminating documents found against some other persons, some entries resembling to the name of the appellant herein were also found. After interrogating several persons, the Department came to the conclusion that Piyush Kumar Barodia was engaged in the

transaction of providing dollars abroad by receiving the money in Indian currency in India. He used to send money through his younger brother placed at Bombay, who in turn, used to give the same to one Shri Babu Bhai Umaidmal Jain @ Bhansali and Bhansali used to send the money to one Shri Anil Bhai at London and the Anil Bhai used to deliver equivalent amount of foreign exchange to the agents of such intending persons abroad.

(b) On 09.12.1994, the Enforcement Directorate, before receiving the reply from the appellant herein, in response to the notice dated 07.05.1993, issued another show cause notice under Section 61 of the FERA for taking cognizance of the offences committed on account of the contravention of the provisions of the FERA. On 07.09.1995, without waiting for the reply of the appellant in response to the two notices, one under Section 51 for adjudication of penalty proceedings and other under Section 61 for taking cognizance of the offence, a complaint was filed by the Department under Section 56 of the FERA alleging violation of provisions contained in Sections 8(2) and 9(1)(f)(i) of the FERA. The Special Director, Enforcement Directorate, FERA, New Delhi after going through the entire record and the evidences, vide order dated 18.11.1996, acquitted the appellant by holding that no penalty could be imposed as there is no proper evidence to connect the appellant with the contravention of any of the provisions of the FERA and accordingly directed to drop the proceedings and discharged the notices.

(c) Though no triable issue remained after the final adjudication by the Special Director, Enforcement Directorate, the criminal proceedings were not dropped by the Department. On 27.03.1997, the appellant filed an application before the Metropolitan Magistrate, Calcutta for dropping the proceedings. Vide order dated 02.09.1997, the Metropolitan Magistrate rejected the said application and held that there is no bar to proceed with the criminal case as the proceeding

before the FERA Board is separate.

(d) Being aggrieved by the said order, on 04.12.1997, the appellant filed an application under Sections 401 and 482 of the Code before the High Court of Calcutta for quashing of the criminal proceedings. The High Court, by the impugned order dated 10.08.2001, rejected the prayer for quashing of the criminal proceedings. Against the said order, the appellant has filed this appeal by way of special leave before this Court.

3. Heard Mr. Amarendra Sharan, learned senior counsel for the appellant and Mr. P.P. Malhotra, learned ASG for the respondents.

4. The main question that arises for consideration in this appeal is whether the Enforcement Directorate (ED) FERA can prosecute the appellant in a proceeding under Section 56 of the FERA when on the self-same facts and cause of action, the respondent-adjudicating authority dropped the charges framed under Section 50 of the FERA.

5. Since I have briefly stated the factual details in the earlier paragraphs, there is no need to traverse the same once again. However, it is not in dispute that the residential premises of the appellant, a business man was searched by the office of the Enforcement Directorate on 22.05.1992 and certain documents were seized. Based on the same, on 07.05.1993, a show cause notice was served against him by the Enforcement Directorate directing him to show cause as to why adjudication proceedings as contemplated under Section 51 of the FERA should not be proceeded against him for contravening the provisions of Sections 8(2) and 9(1)(f)(i) of the FERA. The appellant submitted his reply to the show cause notice. Thereafter, adjudication proceedings in respect of the show cause notice dated 07.05.1993 was instituted before the Special Director, Enforcement Directorate, FERA, New Delhi. After considering the submissions of both sides, Special Director passed an order dated 18.11.1996 holding that the

Enforcement Directorate had failed to make out a prima facie case in support of charges of violation of Sections 8(2) and 9(1)(f)(i) of the FERA and directed that the aforementioned Departmental proceedings be dropped. It is relevant to point out that in the meantime i.e. on 26.07.1995, the respondents filed a complaint against the appellant in the Court of Chief Metropolitan Magistrate, Calcutta on the same cause of action which was taken cognizance by the Magistrate. According to the appellant, inasmuch as the same issues having already been adjudicated by the authority concerned, the Magistrate ought to have dropped the complaint and the continuation of the proceedings would result in abuse of the process of the Court. Aggrieved by the order of the Magistrate in not dropping the proceedings and continuing the same, the appellant preferred revision before the High Court being CRR No. 3593 of 1997. By the impugned order, the High Court accepting the stand of the Department refused to quash the criminal proceedings and dismissed the revision.

6. In order to appreciate the claim of the appellant, it is useful to refer the relevant provisions of FERA which are applicable to the issue raised. They are:

"Penalty

50. If any person contravenes any of the provisions of this Act [other than section 13, clause (a) of sub-section (1) of section 18, section 18A and clause (a) of sub-section (1) of section 19] or of any rule, direction or order made thereunder, he shall be liable to such penalty not exceeding five times the amount or value involved in any such contravention or five thousand rupees, whichever is more, as may be adjudged by the Director of Enforcement or any other officer of Enforcement not below the rank of an Assistant Director of Enforcement specially empowered in this behalf by order of the Central Government (in either case hereinafter referred to as the adjudicating officer).

Power to adjudicate

51. For the purpose of adjudging under section 50 whether any person has committed a contravention of any of the provisions of this Act (other than those referred to in that section) or of any rule, direction or order made thereunder, the adjudicating officer shall hold an inquiry in the prescribed manner after giving that person a reasonable opportunity for making a representation in the matter and if, on such inquiry, he is satisfied that the person has committed the contravention, he may impose such penalty as he thinks fit in accordance with the provisions of that section.

Offences and Prosecutions

56. (1) Without prejudice to any award of penalty by the adjudicating officer under this Act, if any person contravenes any of the provisions of this Act [other than section 13, clause (a) of sub-section (1) of section 18, section 18A clause (a) of sub-section (1) of section 19, sub-section (2) of section 44 and sections 57 and 58], or of any rule, direction or order made thereunder, he shall, upon conviction by a court, be punishable, -(i) in the case of an offence the amount or value involved in which exceeds one lakh of rupees, with imprisonment for a term which shall not be less than six months, but which may extend to seven years and with fine:

Provided that the court may, for any adequate and special reasons to be mentioned in the judgement, impose a sentence of imprisonment for a term of less than six months; (ii) in any other case, with imprisonment for a term which may extend to three years or with fine or with both."

7. Mr. Amarendra Sharan, learned senior counsel for the appellant, after taking through the above provisions as well as the order dated 18.11.1996 of the Special Director,

Enforcement Directorate, dropping the departmental proceedings submitted that in view of the said conclusion and of the fact that the Department had not challenged the same by way of further appeal, there cannot be criminal prosecution for the same cause of action under Section 56(1) of FERA.

8. I have gone through the order of the Special Director dated 18.11.1996. I have already pointed out that pursuant to the search and seizure, after issuance of show cause notice and opportunity of hearing, the Special Director, Enforcement Directorate passed the above order. After considering all the materials and finding that no incriminating documents relating to foreign exchange transactions and further finding that the charges against the appellant for contravening the provisions of Sections 8 (2) and 9(1)(f)(i) read with Section 64 (2) of FERA cannot be sustained, the Special Director dropped the proceedings initiated against the appellants and others. Admittedly, the Department had not challenged the said conclusion by way of an appeal to the Foreign Exchange Regulation Appellate Board as per Section 52 of the FERA. It is the claim of the appellant that since there is a categorical finding by the Special Director exonerating the appellant from all charges leveled against him, the Department is not permitted to initiate criminal proceedings under Section 56 of the FERA. It is the stand of the appellant that in view of the language used in sub-section (1) of Section 56, namely, "without prejudice to any award or penalty by the adjudicating officer under this Act….", and in the light of the categorical conclusion by the Special Director dropping all the charges, the Enforcement Department is estopped from initiating prosecution.

9. In support of the above claim, learned senior counsel for the appellant relied on the following decisions:-

(1) *G.L. Didwania and Another vs. Income Tax officer and Another,* 1995 Supp (2) SCC 724;

(2) *K.C. Builders and Another vs. Assistant Commissioner of Income-Tax,* (2004) 2 SCC 731;

(3) *P.S. Rajya vs. State of Bihar,* (1996) 9 SCC 1 and

(4) *Uttam Chand and Others vs. Income Tax Officer, Central Circle, Amritsar,* (1982) 2 SCC 543.

10. The first decision, being *G.L. Didwania* (supra) arose under the Income Tax Act. The appellant therein was an assessee and for the assessment year 1960-61, he filed his return of income showing his income as Rs. 26,224/- in the prescribed form and the verification was signed by him on 25.08.1961 and the return was filed on 08.09.1961. The appellant showed his business income from firms in Delhi and Bombay. The assessment was made on 31.10.1961 by the officer concerned taking the income to be of Rs. 35,699/-. There was another firm, M/s Young India and Transport Company in which the minor children of the appellant and his two employees were partners. In the assessment proceeding, the assessing authority reached the conclusion that it was not a genuine firm and the instrument of partnership was invalid and inoperative. Therefore, the proceedings under Sections 147 and 148 of the Income Tax Act were initiated against the appellant and his assessment was reopened. In pursuance of the notice under Section 148, the appellant filed his return showing his income as Rs. 29,500/-. By an order dated 17.03.1969, the Income Tax Officer assessed the income of the appellant as Rs. 52,634/- and this figure was arrived at by adding the income of M/s Young India and Transport Company and for the same assessment year as though it was the income of the appellant. The appellant made a statement in the verification to the return filed on 02.12.1971 and delivered an account/statement which according to the assessing authority was false or the assessee knew or believed to be false. On the basis of this assessment, the prosecution was launched and the complaint by the authorised authority was filed on 09.09.1977. Meanwhile, the appellant-assessee filed an appeal before the Income Tax

Appellate Tribunal and the Tribunal by its order dated 24.02.1977 allowed the appeal and held that there was no substantial material to hold that the appellant was the owner of the entire business. The Appellate Tribunal also observed that the assessing authority arrived at wrong conclusion from the facts on record and held that the business run in the name of M/s Young India and Transport Company belonged to the assessee and accordingly the appellate authority deleted the addition of Rs. 23,134/- from the total income of the assessee. After the Appellate Tribunal passed the order, allowing the appeal in favour of the appellant, the assessee filed a petition before the Magistrate to drop the criminal proceedings. The Magistrate by his order dated 02.09.1979 dismissed the said application and held that the prosecution has got a right to lead evidence in support of his complaint and the court can come to the conclusion whether or not any criminal offence is made out. The Magistrate also observed that the order of the Tribunal can be taken only as evidence. Aggrieved by the same, the appellant-assessee filed an application under Section 482 of the Code before the High Court and the High Court dismissed the same in limine which was challenged before this Court. The question before this Court was whether the prosecution can be sustained in view of the order passed by the Tribunal. In the factual scenario, this Court held as under:

> "4. … …. As noted above, the assessing authority held that the appellant-assessee made a false statement in respect of income of M/s Young India and Transport Company and that finding has been set aside by the Income Tax Appellate Tribunal. If that is the position then we are unable to see as to how criminal proceedings can be sustained."

The ratio laid down in the decision is that in view of conclusion of the Income Tax Appellate Tribunal, the Department is not permitted to continue the criminal proceeding which was pending before the Magistrate and the finding of the Appellate Tribunal is a conclusive one. Based on such conclusion, this

Court quashed the criminal proceeding and allowed the appeal of the assessee.

11. The second decision being *K.C.Builders* (supra) also arose under the Income Tax Act. Here again, relying on the earlier decision in *G.L. Didwania* (supra), this Court held as under:

> "31. It is a well-established principle that the matter which has been adjudicated and settled by the Tribunal need not be dragged into the criminal courts unless and until the act of the appellants could have been described as culpable."

12. The third decision being *P.S. Rajya* (supra), relates to power of the Court under Section 482 of the Code in respect of quashing of complaint/FIR. In this decision, it was held that if the issue in the criminal proceeding is identical to the departmental proceeding which could not be established, the Department is not permitted to pursue the same charge in the criminal proceeding.

13. The last decision relied on by the counsel is *Uttam Chand (*supra). This decision also arose under the Income Tax Act. Without adverting to any statutory provisions and the earlier decisions, confining to the facts of this case, noting the finding recorded by the Income Tax Appellate Tribunal that one Smt. Janak Rani was a partner of the assessee firm and that the firm was a genuine firm, this Court quashed the criminal proceeding initiated against her for filing false returns.

14. The first two decisions admittedly arose from the Income Tax Act. It is not demonstrated before us that whether identical provisions, namely, Sections 50, 51 and 56 of the FERA are available in the Income Tax Act. Even otherwise, in the light of the language used in Section 56(1) of the FERA, there cannot be any bar irrespective of the decision under Section 50, which I will elaborate in the succeeding paragraphs. The third decision relied on by the appellant

relates to power of the Court under Section 482 of the Code for quashing the complaint/FIR and the last decision relied on has to be confined to the facts of that case since no other material was available. In other words, there is no ratio for being considered for other cases.

15. Now, let me consider the stand of the Department as projected by Mr. P.P. Malhotra, learned ASG. After taking through Sections 50, 51 and 56 of the FERA, Mr. Malhotra submitted that both the proceedings, namely, the departmental adjudication and imposition of penalty as covered by Sections 50 and 51 and the prosecution covered by Section 56 of the Act can go hand in hand and there is no bar from simultaneous operation of these two systems. He also submitted that all the decisions relied on by the learned counsel for the appellant have no bearing on the issue in the case on hand since no one has dealt with the provisions of FERA, more particularly, Sections 50, 51 and 56. In support of his claim, he relied on the following decisions:- 1) *Standard Chartered Bank and Others vs. Directorate of Enforcement and Others,* (2006) 4 SCC 278; 2) *K.G. Premshanker vs. Inspector of Police and Another,* (2002) 8 SCC 87; 3) *Assistant Collector of Customs vs. L.R. Malwani,* 1969 (2) SCR 438; 4) *Iqbal Singh Marwah and Another vs. Meenakshi Marwah and Another,* (2005) 4 SCC 370 and 5) *B.N. Kashyap vs. Emperor,* AIR (32) 1945 Lahore 23 Full Bench.

16. The first decision i.e. *Standard Chartered Bank* (supra), is a three-Judge Bench decision and arose on the very same provisions, namely, Sections 50, 51 and 56 of the FERA. Since, at the outset, Mr. Amarendra Sharan has pointed out that the question in that decision was not the one relating to the issue being considered in the case on hand, let me first note down the facts and points determined by the three-Judge Bench. On receipt of notices under the FERA for showing cause why adjudication proceedings for imposition of penalty under Sections 50 and 51 be not initiated against the appellant Bank

and some of its officers and further notices under Section 61 of the FERA giving an opportunity to the appellant Bank and its officers of showing that they had the necessary permission from the authority concerned for the transaction involved, the appellant Bank filed Writ Petition No. 1972 of 1994, seeking a declaration that the relevant sections of the FERA are unconstitutional, being violative of Articles 14 and 21 of the Constitution of India and for writ of prohibition restraining the authorities under the FERA from proceeding with the proposed adjudication and the proposed prosecution, in terms of the Act. In another writ petition which was filed by the officers of the Bank as CWP No. 2377 of 1996 challenging the individual notices, the High Court of Bombay rejected the challenge to the constitutional validity of Sections 50, 51, 56 and 68 of the FERA, but clarified that Section 68(1) of FERA was not applicable to an adjudication proceeding and that it was confined to a prosecution for penal offences under the Act. Being aggrieved, the appellant-Bank and its officers as well as the Union of India have filed Civil Appeals before this Court. Initially, those appeals came up before a Bench of two learned Judges which referred the same to a bench of three Judges by order dated 20.04.2004. The three-Judge Bench doubted the correctness of a decision relied on by the Bank and its officers in *Asstt. Commr. vs. Velliappa Textiles Ltd.* (2003) 11 SCC 405 which was a judgment of a Bench of three Judges and by order dated 16-7-2004 [*ANZ Grindlays Bank Ltd. Vs. Directorate of Enforcement,* (2004) 6 SCC 531] referred the question to a Constitution Bench. The Constitution Bench, by judgment dated 5-5-2005 (*Standard Chartered Bank vs. Directorate of Enforcement* (2005) 4 SCC 530) overruled the decision in *Asstt. Commr. vs. Velliappa Textiles Ltd.* (supra) and sent these appeals for being heard on merits by a Division Bench. The question that was decided was whether in a case where an offence was punishable with a mandatory sentence of imprisonment, a company incorporated under the Companies Act, can be prosecuted, as the sentence of imprisonment cannot be imposed on the company. The majority in the

Constitution Bench, held that there could be no objection to a company being prosecuted for penal offences under the FERA and the fact that a sentence of imprisonment and fine has to be imposed and no imprisonment can be imposed on a company or an incorporated body, would not make Section 56 of the FERA inapplicable and that a company did not enjoy any immunity from prosecution in respect of offences for which a mandatory punishment of imprisonment is prescribed. In the light of the said decision of the Constitution Bench, the controversy before the three-Judge Bench has narrowed down and proceeded on the basis that the appellant-Banks are liable to be prosecuted for offences under the FERA. Since the Bench elaborately considered the scope and applicability of Sections 50, 51, and 56 of the FERA with which I am concerned, I extract the entire discussion and the ultimate conclusion.

> **"20.** The learned Senior Counsel for the appellants in Civil Appeal No. 1750 of 1999, in addition to adopting the arguments of the learned Senior Counsel already adverted to, also contended that on the scheme of the Act, it was incumbent on the Directorate of Enforcement to first adjudicate in terms of Section 51 of FERA and only if satisfied, proceed with the prosecution under Section 56 of the Act. According to counsel, under the scheme of FERA, the adjudication proceedings must first be commenced and only after they are completed, the Directorate of Enforcement can, in the light of the findings in the adjudication for penalty, decide to initiate a prosecution and seek to impose or not to impose a further punishment under Section 56 of the Act. It is submitted that the adjudication proceedings would give an idea to the authorities under the Act as to the gravity of the violation and the opportunity to decide whether the contravention deserved also a punishment by way of prosecution. They would decide whether the penalty imposed under Section 50 of the Act is adequate or not. If in the adjudication

> proceedings it is found that the alleged offender has not infringed any of the provisions of the Act, there will be no occasion for the Directorate of Enforcement to prosecute the person concerned. It would then be incongruous and unreasonable for the Directorate of Enforcement to prosecute a person for violating FERA, when in the adjudication proceedings against him, it had been found that the person had not violated any of the provisions of FERA. It was in this context that the scheme of FERA should be understood as indicating that there should first be an adjudication and thereafter, if the Directorate of Enforcement feels that the penalty is inadequate, to consider the launching of a prosecution.
>
> **21.** The learned Additional Solicitor General contended that under FERA, adjudication and prosecution are two separate and distinct procedures with distinct purposes. There was no bar either in FERA or in any other law, to an adjudication and prosecution being launched in respect of an alleged contravention of FERA. Counsel submitted that the law has permitted it by providing two separate modes for dealing with the person who contravenes the law in relation to foreign exchange. While the primary purpose of imposing of the penalty is in the interests of revenue and the preservation of foreign exchange, the primary purpose of prosecution is to serve as a strong deterrent to persons or companies contravening the provisions of the Act and to send a message to society at large. Counsel pointed out that Section 56 of FERA which deals with offences and prosecutions, commences with the words "without prejudice to any award of penalty by the adjudicating officer under this Act". A person contravening any of the provisions shall upon conviction by a court will be punished, even if a penalty has been imposed on him. There was no warrant for reading the words "without prejudice to" as restricting the right of the authorities under the Act to proceed with the adjudication first and to

commence the prosecution only at its conclusion. Counsel also emphasised that the two proceedings are independently dealt with. Counsel pointed out that even in respect of FERA of 1947 in Shanti Prasad Jain v. Director of Enforcement this Court had upheld a special procedure under the statute holding that it was not violative of Article 14 of the Constitution. It is submitted that the purpose of the Act is to bring the accused to book, more so in case of a serious offence and it could not have been the intention of the legislature to await a long time for an adjudication to be completed by way of an appeal and a second appeal and then only to commence the prosecution.

22. The Act was enacted, as indicated by its preamble, for the conservation of foreign exchange resources of the country and the proper utilisation thereof in the economic development of the country. When interpreting such a law, in the absence of any provision in that regard in the Act itself, we see no reason to restrict the scope of any of the provisions of the Act, especially in the context of the presence of the "without prejudice" clause in Section 56 of the Act dealing with offences and prosecutions. We find substance in the contention of the learned Additional Solicitor General that the Act subserves a twin purpose. One, to ensure that no economic loss is caused by the alleged contravention by the imposition of an appropriate penalty after an adjudication under Section 51 of the Act and two, to ensure that the tendency to violate is curbed by imposing an appropriate punishment after a due prosecution in terms of Section 56 of the Act. The contention that as a matter of construction—since the provisions could not be attacked as violative of the rights under Part III of the Constitution—we should interpret the provisions of the Act and hold that an adjudication has to precede a prosecution cannot be accepted as we see nothing in the provisions of the Act justifying such a

construction. On the scheme of the Act, the two proceedings are seen to be independent and the launching of the one or the other or both is seen to be controlled by the respective provisions themselves. In the context of the inclusion of this Act in the Ninth Schedule, the reliance placed on the decision in Rayala Corpn. (P) Ltd. v. Director of Enforcement cannot enable this Court to deem the provisions as arbitrary and to read them down or understand them in the manner suggested by the learned Senior Counsel. The very purpose of the Act and the very object of inclusion of the Act in the Ninth Schedule justifies an interpretation of the provisions as they stand on the basis that there is nothing arbitrary or unreasonable in the provisions and in the scheme as enacted. We may also notice that Section 23-D of the Foreign Exchange Regulation Act, 1947 which was considered in Rayala Corpn. (P) Ltd. had a proviso, which indicated that the adjudication for the imposition of penalty should precede the making of a complaint in writing to the court concerned for prosecuting the offender. The absence of a similar proviso to Section 56 or to Section 51 of the present Act, is also a clear indication that the legislature intended to treat the two proceedings as independent of each other. Obviously, the legislature must be taken to have been conscious of the interpretation placed on the corresponding provisions by this Court in the decisions above referred to when the 1973 Act was enacted and it was also included in the Ninth Schedule to ward off any challenge on the ground that it would be violative of Article 14 of the Constitution, unless understood or read in a particular fashion.

23. The learned Senior Counsel appearing for the appellant in criminal appeal arising out of SLP (Crl.) No. 5892 of 2004 in which the Full Bench decision of the Calcutta High Court is challenged, supported the arguments raised by the learned Senior Counsel in Civil

Appeal No. 1750 of 1999. The Full Bench of the Calcutta High Court in the judgment under appeal has, on a consideration of the relevant aspects, answered the reference made to it by holding that a complaint under Section 56 of FERA can never be said to be premature if it is instituted before the awarding of penalty under Section 50 of the Act and such criminal proceeding being an independent proceeding, can be initiated during the pendency of an adjudication proceeding under Section 51 of FERA, 1973. Therein, the Full Bench has referred to the decision of the Madras High Court in A.S.G. Jothimani Nadar v. Dy. Director, Enforcement Directorate and that of the Andhra Pradesh High Court in Anilkumar Aggarwal v. K.C. Basu which also take the same view as the one taken by the Full Bench in the judgment under challenge. The Court has also derived support for its view from the decisions of this Court in Asstt. Collector of Customs v. L.R. Melwani and in P. Jayappan v. S.K. Perumal. We see no reason not to approve the answer given by the Full Bench to the question referred to it for decision. On the whole, we are satisfied that there is no justification in accepting the argument that unless an adjudication proceeding under Section 51 of the Act is completed, a prosecution under Section 56 of FERA cannot be initiated. Both proceedings can simultaneously be launched and can simultaneously be pursued.

24. Counsel submitted that the devising of a special machinery for adjudication, the limiting of the "without prejudice" clause in Section 56 to any award of penalty and not the initiation of proceedings under Section 51 of the Act, the making of a contravention of any of the provisions of this Act as the key to both proceedings, would all indicate that an adjudication should precede a prosecution under Section 56 of the Act. There is nothing in the Act to indicate that a finding in an adjudication is binding on the court in a prosecution under Section 56 of the Act. There

is no indication that the prosecution depends upon the result of the adjudication. We have already held that on the scheme of the Act, the two proceedings are independent. The finding in one is not conclusive in the other. In the context of the objects sought to be achieved by the Act, the elements relied on by the learned Senior Counsel, would not justify a finding that a prosecution can be launched only after the completion of an adjudication under Section 51 of the Act. The decision in K.C. Builders v. CIT is clearly distinguishable. The Court proceeded as if under the Income Tax Act, the prosecution is dependent on the imposition of penalty. That was a case where the prosecution was based on a finding of concealment of income and the imposition of penalty. When the Tribunal held that there was no concealment, and the order levying penalty was cancelled, according to this Court, the very foundation for the prosecution itself disappeared. This Court held that it is settled law that levy of penalties and prosecution under Section 276-C of the Income Tax Act are simultaneous and hence, once the penalties are cancelled on the ground that there was concealment, the quashing of the prosecution under Section 276-C of the Income Tax Act was automatic. We have held already that on the scheme of FERA, the adjudication and the prosecution are distinct and separate. Hence, the ratio of the above decision is not applicable. That apart, there is merit in the submission of the learned Additional Solicitor General that the correctness of the view taken in K.C. Builders may require reconsideration as the reasoning appears to run counter to the one adopted by the Constitution Bench in Asstt. Collector of Customs v. L.R. Melwani and in other decisions not referred to therein. For the purpose of these cases, we do not think it necessary to pursue this aspect further. Suffice it to say, that the ratio of that decision has no application here."

17. The next decision heavily relied on by the Department

is *K.G. Premshanker* (supra) which is also a three-Judge Bench decision. In this case, this Court has considered the effect of the decision of the civil court on the criminal proceedings and initiation of civil and criminal proceedings against the same person belonging to the same cause. The following discussion and conclusion are relevant:

> "30. What emerges from the aforesaid discussion is — (1) the previous judgment which is final can be relied upon as provided under Sections 40 to 43 of the Evidence Act; (2) in civil suits between the same parties, principle of res judicata may apply; (3) in a criminal case, Section 300 CrPC makes provision that once a person is convicted or acquitted, he may not be tried again for the same offence if the conditions mentioned therein are satisfied; (4) if the criminal case and the civil proceedings are for the same cause, judgment of the civil court would be relevant if conditions of any of Sections 40 to 43 are satisfied, but it cannot be said that the same would be conclusive except as provided in Section 41. Section 41 provides which judgment would be conclusive proof of what is stated therein.
>
> **31.** Further, the judgment, order or decree passed in a previous civil proceeding, if relevant, as provided under Sections 40 and 42 or other provisions of the Evidence Act then in each case, the court has to decide to what extent it is binding or conclusive with regard to the matter(s) decided therein.
>
> **32.** In the present case, the decision rendered by the Constitution Bench in M.S. Sheriff case would be binding, wherein it has been specifically held that no hard-and-fast rule can be laid down and that possibility of conflicting decision in civil and criminal courts is not a relevant consideration. The law envisages "such an eventuality when it expressly refrains from making the decision of one court binding on the other, or even relevant, except for

> limited purpose such as sentence or damages".
>
> **33.** Hence, the observation made by this Court in V.M. Shah case[1] that the finding recorded by the criminal court stands superseded by the finding recorded by the civil court is not correct enunciation of law. Further, the general observations made in Karam Chand case are in context of the facts of the case stated above. The Court was not required to consider the earlier decision of the Constitution Bench in M.S. Sheriff case as well as Sections 40 to 43 of the Evidence Act.
>
> **34.** In the present case, after remand by the High Court, civil proceedings as well as criminal proceedings are required to be decided on the evidence, which may be brought on record by the parties."

18. In *L.R. Malwani* (supra), which is also a Constitution Bench decision, though various questions of law posed before the Bench, I am concerned with question Nos. 1 and 2 which reads thus:

> "(i) Whether the prosecution from which these Criminal Revision Petitions arose is barred under Article 20(2) of the Constitution as against accused Nos. 1 and 2 in that case by reason of the decision of the Collector of Customs in the proceedings under the Sea Customs Act ?
>
> (ii) Whether under any circumstance the finding of the Collector of Customs that the 1st and 2nd accused are not proved to be guilty operated as an issue estoppel in the criminal case against those accused ?"

In those appeals, the case of the prosecution was that the accused persons and some other unknown persons had entered into a conspiracy at Bombay and other places in the beginning of October, 1959 or thereabout for the purpose of smuggling foreign goods into India and in pursuance of that

conspiracy they had smuggled several items of foreign goods in the years 1959 and 1960. In that connection, an enquiry was held by the Customs authorities. In the course of the enquiry, some of the goods said to have been smuggled were seized. After the close of the enquiry those goods were ordered to be confiscated. In addition, penalty was imposed on some of the accused. Thereafter, on February 19, 1965, the Assistant Collector of Customs, Bombay after obtaining the required sanction of the Government filed a complaint against five persons including the appellants in Criminal Appeal No. 35 of 1967 (accused Nos. 1 and 2 in the case) under Section 120-B, I.P.C. read with Clauses (37), (75), (76) and (81) of Section 167 of the Sea Customs Act, 1878 (Act VIII of 1878) as well as under Section 5 of the Imports and Exports (Control) Act, 1947. Before the commencement of the enquiry in that complaint, the 1st accused filed the application mentioned above on August 3, 1965. In the enquiry held by the Collector of Customs, he gave the benefit of doubt to accused Nos. 1 and 2. This is what he stated therein:

> "As regards M/s. Larmel Enterprises (of which accused No. 1 is the proprietor and accused No. 2 is the Manager) although it is apparent that they have directly assisted the importers in their illegal activities and are morally guilty. Since there is no conclusive evidence against them to hold them as persons concerned in the act of unauthorised importation, they escape on a benefit of doubt."

Despite the above finding, the Assistant Collector in his complaint sought to prosecute these accused persons. The Constitution Bench has considered the contention that "the finding of the Collector of Customs referred to earlier operated as an issue estoppeld in the present prosecution". The following conclusion of the Constitution Bench is relevant:

> "9. The rule laid down in that decision was adopted by this Court in *Pritam Singh v. State of Punjab,* AIR 1956 SC 415 and again in *N.R. Ghose alias Nikhil Ranjan Ghose*

> *v. State of West Bengal,* (1960) 2 SCR 58. But before an accused can call into aid the above rule, he must establish that in a previous lawful trial before a competent court, he has secured a verdict of acquittal which verdict is binding on his prosecutor. In the instant case for the reasons already mentioned, we are unable to hold that the proceeding before the Collector of Customs is a criminal trial. From this, it follows that the decision of the Collector does not amount to a verdict of acquittal in favour of accused Nos. 1 and 2."

19. It is relevant to point that the above dictum of the Constitution Bench in *L.R. Malwani* (supra) was relied on by a three-Judge Bench in *Standard Chartered Bank* (supra).

20. In *Iqbal Singh Marwah* (supra), about the binding nature of the decision in criminal court in respect of the same issue, it was held:

> "32. Coming to the last contention that an effort should be made to avoid conflict of findings between the civil and criminal courts, it is necessary to point out that the standard of proof required in the two proceedings are entirely different. Civil cases are decided on the basis of preponderance of evidence while in a criminal case the entire burden lies on the prosecution and proof beyond reasonable doubt has to be given. There is neither any statutory provision nor any legal principle that the findings recorded in one proceeding may be treated as final or binding in the other, as both the cases have to be decided on the basis of the evidence adduced therein. While examining a similar contention in an appeal against an order directing filing of a complaint under Section 476 of the old Code, the following observations made by a Constitution Bench in M.S. Sheriff v. State of Madras give a complete answer to the problem posed: (AIR p. 399, paras 15-16)

"15. As between the civil and the criminal proceedings we are of the opinion that the criminal matters should be given precedence. There is some difference of opinion in the High Courts of India on this point. No hard-and-fast rule can be laid down but we do not consider that the possibility of conflicting decisions in the civil and criminal courts is a relevant consideration. The law envisages such an eventuality when it expressly refrains from making the decision of one court binding on the other, or even relevant, except for certain limited purposes, such as sentence or damages. The only relevant consideration here is the likelihood of embarrassment.

16. Another factor which weighs with us is that a civil suit often drags on for years and it is undesirable that a criminal prosecution should wait till everybody concerned has forgotten all about the crime. The public interests demand that criminal justice should be swift and sure; that the guilty should be punished while the events are still fresh in the public mind and that the innocent should be absolved as early as is consistent with a fair and impartial trial. Another reason is that it is undesirable to let things slide till memories have grown too dim to trust.

This, however, is not a hard-and-fast rule. Special considerations obtaining in any particular case might make some other course more expedient and just. For example, the civil case or the other criminal proceeding may be so near its end as to make it inexpedient to stay it in order to give precedence to a prosecution ordered under Section 476. But in this case we are of the view that the civil suits should be stayed till the criminal proceedings have finished."

21. In *B.N. Kashyap* (supra), the Full Bench of the Court while considering Sections 40 to 43 of the Evidence Act, 1872 has held that finding on certain facts by a civil Court in action in personam is not relevant before the Criminal Court when it

is called upon to give a finding on the same facts. Similarly the finding on certain facts by the Criminal Court is not relevant before the civil Court when it is called upon to give a finding on the same facts.

22. The above decisions, particularly, the decision in *Standard Chartered Bank* (supra) which arose under the FERA and dealt with the scope of Sections 50, 51 and 56 which in turn relied on and followed in the decision of Constitution Bench in *L.R. Malwani* (supra) is directly on the point raised in this appeal. In fact, this Court, in para 21, in the *Standard Chartered Bank* (supra) considered the very scope of the words "without prejudice to any award of penalty by the adjudicating officer under this Act" as mentioned in Section 56 of the Act.

23. Considering the interpretation relating to Sections 50, 51 and 56 by various decisions, I am of the view that in a statute relating to economic offences, there is no reason to restrict the scope of any provisions of the Act. These provisions ensure that no economic loss is caused by the alleged contravention by the imposition of an appropriate penalty after adjudication under Section 51 of the Act and to ensure that the tendency to violate is guarded by imposing appropriate punishment after due transaction in terms of Section 56 of the Act. In fact, it is relevant to point out that Section 23D of the Foreign Exchange Regulation Act, 1947 had a proviso, which indicates that the adjudication for the imposition of penalty should precede making of complaint in writing to the court concerned for prosecuting the offender. The absence of a similar proviso to Section 51 or to Section 56 of the present 1973 Act is a clear indication that the Legislature intended to treat the two proceedings as independent of each other. There is nothing in the present Act to indicate that a finding in adjudication is binding on the Court in a prosecution under Section 56 of the Act or that the prosecution under Section 56 depends upon the result of adjudication under Section 51 of the Act. It is reiterated that the two proceedings are independent and irrespective of

the outcome of the decision under Section 50, there cannot be any bar in initiating prosecution under Section 56. The scheme of the Act makes it clear that the adjudication by the concerned authorities and the prosecution are distinct and separate. No doubt, the conclusion of the adjudication, in the case on hand, the decision of the Special Director dated 18.11.1996, may be a point for the appellant and it is for him to put forth the same before the Magistrate. Inasmuch as FERA contains certain provisions and features which cannot be equated with the provisions of Income Tax Act or the Customs Act and in the light of the mandate of Section 56 of the FERA, it is the duty of the Criminal Court to discharge its functions vest with it and give effect to the legislative intention, particularly, in the context of the scope and object of FERA which was enacted for the economic development of the country and augmentation of revenue. Though the Act has since been repealed and not available at present, those provisions cannot be lightly interpreted taking note of the object of the Act.

24. In view of the above analysis and discussion, I agree with the conclusion arrived at by the Metropolitan Magistrate, Calcutta as well as the decision of the High Court. Consequently, the appeal fails and the same is dismissed.

B.B.B. Appeal allowed.

STATE OF HARYANA & OTHERS

v.

M/S. MAHABIR VEGETABLE OILS PVT. LTD.

(Civil Appeal No. 1977 of 2011)

FEBRUARY 21, 2011

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

Sales Tax – Haryana General Sales Tax Rules, 1975 – r.28A – Haryana General Sales Tax Act, 1973 – Exemption on investment made for setting up Solvent Extraction plant – Withdrawal of, by putting the Solvent extraction plant in the negative list – Challenged – Promissory Estoppel – Applicability of – Held: The principles of promissory estoppel were not applicable as the decision to put the Solvent Extraction Plant in the negative list was taken in public interest since the industry is in the category of polluting industry – In cases where the Government on the basis of material available before it, bona fide, is satisfied that public interest would be served by granting, withdrawing, modifying or rescinding an exemption already granted, it should be allowed a free hand to do so – The Courts should not normally interfere with fiscal policy of the government more so when such decisions are taken in public interest and where no fraud nor lack of bona fide is alleged much less established – The right to exemption or concession is a right that can be taken away under the very power in exercise of which the exemption was granted – Furthermore, in the facts of the instant case, it cannot be said that the Respondent had altered its position relying on the promise inasmuch as even before steps were taken by the Respondent for laying the Solvent Extraction Plant, the appellant had made its intention clear through its notice dated 3.1.1996 that it was likely to amend the law/rules in respect whereof a draft was circulated for information of

persons likely to be affected thereby so as to enable them to file objections and suggestions thereto – Amendments in the terms of the said draft rules were notified on 16-12-1996 substituting Schedule III appended to the Rules whereby and where under the solvent extraction plant was included therein – Though investment was made by the Respondent probably on the belief that it would be entitled to the exemption, however, the said factor alone, in the absence of any specific confirmation cannot stop the State to amend the policy and withdraw the exemption if the same is deemed necessary and expedient in the Public Interest – Moreover, the said policy, which was for the period of 1-4-1988 to 31-3-1997, was nearing its end – Administrative Law.

Doctrines/Principles – Doctrine of Promissory estoppel – Applicability of –Held: The doctrine of Promissory Estoppel is an equitable remedy and has to be moulded depending on the facts of each case – No hard and fast rule for applying the doctrine of Promissory Estoppel but the doctrine has to do justice between the parties and ensure equity between the parties i.e. both the promissor and the promise.

Interpretation of Statutes – Fiscal statute – Exemption – Nature of – Held: It is a concession granted by the State so that the beneficiaries of such concession are not required to pay the tax or the duty they are otherwise liable to pay under such statute – The beneficiary of a concession has no legally enforceable right against the government to grant a concession except to enjoy the benefits of the concession during the period of its grant.

Dispute arose as to whether the Respondent was entitled to the benefit of Sales Tax exemption on the entire investment made by them in setting up the industrial unit i.e. Solvent Extraction Plant, or on the investments made up till 16.12.1996, i.e. date of amendment or in other

words the date on which the exemption granted under Rule 28A of the Haryana Sales Tax Rules ("HSTR") was withdrawn by the State by putting the Solvent extraction plant in the negative list. The High Court, by the impugned judgment, held that once the Respondent was treated to be eligible for exemption, there was no valid reason to further classify the benefit of investment up to the date of amendment, putting the unit in the negative list.

In appeal before this Court, the State vehemently contended that the exemption granted to solvent extraction plant was legally withdrawn by the State Government on 16.12.1996 as the same was deemed necessary in the public interest. The Respondent, on the other hand, submitted that it had taken a decision to establish its industrial unit in the said area of the State of Haryana, only on the basis and footing that the respondent would be entitled to the benefit of sales tax exemption @ 150% on the total capital investment made in that industrial unit and that in view of the doctrine of promissory estoppel, once the Respondent, based on the representation of the State, had initiated the steps to establish the unit and had made substantial investment in that regard, the State now cannot turn around and deny the said benefit of exemption.

Allowing the appeal, the Court

HELD:1. The doctrine of Promissory Estoppel is an equitable remedy and has to be moulded depending on the facts of each case and not straight jacketed into pigeon holes. In other words, there cannot be any hard and fast rule for applying the doctrine of Promissory Estoppel but the doctrine has to evolve and expand itself so as to do justice between the parties and ensure equity

between the parties i.e. both the promissor and the promisee. [Para 24] [965-B-C]

M/s. Motilal Padampat Sugar Mills Co. (P) Ltd. vs. State of Uttar Pradesh and Ors., **(1979) 2 SCC 409 – referred to.**

2. The principles of promissory estoppel is not applicable in the instant case as the decision to put the Solvent Extraction Plant in the negative list was taken in public interest since the industry is in the category of polluting industry. It was never the case of the Respondent that the Solvent Extraction Plant was a non polluting industry. There is also no allegation that the decision to put the Solvent Extraction Plant in the negative list was actuated by fraud or that the said decision was not bona fide. In cases where the Government on the basis of material available before it, bona fide, is satisfied that public interest would be served by granting, withdrawing, modifying or rescinding an exemption already granted, it should be allowed a free hand to do so. The withdrawal of exemption "in public interest" is a matter of policy and the Courts should not bind the government in its policy decision. The Courts should not normally interfere with fiscal policy of the government more so when such decisions are taken in public interest and where no fraud nor lack of bona fide is alleged much less established. [Para 25] [965-C-F]

3. An exemption is nothing but a freedom from an obligation which an assessee is otherwise liable to discharge. In a fiscal statute, an exemption has been held to be a concession granted by the state so that the beneficiaries of such concession are not required to pay the tax or the duty they are otherwise liable to pay under such statute. The beneficiary of a concession has no legally enforceable right against the government to grant

a concession except to enjoy the benefits of the concession during the period of its grant. The right to exemption or concession is a right that can be taken away under the very power in exercise of which, the exemption was granted. [Para 26] [965-G-H; 966-A-B]

4. Furthermore, in the fact of the instant case, it cannot be said that the Respondent had altered its position relying on the promise in as much as even before steps were taken by the Respondent for laying the Solvent Extraction Plant, the Appellant had made its intention clear through its notice dated 3.1.1996 that it was likely to amend the law/rules in respect whereof a draft was circulated for information of persons likely to be affected thereby so as to enable them to file objections and suggestions thereto. Amendments in the terms of the said draft rules were notified on 16-12-1996 substituting Schedule III appended to the Rules whereby and where under the solvent extraction plant was included therein. [Para 27] [966-C-D]

5. Though it cannot be denied that an investment was made by the Respondent in the said area of the State of Haryana, probably on the belief that it would be entitled to the exemption. However, the said factor alone, in the absence of any specific confirmation cannot stop the State to amend the policy and withdraw the exemption if the same is deemed necessary and expedient in the Public Interest. Moreover, the said policy which was for the period of 1-4-1988 to 31-3-1997 was nearing its end. [Para 28] [966-E-F]

6. The High Court went on the premise that once the Appellant have themselves extended the benefit to the Respondent they cannot further classify the benefit of investment up to the date of amendment, putting the unit

in the negative list. It appears that the High Court while arriving at the said finding failed to appreciate the fact that the case of the Respondent was considered for exemption in the light of the judgment passed by this Court in the Mahabir Vegetable case, (2006) 3 SCC 620 wherein it was held that the Respondent is entitled to exemption. However, the issue of quantum was kept open. The High Court while giving the said finding altogether closed itself in considering the said issue and on the contrary held that only because the Respondent was considered for grant of exemption, there was no issue of quantum and the Respondent was entitled to entire exemption. The said finding is not in line with the observations made by this Court in the Mahabir Vegetable case, (2006) 3 SCC 620. [Para 32] [967-E-H; 968-A]

Case Law Reference:

(1979) 2 SCC 409	**referred to**	**Para 23**
(2006) 3 SCC 620	**referred to**	**Para 32**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1977 of 2011.

From the Judgment & Order dated 09.12.2008 of the High Court of Punjab and Haryana at Chandigarh in Civil Writ Petition No. 14236 of 2008.

Rajiv Dutta, Alok Sangwan, Devashish Bharuka for the Appellants.

S. Ganesh, Mahabir Singh, S.P.S. Chauhan, Nikhil Jain for the Respondent.

The Judgment of the Court was delivered

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

2. The issue that falls for our consideration in this appeal is whether the Respondent is entitled to the benefit of Sales Tax exemption on the entire investment made by them in setting up the industrial unit i.e. Solvent Extraction Plant, or on the investments made up till 16.12.1996, the date on which the exemption granted under Rule 28A of the Haryana Sales Tax Rules ("HSTR" for short) was withdrawn by the State by putting the Solvent extraction plant in the negative list.

3. The basic facts which are not in dispute, are as follows:-

The State enacted the Haryana General Sales Tax Act, 1973 (for short "the Act"). Section 64 of the Act provides for rule-making power. The said provision was amended by inserting sub-section (2-A) therein which reads as under:

> "64. (2-A) The power to make rules under sub-sections (1) and (2) with respect to clauses (ff) and (oo) of sub-section (2) shall include the power to give retrospective effect to such rules i.e. from the date on which policy for incentives to industry is announced by the State and for this purpose Rules 28-A, 28-B and 28-C of the Haryana General Sales Tax Rules, 1975, shall have retrospective effect i.e. with effect from 1st April, 1988, 1st August, 1997 and 15th November, 1999 respectively, but such retrospective operation shall not prejudicially affect the interest of any person to whom such rules may be applicable."

4. Clause (ff) of sub-section (2) of Section 64 of the Act provides for the class of industries, period of exemption and conditions of such exemption, under Section 13-B; whereas clause (oo) thereof provides for class of industries, period of deferment and the conditions to be imposed for such deferment under Section 25-A.

5. Pursuant to or in furtherance of the said rule-making power, the State made rules known as the Haryana General

Sales Tax Rules, 1975 (for short "the Rules"). Rule 28-A occurring in Chapter IV-A of the Rules provide for the class of industries, period and other conditions for exemption/deferment from payment of tax as envisaged both under Sections 13-B and 25-A of the Act. "Operative period" has been defined in sub-rule (2)(a) of Rule 28-A of the Rules to mean "the period starting from the 1st day of April, 1988 and ending on the 31st day of March, 1997". Sub-rule (2)(c) thereof defines "New industrial unit" to mean:

> "a unit which is or has been set up in the State of Haryana and comes or has come into commercial production for the first time during the operative period and has not been or is not formed as a result of purchase or transfer of old machinery except when purchased in the course of import into the territory of India, or when the cost of old machinery does not exceed 25% of the total cost of machinery re-establishment, amalgamation, change of lease, change of ownership, change in constitution, transfer of business, reconstruction or revival of the existing unit".

6. "Negative list" has been defined in sub-rule (2)(o) to mean "a list of class of industries as specified in Schedule III appended to these Rules".

7. The State of Haryana announced an industrial policy for the period 1-4-1988 to 31-3-1997 wherein inter alia incentive by way of sales tax exemption was to be given for the industries set up in backward areas in the State. Schedule III appended to the Rules provides for a negative list of the industries and/or class of industries which were not to be included therein. At the initial stage the Solvent extraction plant was admittedly not included in the negative list.

8. On or about 3-1-1996, notice was given as regards the intention of the State to amend the Rules in respect whereof a draft was circulated for information of persons likely to be affected thereby so as to enable them to file objections and

suggestions thereto. Amendments in the terms of the said draft rules were notified on 16-12-1996 substituting Schedule III appended to the Rules whereby and whereunder the solvent extraction plant was included therein. Note 2 appended thereto reads as under:

> "The industrial units in which investment has been made up to 25% of the anticipated cost of the project and which have been included in the above list for the first time shall be entitled to the sales tax benefits related to the extent of investment made up to 3-1-1996. Only those assets will be included in the fixed capital investment which have been installed or erected at site and have been paid for. The anticipated cost of the project will be taken on the basis of documents furnished to a financial institution or banks for drawing a loan and which have been accepted by the financial institution or bank concerned for sanction of loan."

9. On or about 28-5-1997 the said Rules were amended inter alia by omitting Note 2 deeming to have always been omitted.

10. Yet again on 3-6-1997 in clause (a) of sub-rule (2) of Rule 28-A of the Rules instead and in place of "31-3-1997" the words "date on which new policy for incentive to industry is announced by the Government of Haryana in Industries Department" was substituted.

11. On 26-6-2001 in Section 13-B after the words "for such period", the words "either prospectively or retrospectively" were inserted.

12. It is only after the notice dated 3.1.1996 that the respondent Mahabir Vegetable Oils (P) Limited purchased land measuring 30 kanals 17 marlas in the month of August 1996 to set up a solvent extraction plant. It also obtained registration under the provisions of the Act and the Central Sales Tax Act, 1956 on 6-9-1996. On 13-8-1996 it applied for a no-objection

certificate from the Haryana State Pollution Control Board which is a condition precedent for setting up a solvent extraction plant. On 15-8-1996, the appellant entered into an agreement with M/s Saratech Consultants and Engineers, Karnal for supply and erection of the plant for a sum of Rs. 55,55,000.00 and Rs 22,75,000 respectively and advances were paid on different dates. Furthermore, on 6-9-1996, civil construction work started at site. Plans submitted by the appellant for getting permission for storage of hexane were sanctioned by the Explosives Department on 19-9-1996 and licence was finally given on 11-3-1997. On 26-9-1996, process of installation of the plant started at the site. On or about 18-11-1996, a 250 kVA power-generating set costing Rs 9,91,000 was installed, no-objection certificate wherefor was granted on 22-11-1996. The appellant applied to the Haryana State Electricity Board for release of the power connection vide application dated 12-12-1996 and also deposited the security of Rs. 68,700 for the same. On 26-3-1997, the appellant started the trial production and commercial production commenced on 29-3-1997.

13. The respondent had applied for grant of exemption from payment of sales tax as on 16-12-1996 which was rejected the following terms: -

> "… The solvent extraction plants were included in the negative list with effect from 16-12-1996. The industrial unit has made 45% of total investment. In the notification it was stipulated that the industrial unit in which investment has been made up to 25% of the anticipated cost of the project which has been included in the negative list for the first time shall be entitled to sales tax benefit, however, this condition has been deleted vide notification dated 28-5-1997. The Committee was of the view that this condition has already been deleted and certain parties have challenged it in the Punjab and Haryana High Court. The Director of Industries was of the view that in case a particular industry is put in the negative list, benefit on account of investment made

> before the date of putting the unit in the negative list should be available to the unit for sales tax exemption/deferment. Though the Higher Level Screening Committee broadly agreed with this view, yet in view of the fact that such cases were not covered in the existing notification of the Commercial Taxation Department, it was decided to reject the claim of the party."

And the writ petition filed by the Respondent before the High Court was dismissed holding: -

> "(i) The power to grant exemption from the payment of sales tax is an exercise of the powers conferred by the statute on the State Government and is, thus, a delegated legislative function. The delegated legislation can be struck down if it is established that there is manifest arbitrariness. It must be shown that it was not reasonable or manifestly arbitrary.
>
> (ii) As per the records made available, a Standing Committee was constituted by the State of Haryana for revising the negative list periodically keeping in view the industrial scheme of the State and its neighbourhood. Such Standing Committee considered the revision of negative list in its meeting held on 15-9-1995 wherein it was decided to include highly polluting industries, power-intensive industries, conventional type of industries where sufficient capacity has already come up and any further increase in the capacity would jeopardise the health of existing industry in the negative list. There is no challenge to the decision or proceedings of such Committee on any ground indicating arbitrariness, bias, mala fide or any such like reason.
>
> (iii) In view of certain decisions of this Court, the benefit of exemption can be withdrawn in public interest.
>
> (iv) There is no allegation of exercise of such power to

include solvent extraction plant which is actuated by any mala fides, fraud or lack of bona fides. It is a matter of fiscal policy of the State Government as to which industries should be granted exemption.

(v) Mahabir Vegetable Oils (P) Ltd. only invested Rs. 4,44,000 in the land and purchased machinery worth Rs.16,90,000 on 14-12-1996.

(vi) Thus, we hold that there is no representation on behalf of the State Government that the scheme of granting incentives by way of exemption or deferment will not be modified, amended or varied during the operative period. There cannot be any restraint on the State Government to exercise the delegated legislative functions within the parameters laid down by the statute."

14. Against the said dismissal the Respondent approached this Court by filing Special Leave Petition which was converted into Civil Appeal 1635 of 2006. The said Appeal of the respondent was allowed by this Court vide its judgment dated 10-3-2006 which was reported at (2006) 3 SCC 620. This Court by applying the Doctrine of Promissory Estoppel held that the promises/representations made by way of a statute, continued to operate in the field. This Court noted that it may be true that the Respondent altered their position only from August 1996 but it has neither been denied nor disputed that during the relevant period, namely, August 1996 to 16-12-1996 not only have they invested huge amounts but also the authorities of the State sanctioned benefits, granted permissions. The Respondent had also taken other steps which could be taken only for the purpose of setting up of a new industrial unit. This Court further noted that an entrepreneur who sets up an industry in a backward area unless otherwise prohibited, is entitled to alter his position pursuant to or in furtherance of the promises or representations made by the State.

15. However this Court, at that stage, did not interfere with the issue of the quantum of exemption which can be granted to the Respondent and the said issue was kept open and the matter was remanded to the Director Industries for fresh adjudication. The Writ Petition filed by the Respondent under Article 32 was also disposed off. The relevant portion of the said judgment is as follows:-

"38. The promises/representations made by way of a statute, therefore, continued to operate in the field. It may be true that the appellants altered their position only from August 1996 but it has neither been denied nor disputed that during the relevant period, namely, August 1996 to 16-12-1996 not only have they invested huge amounts but also the authorities of the State sanctioned benefits, granted permissions. Parties had also taken other steps which could be taken only for the purpose of setting up of a new industrial unit. An entrepreneur who sets up an industry in a backward area unless otherwise prohibited, is entitled to alter his position pursuant to or in furtherance of the promises or representations made by the State. The State accepted that equity operated in favour of the entrepreneurs by issuing Note 2 to the notification dated 16-12-1996 whereby and whereunder solvent extraction plant was for the first time inserted in Schedule III i.e. in the negative list.

39. Both the provisions contained in Schedule III and Note 2 formed part of subordinate legislation. By reason of the said note, the State did not deviate from its professed object. It was in conformity with the purport for which original Rule 28-A was enacted.

40. We, in this case, are not concerned with the quantum of exemption to which the appellants may be entitled to, but only with the interpretation of the relevant provisions which arise for consideration before us.

41. We may at this stage consider the effect of omission of the said note. It is beyond any cavil that a subordinate legislation can be given a retrospective effect and retroactive operation, if any power in this behalf is contained in the main Act. The rule-making power is a species of delegated legislation. A delegatee therefore can make rules only within the four corners thereof.

42. It is a fundamental rule of law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication. (See West v. Gwynne14.)

43. A retrospective effect to an amendment by way of a delegated legislation could be given, thus, only after coming into force of sub-section (2-A) of Section 64 of the Act and not prior thereto.

44. By reason of Note 2, certain rights were conferred. Although there lies a distinction between vested rights and accrued rights as by reason of a delegated legislation, a right cannot be taken away. The amendments carried out in 1996 as also the subsequent amendments made prior to 2001, could not, thus, have taken away the rights of the appellant with retrospective effect.

45. For the reasons aforementioned, the impugned judgment cannot be sustained which is set aside accordingly. The appeals are allowed and the matter is remitted to the Director of Industries to consider the matter afresh.

46. In view of our findings aforementioned no direction is required to be issued in the writ petition filed by the appellants. The writ petition is disposed of accordingly."

16. The Lower Level Screening Committee ("LLSC" for short) After considering the matter in the light of the

abovementioned judgment passed by this Court made a recommendation for grant of eligibility certificate to the extent of Rs.94,48,911/- for a period of nine years i.e. from 29.03.1997 to 28.03.2006. The said amount was calculated with reference to the investment made by the petitioner up to 16.12.1996 i.e. date of amendment, putting the unit in the negative list. On appeal, the Appellate Authority affirmed the said view with the following observations :-

> ".....The Committee examined the judgment relied upon and observed that the Hon'ble Supreme Court has not found fault with the amendment dated 16.12.1996 whereby the solvent extraction plant have been put into negative list (schedule III). The effect of enlargement of the negative list is that the unit has ceased to be eligible for exemption/ deferment with effect from 16.12.1996. Besides, it is further observed that tax concessions, as repeatedly held by the Hon'ble Supreme Court, are a defeasible, not an indefeasible, right but the withdrawal is always prospective."

17. The respondent challenged the said order & judgment before the High Court of Punjab & Haryana by filling a writ petition. The High Court by the impugned judgment allowed the writ and held once the Respondent has been treated to be eligible for exemption, there was no valid reason to further classify the benefit of investment up to the date of amendment, putting the unit in the negative list. The relevant paras of the impugned judgment are follows:-

> "13. Admittedly, on the date of commercial production and also on the date of issue of entitlement/exemption certificate, the petitioner was in negative list and could not be considered to be eligible unless applicability of notification dated 16.12.1996 was confined to units which started investment before the said date.

14. The respondents themselves have extended the benefit

by not treating the notification dated 16.12.1996 to be applicable to the petitioner. Once the petitioner has been treated to be eligible, there was no valid reason to further classify the benefit of investment up to the date of amendment, putting the unit in the negative list.

14. In view of above, we allow this petition and quash the impugned orders to the extent of restricting the benefit to the date of notification i.e. 16.12.1996.

15. The Appellate Authority may now pass a fresh order in accordance with law, within four months from the date of certified copy of this order."

18. It is against the said judgment that the appellants have approached this Court. We heard the learned Senior Counsel for the parties. However, before we deal with the respective submission we may specify that this Court in the year 2006 has already held that the Respondent is entitled to the exemption, and the only issue which remains to be decide is whether the exemption has to be granted upon the entire investment or the investment made up till 16.12.1996 i.e. date of amendment, putting the unit in the negative list.

19. The learned Senior Counsel appearing for the State vehemently argued that the exemption granted to solvent extraction plant was legally withdrawn by the State Government on 16.12.1996 as the same was deemed necessary in the public interest It was further submitted that it is within the prerogative of the State to withdraw an exemption if the same is deemed necessary in the public interest. It was also submitted that the Respondent does not have a vested right in their favour and the exemption granted cannot go beyond the date of withdrawal by the State. It was also contented that as now the benefit of exemption has been granted on the investment made up till 16.12.1996 the question of retrospective effect also does not arise.

20. On the other hand, it was submitted by the Learned Senior Counsel appearing for the Respondent that the respondent has taken a decision to establish its industrial unit in the said area of the State of Haryana, only on the basis and footing that the respondent would be entitled to the benefit of sales tax exemption @ 150% on the total capital investment made in that industrial unit. In order to supplement the said submission, the learned Senior Counsel placed strong reliance on the doctrine of promissory estoppel and submitted that once the Respondent, based on the representation of the State has initiated the steps to establish the unit and has made substantial investment in that regard, the State now cannot turn around and deny the said benefit of exemption.

21. We have considered the submission made by the learned senior counsel for the parties and have also perused the relevant provision, as amended from time to time and the documents placed on record.

22. The judgment of this Court dated 10-3-2006 in Civil Appeal 1635 of 2006 reported at (2006) 3 SCC 620 only considered the retrospective operation of the amendments made on 16.12.1996 and subsequent amendments which sought to take away certain rights of the Respondents. This Court in the said judgment had only held that the amendment to Rule 28A could not have any retrospective effect, in the sense that it could not affect an assessee's pre-existing rights. It is also important to note that the said judgment clearly clarified that the question of quantum of exemption to which the appellants may be entitled to was not considered. It may also be pointed out that this Court did not go into the challenge made to the validity of the Amendments made which was challenged by the Respondent by way of a Writ Petition. The reliance placed on the said Judgment is therefore misplaced. The issue that falls for our consideration in this appeal is on the quantum of exemption to which the Respondent is entitled and that too for the period subsequent to the date of the amendment. In other

words, the question before us pertains to whether the Respondent is entitled to the benefit of Sales Tax exemption on the entire investment made by them in setting up the industrial unit i.e. Solvent Extraction Plant, made prospectively after 16.12.1996.

23. It has been urged on behalf of the Respondents that benefit of the exemption is required to be advanced to them on the principle of the Doctrine of Promissory Estoppel. We are not in agreement with the said argument. This Court in *M/s. Motilal Padampat Sugar Mills Co. (P) Ltd. vs. State of Uttar Pradesh and Ors.* Reported in (1979) 2 SCC 409 held as under:

> "24. This Court finally, after referring to the decision in the Ganges Manufacturing Co. v. Sourujmull, Municipal Corporation of the City of Bombay v. Secretary of State for India and Collector of Bombay v. Municipal Corporation of the City of Bombay summed up the position as follows:
>
> > "Under our jurisprudence the Government is not exempt from liability to carry out the representation made by it as to its future conduct and it cannot on some undefined and undisclosed ground of necessity or expediency fail to carry out the promise solemnly made by it, nor claim to be the Judge of its own obligation to the citizen on an ex parte appraisement of the circumstances in which the obligation has arisen."
>
> The law may, therefore, now be taken to be settled as a result of this decision, that where the Government makes a promise knowing or intending that it would be acted on by the promisee and, in fact, the promisee, acting in reliance on it, alters his position, the Government would be held bound by the promise and the promise would be enforceable against the Government at the instance of the promisee, notwithstanding that there is no consideration

> for the promise and the promise is not recorded in the form of a formal contract as required by Article 299 of the Constitution. It is elementary that in a republic governed by the rule of law, no one, howsoever high or low, is above the law. Everyone is subject to the law as fully and completely as any other and the Government is no exception. It is indeed the pride of constitutional democracy and rule of law that the Government stands on the same footing as a private individual so far as the obligation of the law is concerned: the former is equally bound as the latter. It is indeed difficult to see on what principle can a Government, committed to the rule of law, claim immunity from the doctrine of promissory estoppel. Can the Government say that it is under no obligation to act in a manner that is fair and just or that it is not bound by considerations of "honesty and good faith"? Why should the Government not be held to a high "standard of rectangular rectitude while dealing with its citizens"? There was a time when the doctrine of executive necessity was regarded as sufficient justification for the Government to repudiate even its contractual obligations; but, let it be said to the eternal glory of this Court, this doctrine was emphatically negatived in the Indo-Afghan Agencies case and the supremacy of the rule of law was established. It was laid down by this Court that the Government cannot claim to be immune from the applicability of the rule of promissory estoppel and repudiate a promise made by it on the ground that such promise may fetter its future executive action. If the Government does not want its freedom of executive action to be hampered or restricted, the Government need not make a promise knowing or intending that it would be acted on by the promisee and the promisee would alter his position relying upon it. But if the Government makes such a promise and the promisee acts in reliance upon it and alters his position, there is no reason why the Government should not be compelled to make good such promise like any other private individual.

The law cannot acquire legitimacy and gain social acceptance unless it accords with the moral values of the society and the constant endeavour of the Courts and the legislature, must, therefore, be to close the gap between law and morality and bring about as near an approximation between the two as possible. The doctrine of promissory estoppel is a significant judicial contribution in that direction. But it is necessary to point out that since the doctrine of promissory estoppel is an equitable doctrine, it must yield when the equity so requires. If it can be shown by the Government that having regard to the facts as they have transpired, it would be inequitable to hold the Government to the promise made by it, the Court would not raise an equity in favour of the promisee and enforce the promise against the Government. The doctrine of promissory estoppel would be displaced in such a case because, on the facts, equity would not require that the Government should be held bound by the promise made by it. When the Government is able to show that in view of the facts as have transpired since the making of the promise, public interest would be prejudiced if the Government were required to carry out the promise, the Court would have to balance the public interest in the Government carrying out a promise made to a citizen which has induced the citizen to act upon it and alter his position and the public interest likely to suffer if the promise were required to be carried out by the Government and determine which way the equity lies. It would not be enough for the Government just to say that public interest requires that the Government should not be compelled to carry out the promise or that the public interest would suffer if the Government were required to honour it. The Government cannot, as Shah, J., pointed out in the Indo-Afghan Agencies case, claim to be exempt from the liability to carry out the promise "on some indefinite and undisclosed ground of necessity or expediency", nor can the Government claim to be the sole Judge of its liability and

repudiate it "on an ex parte appraisement of the circumstances". If the Government wants to resist the liability, it will have to disclose to the Court what are the facts and circumstances on account of which the Government claims to be exempt from the liability and it would be for the Court to decide whether those facts and circumstances are such as to render it inequitable to enforce the liability against the Government. Mere claim of change of policy would not be sufficient to exonerate the Government from the liability: the Government would have to show what precisely is the changed policy and also its reason and justification so that the Court can judge for itself which way the public interest lies and what the equity of the case demands. It is only if the Court is satisfied, on proper and adequate material placed by the Government, that overriding public interest requires that the Government should not be held bound by the promise but should be free to act unfettered by it, that the Court would refuse to enforce the promise against the Government. The Court would not act on the mere ipse dixit of the Government, for it is the Court which has to decide and not the Government whether the Government should be held exempt from liability. This is the essence of the rule of law. The burden would be upon the Government to show that the public interest in the Government acting otherwise than in accordance with the promise is so overwhelming that it would be inequitable to hold the Government bound by the promise and the Court would insist on a highly rigorous standard of proof in the discharge of this burden. But even where there is no such overriding public interest, it may still be competent to the Government to resile from the promise "on giving reasonable notice, which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position" provided of course it is possible for the promisee to restore status quo ante. If, however, the promisee cannot resume his position, the

promise would become final and irrevocable. Vide Emmanuel Avodeji Ajaye v. Briscoe".

24. The doctrine of Promissory Estoppel is an equitable remedy and has to be moulded depending on the facts of each case and not straight jacketed into pigeon holes. In other words, there cannot be any hard and fast rule for applying the doctrine of Promissory Estoppel but the doctrine has to evolve and expand itself so as to do justice between the parties and ensure equity between the parties i.e. both the promissor and the promisee.

25. The principles of promissory estoppel is not applicable in the instant case as the decision to put the Solvent Extraction Plant in the negative list was taken in public interest since the industry is in the category of polluting industry. It has never been the case of the Respondent that the Solvent Extraction Plant is a non polluting industry. There is also no allegation that the decision to put the Solvent Extraction Plant in the negative list was actuated by fraud or that the said decision was not bona fide. In cases where the Government on the basis of material available before it, bona fide, is satisfied that public interest would be served by granting, withdrawing, modifying or rescinding an exemption already granted, it should be allowed a free hand to do so. The withdrawal of exemption "in public interest" is a matter of policy and the Courts should not bind the government in its policy decision. The Courts should not normally interfere with fiscal policy of the government more so when such decisions are taken in public interest and where no fraud nor lack of bona fide is alleged much less established.

26. An exemption is nothing but a freedom from an obligation which an assessee is otherwise liable to discharge. In a fiscal statute, an exemption has been held to be a concession granted by the state so that the beneficiaries of such concession are not required to pay the tax or the duty they are otherwise liable to pay under such statute. The beneficiary of a concession has no legally enforceable right against the

government to grant a concession except to enjoy the benefits of the concession during the period of its grant. The right to exemption or concession is a right that can be taken away under the very power in exercise of which the exemption was granted.

27. Furthermore, in the fact of the instant case, it cannot be said that the Respondent had altered its position relying on the promise in as much as even before steps were taken by the Respondent for laying the Solvent Extraction Plant, the Petitioner had made its intention clear through its notice dated 3.1.1996 that it was likely to amend the law/rules in respect whereof a draft was circulated for information of persons likely to be affected thereby so as to enable them to file objections and suggestions thereto. Amendments in the terms of the said draft rules were notified on 16-12-1996 substituting Schedule III appended to the Rules whereby and where under the solvent extraction plant was included therein.

28. It cannot be denied that an investment was made by the Respondent in the said area of the State of Haryana, probably on the belief that it would be entitled to the exemption. However, the said factor alone, in the absence of any specific confirmation cannot stop the State to amend the policy and withdraw the exemption if the same is deemed necessary and expedient in the Public Interest. Moreover, the said policy which was for the period of 1-4-1988 to 31-3-1997 was nearing its end.

29. The Note 2, appended to the amendment made to Schedule III (extracted hereinabove), categorically state that the industrial units in which investment has been made up to 25% of the anticipated cost of the project and which have been included in the above list for the first time shall be entitled to the sales tax benefits related to the extent of investment made up to 3-1-1996. On or about 28-5-1997 the said Rules were amended inter alia by omitting Note 2 deeming to have always been omitted.

30. The LLSC, while arriving at the quantum of exemption considered the conditions enumerated in the Note 2 and keeping in view the observation made by this Court in the abovementioned judgment, granted the exemption till 16.12.1996 i.e. date of the amendment instead of 3-1-1996 as mentioned in the said Note. The said finding was upheld by the Appellate Authority which found that the quantification was in accord with abovementioned judgment passed by this Court and other principles of law.

31. If one goes by the wording of Note 2, it appears that in order to balance the equities and protect the interest of the investor the benefit of the exemption was granted for the investments made up till 16-12-1996. Moreover, as the benefit has already been granted till 16-12-1996 in terms of the ratio of the judgment passed by this Court, in the *Mahabir Vegetable* case (supra) reported at (2006) 3 SCC 620 it cannot be said that even now an attempt has been made to give retrospective effect to the said amendment.

32. The High Court has gone on the premise that once the Appellant have themselves extended the benefit to the Respondent they cannot further classify the benefit of investment up to the date of amendment, putting the unit in the negative list. It appears that the High Court while arriving at the said finding has failed to appreciate the fact that the case of the Respondent was considered for exemption in the light of the judgment passed by this Court in the *Mahabir Vegetable* case (supra) reported at (2006) 3 SCC 620 wherein it was held that the Respondent is entitled to exemption. However, the issue of quantum was kept open. The High Court while giving the said finding has altogether closed itself in considering the said issue and on the contrary has held that only because the Respondent has been considered for grant of exemption, there is no issue of quantum and the Respondent is entitled to entire exemption. In our opinion the said finding is not in line with the observations made by this Court in the *Mahabir Vegetable* case (supra)

reported at (2006) 3 SCC 620. The quantification made by the LLSC is in accord with the ratio laid by this Court.

33. Accordingly, we allow the appeal and set aside the impugned judgment passed by the High Court leaving the parties to bear their own costs.

B.B.B. Appeal allowed.

CBI

v.

MUSTAFA AHMED DOSSA

(Criminal Appeal Nos.920-922 of 2009)

FEBRUARY 22, 2011

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

Criminal Trial – Bombay Blast case – Trial of two accused arising out of the same incident – Held: Cannot proceed under different procedures – On question of admissibility of evidence, direction made in the case of respondent-accused in terms of an earlier order as regards co-accused – Terrorist and Disruptive Activities (Prevention) Act, 1987.

In 1993, a series of bomb blasts took place in Bombay and its surrounding areas resulting in death and/or injuries to many and large scale damage to property. The State Police registered 27 criminal cases on account of the blast. The investigation was later transferred to the CBI. The trial commenced and the Designated Court under the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA), framed the charges including a common charge of criminal conspiracy against all the accused. The respondent-accused, who had absconded, was declared a proclaimed offender on the 31st December 1997. Subsequently, however, the respondent was arrested and a supplementary charge-sheet was filed against him before the Designated Court and separate trial ordered as regards the respondent. On an application filed by the respondent, the Designated Court directed that the evidence collected before 31st December 1997 in the main trial of the accused could not be used against the

respondent unless the witnesses already examined were allowed to be cross-examined by him . In support of its decision, the Designated Court cited the precedent of a co-accused of the respondent, Abu Salem who too was arrested later on and charge-sheeted pertaining to the same incident although given a separate case number. This order was challenged by the CBI in the instant appeal.

Disposing of the appeals, the Court

HELD:1.1. The Bombay blast took place in the year 1993 and the trial with respect to some of the accused, including the respondent, has yet not been completed though a series of applications have been filed before the Designated Judges followed by appeals in this Court at the instance of the aggrieved parties. Therefore, the legal issues need not be gone into at this stage for the simple reason that the last order in this matter is the order dated 24th August 2009 made by this Court in SLP (Crl) No. 3586/2009 in the case of Abu Salem. It appears that after the order dated 2nd December 2008 in the case of Abu Salem, the matter was carried to this Court in SLP (Crl.) No. 569/2009. This SLP was disposed of on 6th February 2009. An application was thereafter filed by the prosecution on 23rd February 2009 that the depositions of the witnesses recorded in the absence of the accused in BBC No.1/1993 may be taken on record in the case of Abu Salem and others without recalling the witnesses in view of the provisions of Section 299 of the Cr.P.C. This application was, however, dismissed vide order dated 6th February 2009 in the light of the order dated 2nd December 2008 in the case of Abu Salem. It appears that the order dated 16th March 2009 in the case of Abu Salem was carried to the Supreme Court by way of SLP (Crl.) No. 3586/2009 and after hearing both parties the SLP was disposed of on the 24th August 2009 with directions to

Abu Salem to file a statement before the Special Judge as to all the witnesses he proposed to cross-examine and to the prosecution to thereafter take further steps to produce those witnesses for cross-examination. [Para 9] [980-H; 981-A-G]

1.2. It is the case of the CBI that it would be satisfied if a similar order is passed in the present case. There is merit in the submission of CBI for the simple reason that the trial of the respondent and Abu Salem, which arises out of the same incident, cannot proceed under different procedures. Even otherwise the observations of the Designated Court in the impugned judgment that as the changed circumstances in the order passed by the Supreme Court in the case of Abu Salem were pre-dominant and would hold the field, on this very premise the order of the Supreme Court dated 24th August 2009 would now be the final word in the matter. Therefore, the instant appeals are disposed of and direction is made in terms of the order dated 24th August 2009. [Para 10] [981-H; 982-A-C]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 920-922 of 2009.

From the Judgment and Order dated 26.02.2009 of the Designated Court for Bombay Blast Case, Mumbai in BBC No. 1A of 1993.

P.P. Malhotra, ASG and Arvind Kumar Sharma for the Appellant.

Satbir Pillania, Dhananjay Tyagi and Dr. Sushil Balwada for the Respondent.

The Judgment of the Court was delivered by

HARJIT SINGH BEDI, J. 1. These appeals, at the

instance of the Central Bureau of Investigation, are directed against the order of the Designated Court under the Terrorist and Disruptive Activities (Prevention) Act, 1987 (herein called TADA) dated 26th February 2009 allowing the application of the respondent herein and directing that the evidence collected before 31st December 1997 in the Bombay Blast Case (BBC) No.1 of 1993 could not be used against him unless the witnesses already examined were allowed to be cross-examined by the respondent. The facts are as under:

2. On the 12th March, 1993, a series of bomb blasts took place in Bombay and its surrounding areas resulting in the death of 257 persons, injuries to 713 and damage of Rs.27 crores to property. The State Police registered 27 criminal cases on account of the blast. A single charge-sheet dated 4th November 1993 was filed in the Designated Court against 189 persons of which 44 were shown to be absconding. 15 days later, on the 19th November 1993 the investigation was transferred to the CBI which registered its own case as Crime No. RC1 (S)/ 93/STF/BB. 19 supplementary reports were thereafter filed before the Designated Court by the CBI under Section 173(8) of the Cr.P.C. The trial commenced on the 14th July 1994 and the Designated Court, Mumbai after hearing arguments from both sides framed the charges on the 10th April, 1995 including a common charge of criminal conspiracy against all the accused present before it or absconding as well as those who were still unidentified. An application dated 12th April 1994 was thereafter moved by the prosecution seeking orders from the Designated Court for recording the evidence of the prosecution witnesses in the absence of those who were not before the Court. The application was, however, kept pending, as the CBI was making efforts to trace out the absconding accused. The CBI also filed a fresh list of those accused who were absconding and others whose name had surfaced later in the investigation and they too were included in the list of absconding persons. As the case had reached the trial stage and the prosecution witnesses were to be examined from the

20th June 1995 onwards, the Designated Court passed an order on the 19th June 1995 observing that as "there was no immediate prospect of the arrest of the absconders and as they were wanted for offences committed by them pursuant to a conspiracy it was appropriate that the evidence which was led by the prosecution may be recorded on the arrest of the accused persons whose names figure in list Annexure-A (to the order) be given in evidence against them on the enquiry on the into or trial for the offences with which they will be charged as, if the deponent was dead or incapable of giving evidence or could not be found or his presence could not be procured without expense or inconvenience which in the circumstances of the case would be unreasonable and that if during the trial any of the accused wanted in this case was arrested the prosecution would be at liberty to move this Court to join him in the trial." On the 20th August 1995 the confessional statement of accused Salem Mira Moiuddin Sheikh was recorded which disclosed the involvement of Mustafa Ahmed Dossa, the respondent herein, and five others. It also came out that the respondent had attended several meetings in Dubai in furtherance of the conspiracy and contraband material had also been sent to India by him. On the 3rd June 1996, an application was moved by the CBI for the issuance of non-bailable warrants qua the respondent Mustafa Ahmed Dossa and 5 others and it was prayed that orders for the publication of a written proclamation under Section 8(3)(a) of the TADA requiring the respondent and others to appear before the TADA Court on a specified date and further that non-bailable warrants and a Red Corner notice, be issued. This application was dismissed by the Designated Court on the 1st August 1996. The order of the Designated Court was, however, reversed by this Court on the 7th May 1997 with a direction that the application of the CBI should be taken up for reconsideration by the Designated Court. This application was decided on the 29th August 1997 and the prayers made by the CBI were allowed. A proclamation was thereafter issued on the 16th September 1997 and the respondent and the others were called upon to appear in the

Designated Court within 30 days thereof. As the respondent did not appear in response to the proclamation, he was declared a proclaimed offender on the 31st December 1997 in BBC No.1 of 1993. The respondent was, however, arrested at the Indira Gandhi International Airport, New Delhi on the 20th March 2003. It transpired from the documents recovered from him that he had acquired Pakistani nationality under the assumed named of Mustafa Umar Merchant and had also obtained a National Residential Permit for the UAE on the basis of his Pakistani Passport. A supplementary charge-sheet was accordingly filed before the Designated Court in Case No. BBC No.1 of 1993 against the respondent on the 3rd May 2003. It appears the prior to the arrest of the respondent, another absconder named Eizaz Pathan had been deported from the UAE to India and arrested in BBC No.1 of 1993. Eizaz Pathan made an application to the Designated Court making two prayers (1) that the Court allow him to join the trial and (2) requesting that all the 684 prosecution witnesses who had been also examined thus far should be recalled for cross-examination. This application was allowed qua the first prayer but rejected qua the second one on the ground that a similar application had already been rejected earlier on the 28th May 2003. After a supplementary charge-sheet had been filed against the respondent, the prosecution moved an application that he be also joined in the trial proceedings in BBC No.1 of 1993. The respondent opposed the application and prayed that his trial should be separated whereas the co- accused also opposed the application saying that if the respondent was joined in the trial at that stage it would cause serious prejudice to them and further delay the trial which had run for almost 11 years. The application was, however, dismissed by the Designated Judge Shri P.D.Kode vide order dated 4th July 2003 holding that the evidence recorded after the 31st December 1997 with respect to the respondent could be used by the prosecution but in so far as the evidence recorded prior to that date was concerned the respondent was required to be given an opportunity to meet the said evidence. The order

dated 4th July 2003 was challenged by the respondent by way of SLP(Crl) No. 3806 of 2003. This Special Leave Petition was disposed of on the 21st November 2003 with the following order:

> "Heard the learned counsel for the parties. The petitioner is challenging an order by which separate trial has been ordered as regards the petitioner. The petitioner pays that trial should have been along with other accused learned ASG submitted that case of the other accused have already been over and judgment is reserved. In view of the above circumstances, the prayer made by the petitioner has become infructuous. The petitioner prays that his trial may be initiated at the earliest and be completed urgently. The Special Judge shall conduct the trial expeditiously. The SLP is disposed of."

3. The respondent thereupon filed application No. 57 of 2004 on the 10th March 2004 before the Designated Court highlighting that the evidence collected during the main trial of the accused in BBC No.1 of 1993 could not be used against him and prayed that the Court be called upon to opine on this aspect and to give a reasoned order. This application was dismissed on the 11th July 2005 by observing that the matter had already been concluded by the order dated 4th July 2003. Special Leave Petition (Crl.) No. 387 of 2006 was filed by the respondent challenging the order of 11th July 2005, inter-alia, praying that this Court opine that the evidence recorded and documents and articles exhibited in BBC 1 of 1993 after the issuance of proclamation against the respondent could not be taken on record in his trial as despite the fact that he had been declared a proclaimed offender on the 31st December 1997, no request application or proceedings under section 299 of Code of Criminal Procedure Code or under Section 14 (5) of the TADA had been taken against him. The Special Leave Petition was, however, disposed of as withdrawn on the request of the counsel for the petitioner (respondent herein) on the 16th

November 2006. It is the case of the appellant CBI that the orders passed by the Designated Court on the 4th July 2003 and 11th July 2005 with regard to the admissibility of the evidence recorded in BBC No.1 of 1993 had attained finality on account of the subsequent orders passed by this Court and noted above. The respondent, however, still undeterred, filed another application on the 8th October 2008 before the Designated Court again praying for an order that the prosecution could not rely on the evidence collected in BBC No.1 of 1993. It was pleaded, inter-alia, that the order of the Designated Court dated 4th July 2003 made by Shri P.D.Kode was an interlocutory order and subject to review or re-appraisal under Section 362 of the Code of Criminal Procedure and there was no bar on a successor Judge to re-examine the issue more particularly as the circumstances had changed as the trial in BBC No.1 of 1993 had since been completed and that the conditions for the applicability of section 299 which permitted the recording of evidence in the absence of the accused could not be applied to the facts of the case. A reply was filed by the prosecution bringing out the facts of the case, as already revealed above, and further highlighting that orders on similar prayers of the applicant had already been made by Shri Kode on the 21st February 2004 and 11th July 2005 and the question of admissibility of the evidence earlier collected had already been settled and could not be re-examined. In para 8 the Designated Judge noted that the point in dispute was thus:

> "In the light of the rival submissions the point to be decided is whether prosecution can rely on and use the evidence recorded in main trial BBC 1/1993 in absence of even before arrest of this accused Mustafa Dosa."

4. The Designated Court thereafter re-examined the matter in the light of the provisions of Sections 273 and 299 of the Cr.P.C. and Section 14 (5) of the TADA and observed that as the conditions envisaged under these provisions were not satisfied, the evidence recorded in the absence of the accused

could not be admissible without his right of cross-examination being respected. The Court noted that the order of Shri Kode dated 4th July 2003 had been challenged in the Supreme Court but observed that the application had not been decided on merits but had been disposed of as infructuous in the light of the submission made by the State counsel that the main trial was fixed for judgment. The Designated Court also observed that the order of 4th July 2003 was an interlocutory one and could be reviewed in the interests of a fair trial, and that the evidence collected in the absence of the accused-respondent was not admissible unless he had been given a right of cross-examination. In support of its decision, the Designated Court also cited the precedent of a co-accused of the respondent, Abu Salem Ansari, Riyaz Ahmed Siddique and Abdul Karim Shaikh who had been arrested on the 2nd August 2005 and charge-sheeted in the year 2006 pertaining to the same incident although given a separate case number of BBC1- of 1993. In these proceedings, the Designated Judge by order dated 2nd December 2008 directed that the prosecution was not entitled to rely on or to use any evidence in BBC 1 of 1993 qua Abu Salem Ansari and the others and it was for the prosecution to establish the existence of circumstances in terms of Section 299 of the Code. It appears that the order of 2nd December 2008 was challenged by the CBI before this Court in SLP(Crl.) No.569 of 2009 and the matter was disposed of on the first hearing in the following terms on the 6th February 2009:

> "In the present case, sub-section (2) of the Section 299 Cr.P.C. has no application. Therefore, we make it clear that the prosecution may rely on the earlier evidence recorded in the earlier trial against the first respondent subject to establishment of existence of any of the conditions precedent as described in first part of Section 299 Cr.P.C. The appeal is disposed of accordingly."

5. The Designated Court accordingly sought support for its

opinion from the order dated 6th February 2009 in the case of Abu Salem and observed that:

> "In both the trials i.e. BBC 1-A/93 of this accused (i.e. the present trial) and BBC 1-B/93 against accused Abu Saleem and others some of the evidence is recorded in common. Some of the witnesses are examined afresh by the prosecution. And when in the case of accused Abu Salem Hon'ble Apex Court has held that the earlier evidence would not be available against Abu Saleem unless witnesses are examined afresh the same being the statement of law is also binding. In this case which is arising out of the same crime number and is simply separated for the sake of convenience as the accused is arrested later on when the earlier trial was already over and case was reserved for judgment. No any contrary matrix can be applied to this case otherwise it will amount to discrimination before law as court will have to give distinct treatment and legal protection to two distinct sets of accused involved in the same crime. So far the evidence regarding the confessional statement is concerned I am compelled to reiterate that law does not permit the acceptance against this accused as the matter is not charged or tried together in the same case with this accused. In the circumstances prosecution cannot rely on or even prove the confessional statement of any of the accused whose trial has come to end by declaration of judgment in the year 2007 by examining any Police Officer who recorded the same. It will be inadmissible evidence and no purpose of law will be served by allowing an inadmissible evidence on record."

6. The Court also held that in view of the order dated 6th of February 2009 the circumstances had changed and as such it was appropriate that a similar order be made and ultimately issued the following directions on the 26th February 2009:

"It is held that prosecution is not entitled to rely on any piece of evidence recorded in earlier trial BBC 1/93 AS IT IS without examining those witnesses afresh in this trial.

It is held that prosecution may rely on the evidence recorded in earlier trial BBC 1/93 against accused Mustafa Dosa subject to establishment of existence of any of the condition precedent as described in Second part of Sec.299 of Cr.P.C. subject to further condition that such evidence u/sec.299 of Cr.P.C. must relate to the later evidence recorded after 31/12/1997 i.e. the date accused Mustafa Dosa was declared as proclaimed offender.

It is further held that the prosecution is not entitled to rely on any evidence tending to prove confessional statements of any of the accused who is already charged and tried in main trial BBC 1/93 which is terminated by judgment declared 12/9/2006 to 31/7/2007.

The Prosecution is at liberty to proceed to rely on any piece of evidence recorded in the aforesaid earlier trial strictly within the above parameters and subject to the conditions mentioned herein-in-above."

This order has challenged before us by the CBI.

7. Mr. P.P.Malhotra, the learned Additional Solicitor General, has first and foremost argued that the observations of the Designated Court in the impugned order that the order of Designated Judge Shri Kode dated 11th July 2005 was an interlocutory one which could be tinkered with at any time under Section 362 of the Cr.P.C. were wrong as the said order had settled the rights in a very specific manner and more particularly Section 362 could operate only to correct clerical or arithmetical errors. It has been pointed out that review was a creature of a statute and there was no inherent power of review vested in a Designated Court and that even the criminal procedure did not

envisage review of an order except in the limited situations mentioned in Section 362. It has also been submitted that in any case the power under Section 299 of the Code of Criminal Procedure could be exercised in the case of respondent herein as he had been an absconder and that the CBI while submitting its challan had done so not only with respect to those accused who were in the custody but even to those who were absconding or who were not yet identified and could be identified at a later stage. He has further submitted that the changed circumstances on which emphasis had been laid by the Designated Court in the impugned order had further changed as the order of 6th February 2009 in SLP (Crl.) No. 569/2009 had further been modified by this Court subsequently vide order dated 24th August 2009 and that in this view of the matter the trial in the case of respondent herein was also required to proceed in accordance with the directions issued by this Court on 24th August 2009 in the case of Abu Salem.

8. The arguments raised by Mr. Malhotra, ASG have been countered by Mr. R.S.Sodhi, the learned senior counsel for the respondent. It has been pointed out that the order made by Shri Kode was nonest in the eyes of law and, therefore, interference by the successor Designated Judge ignoring them was fully justified. It has further been pleaded that the conditions for the applicability of Section 299 of the Cr.P.C. were not made out and the respondent was not an accused person or a proclaimed offender till a formal declaration to that effect and as such the evidence produced by the prosecution prior to the 31st August 1997 could not be utilized against him. It has been highlighted that Section 273 of the Cr.P.C. clearly envisaged the recording of evidence in the presence of the accused and if such a direction was violated, it would amount to a complete miscarriage of justice. The learned counsel has relied upon certain documents on its plea.

9. As would be evident, several legal issues have been raised in his matter. We, however, see that the Bombay blast

took place in the year 1993 and the trial with respect to some of the accused, including the respondent herein, has yet not been completed though a series of applications have been filed before the Designated Judges to be followed by appeals in this Court at the instance of the aggrieved parties. We are, therefore, of the opinion that the legal issues need not be gone into at this stage for the simple reason that the last order in this matter is the order dated 24th August 2009 made by this Court in SLP (Crl) No. 3586/2009 in the case of Abu Salem. It appears that after the order dated 2nd December 2008 in the case of Abu Salem, the matter was carried to this Court in SLP (Crl.) No. 569/2009. This SLP was disposed of on 6th February 2009 by the order already quoted above. An application was thereafter filed by the prosecution on 23rd February 2009 that the depositions of the witnesses recorded in the absence of the accused in BBC No.1/1993 may be taken on record in the case of Abu Salem and others without recalling the witnesses in view of the provisions of Section 299 of the Cr.P.C. This application was, however, dismissed vide order dated 6th February 2009 in the light of the order dated 2nd December 2008 in the case of Abu Salem. It appears that the order dated 16th March 2009 in the case of Abu Salem was carried to the Supreme Court by way of SLP (Crl.) No. 3586/2009 and after hearing both parties the SLP was disposed of on the 24th August 2009 with the following directions:

> "Respondent accused will file a statement within one week before the Special Judge as to who are all the witnesses whom they propose to cross-examine in BBC-1 of 1993. Thereafter the prosecution will take further steps to produce those witnesses for cross-examination. The Trial Judge will expedite the matter.
>
> Earlier interim order is vacated.
>
> The Special Leave Petition is disposed of accordingly."

10. It is the case of the CBI that it would be satisfied if a similar order is passed in the present case. We find merit in the submission for the simple reason that the trial of the respondent herein and Abu Salem, which arises out of the same incident, cannot proceed under different procedures. Even otherwise the observations of the Designated Court in the impugned judgment dated 16th March 2009 that as the changed circumstances in the order passed by the Supreme Court in the case of Abu Salem were pre-dominant and would hold the field, on this very premise the order of the Supreme Court dated 24th August 2009 would now be the final word in the matter. We, therefore, dispose of these Appeals and make direction in terms of the order dated 24th August 2009. No other order is necessary.

B.B.B. Appeals disposed of.

NARAYAN DUTT AND ORS.
v.
STATE OF PUNJAB AND ANR.
(Civil Appeal No. 2058 of 2011)

FEBRUARY 24, 2011

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

Constitution of India, 1950 – Art.161 – Grant of pardon by Governor under Art. 161 – Nature and scope of the power of pardon – Extent of judicial review over such power – Murder of one person – Additional Sessions Judge convicted accused-appellants under s.302 IPC r/w other provisions of IPC and sentenced them to life imprisonment – All the appellants appealed before the High Court – During the pendency of the appeals, the appellants also filed petitions under Article 161 of the Constitution before the Governor of the State – The Governor granted pardon to them and they were directed to be released – Writ petition was filed thereagainst – High Court set aside the order of pardon of the Governor – Held: There is limited scope of judicial review on exercise of power by the Governor under Article 161 – In the instant case, before the Governor could pass the order of pardon, the accused-appellants filed appeals against the order of conviction and sentence and the same were pending before the High Court – This was a relevant fact for the Governor to take into consideration before granting his power of pardon – But, in the instant order of the Governor there was no reference to this fact – Therefore, all relevant facts were possibly not placed before the Governor – Apart from this, there is another vital aspect in the order of the Governor which requires serious consideration, inasmuch as, in the order of the Governor, there were some observations about the guilt or innocence of the accused-appellants – The powers of a Court of law in a criminal trial and subsequent appeal right

upto Supreme Court and that of the President/Governor under Article 72/161 of the Constitution operate in totally different arenas and the nature of these two powers are also totally different from each other – One should not trench upon the other – The instant order of the Governor, by pronouncing upon the innocence of the accused therefore exceeded the permissible constitutional limits under Article 161 of the Constitution – The order of the Governor cannot be approved – Matter remanded to the Governor for re-consideration of the matter in accordance with law – Penal Code, 1860 – ss. 148, 302/149, 323, 149, 324, 325 and 326.

In a criminal case involving murder of a person, the Additional Sessions Judge convicted the accused-appellants under s.302 IPC r/w other provisions of IPC and sentenced them to life imprisonment. All the accused-appellants appealed before the High Court. During the pendency of the appeals, the accused-appellants also filed petitions under Article 161 of the Constitution before the Governor of the State. The Governor granted pardon to them and they were directed to be released. Writ petition was filed thereagainst. The High Court set aside the order of pardon of the Governor.

In the instant appeals, the questions which arose for consideration were: 1) whether the power under Article 161 of the Constitution is subject to judicial review and if yes, to what extent and 2) whether in the instant case the Governor had rightly exercised his power to pardon under Article 161 of the Constitution.

Disposing of the appeals, the Court

HELD:1.1. Article 161 of the Constitution of India confers on the Governor of a State the right to grant pardons, remissions, reprieves or commute the sentence of any person convicted of any offence against any law

relating to a matter to which the executive power of the State extends. [Paras 18, 19] [992-D-E]

1.2. There is limited scope of judicial review on the exercise of power by the Governor under Article 161. Since the power of granting pardon under Article 161 of the Constitution is a constitutional power, it is amenable to judicial review on the following grounds: a) if the Governor had been found to have exercised the power himself without being advised by the government, b) if the Governor transgressed his jurisdiction in exercising the said power, c) if the Governor had passed the order without applying his mind, d) the order of the Governor was mala fide, or e) the order of the Governor was passed on some extraneous considerations. Further, if the Governor was not aware of general considerations such as period of sentence undergone by the convict, his conduct and behaviour while undergoing sentence and other such material considerations, it would make the order of the Governor under Article 161 arbitrary and irrational. [Paras 28, 29, 36] [995-E-H; 996-B; 997-E-F]

1.3. It is axiomatic that before the power of the Governor under Article 161 of the Constitution is invoked by any person, the condition precedent is that such person or persons must be convicted of any offence against any law and will be subjected to undergo a sentence. Therefore, an omission of any reference to an order of conviction or sentence in the Governor's order in respect of the accused is really of no consequence. [Para 38] [997-G-H; 998-A-B]

1.4. However, in this case before the Governor could pass the aforesaid order of pardon, the accused persons filed appeals against the order of conviction and sentence and the same were pending before the High Court. This is a relevant fact for the Governor to take into

consideration before granting his power of pardon. But, in the instant order of the Governor there is no reference to this fact. This court, therefore, is inclined to infer that all relevant facts were possibly not placed before the Governor. Apart from this, there is another vital aspect in the order of the Governor which requires serious consideration, in as much as, in the order of the Governor, there are some observations about the guilt or innocence of the accused persons who prayed for pardon under Article 161 of the Constitution. [Paras 39, 40] [998-C-E]

Maru Ram & Ors. v. Union of India and Ors. **AIR 1980 SC 2147;** *Kehar Singh & Anr. v. Union of India and Anr.* **AIR 1989 SC 653;** *Swaran Singh v. State of U.P. and Ors.* **AIR 1998 SC 2026 = 1998 (2) SCR 206;** *Satpal and Anr. v. State of Haryana & Ors.* **AIR 2000 SC 1702 = 2000 (3) SCR 858;** *Bikas Chatterjee v. Union of India & Ors.* **(2004) 7 SCC 634;** *Epuru Sudhakar & Anr. v. Government of A.P. & Ors.* **AIR 2006 SC 3385 = 2006 (7) Suppl. SCR 81 – relied on.**

Ex Parte Williams Wells **(1854-57) 15 Law Ed 421[U.S. Supreme Court];** *Ex parte Philip Grossman* **(1924) 267 US 87 and** *U.S. v. Benz,* **(1930) 75 Law Ed 354 – referred to.**

2. It is well settled that to decide on the innocence or otherwise of an accused person in a criminal trial is within the exclusive domain of a Court of competent jurisdiction as this is essentially a judicial function. A Governor's power of granting pardon under Article 161 of the Constitution being an exercise of executive function, is independent of the Court's power to pronounce on the innocence or guilt of the accused. The powers of a Court of law in a criminal trial and subsequent appeal right upto this Court and that of the President/Governor under Article 72/161 of the Constitution operate in totally different arenas and the nature of these two powers are also totally different from

each other. One should not trench upon the other. The instant order of the Governor, by pronouncing upon the innocence of the accused has therefore exceeded the permissible constitutional limits under Article 161 of the Constitution. The order of the Governor cannot be approved. Therefore the order of the Governor is set aside and the matter is remanded to the Governor for re-consideration in accordance with law. [Paras 41 & 42] [998-F-H; 999-A]

Case Law Reference:

AIR 1980 SC 2147	**relied on**	**Para 20**
AIR 1989 SC 653	**relied on**	**Para 24**
1854-57) 15 Law Ed 421 [U.S. Supreme Court]	**referred to**	**Para 24**
(1924) 267 US 87	**referred to**	**Para 24**
(1930) 75 Law Ed 354	**referred to**	**Para 25**
1998 (2) SCR 206	**relied on**	**Para 27**
2000 (3) SCR 858	**relied on**	**Para 28**
(2004) 7 SCC 634	**relied on**	**Para 30**
2006 (7) Suppl. SCR 81	**relied on**	**Para 31**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2058 of 2011.

From the Judgment & Order dated 11.03.2008 of the High Court of Punjab and Haryana at Chandigarh in C.W.P. No.2147 of 2008.

WITH

C.A. No. 2059 of 2011.

U.U. Lalit, Kamini Jaiswal, Abhinanue Shreshtha, D.P. Singh for the Appellant.

Raju Ramchandran, Amita Gupta, Rahat Bansal, Ajay Pal for the Respondents.

The Judgment of the Court was delivered by

GANGULY, J. 1. Delay condoned.

2. Leave is granted in both the special leave petitions. They are heard together as common questions of facts and law are involved.

3. One Kiranjit Kaur, daughter of a handicapped school master, was abducted when she was returning from school on 29.07.1997, and then gang-raped and murdered by Gurprit Singh, Jagraj Singh, Desh Raj and Partap Singh. The Hon'ble Additional Sessions Judge, Barnala, after holding the trial convicted and sentenced them to undergo life imprisonment. In the area an Action Committee was formed to ensure that accused persons, involved in the gang-rape and murder of that girl, were brought to book. That committee consisted, inter-alia, of Manjit Singh, Prem Kumar and Narayan Dutt, accused in the present case, as its members. Ultimately, the accused persons in the case of gang-rape and murder of Kiranjit Kaur were punished, as aforesaid.

4. On 3.03.2001, Beant Singh (father of Jagraj Singh), Dalip Singh (grandfather of Jagraj Singh), Gurnam Singh and Rajinder Pal Singh (nephew of Dalip Singh), while coming out of Court, after hearing a criminal case, were attacked by a mob consisting of 7 persons, namely- Sukhwinder Singh, Labh Singh and Avtar Singh (all armed with kirpans), Bakhtaur Singh (armed with a ghop), Manjit Singh (armed with a kirch), along with Prem Kumar and Narayan Dutt (both without any weapon in their hands). Apparently, Bakhtaur Singh gave a blow to the head of Dalip Singh, who was being allegedly held by Prem Kumar and Narayan Dutt, which resulted in his death.

5. Beant Singh lodged an FIR on the same day under Sections 307, 148, 149 and 120-B of IPC and investigation commenced in the matter. During the course of investigation Dalip Singh had passed away, and thus, the charge under Section 302 IPC was added. After investigation, the police, in its report under Section 173 Cr.P.C, found that Manjit Singh, Prem Kumar and Narayan Dutt were innocent. Thus, charge sheet was filed by the police only against the remaining four accused under Sections 302/34, 326, 325, 324 and 323 IPC and the case was committed to the Court of Sessions for trial. At the stage of trial, Beant Singh moved an application on 11.9.2001 under Section 319 Cr.P.C., whereupon the Sessions Judge by an order dated 19.9.2001 summoned Manjit Singh, Prem Kumar and Narayan Dutt. The Sessions Judge found a prima-facie case against them and framed charges against all accused, including those three, under Sections 302, 148, 326, 325, 324 and 323 of IPC on 6.2.2002.

6. However, the prosecution then filed an application dated 29.10.2002 under section 321 Cr.P.C., seeking to withdraw the case against Manjit Singh, Prem Kumar and Narayan Dutt and that was disallowed by the Trial Court vide order dated 7.11.2002.

7. Aggrieved, the accused filed criminal revision petitions (No. 2248/2002 and 2413/2002), which were dismissed by the High Court of Punjab and Haryana vide common order dated 14.10.2003. A Special leave petition filed by the State of Punjab against the order of the High Court dated 14.10.2003 was also dismissed by this Court.

8. Accordingly, the trial commenced against all the 7 accused.

9. The Additional Sessions Judge, Barnala, convicted all the accused by judgment and order dated 28.03.2005 and convicted them under Sections 148 IPC and Sections 302, 302/

149, 323, 149, 324, 325 and 326 on various counts and passed an order of life sentence on 30.03.2005.

10. All the accused appealed before the High Court of Punjab and Haryana. During the pendency of the appeals, Narayan Dutt, Manjit Singh and Prem Kumar also filed petitions under Article 161 of the Constitution of India before the Governor of Punjab.

11. The Governor of Punjab, vide order dated 24.07.2007, in exercise of his powers under Article 161, granted pardon to Narayan Dutt, Prem Kumar and Manjit Singh and they were directed to be released immediately.

12. Challenging that order Rajinder Pal Singh filed a writ petition before the High Court of Punjab and Haryana.

13. The criminal appeals of the accused and the writ petition of Rajinder Pal Singh were heard together by the High Court of Punjab and Haryana. The High Court framed two questions for consideration:

a. Whether case of the prosecution is proved against all the appellants by evidence on record?

b. Whether the order of pardon is sustainable in law?

14. Vide the impugned common judgment dated 11.03.2008, the High Court allowed the writ petition and set aside the order of pardon of the Governor of Punjab. It gave the benefit of doubt to Prem Kumar and Narayan Dutt, and allowed their appeals by acquitting them. However, the conviction and sentence of Sukhwinder Singh, Labh Singh, Bakhtaur Singh, Avtar Singh and Manjit Singh was upheld by the High Court and it was of the opinion that the prosecution had successfully established the offences against them.

15. Against the said impugned judgment dated

11.03.2008, the State of Punjab filed Special Leave Petition (CC No.3090/2010) before this Court. Accused Narayan Dutt, Prem Kumar and Manjit Singh also filed another Special Leave Petition (No.11544/2008) before this Court. Both the Special Leave Petitions were directed against the order of the High Court whereby the order of pardon by the Governor of Punjab was set aside.

16. In the background of these facts, questions of law arising before us are:

a. Whether the power under Article 161 is subject to judicial review and if yes, to what extent?

b. Whether the Governor had rightly exercised his power to pardon under Article 161?

17. The order of the Governor dated 6.8.2007, which is relevant in the present context, reads as follows:

"I have considered the matter carefully.

Ever since the lodging of FIR, there has been a widespread public belief that Sarvshri Narain Dutt, Prem Kumar and Manjit Singh had been falsely implicated in the murder of Dalip Singh, because of their role as leaders of the Action Committee set up to secure justice for the late Kiranjit Kaur's family. This has been corroborated by the investigation into the case, during the course of which, the above three persons were found to be innocent. The Intelligence Wing has also supported the innocence of these persons.

It is also noteworthy that out of the 7 persons accused and convicted for the murder of Dalip Singh, pardon has been sought only for the three persons that have been found to be innocent. This benefit has not been proposed for the other 4 accused. Further, the recommendation for pardon had initially been moved by the previous government, and

has also been endorsed by the present one. Hence, the recommendation for pardon seems to be objective and bona fide.

The courts have held that the power under Article 72 and 161 is a wide power, conferred inter alia with the purpose of doing justice in cases even where the courts might have convicted a person.

In view of the above, I exercise my powers under Article 161 and grant "pardon" to Sarvshri Narain Dutt, Prem Kumar and Manjit Singh in FIR No. 56 dated 03.03.2001 P.S- Kotwali Barnala."

18. Article 161 of the Constitution of India confers on the Governor of a State the right to grant pardons, remissions, reprieves or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends.

19. The nature and scope of the power of pardon and the extent of judicial review over such power has come up for consideration in a catena of cases and has now virtually crystallised into a rule of law.

20. In *Maru Ram & Ors. v. Union of India & Ors.* [AIR 1980 SC 2147] Krishna Iyer J, speaking for the Constitution Bench, held that although the power under Articles 72 and 161 were very wide, it could not "run riot". His Lordship held that no legal power can run unruly like John Gilpin on the horse, but "must keep sensibly to a steady course". According to His Lordship, "all public power, including constitutional power, shall never be exercisable arbitrarily or mala fide and, ordinarily, guidelines for fair and equal execution are guarantors of the valid play of power." (para 62 at p. 2170)

21. The Court further observed that "Article 14 is an expression of the egalitarian spirit of the Constitution and is a

clear pointer that arbitrariness is anathema under our system. It necessarily follows that the power to pardon, grant of remission and commutation, being of the greatest moment for the liberty of the citizen, cannot be a law unto itself but must be informed by the finer canons of constitutionalism." The Constitution Bench also observed "the Government is not and should not be as free as an individual in selecting the recipients for its largesse. Whatever its activity, the Government is still the Government and will be subject to restraints, inherent in its position in a democratic society. A democratic Government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal… Every action of the Executive Government must be informed with reason and should be free from arbitrariness… it makes no difference whether the exercise of the power involves affectation of some right or denial of some privilege… From this angle, even the power to pardon, commute or remit is subject to the wholesome creed that guidelines should govern the exercise even of Presidential power." (para 63 at p. 2170-71)

22. The Bench cautioned that political vendetta or party favoritism should not be the basis of exercising such power. It also advised that the government should make rules for its own guidance in the exercise of the pardon power to exclude the vice of discrimination.

23. In conclusion, the Bench observed that considerations for exercise of power under Articles 72/161 "may be myriad and their occasions protean, and are left to the appropriate Government, but no consideration nor occasion can be wholly irrelevant, irrational, discriminatory or mala fide. Only in these rare cases will the court examine the exercise." (para 72 at p. 2175)

24. In the subsequent Constitution Bench decision in *Kehar Singh & Anr. v. Union of India & Anr.* [AIR 1989 SC 653] on the same question, this Court quoted the United States Supreme Court in *Ex Parte Williams Wells,* (1854-57) 15 Law

Ed 421, on its power to scrutinize the exercise of this power and pointed out that it was to be used "particularly when the circumstances of any case disclosed such uncertainties as made it doubtful if there should have been a conviction of the criminal, or when they are such as to show that there might be a mitigation of the punishment without lessening the obligation of vindicatory justice." The Bench also quoted Chief Justice Taft in *Ex parte Philip Grossman,* (1924) 267 US 87), wherein the learned Chief Justice opined:

> "Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or the enforcement of the criminal law. The administration of justice by the Courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the Courts power to ameliorate or avoid particular criminal judgments…" (para 8 at p. 658)

25. The Bench having regard to the nature of the power of the President under Article 72, stated that the President under Article 72 could scrutinize the evidence on record of a criminal case and come to a different conclusion from that of the court. In doing so, "the President does not amend or modify or supersede the judicial record. The judicial record remains intact, and undisturbed. The President acts in a wholly different plane from that in which the Court acted. He acts under a constitutional power, the nature of which is entirely different from the judicial power and cannot be regarded as an extension of it." The Bench quoted with approval the formulations of Sutherland, J. in *U.S. v. Benz,* (1930) 75 Law Ed 354, wherein the learned Judge held:

> "The judicial power and the executive power over sentences are readily distinguishable. To render judgment

is a judicial function. To carry the judgment into effect is an executive function. To cut short a sentence by an act of clemency is an exercise of executive power which abridges the enforcement of the judgment, but does not alter it qua a judgment."

26. In *Kehar Singh* (supra) this Court observed that the order of the President under Article 72 could not be subjected to judicial review on merits except within the strict limitations defined in *Maru Ram* (supra). Therefore, on the ambit of judicial review, *Kehar Singh* (supra) concurred with *Maru Ram* (supra).

27. In *Swaran Singh v. State of U.P. & Ors.* [AIR 1998 SC 2026], a three-Judge Bench held that "this Court has no power to touch the order passed by the Governor under Article 161 of the Constitution. If such power was exercised arbitrarily, mala fide or in absolute disregard of the finer canons of the constitutionalism, the by-product order cannot get the approval of law and in such cases, the judicial hand must be stretched to it." (para 12 at p. 2028)

28. Again in *Satpal & Anr. v. State of Haryana & Ors.* [AIR 2000 SC 1702], this Court held that the power of granting pardon under Article 161 was very wide and did not contain any limitation as to the time and occasion on which and the circumstances under which it was to be exercised. Since the power is a constitutional power, it is amenable to judicial review on the following grounds:

a. If the Governor had been found to have exercised the power himself without being advised by the government,

b. If the Governor transgressed his jurisdiction in exercising the said power,

c. If the Governor had passed the order without applying his mind,

d. The order of the Governor was mala fide, or

e. The order of the Governor was passed on some extraneous considerations.

29. Further, if the Governor was not aware of general considerations such as period of sentence undergone by the convict, his conduct and behaviour while undergoing sentence and other such material considerations, it would make the order of the Governor under Article 161 arbitrary and irrational.

30. The Constitution Bench in *Bikas Chatterjee v. Union of India & Ors.* [(2004) 7 SCC 634] reiterated the same principles on the extent of judicial review as laid down in *Maru Ram* (supra) and *Satpal* (supra).

31. In *Epuru Sudhakar & Anr. v. Government of A.P. & Ors.* [AIR 2006 SC 3385] this Court observed that it was well settled that the exercise or non-exercise of the power of pardon by the President or Governor was not immune from judicial review and limited judicial review was available in certain cases.

32. Justice Pasayat, delivering the judgment, summed up the ground on which judicial review of an order passed under Articles 72 and 161 could be undertaken. Those grounds are:

(a) that the order has been passed without application of mind;

(b) that the order is malafide;

(c) that the order has been passed on extraneous or wholly irrelevant considerations;

(d) that relevant materials have been kept out of consideration;

(e) that the order suffers from arbitrariness.

33. Justice Kapadia (as His Lordship then was) in his concurring opinion, observed that "granting of pardon is in no sense an overturning of a judgment of conviction, but rather it is an Executive action that mitigates or set aside the punishment for a crime. It eliminates the effect of conviction without addressing the defendant's guilt or innocence. The controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject-matter." (para 64 at p. 3402)

34. His Lordship further added that "the exercise of power depends upon the facts and circumstances of each case and the necessity or justification for exercise of that power has to be judged from case to case... Rule of law should be the overarching constitutional justification for judicial review." (para 65, 67 at p. 3402)

35. In that case, an order of remission had been passed, inter alia, on an inference that the accused was not involved in the murder, was falsely implicated and false witnesses had been produced. This Court held such reasons to be irrelevant and held that the order of remission was bad.

36. From the abovementioned judicial decisions it is clear that there is limited scope of judicial review on the exercise of power by the Governor under Article 161.

37. Keeping the aforesaid principles in our mind if we look at the order of the Governor it appears that there has been consideration of various aspects of the matter by the Governor in granting pardon. The Governor's order also contains some reasons.

38. The Governor's order does not contain any reference to the order of conviction and sentence imposed on the accused persons. It is axiomatic that before the power of the Governor under Article 161 of the Constitution is invoked by any person, the condition precedent is that such person or persons

must be convicted of any offence against any law and will be subjected to undergo a sentence. Therefore, an omission of any reference to an order of conviction or sentence in the Governor's order in respect of the accused is really of no consequence.

39. However, in this case before the Governor could pass the aforesaid order of pardon, the accused persons filed appeals against the order of conviction and sentence and the same were pending before the Hon'ble High Court. This is a relevant fact for the Governor to take into consideration before granting his power of pardon. But, in the instant order of the Governor there is no reference to this fact. This court, therefore, is inclined to infer that all relevant facts were possibly not placed before the Governor.

40. Apart from this, there is another vital aspect in the order of the Governor which requires serious consideration, in as much as, in the order of the Governor, there are some observations about the guilt or innocence of the accused persons who prayed for pardon under Article 161 of the Constitution.

41. It is well settled that to decide on the innocence or otherwise of an accused person in a criminal trial is within the exclusive domain of a Court of competent jurisdiction as this is essentially a judicial function. A Governor's power of granting pardon under Article 161 being an exercise of executive function, is independent of the Court's power to pronounce on the innocence or guilt of the accused. The powers of a Court of law in a criminal trial and subsequent appeal right upto this Court and that of the President/Governor under Article 72/161 operate in totally different arenas and the nature of these two powers are also totally different from each other. One should not trench upon the other. The instant order of the Governor, by pronouncing upon the innocence of the accused, has therefore, if we may say so with respect, exceeded the permissible constitutional limits under Article 161 of the Constitution.

42. For these reasons, we are constrained to hold that we cannot approve the order of the Governor. We therefore, set aside the order and remand it to the Hon'ble Governor for re-consideration of the matter in accordance with law.

43. It may be mentioned in this connection, that of those three accused persons, two persons namely, Prem Kumar and Narayan Dutt, had been acquitted by the High Court by judgment and order dated 11.3.2008 in connection with the criminal appeals filed by them.

44. The appeals are thus disposed of. No orders as to costs.

B.B.B. Appeals disposed of.

T.V. VENUGOPAL
v.
USHODAYA ENTERPRISES LTD. AND ANR.
(Civil Appeal Nos.6314-6315 of 2001)

MARCH 03, 2011

[DALVEER BHANDARI AND K.S. RADHAKRISHNAN, JJ.]

Intellectual Property – Passing-off in trade mark – Infringement of copyright – Appellant is sole proprietor of a Karnataka based firm carrying on manufacture of incense sticks (agarbathis), which adopted the trade mark 'Eenadu' and started selling its product in the State of Andhra Pradesh – Respondent company, engaged in the business of publishing a newspaper in Telugu entitled as 'Eenadu' and other businesses in the State of Andhra Pradesh, filed a suit for infringement of copyrights and passing-off trade mark – Whether the appellant should be permitted to sell his product with the mark 'Eenadu' in the State of Andhra Pradesh – Held: The respondent company's mark 'Eenadu' has acquired extraordinary reputation and goodwill in the State of Andhra Pradesh – 'Eenadu' means literally the products or services provided by the respondent company in the State of Andhra Pradesh – In this background, the appellant cannot be referred or termed as an honest concurrent user of the mark 'Eenadu' – Adoption of the words 'Eenadu' is ex facie fraudulent and mala fide from the very inception – By adopting the mark 'Eenadu' in the State of Andhra Pradesh, the appellant clearly wanted to ride on the reputation and goodwill of the respondent company – Permitting the appellant to sell his product with the mark 'Eenadu' in the State of Andhra Pradesh would definitely create confusion in the minds of the consumers because the appellant is selling Agarbathies marked 'Eenadu' designed or calculated to lead purchasers

to believe that its product Agarbathies are in fact the products of the respondent company – No one can be permitted to encroach upon the reputation and goodwill of other parties – This approach is in consonance with protecting the proprietary rights of the respondent company.

The appellant is the sole proprietor of a Karnataka based firm carrying on manufacture of incense sticks (agarbathis), which adopted the trade mark 'Eenadu' and started selling its product in the State of Andhra Pradesh. The word 'Eenadu' means 'this land' in Kannada, Malayalam and Tamil languages and 'today' in Telugu language. The respondent company, which was engaged in the business of publishing a newspaper in Telugu entitled as 'Eenadu' and other businesses in the State of Andhra Pradesh, filed a suit for infringement of copyrights and passing-off trade mark. The respondent company contended that the use of the word 'Eenadu' by the appellant amounted to infringement of their copyright and passing-off in trade mark. The trial court partially decreed the suit of the respondent company by injuncting the appellant from using the words 'Eenadu' in the State of Andhra Pradesh. The appellant was not injuncted from using the words 'Eenadu' in the entire country other than in the State of Andhra Pradesh. The appellant filed appeal before the High Court. The respondent company also filed an appeal praying that the order of injunction to be made absolute and not be confined to the State of Andhra Pradesh. A Single Judge of the High Court dismissed the appeal filed by respondent company while allowing the appeal filed by the appellant. The respondent company filed Letters Patent Appeal before the Division Bench of the High Court which was allowed, thereby decreeing the original suit filed by the respondents in 1999. Hence the present appeals.

Disposing of the appeals, the Court

HELD: 1.1. The respondent company's mark 'Eenadu' has acquired extra-ordinary reputation and goodwill in the State of Andhra Pradesh. 'Eenadu' newspaper and TV are extremely well known and almost household words in the State of Andhra Pradesh. The word 'Eenadu' may be a descriptive word but has acquired a secondary or subsidiary meaning and is fully identified with the products and services provided by the respondent company. [Para 100] [1053-G-H; 1054-A]

1.2. The appellant is a Karnataka based company which started manufacturing its product in Bangalore in the name of 'Ashika' and started selling its product in the State of Andhra Pradesh in 1995. The appellant started using the name 'Eenadu' for its Agarbathi and used the same artistic script, font and method of writing the name which obviously cannot be a co-incidence. The appellant company after adoption of name 'Eenadu' accounted for 90% of sale of their product Agarbathi. [Para 101] [1054-B]

3. On consideration of the totality of facts and circumstances of the case, the following findings and conclusions are arrived at:

a) The respondent company's mark 'Eenadu' has acquired extraordinary reputation and goodwill in the State of Andhra Pradesh. The respondent company's products and services are correlated, identified and associated with the word 'Eenadu' in the entire State of Andhra Pradesh. 'Eenadu' means literally the products or services provided by the respondent company in the State of Andhra Pradesh. In this background the appellant cannot be referred or termed as an honest concurrent user of the mark 'Eenadu';

b) the adoption of the words 'Eenadu' is ex facie fraudulent and mala fide from the very inception. By

adopting the mark 'Eenadu' in the State of Andhra Pradesh, the appellant clearly wanted to ride on the reputation and goodwill of the respondent company;

c) permitting the appellant to carry on his business would in fact be putting a seal of approval of the court on the dishonest, illegal and clandestine conduct of the appellant;

d) permitting the appellant to sell his product with the mark 'Eenadu' in the State of Andhra Pradesh would definitely create confusion in the minds of the consumers because the appellant is selling Agarbathies marked 'Eenadu' as to be designed or calculated to lead purchasers to believe that its product Agarbathies are in fact the products of the respondent company. In other words, the appellant wants to ride on the reputation and goodwill of the respondent company. In such a situation, it is the bounden duty and obligation of the court not only to protect the goodwill and reputation of the respondent company but also to protect the interest of the consumers;

e) permitting the appellant to sell its product in the State of Andhra Pradesh would amount to encouraging the appellant to practise fraud on the consumers;

f) permitting the appellant to carry on his business in the name of 'Eenadu' in the State of Andhra Pradesh would lead to eroding extra-ordinary reputation and goodwill acquired by the respondent company over a passage of time;

g) the appellant's deliberate misrepresentation has the potentiality of creating serious confusion and deception for the public at large and the consumers have to be saved from such fraudulent and deceitful conduct of the appellant;

h) permitting the appellant to sell his product with the mark 'Eenadu' would be encroaching on the reputation and goodwill of the respondent company and this would constitute invasion of proprietary rights vested with the respondent company and

i) honesty and fair play ought to be the basis of the policies in the world of trade and business. [Para 102] [1054-C-H; 1055-A-H; 1056-A]

1.4. The law is consistent that no one can be permitted to encroach upon the reputation and goodwill of other parties. This approach is in consonance with protecting proprietary rights of the respondent company. [Para 103] [1056-B]

Daimler Benz Aktiegesellschaft and another v. Hybo Hindustan **AIR 1994 Delhi 239;** *Ruston & Hornsby Ltd. v. The Zamindara Engineering Co.* **1969 (2) SCC 727;** *Laxmikant V. Patel v. Chetanbhai Shah and Another* **2002 (3) SCC 65;** *Satyam Infoway Ltd. v. Sifynet Solutions (P) Limited* **2004 (6) SCC 145;** *Ramdev Food Products (P) Limited v. Arvindbhai Rambhai Patel and Others* **2006 (8) SCC 726;** *Midas Hygiene Industries (P) Ltd. and another v. Sudhir Bhatia and others* **(2004) 3 SCC 90;** *Madhubhan Holiday Inn v. Holiday Inn Inc.* **100 (2002) DLT 306 (DB);** *Mahendra & Mahendra Paper Mills Limited v. Mahindra & Mahindra Limited* **(2002) 2 SCC 147;** *Bata India Limited v. Pyare Lal & Company, Meerut City & Ors.* **AIR 1985 All 242;** *N.R. Dongre and others v. Whirlpool Corporation and another* **(1996) 5 SCC 714;** *Godfrey Philips India Limited v. Girnar Food & Beverages (P) Limited* **(2004) 5 SCC 257;** *Info Edge (India) Private Limited and another v. Shailesh Gupta and another* **98 (2002) DLT 499;** *Kamal Trading Co., Bombay and Others v. Gillette U.K. Limited* **[1988] IPLR 135;** *Honda Motors Company Limited v. Charanjit Singh & Others* **(101 (2002) DLT 359);** *M/s. Bengal Waterproof Limited Vs. M/s. Bombay Waterproof*

Manufacturing Company and Another **(1997) 1 SCC 99;** *Heinz Italia and another v. Dabur India Limited* **(2007) 6 SCC 1;** *Ford Motor Company of Canada Limited and another v. Ford Service Centre* **2009 (39) PTC 149;** *Prakash Roadline Limited v. Prakash Parcel Service (P) Ltd.* **48 (1992) Delhi Law Times 390 – referred to.**

Taylor Mary Campbell v. Secretary of Health and Human Services **69 Fed. Cl. 775 (2006) [US Court of Federal Claims];** *Lamilem Badasa v. Michael B. Mukasey* **540 F.3d 909 [US Court of Appeals];** *Reddaway & Co. and Another v. Banham & Co. and Another* **1895-99 All ER 133;** *Reckitt & Colman Products Ltd. v. Borden Inc. and others* **1990 (1) ALL ER 873;** *Harrods Limited v. R. Harrod Limited* **(1924) RPC 74;** *Harrods Limited v. Harrodian School Limited* **(1996) RPC 697;** *Office Cleaning Services Limited v. Westminster Office Cleaning Association* **1944 (2) All ER 269;** *Taittinger and others v. Allbev Limitd and others* **(1994) 4 All ER 75 – referred to.**

Case Law Reference:

AIR 1994 Delhi 239	**referred to**	**Para 29, 76**
69 Fed. Cl. 775 (2006)	**referred to**	**Para 37**
540 F.3d 909	**referred to**	**Para 37**
1895-99 All ER 133	**referred to**	**Para 61**
1990 (1) ALL ER 873	**referred to**	**Para 63**
1969 (2) SCC 727	**referred to**	**Para 64**
2002 (3) SCC 65	**referred to**	**Para 65**
2004 (6) SCC 145	**referred to**	**Para 66**
2006 (8) SCC 726	**referred to**	**Para 67, 95**
(1924) RPC 74	**referred to**	**Para 68**

(1996) RPC 697	**referred to**	**Para 69, 73, 77**
(2004) 3 SCC 90	**referred to**	**Para 70**
(2002) DLT 306 (DB	**referred to**	**Para 71**
(2002) 2 SCC 147	**referred to**	**Para 74**
AIR 1985 All 242	**referred to**	**Para75**
(1996) 5 SCC 714	**referred to**	**Para 79**
(2004) 5 SCC 257	**referred to**	**Para 80**
98 (2002) DLT 499	**referred to**	**Para 81**
1944 (2) All ER 269	**referred to**	**Para 82**
(1994) 4 All ER 75	**referred to**	**Para 87**
1988 IPLR 135	**referred to**	**Para 89**
(2002) DLT 359	**referred to**	**Para 90**
(1997) 1 SCC 99	**referred to**	**Para 93**
(2007) 6 SCC 1	**referred to**	**Para 94**
2009 (39) PTC 149	**referred to**	**Para 96**
(1992) DLT 390	**referred to**	**Para 97**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6314-6315 of 2001.

From the Judgment & Order dated 15.06.2001 of the High Court of Andhra Pradesh at Hyderabad in LPA Nos. 12 & 13 of 2001.

Pratibha M. Singh, Kapil Wadhwa, Abhinav Mukherjee for the Appellant.

C.A. Sundaram, Neelima Tripathi, G.V.S. Jagannadha Rao, Rohini Musa, Abhishek Gupta, K.V. Mohan, Zafar Inyat,

Md. Niyazuddin, Anandh Kannan for the Respondents.

The Judgment of the Court was delviered by

DALVEER BHANDARI, J. 1. These appeals are directed against the judgment delivered by a Division Bench of High Court of Andhra Pradesh in Letter Patent Appeal Nos. 12 and 13 of 2001 on 15.06.2001.

2. Brief facts which have been given by the appellant are recapitulated as under.

3. The appellant is the sole proprietor of a firm carrying on business inter alia as manufacturers of and dealers in incense sticks (agarbathis) in the name and style of Ashika Incense Incorporated at Bangalore.

4. The appellant started his business in the year 1988 and adopted the mark 'Ashika's Eenadu'. According to the appellant the word 'Eenadu' in Kannada language means 'this land'. In Malayalam and Tamil language it conveys the same meaning. In Telugu language it means 'today'.

5. In consonance with the above meaning the appellant devised an artistic label comprising a rectangular carton in bottle green background with sky-blue border and in the centre, in an oval tricolour, the word 'Eenadu' is written.

6. According to the appellant, in the year 1993 he honestly and bona fidely adopted the trade mark 'Eenadu' meaning 'this land' in Kannada. In the said label the other expressions used are 'Ashika's original' and the firm's logo printed in red against yellow background. The other panel of the carton contains the same description in Telugu besides the name and address of the appellant. The panel on one side of the carton mentions the name, address, contents and another side contains 'Eenadu' in Devnagari, Tamil and Malayalam.

7. The appellant applied for registration of trade mark on or about 10.02.1994 of the said label bearing application No. 619177. The appellant made an application to the Registrar of the Trade Marks for a certificate under proviso to Section 45(1) of the Copyright Act, 1957. The Registrar issued a certificate on 7.3.1996. Thereafter, an application for registration for copyright was made by the appellant on 14.3.1997.

8. The appellant's product, incense sticks (agarbathies) were well received in the market and according to him, when he filed the appeal before this Court, his annual business was about rupees eleven crores per annum.

9. The respondent company, who was engaged in the business of publishing a newspaper in Telugu entitled as 'Eenadu', served a cease and desist notice on the appellant which was replied by the appellant on 8.3.1995. The respondent company in the year 1999 filed a suit for infringement of copyrights and passing-off trade mark in the Court of Second Additional Chief Judge, City Civil Court, Hyderabad. The respondent company therein claimed that they have been in the business of publishing a newspaper, broadcasting, financing and developing a film city.

10. It was contended by the respondent company that the use of the word 'Eenadu' by the appellant amounted to infringement of their copyright and passing-off in trade mark. According to the respondent company, the business of the appellant and the respondent company was different and there is no commonality or casual connection between the two businesses.

11. The appellant states that the word 'Eenadu' is a well known and well understood word appearing in all the South Indian languages. It means 'today' in Telugu. In Tamil, Malayalam and Kannada it means 'this land'. Therefore, no absolute monopoly could either be claimed or vest in any single

proprietor in respect of the entire spectrum of goods and/or services and there have been other traders and manufacturers who have been using the word 'Eenadu' to distinguish their merchandise from similar merchandise of others.

12. The appellant also asserted that in Hyderabad one co-operative bank exists in the name of 'Eenadu Cooperative Bank Ltd.' and their services are advertised as 'Eenadu Deposits', a shop also exists in Vijayawada by the name 'Eenadu Men's Wear' and a film titled 'Eenadu' in Malayalam and Telugu was produced some time over a decade back. The appellant contended that detergent powder, playing cards, hair oil, coffee powder, tea powder, papad etc. are being sold with the mark 'Eenadu'.

13. The Second Additional Chief Judge, City Civil Court, Hyderabad on 24.11.1999 had granted an ex-parte ad interim injunction restraining the appellant from using the expression 'Eenadu' and the same was confirmed on 27.12.1999. Thereafter, the appellant, aggrieved by the said order, moved the High Court of Andhra Pradesh at Hyderabad. The High Court suspended the interim injunction. The High Court permitted the appellant to dispose off their finished products to the tune of Rs.1 crore and also permitted the appellant to produce goods that were in the process of manufacture to the tune of Rs. 78 lakhs.

14. Meanwhile, the trial court on 24.7.2000 partially decreed the suit of the respondent company. The appellant was not injuncted from using the words 'Eenadu' in the entire country other than in the State of Andhra Pradesh.

15. The appellant, aggrieved by the order of the City Civil Judge filed an appeal before the High Court of Andhra Pradesh. The respondent company also filed an appeal against the order of City Civil Judge praying that the order of injunction to be made absolute and not be confined to the State of Andhra

Pradesh. The learned Single Judge disposed of both the appeals by a common judgment/order dated 29.12.2000. The appeal filed by the respondent company was dismissed and the appeal filed by the appellant was allowed.

16. Aggrieved by the said order of the learned Single Judge, the respondent company filed Letters Patent Appeals before the Division Bench of the High Court. The High Court vide impugned order allowed its appeals, decreeing the O.S. No.555 of 1999.

17. The appellant also aggrieved by the impugned judgment filed appeals and submitted that the courts below were not justified in granting relief which was not specifically prayed for in the plaint. The appellant further submitted that the High Court erred in holding that the copyrights of the respondent company were infringed in the absence of a prayer for infringement of copyrights. According to the appellant the Division Bench of the High Court erred in holding that they were passing-off the copyrights when the Copyright Act, 1957 does not provide for such a remedy.

18. The appellant also submitted that the courts below have not properly appreciated the distinction between the existence of a copyright and its infringement.

19. According to the appellants, the respondent company was aware of the appellant's business since at least 27.2.1995 and there has been a gross delay in filing of the suit and because of inordinate delay in approaching the court, the respondent company is not entitled to any relief.

20. The appellant further submitted that whether an action for passing-off could be maintained and injunction granted when a mark is used consisting of the word 'Eenadu', which is a common word. The word 'Eenadu' literally means 'Today' in Telugu and 'this land/our land' in Kannada, Tamil and

Malayalam.

21. The appellant contended that the businesses of the appellant and the respondent company are entirely different and there is no question of passing-off of the goods of the appellant as that of the respondent company.

22. The respondent company denied all the averments of the appellant and submitted the following propositions.

1. The essence of an action of passing-off is an attack on or dilution or benefitting from the goodwill and reputation of another person.

2. If such goodwill or reputation arises out of the use of a name in respect of a particular product and the goodwill and reputation is restricted only to such product and unknown outside such product then the use of such name by another person with respect to a totally different product would not affect the goodwill and reputation so as to constitute an action of passing-off

3. If, however, the goodwill and reputation is sufficiently wide and the name is associated with the source in a more general way rather than restricted only to a given product then the use of such name by another trader for even a totally different product could amount to a passing-off.

4. The exception to the three above propositions would be if such name is a generic name for the product being manufactured by the rival trader in which case it would never constitute an action of passing-off.

5. Again, if the said name is descriptive of the product

of the rival trader, it would then amount to passing-off only if it is established that it has become a household name of such a nature as to have acquired a strong secondary meaning and it being associated substantially with the first trader, in which case alone it would amount to a passing-off. The standard of proof of such a case would be higher than the standard of proof of first three propositions.

23. Mr. Mukul Rohtagi, learned senior counsel and Mrs. Prathiba Singh, learned counsel arguing on behalf of the appellant submitted that in the instant case the suit was in fact governed by Trade & Merchandise Marks Act, 1958 and not by the Trade Marks Act, 1999 which came into force w.e.f. 15.9.2003. It was submitted that this case is covered under section 159(4) of the 1999 Act, which specifically provides that any legal proceedings pending in any court at the commencement of this Act would be governed by the old Act. Section 159(4) of the 1999 Act is reproduced as under:-

> "159. (4) Subject to the provisions of section 100 and notwithstanding anything contained in any other provision of this Act, any legal proceeding pending in any Court at the commencement of this Act may be continued in that court as if this Act had not been passed."

Thus, none of the concepts of well-known marks, dilution etc. as statutorily applicable under the 1999 Act, have any application in this case. It is submitted that the present case, as decided by all the courts below, is a case of passing off and not of dilution.

24. In reply to the submission of the respondent company, learned counsel for the appellant submitted that the passing off test is the test of likelihood of confusion. Such confusion should

be either confusion arising due to get up of products, confusion as to sponsorship/affiliation of source or confusion arising out of the use of identical/deceptively similar trademarks.

25. Learned counsel for the appellant also submitted that dilution is a completely different concept, namely, if there is confusion, there is no dilution. The concept of dilution steps in when in fact the consumer is not being confused but the plaintiff's mark is being diluted in some form or the other. McCarthy, a well-known author on Trademarks and Unfair Competition clearly states the same in the said publication. Reliance is being placed at para 24.70 wherein it has been observed that "the dilution doctrine is concerned with granting protection to trademarks beyond that provided by the classic 'likelihood of confusion' tests."

26. According to the appellant, the principle of dilution requires that the consumer in fact should not be confused but a well-known mark, in the absence of confusion, is being diluted. In the United States of America, dilution is protected by a specific statute called the Federal Anti Dilution Act, 1996. The discussion on dilution in McCarthy establishes the following:-

a) The traditional likelihood of confusion test applies to passing off.

b) If a mark is a well-known mark, then the argument of dilution is to be considered in the absence of confusion.

c) Dilution is a doctrine which should be strictly applied.

d) Standard of distinctiveness required to protect a mark from dilution is very high.

e) Not every trade mark can be protected against

dilution.

f) If a mark enjoys a regional reputation it does not deserve protection under the law of dilution.

g) A reputation on a national scale, especially while testing the mark for unrelated goods, is required to be protected under dilution.

27. Learned counsel for the appellant submitted that under the traditional law of passing off or under the law of dilution, the only marks which have been protected across product category are marks which can easily be termed even in the common parlance as well-known marks. Such marks such as Bata, Volvo, Benz, Mahindra & Mahindra and Tata etc.

28. It was submitted that the case pleaded by the respondent company (plaintiff) is one of confusion and passing off and not of dilution. The standard for establishing dilution are completely different. There is neither a pleading in the present case alleging dilution, nor any evidence in support of dilution. The standards for recognizing dilution have not been confirmed by any court of law in India and while deciding the present case in the courts below the threshold of dilution was never applied.

29. In India, the law on dilution has developed through case law going back to the Benz's case decided by the Delhi High Court in Daimler Benz Aktiegesellschaft and another v. Hybo Hindustan AIR 1994 DELHI 239. However, 'Eenadu' cannot claim the distinctiveness or the reputation which is enjoyed by a mark like Benz or Harrods. 'Eenadu' is a very ordinary word commonly used in Telugu language and to vest a monopoly in favour of the respondent company (plaintiff) for such a common word on the ground of dilution would result in conferring an undue monopoly to a generic/descriptive word. There are several marks which are used in the ordinary language for different types of products, such as :-

1.	Time/Times	Time Magazine, Time Education, Times London, Times of India, Navbharat Times, Hindustan Times, Times Now
2.	Today	India Today, Punjab Today, Today's Tea, Today's Contraceptive
3.	Marvel	Marvel Comics, Marvel Detergent
4.	Sun, Surya, Suraj	Oil, Lights & Bulbs, Tobacco
5.	Metro	Metro Shoes, Delhi Metro, Metro Walk Malls
6.	Maruti	Oil, Cars
7.	Taj	Hotels (Taj Hotels), Tea (Wah! Taj)
8.	Citi	Citi Bank, City Mall
9.	Mustang	Motel, Cars, Trailers

30. The learned counsel for the appellant submitted that 'Eenadu' is a common word used in Telugu language. This has been fully established by the evidence on record.

31. He referred to the deposition of Jagannadharao, PW1, Law Officer of the plaintiff, who has stated that the literal meaning of the word 'Eenadu' is 'Today'.

32. According to the deposition of PW2, N. Swami, Artist, the meaning of the word 'Eenadu' is 'Today'.

33. Learned counsel for the appellant referred to deposition of PW5, R. Kumaraswamy, Advocate who has stated that literal meaning of the word 'Eenadu' is 'Today'.

34. The learned counsel referred to the deposition of PW6, T.V. Venugopal, the appellant herein. He has stated that the word 'Eenadu' was specifically given for the purpose of 'daily' prayer.

35. The learned counsel for the appellant submitted that

the word 'Eenadu' literally means "Today" or "This Day" and hence is not an invented word but is a generic/descriptive word used in common parlance. This is further proved by the fact that the word 'Eenadu' has been used by several parties for various products which include :-

- 'Eenadu' Turmeric powder – even the script is the same
- 'Eenadu' Cooperative Bank
- 'Eenadu' Match Sticks – even the script is the same
- 'Eenadu' Playing Cards
- 'Eenadu' Ayurvedic Bath Soaps
- 'Eenadu' Dresses
- 'Eenadu' Chilly Powder – even the script is the same
- 'Eenadu' Washing Powder
- 'Eenadu' Coffee – even the script is the same
- 'Eenadu' Telugu Feature Film
- 'Eenadu' Tobacco – same script
- 'Eenadu' Hotel
- 'Eenadu' Marble Estate
- 'Eenadu' Feature Film (The said film by UTV Production uses the word 'Eenadu' in the same script as used by the respondent – (This particular film has, in fact, been featured for a review in the respondent's own newspaper dated 15.8.09 & 27.8.09 and copies of the same are attached. The music launch of this film was also featured in the

newspaper of the respondents dt. 14.9.09. This film has at least 2 songs with the word 'Eenadu'. One of the songs in the film called "Eenadu Eesamaram" which means "This Day, This War".

- A famous Kannada song – Eenadu Kannada, Eeneeru Kannada (This day is Kannada, This water is Kannada).

36. The appellant submitted that it is clear that 'Eenadu' is a term which is used in the ordinary Telugu language and in Kannada and the same is acknowledged by the respondent company itself as is evident from the wide publicity given to the film in the respondent company's newspaper.

37. The appellant further submitted that the evidence relied upon by the respondent company in order to allege that 'Eenadu' is a reputed and distinctive mark, is a compilation of documents handed over before this court during the course of arguments on 23.3.10. In order to show that 'Eenadu' is a household name, an extract from Wikipedia printed on 13.4.09 was submitted by the respondent company before this court. In fact, all the other internet print-outs annexed by the respondent company are based on Wikipedia itself. It is the submission of the appellant that it is now an established position, internationally in law that Wikipedia does not have any evidentiary value in the court proceedings. The same has been held by the US Court of Federal Claims in *Taylor Mary Campbell v. Secretary of Health and Human Services* 69 Fed. Cl. 775 (2006) and by the US Court of Appeals in *Lamilem Badasa v. Michael B. Mukasey* 540 F.3d 909. As against the Wikipedia evidence, the actual evidence on record reveals the following:-

a) 'Eenadu' has a specific meaning in Telugu language and also has a meaning in Kannada language and possibly even in Malayalam;

b) 'Eenadu' has been used by several parties in the same script without any objection whatsoever from the respondent company (barring 2 ex-parte injunctions).

c) 'Eenadu' means "Today" or "This Day".

d) The respondent company itself has acquiesced to 3rd party usage of the mark (including 'Eenadu' feature film by UTV).

e) The respondent company's submission that this court ought to ignore the concrete documentary evidence and testimony and instead rely upon extracts from the Wikipedia to prove that 'Eenadu' is a household name, is not liable to be entertained.

38. Thus, 'Eenadu' does not enjoy the distinctiveness which the respondent company claim and in any event such distinctiveness does not span across all classes of goods and services.

39. The respondent company has argued before this court that the descriptive nature of the mark has to be determined with respect to the appellant's goods. This approach according to the appellant is completely erroneous. While determining the nature of the mark – for the purpose of registration or for the purpose of passing-off/infringement, the first inquiry which the court ought to carry out is to determine whether the applicant's/plaintiff's mark is invented, arbitrary/suggestive, descriptive or generic. The nature of the mark is always determined with respect to the plaintiff's/applicant's goods. For example, if a person applies for a trademark called "Extra Strong", the Registrar of trade mark has to examine whether the mark is descriptive or laudatory for the goods for which it is applied, i.e., the applicant's goods. The inquiry does not depend on the person opposing the use of the said mark. Thus, to hold that

the nature of the mark has to be determined by the nature of the appellant's goods is stating the proposition in the reverse.

40. In the present case, the plaintiff/respondent company was conscious that 'Eenadu' is a descriptive mark and it is for this reason that in the plaint, the plaintiff (respondent) company has pleaded a secondary meaning with respect to their mark 'Eenadu'. If the plaintiff's case is based on 'Eenadu' being a distinctive mark, a suggestive mark and a well known mark, then there is no question of pleading secondary meaning to its mark. It is only with respect to descriptive marks that secondary meaning needs to be pleaded and considered by this court.

41. The argument of the respondent company is that 'Eenadu' is not a generic or descriptive mark but a suggestive mark. The difference between categorization as generic, descriptive or suggestive is a follows:-

* A generic mark can never be a trademark

* A descriptive mark can become a trademark if it acquires secondary meaning

* A suggestive mark is inherently distinctive

42. The line between suggestive marks and descriptive marks is very thin. Various commentaries including McCarthy have laid down the imagination test to determine as to whether a mark is descriptive or suggestive. When this test is applied to the mark 'Eenadu' for a newspaper, it is clear that the same is descriptive in nature inasmuch as it means 'Today', i.e. news for today. It does not require any imagination at all. Thus in the imagination test, if the mark describes a characteristic of the product – in the case of 'Eenadu' the newspaper, it refers to the characteristic of the newspaper, i.e., today's news. 'Eenadu' would therefore, be an expression which immediately describes a newspaper. In fact with respect to its Agarbathies, 'Eenadu' would be a completely arbitrary term. However, with respect to

newspapers, this is a descriptive term.

43. The appellant submitted that the entire object of including the 4th Schedule in the Trademark Rules is that marks are to be registered for the goods and services for the purpose for which they are used. Non-use of a mark entails rectification under section 46 of the 1958 Act. Thus, the entire object of trademarks is to confer monopoly of a particular individual or entity with respect to a mark for a particular category of goods or category of services. It is only in exceptional cases that a mark is protected across all product categories. If that was not the position, then every trademark owner whose mark enjoys a reputation in whatever limited field and for specific goods/services, would be able to claim monopoly for the mark with respect to all 42 classes of goods and services. This could never have been the intention of the Legislature. Even while establishing the criteria for the marks which are well-known, the legislature has thought it fit to deal with the reputation of such well-known marks by taking into consideration factors like section of the public, relevant geographical area etc. Thus, every trade mark is not entitled to protection across all categories as every trade mark does not automatically become a "well-known mark". If this was not the case, then there would come a time when most words would get monopolized across products and services which would not conform to the intention behind the Law of Trade Marks.

44. Every mark with a reputation cannot be determined as a well-known mark as reputation by itself does not escalate the mark into the position of a well-known mark. The reputation of a mark can be restricted to a particular territory, to a particular category of goods or services, to a particular category of population, to a particular linguistic section of public etc.

45. The appellant submitted that in most of the cases where absolute protection has been granted, extending it beyond the goods and services in which the plaintiff deals with, the mark or name has been an extremely distinctive mark. They

have either invented the mark or marks which are derived from surnames or marks are used across categories of products. The defendant's products may be confused from the other products originating from the plaintiff, but the plaintiff has to be dealing with more than one products or services with respect to the said mark/name.

46. In the present case, the evidence on record has established that the plaintiff/respondent company has only dealt with mark 'Eenadu' for newspapers. The television channel is known as ETV where the word 'Eenadu' is not used for the same. The evidence itself establishes the same. Further it is pertinent to note that:

* There is not a single document showing that the respondent company is referred to as 'Eenadu' Margdarshi's goods;

* Priya is also a mark of pickles which is manufactured by the respondent company;

* 'Eenadu' pickles (if any) are not available in the local market;

* ETV is the shortcut name for the 'Eenadu' Television;

* The respondent company does not manufacture incense sticks;

* That 'Eenadu' has been used to convey the literal meaning as "Today".

47. The appellant submitted that in the background of this evidence emanating from the plaintiff's main witness, it is evident that 'Eenadu' is not a distinctive mark. It is in fact a descriptive mark. At best, a secondary meaning may accrue in its favour with respect to only newspapers and nothing more. Descriptive words which have been used only for one category

of goods cannot claim across the board protection. 'Eenadu' is not like Volvo or Kirloskar or Harrods or Benz.

48. 'Eenadu' would fall in the category of marks like Shell, Safeguard, Flexgrip, Imperial, Skyline and Financial Times, Heat Piller, One Day Drycleaners, Instea, Kesh Nikhar, Whipp Toppings. All these words have not been granted protection across the board.

49. The respondent company has argued before this court that the appellant's adoption is dishonest in view of the similar scripts being used by the defendant. The script being used by the appellant is a *standard block script in the Telugu language.* The perusal of all the third party use of the mark 'Eenadu' would reveal that almost every party uses the same script. Thus, there is no dishonesty in adoption of the same as the script is commonly used in Telugu language. Even the feature film which has been released in 2009 has used the same script. There is no dishonesty in the adoption of the mark 'Eenadu' or the script 'Eenadu'. The appellant went through the process of applying for a Search as prescribed under the Copyright Act. The appellant obtained a No-Objection in accordance with Section 45 of the Copyright Act and Rule 24(3) of the Trade Mark Rules, 1959.

50. The mark 'Eenadu' meaning DAILY or TODAY, the appellant genuinely adopted the same to signify Daily use of Agarbathi, which is in fact used on a daily basis by persons performing puja. Thus, the appellant does have a valid and acceptable explanation for the adoption. It is submitted that for the appellant's goods, it is an arbitrary mark.

51. The appellant submitted that in order to establish the appellant's bona fides, the appellant is ready and willing to change the script and to prefix the word "Ashika" in order to distinguish itself from the respondent company and to ensure that there is no confusion as to source.

52. The appellant submitted that as long as the product is distinguishable from the product of the respondent company, the appellant prays that the injunction ought to be modified and the appellant ought to be permitting to adopt the carton which it has proposed to use before this court. It is incorrect that the trade made application for registration of the trade mark was subsequent to the issuance of the notice. The appellant submitted that the respondent company has not been able to establish bona fide conduct. This is established from the following facts:-

a. According to the appellant, the mark 'Eenadu' has been permitted by the respondent company to be in common use because the respondent company did not take action against all those who had been using the mark 'Eenadu'.

b. According to the respondent company, the appellant stopped using the mark after caution notice was sent to the appellant in 1995 and then commenced using it in 1999. In 1995 the respondent company gave a notice restricting the grievance to Copyright. The grievance was restricted to a Disclaimer. After 1995 when the sales of the appellant began to increase from sales of two crores to the sales of approximately ten crores, then the suit was filed by the respondent company on a false plea in the plaint and obtained an ex-parte injunction.

53. The appellant submitted that the case law is clear that confusion as to source applies only when the source is not clearly stated. The appellant in the impugned carton has used the word Agarbathi along with the word 'Eenadu'. However, Ashika's Eenadu completely distinguishes itself from the respondent company. A carton being proposed to be adopted by the appellant which would completely eliminate any remote

chance of any confusion.

54. Mr. R.A. Sundaram, learned Senior Advocate argued on behalf of the respondent company. He submitted that 'Eenadu' is not a common Telugu word meaning "Today" and is not a common word. He submitted that 'Eenadu' has acquired secondary meaning and referred to and relied on the trial court findings in that respect. He submitted that the appellant failed to note that 'Eenadu' Group is inter alia a publisher of a newspaper which is the second largest regional daily circulating in India and is the largest in Andhra Pradesh.

55. Mr. Sundaram submitted that the appellant is a Bangalore based company which started manufacturing its products in Bangalore under the name "Ashika" and had started selling its products in Andhra Pradesh in 1995. The appellant started using the name 'Eenadu' for its Agarbathies and used same artistic script, font and method of writing the name cannot be a co-incidence. The appellant is a Karnataka company after adoption of the name 'Eenadu' accounted for 90% of the sale of their product Agarbathies. The appellant was restrained from using the word 'Eenadu' in the State of Andhra Pradesh, their sales have dropped by 10 times although they continued to sell the product under the name "Ashika". The appellant glossed over the fact of being manufacturer of Agarbathies as is inexplicable as to why they had applied for registration of name 'Eenadu' not just for Agarbathies but inasmuch as 34 classes of the Trade Marks Act for goods which they do not even produce or do not have any intention to produce which would itself show the intention that they can trade on the respondent company's household name and goodwill and reputation. According to the respondent company, all these facts clearly show that adoption of name 'Eenadu' was by no means innocent but was intended to capitalize and derive benefit on the goodwill and reputation of the respondent company which is impressible.

56. Mr. Sundaram submitted the basic underlying fallacy

is that since after all the readers of a newspaper are literate and, therefore, would be able to make out that the Agarbathies are by the name "Ashika Eenadu" or that it comes from a different source, overlooks completely that it is the purchaser of the Agarbathies and not the purchaser of newspaper that we are concerned with. The goodwill sought to be cashed in is the name 'Eenadu" by the appellant who is selling Agarbathies and the person so deceived is not the purchaser of the newspaper but the purchaser of the Agarbathies. To say that all the purchasers of Agarbathies are illiterate people is a basic fallacy since the purchasers of Agarbathies will transcend all classes of people in the society. The entire submission, therefore, overlooks the basic fact that the purchaser of the Agarbathies would be deceived into believing that the said Agarbathies also come from the House of 'Eenadu' and thereby they would be deceived as to the source of the product, and this cashing in on the goodwill and reputation of the respondent company is impressible in law.

57. The respondent company's reply to the appellant's contention that 'Eenadu' is not a household name since it only deals with newspaper is complete fallacy because the group is known as "Eenadu Margadarshi Group" and the meaning of 'Eenadu' in various publications is stated to be the respondent company's group. Furthermore, it also overlooked that in actual fact there are various products which are also being produced and sold by the respondent company under the business name of 'Eenadu'. It is also relevant to mention that the 'Eenadu' TV Channel (also known as ETV) is one of the most popular channels and, therefore, the word 'Eenadu' has come to be completely associated with the respondent company group and in fact is a household name. He has referred to the findings of the Trial Court, the High Court and that of the learned Single Judge and submitted that such findings are not unreasonable so as to require interference under section 136 of the Constitution.

58. Mr. Sundaram submitted that 'Eenadu' is not a generic name, but in fact would be a 'fancy' name outside the State of Andhra Pradesh and within the State of Andhra Pradesh it is a name which is not in common use, and therefore, would be a 'fancy' name. In any event, 'Eenadu' is not generic in the Trade Mark's sense of the word since it is not the use of the product name itself. What is meant by generic for Trade Mark law is that when you call a cake a cake or a shoe a shoe. When a shoe is called a cake or a cake is called a shoe, it is neither descriptive nor generic. On the contrary, it is 'fancy'. The name 'Eenadu', therefore, for any of the products of the respondent company would not be a generic name at all. The appellant overlooks that his complaint as to name being generic can only arise qua product using generic or descriptive name. It is nobody's case that 'Eenadu' is descriptive of Agarbathi.

59. All the cases, i.e., Newseek, Ovenchips, MaltedMilk, Shredded Wheat etc. were cases where the appellant wanted exclusivity of the name which was descriptive of their product and the respondent company who was manufacturing a similar product objected to the exclusivity on the ground that the name was descriptive of the product in question. In this case, for the application of the judgments the following must arise:-

- are the appellant and the respondent company dealing in the name product? This is not so.

- is the word 'Eenadu' descriptive of the respondent company's product (i.e. Agarbathies)? This is no so.

60. Mr. Sundaram while dealing with the scope of passing off action submitted that the law of passing off can be summarized in one short general proposition - no man may pass off his goods as those of another. More specifically, it may be expressed in terms of the elements which the appellant in such an action has to prove in order to succeed. These are

there in number.

a) He must establish a goodwill or reputation attached to the goods or services which he supplies in the mind of the purchasing public by association with the identifying 'get-up' (whether it consists simply of a brand name or a trade description, or the individual features of labeling or packaging) under which his particular goods or services are offered to the public, such that the get-up is recognized by the public as distinctive specifically to the appellant's goods or services.

b) He must demonstrate a misrepresentation by the respondent company to the public (whether or not intentional) leading or likely to lead the public to belief that the goods or services offered by him are the goods or services of the appellant and the source of such goods or services is the appellant even if the appellant does not make such products.

c) He must demonstrate that he suffers or, in a quia timet action, that he is likely to suffer damage by reason of the erroneous belief engendered by the respondent company's misrepresentation that the source of the respondent company's goods or service is the same as the source of those offered by the appellant.

d) Alternatively, the appellant must show that the description or confusion in the public is that the source of the respondent company's product that they are buying is the appellant.

61. Learned counsel placed reliance on the following passage from a well-known case *Reddaway & Co. and Another v. Banham & Co. and Another* 1895-99 All ER 133

which reads as under:-

"The name "Glenfield" had become associated with the starch manufactured by the plaintiff, and the defendant, although he established his manufactory at Glenfield, was restrained from using that word in connection with his goods in such a way as to deceive. Where the name of a place precedes the name of an article sold, it primâ facie means that this is its place of production or manufacture. It is descriptive, as it strikes me, in just the same sense as "camel hair" is descriptive of the material of which the plaintiff's belting is made. Lord Westbury pointed out that the term "Glenfield" had acquired in the trade a secondary signification different from its primary one, that in connection with the word starch it had come to mean starch which was the manufacture of the plaintiff. In Massam v. Thorley's Cattle Food Co. just referred to, James L.J. said:

> "The defendant was actually manufacturing starch at Glenfield, having gone thither for the purpose of enabling him to say that he was manufacturing it at Glenfield. The House of Lords said the mere fact that he was really carrying on his manufacture at Glenfield, and was not therefore telling a lie, did not exempt him from the consequence of the fact that his proceedings were intended and calculated to produce on the mind of the purchasers the belief that his article was the article of the plaintiffs."

62. The House of Lords was justified in observing that fallacy lies in overlooking the fact that a word may acquire in a trade a secondary signification differing from its primary one, and that if it is used to persons in the trade who will understand it, and be known and intended to understand it in its secondary sense, it will none the less be a falsehood that in its primary sense it may be true. A man who uses language which will convey to persons reading or hearing it a particular idea which

is false, and who knows and intends this to be the case, is surely not to be absolved from a charge of falsehood because in another sense which will not be conveyed and is not intended to be conveyed it is true. In the present case the jury have found that there was ample evidence to justify it, that the words "camel hair" had in the trade acquired a secondary signification in connection with belting, that they did not convey to persons dealing in belting the idea that it was made of camel's hair, but that it was belting manufactured by the plaintiffs. They have found that the effect of using the words in the manner in which they were used by the defendants would be to lead purchasers to believe that they were obtaining goods manufactured by the plaintiffs, and thus both to deceive them and to injure the plaintiffs. On authority as well as on principle, the court granted relief to the plaintiffs.

63. Mr. Sundaram also placed reliance on *Reckitt & Colman Products Ltd. v. Borden Inc. and others* – 1990 (1) ALL ER 873 where the court has dealt with general law applicable to passing off of action. In that case the court observed thus:-

> "The basic underlying principle of such an action was stated in 1842 by Lord Langdale M.R. in *Perry v. Truefitt* (1842) 6 Beav. 66 , 73 to be: "A man is not to sell his own goods under the pretence that they are the goods of another man……". Accordingly, a misrepresentation achieving such a result is actionable because it constitutes an invasion of proprietary rights vested in the plaintiff. However, it is a prerequisite of any successful passing off action that the plaintiff's goods have acquired a reputation in the market and are known by some distinguishing feature. It is also a prerequisite that the misrepresentation has deceived or is likely to deceive and that the plaintiff is likely to suffer damage by such deception. Mere confusion which does not lead to a sale is not sufficient. Thus, if a customer asks for a tin of black shoe polish without

> specifying any brand and is offered the product of A which he mistakenly believes to be that of B, he may be confused as to what he has got but he has not been deceived into getting it. Misrepresentation has played no part in his purchase".

64. He also relied on the judgment of this court in Ruston & Hornsby Ltd. v. The Zamindara Engineering Co. – 1969 (2) SCC 727 wherein the court observed as under:-

> "The distinction between an infringement action and a passing off action is important. Apart from the question as to the nature of trade mark the issue in an infringement action is quite different from the issue in a passing off action. In a passing off action the issue is as follows :
>
> > "Is the defendant selling goods so marked as to be designed or calculated to lead purchasers to believe that they are the plaintiff's goods?"
>
> But in an infringement action the issue is as follows:
>
> > "Is the defendant using a mark which is the same as or which is a colourable imitation of the plaintiff's registered trade mark ?"

65. He also relied on *Laxmikant V. Patel v. Chetanbhai Shah and Another* – 2002 (3) SCC 65. This court observed as under:-

> "A person may sell his goods or deliver his services such as in case of a profession under a trading name or style. With the lapse of time such business or services associated with a person acquire a reputation or goodwill which becomes a property which is protected by courts. A competitor initiating sale of goods or services in the same name or by imitating that name results in injury to the business of one who has the property in that name. The law does not permit any one to carry on his business in

such a way as would persuade the customers or clients in believing that he goods or services belonging to someone else are his or are associated therewith. It does not matter whether the latter person does so fraudulently or otherwise. The reasons are two. Firstly, honesty and fair play are, and ought to be, the basic policies in the world of business. Secondly, when a person adopts or intends to adopt a name in connection with his business or services which already belongs to someone else it results in confusion and has propensity of diverting the customers and clients of someone else to himself and thereby resulting in injury."

66. Mr. Sundaram also placed reliance on a judgment of this court in *Satyam Infoway Ltd. v. Sifynet Solutions (P) Limited* – 2004 (6) SCC 145. The relevant passage is reproduced as under:-

"The next question is would the principles of trade mark law and in particular those relating to passing off apply? An action for passing off, as the phrase "passing off" itself suggests, is to restrain the defendant from passing off its goods or services to the public as that of the plaintiff's. It is an action not only to preserve the reputation of the plaintiff but also to safeguard the public. The defendant must have sold its goods or offered its services in a manner which has deceived or would be likely to deceive the public into thinking that the defendant's goods or services are the plaintiff's. The action is normally available to the owner of a distinctive trademark and the person who, if the word or name is an invented one, invents and uses it. If two trade rivals claim to have individually invented the same mark, then the trader who is able to establish prior user will succeed. The question is, as has been aptly put, who gets these first? It is not essential for the plaintiff to prove long user to establish reputation in a passing off action. It would depend upon the volume of sales and extent of advertisement."

67. Mr. Sundaram also relied on *Ramdev Food Products (P) Limited v. Arvindbhai Rambhai Patel and Others* – 2006 (8) SCC 726 as under:-

"A trade mark is the property of the manufacturer. The purpose of a trade mark is to establish a connection between the goods and the source thereof which would suggest the quality of goods. If the trade mark is registered, indisputably the user thereof by a person who is not otherwise authorised to do so would constitute infringement. Section 21 of the 1958 Act provides that where an application for registration is filed, the same can be opposed. Ordinarily under the law and, as noticed hereinbefore, there can only be one mark, one source or one proprietor. Ordinarily again right to user of a trade mark cannot have two origins. The first respondent herein is a rival trader of the appellant-Company. It did not in law have any right to use the said trade mark, save and except by reason of the terms contained in the MOU or continuous user. It is well-settled that when defences in regard to right of user are set up, the onus would be on the person who has taken the said plea. It is equally well-settled that a person cannot use a mark which would be deceptively similar to that of the registered trade mark. Registration of trade marks is envisaged to remove any confusion in the minds of the consumers. If, thus, goods are sold which are produced from two sources, the same may lead to confusion in the minds of the consumers. In a given situation, it may also amount to fraud on the public. A proprietor of a registered trade mark indisputably has a statutory right thereto. In the event of such use by any person other than the person in whose name the trade mark is registered, he will have a statutory remedy in terms of Section 21 of the 1958 Act. Ordinarily, therefore, two people are not entitled to the same trade mark, unless there exists an express licence in that behalf."

68. He also relied on *Harrods Limited v. R. Harrod Limited* – (1924) RPC 74 where the court observed as under:-

> "…….it seems to me to be quite clear that where there is fraud the Court can interfere and there is fraud where you find a particular name taken by a defendant, a well known fancy name, which could not be taken for a legitimate purpose, and a name which is taken, to use Lord Justice Buckley's words, for the purpose of posing as being some person whom you are not.
>
> In *Aerators Limited v. Tollitt* (L.R. (1902) 2 Ch., p.319), Mr.Justice Farwell, said this, that you can interfere where the use of the particular name is calculated to deceive, even though it does not point to intentional fraud, and it is a question of fact in each case as to whether or not the names were so alike as to induce the belief that the companies are identical. So that, where there is fraud, the court can interfere, and where the names are so alike as to be calculated to deceive it can interfere. Further it may draw the inference that there is fraud where there is an attempt to pose as being a particular business firm when you are not, and are not entitled to use their name."

69. Mr. Sundaram also placed reliance on *Harrods Limited v. Harrodian School Limited* (1996) RPC 697. In this case the court held that the manifold services and activities for which the plaintiffs are known, and the wide field of recognition of the name "Harrods", would lead to an assumption that, the plaintiffs are in some way are connected, associated or mixed-up with the school which bears their name in its adjectival form. The court also observed that Erosion of distinctiveness of a brand name had been recognized as a form of damage to the goodwill of a business with which the name is connected in a number of cases, but unless care was taken this could mark an unacceptable extension of the law of passing off.

70. Learned counsel for the respondent company also relied on a judgment of this Court in the case of *Midas Hygiene Industries (P) Ltd. and another v. Sudhir Bhatia and others* (2004) 3 SCC 90. The court observed that the law on the subject is well settled. In cases of infringement either of trade mark or of copyright, normally an injunction must follow. Mere delay in bringing action is not sufficient to defeat grant of injunction in such cases. The grant of injunction also becomes necessary if it prima facie appears that the adoption of the mark was itself dishonest.

71. Mr. Sundaram also relied on a judgment of the Delhi High Court in the case of *Madhubhan Holiday Inn v. Holiday Inn Inc.* 100 (2002) DLT 306 (DB) (on which one of us, Dalveer Bhandari, J. was the author). The Division Bench of the High Court observed as under:

> "… the adoption of the words "Holiday Inn" by the appellants is ex facie fraudulent and mala fide from the very inception. The words "Holiday Inn" have been adopted by the appellant to ride on the global reputation of the respondent. The appellant was actuated by bad faith and dishonest motive. In the facts and circumstances, the learned Single Judge was fully justified in granting the injunction and decreeing the suits in order to protect the commercial goodwill and to ensure that the global business reputation of the respondent is not exploited by the appellants in a clandestine manner."

72. Learned counsel for the respondent company also submitted that where a trade/business name has acquired a reputation such as it has become a household name. In such a case anyone who uses the identical name albeit in a different field of business altogether would be guilty of passing off by cashing in on the reputation and goodwill of the business of the plaintiff and would be restrained.

73. Mr. Sundaram also placed reliance on the judgment

of *Harrodian School Limited* (supra). The court observed as under:

> "The absence of any common field of activity: This is of particular significance in the present case. The judge correctly directed himself as to the law; he cannot be faulted in the way in which he applied it. It is not merely that the plaintiffs have never run a school and have no established reputation for doing so; or even that the nature of the parties' respective businesses are as dissimilar as can well be imagined. It is rather that the commercial reputation for excellence as a retailer which the plaintiffs enjoy would be regarded by the public as having no bearing upon their ability to run a school. Customers of the plaintiffs would be surprised to learn that Harrods had ventured into the commercial theatre; they would, I think, be incredulous if they were told that Harrods had opened a preparatory school."

74. The respondent company also placed reliance on a judgment of this Court in the case of *Mahendra & Mahendra Paper Mills Limited v. Mahindra & Mahindra Limited* (2002) 2 SCC 147 wherein this Court observed as under:

> "Judging the case in hand on touchstone of the principles laid down in the aforementioned decided cases, it is clear that the plaintiff has been using the word "Mahindra" and "Mahindra & Mahindra" in its companies/business concerns for a long span of time extending over five decades. The name has acquired a distinctiveness and a secondary meaning in the business or trade circles. People have come to associate the name 'Mahindra' with a certain standard of goods and services. Any attempt by another person to use the name in business and trade circles is likely to and in probability will create an impression of a connection with the plaintiffs' group of companies. Such user may also effect the plaintiff prejudicially in its business and trading activities.

> Undoubtedly, the question whether the plaintiffs' claim of 'passing-off action' against the defendant will be accepted or not has to be decided by the Court after evidence is led in the suit. Even so far the limited purpose of considering the prayer for interlocutory injunction which is intended for maintenance of status quo, the trial Court rightly held that the plaintiff has established a prima facie case and irreparable prejudice in its favour which calls for passing an order of interim injunction restraining the defendant-company which is yet to commence its business from utilising the name of 'Mahindra' or 'Mahindra & Mahindra' for the purpose of its trade and business. Therefore, the Division Bench of the High Court cannot be faulted for confirming the order of injunction passed by the learned single Judge."

75. Mr. Sundaram also relied on a judgment of this court in the case of *Bata India Limited v. Pyare Lal & Company, Meerut City & Ors.* AIR 1985 All 242] the Allahabad High Court observed that considering the plea of passing-off or enabling others to pass-off mattresses, sofa cushions and other articles associating them with the name of "Bata" in any manner or form held that:

> "The name 'Bata' was well known in the market and the user of such a name is likely to cause not only deception in the mind of an ordinary customer but may also cause injury to the plaintiff Company. The fact that the plaintiff was not producing form was not enough to hold that there could be no passing-off action in respect of the user of the name 'Bata' to the products marketed by the defendants. The use of the name or mark 'Bata' by the defendants is indicative of their intent."

76. Learned counsel for the respondent company also relied on a judgment of Delhi High Court in the case of *Diamler Benz Aktiegesellschaft* (supra) wherein the Court observed as under:

"… … …The boxes in which the defendant sells its undergarments for men, and the representation thereon is of a man with his legs separated and hands joined together above his shoulder, all within a circle, indicate, the strong suggestion of the link between the three pointed star of "Mercedes Benz" car and the undergarment's sold by the defendant. In my view, this cannot be considered to be a "honest concurrent user" by the defendant of the above said symbol."

The Court also observed in the said case that:

"There are marks which are different from other marks. There are names which are different from other names. There are names and marks which have become household words. "Benz" as name of a Car would be known to every family that has ever used a quality car. The name "Benz" as applied to a car, has a unique place in the world. There is hardly one who is conscious of existence of the cars/automobiles, who would not recognize the name "Benz" used in connection with cars. Nobody can plead in India, where "Mercedes Benz" cars are seen on roads, where "Mercedes" have collaborated with Tatas, where there are Mercedes Benz Tata trucks have been on roads in very large number, (known as Mercedes Benz Trucks, so long as the collaboration was there), who can plead that he is unaware of the word "Benz" as used with reference to car or trucks.

In my view, the Trade Mark law is not intended to protect a person who deliberately sets out to take the benefit of somebody else's reputation with reference to goods, especially so when the reputation extends world wide. By no stretch of imagination can it be said that use for any length of time of the name "Benz" should be not objected to."

The Court further observed as under:

"However, if despite legal notice, any one big or small, continues to carry the illegitimate use of a significant world wide renowned name/ mark as is being done in this case despite notice dated 09-12-1989, there cannot be any reason for not stopping the use of a world reputed name. None should be continued to be allowed to use a world famed name to goods which have no connection with the type of goods which have generated the world wide reputation.

In the instant case, "Benz" is a name given to a very high priced and extremely well engineered product. In my view, the defendant cannot dilute, that by user of the name "Benz" with respect to a product like under-wears."

77. Mr. Sundaram placed reliance on *Harrods Limited* (supra) where the Court observed as under:

"Messrs. Harrods Limited, a long established and well known Company whose business included a banking department but who were precluded by their Articles of Association from carrying on a moneylenders business brought an action against R. Harrod Limited, a Company registered in August, 1923, with the object of carrying on the business of a registered moneylender. The plaintiffs applied for an interlocutory injunction "to restrain the Defendant Company, its servants and agents until judgment or further order from carrying on business under the name R. Harrod Limited or under any name comprising the word "Harrod" likely to mislead the public into the belief that the Defendant Company was connected with the Plaintiff Company or that the business of the Defendant Company was the same as or in any way connected with the business of the Plaintiff Company."

78. Learned counsel for the respondent company

submitted that the scope of passing-off action is wider than in an infringement of trademark or copyright action. Therefore, in an action of passing-off, an injunction can be granted even against a registered trademark holder.

79. Learned counsel for the respondent company also relied on a judgment of this Court in the case of *N.R. Dongre and others v. Whirlpool Corporation and another* (1996) 5 SCC 714. In this case this Court affirmed the concurrent findings of the single Judge, as affirmed on appeal by the division bench of the Delhi High Court and observed that:

> "… … …adopting the mark 'Whirlpool' when business in washing machines was being carried out earlier in other names, which at this stage, is supportive of the plea of unfair trading activity in an attempt to obtain economic benefit of the reputation established by Plaintiff 1, whose name is associated with the mark 'Whirlpool'. … … …"

80. Mr. Sundaram also submitted that common words with strong primary meaning retain the said meaning and protection would then be granted only qua the product for which such common word is used viz. Sun TV, Moon, Earth etc. In this connection learned counsel for the respondent company relied on a case of this Court in the case of *Godfrey Philips India Limited v. Girnar Food & Beverages (P) Limited* (2004) 5 SCC 257 where this court observed as under:

> "Without going into the question whether the conclusion arrived at by the Division Bench that the trade mark is descriptive is correct or not, it appears to us, and as is conceded by both parties before us, that the enunciation of principle of law with regard to the protection available even in respect of the descriptive trade mark was wrong. A descriptive trade mark may be entitled to protection if it has assumed a secondary meaning which identifies it with a particular product or as being from a particular source. … … …"

81. Learned counsel for the respondent company also relied on a judgment of Delhi High Court in the case of *Info Edge (India) Private Limited and another v. Shailesh Gupta and another* 98 (2002) DLT 499 where the Court observed that:

> "It was sought to be submitted by the counsel appearing for the defendant that the word 'Naukri' cannot assume a significance of a trademark, as the same is generic. The word 'Naukri', would be a descriptive word as it denotes and describes the nature of work and business offered by the plaintiff. The plaintiff has chosen to use the domain name 'Naukri.Com', which is descriptive of the business, the plaintiff carries on i.e. it gives information to its subscribers about the availability of jobs and employment in various establishments, concerns and offices and the manner in which request for employment could be made and, therefore, it is a service offered by the plaintiff relating to job opportunity and situation and giving guidance thereto and, therefore, the same is a descriptive word. It is also a settled law that the distinction between the generic word and descriptive word is very thin and such word could also assume a secondary meaning by its long user by a person, who establishes his reputation in the market.
>
> If a product of a particular character or composition is marketed in a particular area or place under a descriptive name and gained a reputation there under, that name which distinguished it from competing products of different composition, the goodwill in the name of those entitled to make use of it there was protected against deceptive use there of the name of competitors. In *Erven Warnink by and Ors. v. J Townend & Sons (Hull) Ltd. and Ors.* reported in (1979) 2 All ER, it was held that whether the name denoted a product made from ingredients from a particular locality or whether the goodwill in the name was the result of the product being made from particular

ingredients regardless of their provenance, since it was the reputation that the product itself had gained in the market by reason of its recognisable and distinctive qualities which had generated the relevant goodwill. In the said case, the trademark was the name of a spirit-based product called ADVOCAAT. The said product had gained a reputation and goodwill for that name in the English market and the defendants were seeking to take advantage of that name by misrepresenting that their wine-based product was of the same type as ADVOCAAT."

82. Mr. Sundaram placed reliance on a judgment of House of Lords in the case of *Office Cleaning Services Limited v. Westminster Office Cleaning Association* 1944 (2) All E R 269, where the court observed that the word 'office cleaning' was held to be a descriptive word, for it is a descriptive of the business they carry on. It was held that the plaintiff could assume or establish monopoly on the said word only when they show that they have acquired a secondary or subsidiary meaning. The aforesaid legal principle is well-settled and even the counsel for the defendant did not dispute the aforesaid position.

83. In Halsbury's Laws of England, Volume 48 Fourth edition at page 190, it is stated that it is possible for a word or phrase, which is wholly descriptive of the goods or services concerned, to become so associated with the goods or services of a particular trader that its use by another trader is capable of amounting to a representation that his goods or services are those of the first trader and that although the primary meaning of the words is descriptive, they have acquired a secondary meaning as indicating the products of a particular trader.

84. In McCarthy on Trademarks and Unfair Competition Vol. 2 3rd Edition in para 12.5 (2) it is stated that in order to obtain some form of relief on a "passing off" claim, the user of a generic term must prove some false or confusing usage by the newcomer above and beyond mere use of generic name.

85. The contention of the defendant is that adjectives are normally descriptive words and nouns are generic word. However, McCarthy has said that the said "part of speech" test does not accurately describes the case law results. therefore, such a criteria cannot be accepted as a safe and sound basis to ascertain as to whether a particular name is generic or descriptive. Besides, even assuming that the said word is generic yet if it is found by the court that such a mark has attained distinctiveness and is associated with the business of the plaintiff for considerable time and thereafter the defendant adopts a similar word as one of his two marks to induce innocent internet users to come to the website of the defendant, which establishes dishonest intention and bad faith, would the court still be not granting injunction to protect the business of the plaintiff? The answer to the said question has to be an emphatic 'No". User of similar word by a competitor coupled with dishonest intention and bad faith would empower a court to restrain such user/misuser to do equitable justice to the aggrieved party.

86. Learned counsel for the respondent company also submitted that the use of the word by another would result in diminishing the distinctiveness of the word qua the good and reputation of the plaintiff.

87. Mr. Sundaram also placed reliance on *Taittinger and others v. Allbev Limitd and others* (1994) 4 All E R 75. The relevant passages are reproduced as under:

"… … …Further it cannot be right that the larger the scale of the activities of a trader suing in passing off, the less protection it will receive from the Court because of a comparison with the scale of the activities of a defendant who trades on a smaller scale. The question is whether the relevant activities of the defendants are on such a small scale leading to such a small injury that it can be ignored. On the evidence of the defendants' sales, I find it impossible to say that is the case here.

But in my judgement the real injury to the champagne houses' goodwill comes under a different head and although the judge refers to Mr. Sparrow putting the point in argument, he does not deal with it specifically or give a reason for its undoubted rejection by him. Mr. Sparrow had argued that if the defendants continued to market their product, there would take place a blurring or erosion of the uniqueness that now attends the word champagne, so that the exclusive reputation of the cham pagne houses would be debased. He put this even more forcefully before us. He submitted that if the defendants are allowed to continue to call their product Elderflower Champagne, the effect would be to demolish the distinctiveness of the word champagne, and that would inevitably damage the goodwill of the champagne houses.

In Advocaat case [1980] RPC 31 at first instance Goulding J. held that one type of damage was 'a more gradual damage to the plaintiffs' business through depreciation of the reputation that their goods enjoy.' He continued: Damage of [this] type can rarely be susceptible of positive proof. In my judgement, it is likely to occur if the word 'Advocaat' is permitted to be used of alcoholic egg drinks generally or of the defendants' product in particular.

In the House of Lords in that case Lord Diplock referred to that type of damage to goodwill as relevant damage, which he described as caused 'indirectly in the debasement of the reputation attaching to the name “advocaat. …”

In *Vine Products Ltd. v. Mackenzie & Co. Ltd. Cross J.,* [1969] RPC 1 commenting with approval on the decision of Danckwerts J. in Bollinger v. Costa Brava Wine Co. Ltd. (No. 2) said:

[Danckwerts J.] thought, as I read in his judgment, that if people were allowed to call sparkling wine not produced

in Champagne 'Champagne,' even though preceded by an adjective denoting the country of origin, the distinction between genuine Champagne and 'champagne type' wines produced elsewhere would become blurred; that the word 'Champagne' would come gradually to mean no more than 'sparkling wine'; and that the part of the plaintiffs' goodwill which consisted in the name would be diluted and gradually destroyed.

That passage was referred to approvingly by Gault J. in *Wineworths Group Limited v. Comite Interprofessionel du Vin de Champagne* [1992] 2 NZLR 327 In that case the sale of Australian sparkling wine under the name champagne was held to constitute passing off. The New Zealand Court of Appeal upheld the decision of Jeffries J. who had held in C.I.V.C. v. Wineworths:

By using the word champagne on the label the defendant is deceptively encroaching on the reputation and goodwill of the plaintiffs. [1991] 2 NZLR 432

Jeffries J. had no doubt that if relief was not granted the plaintiffs would most certainly suffer damage if the word was used on all or any sparkling wine sold in New Zealand. He thought the ordinary purchaser in New Zealand without special knowledge on wines was likely to be misled. Gault J. after agreeing with Jeffries J. on deception said (at p.343):

I find the issue of damage or likely damage to the goodwill with which the name 'Champagne' is associated equally obvious in light of the finding that there is in fact an established goodwill in New Zealand. I have no doubt that erosion of the distinctiveness of a name or mark is a form of damage to the goodwill of the business with which the name is connected. There is no clearer example of this than the debasing of the name 'Champagne' in Australia as a result of its use by local wine makers.

By parity of reasoning it seems to me no less obvious that erosion of the distinctiveness of the name champagne in this country is a form of damage to the goodwill of the business of the champagne houses. There are undoubtedly factual points of distinction between the New Zealand case and the present case, as Mr. Isaacs has pointed out, and he placed particular reliance on the fact that in the New Zealand case as well as in Bollinger v. Costa Brava Wine Co. Ltd. (No. 2), the Court held that there was a deliberate attempt to take advantage of the name champagne, whereas in the present case the judge found no such specific intention. In general it is no doubt easier to infer damage when a fraudulent intention is established. But that fact does not appear to have played any part in the reasoning on this particular point either of Jeffries J. or of Sir Robin Cooke P., who thought the case exemplified the principle that a tendency to impair distinctiveness might lead to an inference of damage to goodwill [1992] 2 NZLR 327, or of Gault J.; nor in logic can I see why it should. It seems to me inevitable that if the defendants, with their not insignificant trade as a supplier of drinks to Sainsbury and other retail outlets, are permitted to use the name Elderflower Champagne, the goodwill in the distinctive name champagne will be eroded with serious adverse consequences for the champagne houses.

In my judgement therefore the fifth characteristic identified in Advocaat case is established. I can see no exceptional feature to this case which would justify on grounds of public policy withholding from the champagne houses the ordinary remedy of an injunction to restrain passing off. I would therefore grant an injunction to restrain the defendants from selling, offering for sale, distributing and describing, whether in advertisements or on labels or in any other way, any beverages, not being wine produced in Champagne, under or by reference to the word champagne. That injunction, I would, emphasise, does not prevent the sale

of the defendants' product, provided it is not called champagne."

88. Learned counsel for the respondent company also submitted that the protection qua common field of activity has now expanded and been interpreted to mean extending to other product lines than what is manufactured by the plaintiff and hence common field of activity is not restricted to same or similar products but extend to all other products. The test of common field of activity now accepted is that of "common class of consumers". The reason for this is the likelihood of such consumers identifying the Defendant's goods as originating from the same source as the plaintiff. The question therefore would be, whether from the factual situation, an inference can be drawn that a purchaser of the Defendant's product could assume such product as originating from the plaintiff.

89. He also relied on *Kamal Trading Co., Bombay and Others v. Gillette U.K. Limited* [1988] IPLR 135 wherein it has been observed that:

"… … ..the plaintiffs have not established any of the conditions required for grant of interim relief. It was submitted that the goods manufactured by the plaintiffs and the defendants are different in nature; the plaintiffs manufacture blades, while the defendants manufacture "tooth brushes". The goods of the plaintiffs and the defendants are not available in the same shop and the customers of these goods are different. The goods sold by the plaintiffs are blades and fall in class 8, while those of the defendants are tooth brushes which fall in class 21. Relying on these circumstances, it was merit in this submission. In the first instance, the assumption of the learned counsel that the class of customers for purchase of safety blades and tooth brushes are different and these goods are not available in the same shop is wholly misconceived. We take judicial notice of the fact that these goods are available in every shop including a small shop

and each and every person is required to purchase these goods. … … …"

90. Mr. Sundaram also relied on *Honda Motors Company Limited v. Charanjit Singh & Others* (101 (2002) DLT 359) wherein it has been observed that:

"The case of the plaintiff is in fact based on passing off action and not for infringement of the trade mark. It has never been the case of the plaintiff that the two sets of goods are identical. The concept of passing off, which is a form of tort has undergone changes with the course of time. The plaintiff now does not have to be in direct competition with the defendant to suffer injury from the use of its trade name by the defendants."

The court further observed that:

"In the present case the plaintiff's mark HONDA has acquired a global goodwill and reputation. Its reputation is for quality products. The name of HONDA is associated with the plaintiff's especially in the field of automobiles and power equipments on account of their superior quality and high standard. The plaintiff's business or products under the trade mark HONDA has acquired such goodwill and reputation that it has become distinctive of its products and the defendants' user of this mark for their product "Pressure Cooker" tends to mislead the public to believe that the defendants business and goods are that of the plaintiff. Such user by the defendants has also diluted and debased the goodwill and reputation of the plaintiff.

As observed above, the concept of passing off is a tort and with the passage of time, with the developing case law it has changed and now the two traders need not necessarily operate in the same field so as to suffer injury on account of the goods of one trader being passed off as those of the other.

With the changed concept of passing off action, it is now not material for a passing off action that the plaintiff and the defendant should trade in the same field. I find that some business are truly international in character and the reputation and goodwill attached to them cannot in fact be held being international also. The plaintiff's business is of international character and obviously the reputation and goodwill attached to its trade mark HONDA is also of international repute. The plaintiff's trade mark HONDA, which is of global repute, is used by the defendants for a product like pressure cooker, to acquire the benefit of its goodwill and reputation so as to create deception for the public who are likely to buy defendant's product believing the same as coming from the house of HONDA or associated with the plaintiff in some manner. By doing so, it would dilute the goodwill and reputation of the plaintiff and the wrong committed by the defendants would certainly be an actionable wrong and the plaintiff is within its rights to ask for restraint against the defendants from using its mark HONDA for their products."

91. From the above discussions, the following two situations arise:

i. Where the name of the plaintiff is such as to give him exclusivity over the name, which would ipso facto extend to barring any other person from using the same. viz. Benz, Mahindra, Caterpillar, Reliance, Sahara, Diesel etc.

ii. The plaintiff's adopted name would be protected if it has acquired a strong enough association with the plaintiff and the defendant has adopted such a name in common field of activity i.e. the purchasers test as to whether in the facts of the case, the manner of sale, surrounding circumstances etc. would lead to an inference that the source of product is the plaintiff.

92. Learned counsel for the respondent company also submitted that once there is a dishonest intention to adopt the mark a mere delay in bringing an action will not be defeated because in case of continuing tort fresh period of limitation begins to run every moment of the time during which the breach continues.

93. Mr. Sundaram relied on a case of this court in *M/s. Bengal Waterproof Limited Vs. M/s. Bombay Waterproof Manufacturing Company and Another* (1997) 1 SCC 99 wherein it has been observed that:

> "… … …It is now well settled that an action for passing off is a common law remedy being an action in substance of deceit under the Law of Torts. Wherever and whenever fresh deceitful act is committed the person deceived would naturally have a fresh cause of action in his favour. Thus every time when a person passes off his goods as those of another he commits the act of such deceit. Similarly whenever and wherever a person commits breach of a registered trade mark of another he commits a recurring act of breach or infringement of such trade mark giving a recurring and fresh cause of action at each time of such infringement to the party aggrieved. … … …"
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> … … …
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> … … …
>
> In cases of continuous causes of action or recurring causes of action bar of Order 2 Rule 2 Sub-rule (3) cannot be invoked. In this connection it is profitable to have a look at Section 22 of the Limitation Act, 1963. It lays down that 'in the case of a continuing breach of contract or in the case of a continuing tort, a fresh period of limitation begins to run at every moment of the time during which the branch or the tort, as the case may be, continues. As act of passing off is an act of deceit and tort every time when such tortuous act or deceit is committed by the defendant the plaintiff gets a fresh cause of action to come to the court by appropriate proceedings. Similarly infringement of a registered trade mark would also be a continuing wrong so long as infringement continues. Therefore, whether the earlier infringement has continued or a new infringement has taken place cause of action for filing a fresh suit would obviously arise in favour of the plaintiff who is aggrieved by such fresh infringements of trade mark or fresh passing off actions alleged against the defendant. Consequently, in our view even on merits the learned Trial Judge as well as the learned Single Judge were obviously in error in taking the view that the second suit of the plaintiff in the present case was barred by Order 2 Rule 2 Sub-rule (3), CPC."

94. Learned counsel for the respondent company also placed reliance on another judgment of this Court in the case of *Heinz Italia and another v. Dabur India Limited* (2007) 6 SCC 1 wherein this court observed that:

> "… …. it has been repeatedly held that before the use of a particular mark can be appropriated it is for the plaintiff to prove that the product that he is representing had earned a reputation in the market and that this reputation had been sought to be violated by the opposite party. In *Corn Products* case (supra) it was observed that the principle of similarity could not to be very rigidly applied and that if it could be prima facie shown that there was a dishonest intention on the part of the defendant in passing off goods, an injunction should ordinarily follow and the mere delay in bringing the matter to Court was not a ground to defeat the case of the plaintiff. It bears reiteration that the word "Glucon-D" and its packaging had been used by Glaxo since 1940 whereas the word "Glucose-D" had been used for the first time in the year 1989."

95. Mr. Sundaram further placed reliance on another

judgment of this Court in *Ramdev Food Products (P) Limited* (supra), wherein it has been held that:

> "Acquiescence is a facet of delay. The principle of acquiescence would apply where: (i) sitting by or allow another to invade the rights and spending money on it; (ii) it is a course of conduct inconsistent with the claim for exclusive rights for trade mark, trade name, etc.
>
> In *Power Control Appliances and Ors. v. Sumeet Machines Pvt. Ltd.* [1994] 1 SCR 708, this Court stated:
>
> Acquiescence is sitting by, when another is invading the rights and spending money on it. It is a course of conduct inconsistent with the claim for exclusive rights in a trade mark, trade name etc. It implies positive acts; not merely silence or inaction such as is involved in laches."
>
> The court further observed that:
>
> "The defence of acquiescence, thus, would be satisfied when the plaintiff assents to or lay by in relation to the acts of another person and in view of that assent or laying by and consequent acts it would be unjust in all the circumstances to grant the specific relief."

96. Mr. Sundaram, counsel for the respondent company also submitted that use of a similar mark(s) by third parties is not a defense to an illegal act of passing-off. He relied on a judgment of Delhi High Court in Ford Motor Company of *Canada Limited and another v. Ford Service Centre* 2009 (39) PTC 149, wherein the Court observed that:

> "… do not find any merit in the plea of defendant of two others, outside India using FORD in relation to other business. Their case is not before this Court for adjudication and even if the plea of dilution was to be available in an infringement action, no case of dilution in India is made out. Recently the Division Bench of this Court in *Pankaj Goel v. Dabur India Limited* 2008 (38) PTC 49 (Delhi) held that merely because others are carrying on business under similar or deceptively similar trademark or have been permitted to do so by the plaintiff, cannot offer a licence to the world at large to infringe the trademark of the plaintiff. It was further held that even otherwise, the use of similar marks by a third party cannot be a defence to an illegal act of passing off. In *Castrol Limited v. A.K. Mehta* 1997 (17) PTC 408 DB it was held that a concession given in one case does not mean that other parties are entitled to use the same. Also, in *Prakash Roadline v. Prakash Parcel Service* 1992 (2) Arbitration Law Reporter 174 it has been held that use of a similar mark by a third party in violation of plaintiff's right is no defence."

97. Learned counsel for the respondent company also placed reliance on Prakash Roadline Limited v. Prakash Parcel Service (P) Ltd. 48 (1992) Delhi Law Times 390 the Delhi High Court held that:

> "… … … Merely because no action is taken against certain other parties, it does not mean that the plaintiff is not entitled to take action against the defendant. The other parties may not be affecting the business of the plaintiff. They may be small-time operators who really do not matter to the plaintiff. Therefore, the plaintiff may not chose to take any action against them. On the contrary the plaintiff feels danger from defendant in view of the fact that the defendant's promoters are the ex Directors/employees of the plaintiff who are fully in the know of the business secrets of the plaintiff. Therefore, the mere fact that the plaintiff has not chosen to take any action against such other parties cannot disentitle the plaintiff from taking the present action. This contention is, therefore, prima-facie without any merit and is rejected."

98. Lastly, learned counsel for the respondent company

submitted that in any one of the following circumstances the plaintiff would be entitled to injunctive relief even qua a common word:

a. If the factors for justifying absolute protection as per 'absolute protection for common words' have been made out then it would ipso facto entitle the plaintiff to protection against the world at large.

b. The protection would be given against any particular defendant if the plaintiff's name has acquired a secondary meaning and the defendant uses the name in a common field of activity, i.e. where there are common purchasers. However, the court may decline to grant the relief if such name is descriptive of the defendant's product and not just a name unconnected with the defendant's product.

c. The protection would be granted qua a defendant with relation to even an unrelated product where the tests of dishonest adoption are satisfied and the defendant will be restrained from cashing in or profiting from the plaintiff's name.

99. We have heard the detailed and comprehensive arguments advanced by the learned counsel for the parties. We place on record our appreciation for the able assistance provided by the learned counsel for the parties in this case. We have also carefully examined relevant decided Indian, English and American cases.

100. The respondent company's mark 'Eenadu' has acquired extra-ordinary reputation and goodwill in the State of Andhra Pradesh. 'Eenadu' newspaper and TV are extremely well known and almost household words in the State of Andhra Pradesh. The word 'Eenadu' may be a descriptive word but has acquired a secondary or subsidiary meaning and is fully identified with the products and services provided by the

respondent company.

101. The appellant is a Karnataka based company which has started manufacturing its product in Bangalore in the name of 'Ashika' and started selling its product in the State of Andhra Pradesh in 1995. The appellant started using the name 'Eenadu' for its Agarbathi and used the same artistic script, font and method of writing the name which obviously cannot be a co-incidence. The appellant company after adoption of name 'Eenadu' accounted for 90% of sale of their product Agarbathi.

102. On consideration of the totality of facts and circumstances of the case, we clearly arrive at the following findings and conclusions :

a) The respondent company's mark 'Eenadu' has acquired extraordinary reputation and goodwill in the State of Andhra Pradesh. The respondent company's products and services are correlated, identified and associated with the word 'Eenadu' in the entire State of Andhra Pradesh. 'Eenadu' means literally the products or services provided by the respondent company in the State of Andhra Pradesh. In this background the appellant cannot be referred or termed as an honest concurrent user of the mark 'Eenadu';

b) The adoption of the words 'Eenadu' is ex facie fraudulent and mala fide from the very inception. By adopting the mark 'Eenadu' in the State of Andhra Pradesh, the appellant clearly wanted to ride on the reputation and goodwill of the respondent company;

c) Permitting the appellant to carry on his business would in fact be putting a seal of approval of the court on the dishonest, illegal and clandestine conduct of the appellant;

d) Permitting the appellant to sell his product with the

mark 'Eenadu' in the State of Andhra Pradesh would definitely create confusion in the minds of the consumers because the appellant is selling Agarbathies marked 'Eenadu' as to be designed or calculated to lead purchasers to believe that its product Agarbathies are in fact the products of the respondent company. In other words, the appellant wants to ride on the reputation and goodwill of the respondent company. In such a situation, it is the bounden duty and obligation of the court not only to protect the goodwill and reputation of the respondent company but also to protect the interest of the consumers;

e) Permitting the appellant to sell its product in the State of Andhra Pradesh would amount to encouraging the appellant to practise fraud on the consumers;

f) Permitting the appellant to carry on his business in the name of 'Eenadu' in the State of Andhra Pradesh would lead to eroding extra-ordinary reputation and goodwill acquired by the respondent company over a passage of time;

g) Appellant's deliberate misrepresentation has the potentiality of creating serious confusion and deception for the public at large and the consumers have to be saved from such fraudulent and deceitful conduct of the appellant.

h) Permitting the appellant to sell his product with the mark 'Eenadu' would be encroaching on the reputation and goodwill of the respondent company and this would constitute invasion of proprietary rights vested with the respondent company.

i) Honesty and fair play ought to be the basis of the policies in the world of trade and business.

103. The law is consistent that no one can be permitted to encroach upon the reputation and goodwill of other parties. This approach is in consonance with protecting proprietary rights of the respondent company.

104. Consequently, the appeals are disposed of in terms of the aforesaid observations and directions.

105. In the facts and circumstances of this case, the parties are directed to bear their own costs.

B.B.B. Appeals disposed of.

ARUNA RAMCHANDRA SHANBAUG
v.
UNION OF INDIA AND OTHERS
(Writ Petition (Criminal) No. 115 of 2009)

MARCH 7, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Human Rights:

Euthanasia – Withdrawal of life support – Writ petition filed in Supreme Court seeking euthanasia for a 60 year old woman – Petitioner was a Staff Nurse working in KEM Hospital, Mumbai, who was assaulted by a sweeper in the hospital who sodomized her and during this act twisted a dog chain around her neck due to which supply of oxygen to the Petitioner's brain stopped and her brain got damaged – Petitioner lay bed-ridden in KEM Hospital, Mumbai since 1973 allegedly in a Persistent Vegetative State (PVS) – Held: The Petitioner cannot be said to be dead – Even from the report of Committee of Doctors it appears that she has some brain activity, though very little – The Petitioner recognizes that persons are around her and expresses her like or dislike by making some vocal sound and waving her hand by certain movements – She smiles if she receives her favourite food, fish and chicken soup – She breathes normally and does not require a heart lung machine or intravenous tube for feeding – Her dementia has not progressed and has remained stable for many years – Whatever the condition of her cortex, her brain stem is certainly alive – Though the Petitioner's parents are dead and other close relatives are not interested in her ever since she had the unfortunate assault on her, however, the KEM hospital staff have been caring for her day and night for so many long years, who really are her next friends – Hence it is for the KEM hospital staff to take a decision on withdrawal of life support to the Petitioner – The KEM hospital

staff have clearly expressed their wish that Petitioner should be allowed to live – However, assuming that the KEM hospital staff at some future time changes its mind, in such a situation the KEM hospital would have to apply to the Bombay High Court for approval of the decision to withdraw life support – Petition accordingly dismissed.

Euthanasia – Withdrawal of life support of a patient in Permanent Vegetative State (PVS) – No statutory provision in India as to the legal procedure for withdrawing life support to a person in PVS or who is otherwise incompetent to take a decision in this connection – Held: Passive euthanasia should be permitted in India in certain situations.

Euthanasia – Withdrawal of life support of a patient in Permanent Vegetative State (PVS) – Law laid down by Supreme Court in this connection until Parliament makes a law on the subject – Held: A decision has to be taken to discontinue life support either by the parents or the spouse or other close relatives, or in the absence of any of them, such a decision can be taken even by a person or a body of persons acting as a next friend – It can also be taken by the doctors attending the patient – However, the decision should be taken bona fide in the best interest of the patient – Even if a decision is taken by the near relatives or doctors or next friend to withdraw life support, such a decision requires approval from the High Court – This is even more necessary since cannot rule out the possibility of mischief being done by relatives or others for inheriting the property of the patient – This is in the interest of the protection of the patient, protection of the doctors, relative and next friend, and for re-assurance of the patient's family as well as the public – This is also in consonance with the doctrine of parens patriae.

Euthanasia – Withdrawal of life support to a person who is unable to take a decision as regards such withdrawal – Application for, by near relatives or next friend or the doctors/

hospital staff – Power of High Court u/Art.226 – Held: Article 226 gives abundant power to the High Court to pass suitable orders on the application filed by the near relatives or next friend or the doctors/hospital staff praying for permission to withdraw the life support – Procedure to be adopted by the High Court when such an application is filed – When such an application is filed the Chief Justice of the High Court should forthwith constitute a Bench of at least two Judges who should decide to grant approval or not – Before doing so the Bench should seek the opinion of a committee of three reputed doctors to be nominated by the Bench after consulting such medical authorities/medical practitioners as it may deem fit – Preferably one of the three doctors should be a neurologist, one a psychiatrist, and the third a physician – For this purpose a panel of doctors in every city may be prepared by the High Court in consultation with the State Government/ Union Territory and their fees for this purpose may be fixed – The committee of three doctors nominated by the Bench should carefully examine the patient and also consult the record of the patient as well as taking the views of the hospital staff and submit its report to the High Court Bench – Simultaneously with appointing the committee of doctors, the High Court Bench shall also issue notice to the State and close relatives e.g. parents, spouse, brothers/sisters etc. of the patient, and in their absence his/her next friend, and supply a copy of the report of the doctor's committee to them as soon as it is available – After hearing them, the High Court bench should give its verdict – The above procedure should be followed all over India until Parliament makes legislation on this subject – The High Court should give its decision speedily at the earliest, since delay in the matter may result in causing great mental agony to the relatives and persons close to the patient – The High Court should give its decision assigning specific reasons in accordance with the principle of 'best interest of the patient' – The views of the near relatives and committee of doctors should be given due weight by the High Court

before pronouncing a final verdict which shall not be summary in nature – Constitution of India, 1950 – Article 226.

Euthanasia – Types of – Held: Euthanasia is of two types: active and passive – Active euthanasia entails the use of lethal substances or forces to kill a person e.g. a lethal injection given to a person with terminal cancer who is in terrible agony – Passive euthanasia entails withholding of medical treatment for continuance of life, e.g. withholding of antibiotics where without giving it a patient is likely to die, or removing the heart lung machine, from a patient in coma – Further categorization of euthanasia between voluntary euthanasia and non voluntary euthanasia – Voluntary euthanasia is where the consent is taken from the patient, whereas non voluntary euthanasia is where the consent is unavailable e.g. when the patient is in coma, or is otherwise unable to give consent.

Euthanasia – Legal position all over the world – Held: The general legal position all over the world seems to be that while active euthanasia is illegal unless there is legislation permitting it, passive euthanasia is legal even without legislation provided certain conditions and safeguards are maintained.

Euthanasia – Active Euthanasia and Physician assisted suicide – Legal position in India – Held: In India active euthanasia is illegal and a crime under section 302 or at least section 304 IPC – Physician assisted suicide is a crime under section 306 IPC (abetment to suicide).

Euthanasia – Distinction between euthanasia and physician assisted suicide – Held: The difference is in who administers the lethal medication – In euthanasia, a physician or third party administers it, while in physician assisted suicide it is the patient himself who does it, though on the advice of the doctor.

Precedents – Foreign decisions – Value of – Held: Foreign decisions have only persuasive value in our country, and are not binding authorities on our Courts – Hence one can even prefer to follow the minority view, rather than the majority view, of a foreign decision, or follow an overruled foreign decision.

Penal Code, 1860 – s.309 – Held: s.309 should be deleted by Parliament as it has become anachronistic – A person attempts suicide in a depression, and hence he needs help, rather than punishment.

Medical Jurisprudence – When can a person be said to be dead – Held: If the brain is dead, a person is said to be dead.

Medical Jurisprudence – Brain death – Meaning of – Discussed.

Doctrines – Doctrine of Parens Patriae – Held: The doctrine of Parens Patriae (father of the country) had originated in British law – It implies that the King is the father of the country and is under obligation to look after the interest of those who are unable to look after themselves – The duty of the King in feudal times to act as parens patriae (father of the country) has been taken over in modern times by the State – In the case of an incompetent person who is unable to take a decision whether to withdraw life support or not, it is the Court alone, as parens patriae, which ultimately must take this decision, though, no doubt, the views of the near relatives, next friend and doctors must be given due weight.

Constitution of India, 1950 – Article 21 – Held: The right to life guaranteed by Article 21 of the Constitution does not include the right to die.

The issue of 'Euthanasia' was raised in a writ petition under Article 32 of the Constitution.

It was stated in the writ petition that the petitioner was a staff Nurse working in King Edward Memorial (KEM) Hospital, Mumbai; that on the evening of 27th November, 1973 she was assaulted by a sweeper in the hospital who sodomized the petitioner and to immobilize her during this act he twisted a dog chain around her neck and that the next day, the petitioner was found lying on the floor with blood all over in an unconscious condition.

It was alleged that due to strangulation by the dog chain the supply of oxygen to the petitioner's brain stopped and her brain got damaged; that now the Petitioner was about 60 years of age; that she was in a persistent vegetative state (p.v.s.) and virtually a dead person and had no state of awareness, and her brain was virtually dead; that she could neither see, nor hear anything nor could she express herself or communicate, in any manner whatsoever; that mashed food was put in her mouth, she was not able to chew or taste any food; that she was not even aware that food had been put in her mouth; that she was not able to swallow any liquid food, which shows that the food went down on its own and not because of any effort on her part; that the process of digestion went on in this way as the mashed food passed through her system; that, however, the Petitioner was virtually a skeleton; her excreta and the urine was discharged on the bed itself and that once in a while she was cleaned up but in a short while again she went back into the same sub-human condition.

It was contended that judged by any parameter, the Petitioner could not be said to be a living person and it was only on account of mashed food which was put into her mouth that there was a facade of life which was totally devoid of any human element. It was alleged that there was not the slightest possibility of any improvement in the condition of the Petitioner and her body lay on the

bed in the KEM Hospital, Mumbai like a dead animal, and this has been the position for the last 37 years.

The prayer of the petitioner was that the respondents be directed to stop feeding her, and let her die peacefully.

Notice was issued by this Court on 16.12.2009 to all the respondents. A counter affidavit was earlier filed on behalf of the respondent nos.3 and 4, the Mumbai Municipal Corporation and the Dean, KEM Hospital by Dr. Amar Ramaji Pazare, Professor and Head in the said hospital. Since there was some variance in the allegation in the writ petition and the counter affidavit of Dr. Pazare, this Court, by order dated 24th January, 2011 appointed a team of three distinguished doctors of Mumbai to examine the Petitioner thoroughly and submit a report about her physical and mental condition. The said team of three doctors handed over a report and also handed over a CD in this connection. Meanwhile, the Dean KEM Hospital Mumbai issued a statement on 24.1.2011 opposing euthanasia. The Hospital staff of KEM Hospital, Mumbai also issued statements that they were looking after Petitioner and wanted her to live. One retired nurse, who used to take care of the Petitionerwhile in service, even offered to continue to take care of her without any salary and without charging any traveling expenses.

Dismissing the petition, the Court

HELD: 1. This Court could have dismissed the instant petition on the short ground that under Article 32 of the Constitution of India (unlike Article 226) the petitioner has to prove violation of a fundamental right, and the petitioner herein did not show violation of any of her fundamental rights. The right to life guaranteed by Article 21 of the Constitution does not include the right to die. However, in view of the importance of the issues involved,

the merits of the case are required to be gone into. [Para 4] [1085-A-C]

Gian Kaur v. State of Punjab **1996(2) SCC 648 – referred to.**

LEGAL ISSUES: Active and Passive Euthanasia

2.1. Euthanasia is of two types: active and passive. Active euthanasia entails the use of lethal substances or forces to kill a person e.g. a lethal injection given to a person with terminal cancer who is in terrible agony. Passive euthanasia entails withholding of medical treatment for continuance of life, e.g. withholding of antibiotics where without giving it a patient is likely to die, or removing the heart lung machine, from a patient in coma. The general legal position all over the world seems to be that while active euthanasia is illegal unless there is legislation permitting it, passive euthanasia is legal even without legislation provided certain conditions and safeguards are maintained. [Para 38, 39] [1124-A-C]

2.2. A further categorization of euthanasia is between voluntary euthanasia and non voluntary euthanasia. Voluntary euthanasia is where the consent is taken from the patient, whereas non voluntary euthanasia is where the consent is unavailable e.g. when the patient is in coma, or is otherwise unable to give consent. While there is no legal difficulty in the case of the former, the latter poses several problems. [Para 40] [1124-D-E]

Active Euthanasia

2.3. Active euthanasia is a crime all over the world except where permitted by legislation. In India active euthanasia is illegal and a crime under section 302 or at least section 304 IPC. Physician assisted suicide is a crime under section 306 IPC (abetment to suicide). Active

euthanasia is taking specific steps to cause the patient's death, such as injecting the patient with some lethal substance, e.g. sodium pentothal which causes a person deep sleep in a few seconds, and the person instantaneously and painlessly dies in this deep sleep. [Paras 41, 42] [1124-F-H]

2.4. A distinction is sometimes drawn between euthanasia and physician assisted dying, the difference being in who administers the lethal medication. In euthanasia, a physician or third party administers it, while in physician assisted suicide it is the patient himself who does it, though on the advice of the doctor. In many countries/States the latter is legal while the former is not. The difference between "active" and "passive" euthanasia is that in active euthanasia, something is done to end the patient's life' while in passive euthanasia, something is not done that would have preserved the patient's life. An important idea behind this distinction is that in "passive euthanasia" the doctors are not actively killing anyone; they are simply not saving him. While one usually applauds someone who saves another person's life, one does not normally condemn someone for failing to do so. If one rushes into a burning building and carries someone out to safety, he will probably be called a hero. But if one sees a burning building and people screaming for help, and he stands on the sidelines -- whether out of fear for his own safety, or the belief that an inexperienced and ill-equipped person like himself would only get in the way of the professional firefighters, or whatever -- if one does nothing, few would judge him for his inaction. One would surely not be prosecuted for homicide. (At least, not unless one started the fire in the first place.) Thus, proponents of euthanasia say that while one can debate whether active euthanasia should be legal, there can be

no debate about passive euthanasia: One cannot prosecute someone for failing to save a life. Even if one thinks it would be good for people to do X, one cannot make it illegal for people to not do X, or everyone in the country who did not do X today would have to be arrested. [Para 43 to 45] [1125-A-G]

2.5. Some persons are of the view that the distinction is not valid. In fact there are many laws that penalize people for what they did not do. A person cannot simply decide not to pay his income taxes, or not bother to send his/her children to school (where the law requires sending them), or not to obey a policeman's order to put down one's gun. However, this Court is of the opinion that the distinction is valid. [Paras 47 to 49] [1125-H; 1126-A-C]

<u>Passsive Euthanasia:</u>

2.6. Passive euthanasia is usually defined as withdrawing medical treatment with a deliberate intention of causing the patient's death. For example, if a patient requires kidney dialysis to survive, not giving dialysis although the machine is available, is passive euthanasia. Similarly, if a patient is in coma or on a heart lung machine, withdrawing of the machine will ordinarily result in passive euthanasia. Similarly not giving life saving medicines like antibiotics in certain situations may result in passive euthanasia. Denying food to a person in coma or PVS may also amount to passive euthanasia. [Para 51] [1135-B-C]

2.7. In voluntary passive euthanasia a person who is capable of deciding for himself decides that he would prefer to die (which may be for various reasons e.g., that he is in great pain or that the money being spent on his treatment should instead be given to his family who are

in greater need, etc.), and for this purpose he consciously and of his own free will refuses to take life saving medicines. In India, if a person consciously and voluntarily refuses to take life saving medical treatment it is not a crime. [Para 52] [1135-D-F]

2.8. Non voluntary passive euthanasia implies that the person is not in a position to decide for himself e.g., if he is in coma or PVS. The present is a case where one has to consider non voluntary passive euthanasia i.e. whether to allow a person to die who is not in a position to give his/her consent. [Para 53] [1135-G]

Airedale NHS Trust v. Bland **(1993) All E.R. 82 (H.L.) – referred to.**

LEGISLATION IN SOME COUNTRIES RELATING TO EUTHANASIA OR PHYSICIAN ASSISTED DEATH

3.1. There is a plethora of case law all over the world relating to both active and passive euthanasia. [Para 54] [1135-H; 1136-A]

3.2. Netherlands: Euthanasia in the Netherlands is regulated by the "Termination of Life on Request and Assisted Suicide (Review Procedures) Act", 2002. It states that euthanasia and physician-assisted suicide are not punishable if the attending physician acts in accordance with the criteria of due care. These criteria concern the patient's request, the patient's suffering (unbearable and hopeless), the information provided to the patient, the presence of reasonable alternatives, consultation of another physician and the applied method of ending life. To demonstrate their compliance, the Act requires physicians to report euthanasia to a review committee. [Para 50] [1126-D-E]

3.3. Switzerland: Switzerland has an unusual

position on assisted suicide: it is legally permitted and can be performed by non-physicians. However, euthanasia is illegal, the difference between assisted suicide and euthanasia being that while in the former the patient administers the lethal injection himself, in the latter a doctor or some other person administers it. Switzerland seems to be the only country in which the law limits the circumstances in which assisted suicide is a crime, thereby decriminalising it in other cases, without requiring the involvement of a physician. Consequently, non-physicians have participated in assisted suicide. However, legally, active euthanasia e.g. administering a lethal injection by a doctor or some other person to a patient is illegal in Switzerland (unlike in Holland where it is legal under certain conditions). The Swiss law is unique because (1) the recipient need not be a Swiss national, and (2) a physician need not be involved. Many persons from other countries, especially Germany, go to Switzerland to undergo euthanasia. [Para 50] [1129-B-G]

3.4. Belgium: Belgium became the second country in Europe after Netherlands to legalize the practice of euthanasia in September 2002. The Belgian law sets out conditions under which suicide can be practised without giving doctors a licence to kill. Patients wishing to end their own lives must be conscious when the demand is made and repeat their request for euthanasia. They have to be under "constant and unbearable physical or psychological pain" resulting from an accident or incurable illness. The law gives patients the right to receive ongoing treatment with painkillers -- the authorities have to pay to ensure that poor or isolated patients do not ask to die because they do not have money for such treatment. Unlike the Dutch legislation, minors cannot seek assistance to die. [Para 50] [1129-H; 1130-A-D]

3.5. U.K., Spain, Austria, Italy, Germany, France, etc.: In none of these countries is euthanasia or physician assisted death legal. [Para 50] [1130-E]

3.6. United States of America: Active Euthanasia is illegal in all states in U.S.A., but physician assisted dying is legal in the states of Oregon, Washington and Montana. [Para 50] [1130-H; 1131-A]

3.7. Canada: In Canada, physician assisted suicide is illegal vide Section 241(b) of the Criminal Code of Canada. [Para 50] [1134-B]

3.8. However, foreign decisions have only persuasive value in our country, and are not binding authorities on our Courts. Hence one can even prefer to follow the minority view, rather than the majority view, of a foreign decision, or follow an overruled foreign decision. In the opinion of this Court, the Airedale's case decided by the House of Lords in the U.K. is apposite as a precedent. [Paras 95, 96] [1156-G-H; 1157-A-B]

Sue Rodriguez v. British Columbia (Attorney General), **(1993) 3 SCR 519 [Canada Supreme Court];** *Airedale NHS Trust v. Bland* **(1993) All E.R. 82 (H.L.);** *In Re J* **(A Minor Wardship : Medical Treatment) 1990(3) All E.R. 930;** *Washington v. Glucksberg* **521 U.S. 702 (1997);** *Vacco v. Quill* **521 U.S. 793 (1997);** *Cruzan v. Director,* **MDH 497 U.S. 261 (1990);** *Schloendorff v. Society of New York Hospital* **211 N.Y. 125, 129-30, 105 N.E. 92, 93 (1914); In re Quinlan 70 N.J.10, 355 A. 2d 647; In re Conroy 98 NJ 321, 486 A.2d 1209 (1985) – referred to.**

LAW IN INDIA

4.1. In India abetment of suicide (Section 306 Indian Penal Code) and attempt to suicide (Section 309 of Indian Penal Code) are both criminal offences. This is in contrast

to many countries such as USA where attempt to suicide is not a crime. The Constitution Bench of the Indian Supreme Court in Gian Kaur's case held that both euthanasia and assisted suicide are not lawful in India. The Court held that the right to life under Article 21 of the Constitution does not include the right to die. In Gian Kaur's case the Supreme Court approved of the decision of the House of Lords in Airedale's case, and observed that euthanasia could be made lawful only by legislation. [Para 98] [1157-D-F]

4.2. Although Section 309 Indian Penal Code (attempt to commit suicide) has been held to be constitutionally valid in Gian Kaur's case, the time has come when it should be deleted by Parliament as it has become anachronistic. A person attempts suicide in a depression, and hence he needs help, rather than punishment. This Court therefore recommends to Parliament to consider the feasibility of deleting Section 309 from the Indian Penal Code. [Para 100] [1158-B-C]

4.3. In Gian Kaur's case although the Supreme Court has quoted with approval the view of the House of Lords in Airedale's case, it has not clarified who can decide whether life support should be discontinued in the case of an incompetent person e.g. a person in coma or PVS. This vexed question has been arising often in India because there are a large number of cases where persons go into coma (due to an accident or some other reason) or for some other reason are unable to give consent, and then the question arises as to who should give consent for withdrawal of life support. This is an extremely important question in India because of the unfortunate low level of ethical standards to which our society has descended, its raw and widespread commercialization, and the rampant corruption, and hence, the Court has to be very cautious that

unscrupulous persons who wish to inherit the property of someone may not get him eliminated by some crooked method. [Paras 101 and 102] [1158-D-G]

4.4. Also, since medical science is advancing fast, doctors must not declare a patient to be a hopeless case unless there appears to be no reasonable possibility of any improvement by some newly discovered medical method in the near future. However, this Court makes it clear that it is experts like medical practitioners who can decide whether there is any reasonable possibility of a new medical discovery which could enable such a patient to revive in the near future. [Para 103 & 104] [1158-H; 1159-A-B]

Gian Kaur v. State of Punjab **1996(2) SCC 648 and** *P. Rathinam v. Union of India* **1994(3) SCC 394 – referred to.**

Airedale NHS Trust v. Bland **(1993) All E.R. 82 (H.L.) – referred to.**

WHEN CAN A PERSON IS SAID TO BE DEAD

5.1. A person's most important organ is his/her brain. This organ cannot be replaced. Other body parts can be replaced e.g. if a person's hand or leg is amputed, he can get an artificial limb. Similarly, one can transplant a kidney, a heart or a liver when the original one has failed. However, one cannot transplant a brain. If someone else's brain is transplanted into one's body, then in fact, it will be that other person living in one's body. The entire mind, including one's personality, cognition, memory, capacity of receiving signals from the five senses and capacity of giving commands to the other parts of the body, etc. are the functions of the brain. Hence one is one's brain. It follows that one is dead when one's brain is dead. [Para 106] [1159-F-H; 1160-A]

5.2. The brain cells normally do not multiply after the early years of childhood (except in the region called hippocampus), unlike other cells like skin cells, which are regularly dying and being replaced by new cells produced by multiplying of the old cells. This is probably because brain cells are too highly specialized to multiply. Hence if the brain cells die, they usually cannot be replaced (though sometimes one part of the brain can take over the function of another part in certain situations where the other part has been irreversibly damaged). [Para 107] [1160-B-C]

5.3. Brain cells require regular supply of oxygen which comes through the red cells in the blood. If oxygen supply is cut off for more than six minutes, the brain cells die and this condition is known as anoxia. Hence, if the brain is dead a person is said to be dead. [Para 108] [1160-D]

BRAIN DEATH

6.1. The term 'brain death' has developed various meanings. While initially, death could be defined as a cessation of breathing, or, more scientifically, a cessation of heart-beat, recent medical advances have made such definitions obsolete. The earlier understanding of death emerged from a cardiopulmonary perspective. In such cases, the brain was usually irrelevant -- being understood that the cessation of circulation would automatically lead to the death of brain cells, which require a great deal of blood to survive. The invention of the ventilator and the defibrillator in the 1920s altered this understanding, it being now possible that the cessation of respiration and circulation, though critical, would no longer be irreversible. Hence, a present-day understanding of death as the irreversible end of life must imply total brain failure, such that neither breathing, nor

circulation is possible any more. The question of the length of time that may determine such death is significant, especially considering a significant increase in organ donations across jurisdictions over the last few years. [Paras 109, 110 and 111] [1160-E-F; 1161-A-E]

6.2. Brain death, may, be defined as "the irreversible cessation of all functions of the entire brain, including the brain stem". It is important to understand that this definition goes beyond acknowledging consciousness -- a person who is incapable of ever regaining consciousness will not be considered to be brain dead as long as parts of the brain e.g. brain stem that regulate involuntary activity (such as response to light, respiration, heartbeat etc.) still continue to function. Likewise, if consciousness, albeit severely limited, is present, then a person will be considered to be alive even if he has suffered brain stem death, wherein breathing and heartbeat can no longer be regulated and must be mechanically determined. Hence, the international standard for brain death is usually considered to include "whole-brain death", i.e., a situation where the higher brain (i.e. the part of the brain that regulates consciousness and thought), the cerebellum or mid-brain, and the brain-stem have all ceased to demonstrate any electrical activity whatsoever for a significant amount of time. To say, in most cases, that only the death of the higher brain would be a criteria for 'brain death' may have certain serious consequences -- for example, a foetus, technically under this definition, would not be considered to be alive at all. Similarly, as per this, different definitions of death would apply to human and non-human organisms. [Para 112] [1161-F-G; 1162-A-D]

6.3. Brain death, thus, is different from a persistent vegetative state, where the brain stem continues to work, and so some degree of reactions may occur, though the

possibility of regaining consciousness is relatively remote. Even when a person is incapable of any response, but is able to sustain respiration and circulation, he cannot be said to be dead. The mere mechanical act of breathing, thus, would enable him or her to be "alive". [Para 113] [1162-E-F]

6.4. It is important, that it be medically proved that a situation where any human functioning would be impossible should have been reached for there to be a declaration of brain death--situations where a person is in a persistent vegetative state but can support breathing, cardiac functions, and digestion without any mechanical aid are necessarily those that will not come within the ambit of brain death. [Para 115] [1163-G; 1164-A-B]

6.5. In legal terms, the question of death would naturally assume significance as death has a set of legal consequences as well. As per the definition in the American Uniform Definition of Death Act, 1980. an individual who "sustain[s] . . . irreversible cessation of all functions of the entire brain, including the brain stem, is dead." This stage, thus, is reached at a situation where not only consciousness, but every other aspect of life regulated from the brain can no longer be so regulated. [Para 116] [1164-B-C]

6.6. In the case of 'euthanasia', however, the situation is slightly different. In these cases, it is believed, that a determination of when it would be right or fair to disallow resuscitation of a person who is incapable of expressing his or her consent to a termination of his or her life depends on two circumstances:

a. when a person is only kept alive mechanically, i.e. when not only consciousness is lost, but the person is only able to sustain involuntary

functioning through advanced medical technology--such as the use of heart-lung machines, medical ventilators etc.

b. when there is no plausible possibility of the person ever being able to come out of this stage. Medical "miracles" are not unknown, but if a person has been at a stage where his life is only sustained through medical technology, and there has been no significant alteration in the person's condition for a long period of time—at least a few years--then there can be a fair case made out for passive euthanasia.

To extend this further, especially when a person is incapable of being able to give any consent, would amount to committing judicial murder. [Para 117] [1164-D-H; 1165-A]

6.7. In this case, one may refer to the Transplantation of Human Organs Act, 1994, particularly Section 2(d) and 3(6) thereof. Although the said Act was enacted only for the purpose of regulation of transplantation of human organs, but throws some light on the meaning of brain death. [Para 118 & 120] [1165-B, H; 1166-A]

Schmidt v. Pierce **344 S.W.2d 120, 133 (Mo. 1961) and** *Sanger v. Butler* **101 S.W. 459, 462 (Tex. Civ. App. 1907) – referred to.**

7.1. In the instant case, it cannot be said that the Petitioner is dead. Even from the report of Committee of Doctors it appears that she has some brain activity, though very little. The Petitioner recognizes that persons are around her and expresses her like or dislike by making some vocal sound and waving her hand by certain movements. She smiles if she receives her

favourite food, fish and chicken soup. She breathes normally and does not require a heart lung machine or intravenous tube for feeding. Her pulse rate and respiratory rate and blood pressure are normal. She was able to blink well and could see her doctors who examined her. When an attempt was made to feed her through mouth she accepted a spoonful of water, some sugar and mashed banana. She also licked the sugar and banana paste sticking on her upper lips and swallowed it. She would get disturbed when many people entered her room, but she appeared to calm down when she was touched or caressed gently. The Petitioner meets most of the criteria for being in a permanent vegetative state which has resulted for 37 years. However, her dementia has not progressed and has remained stable for many years. From the examination by the team of doctors, it cannot be said that Petitioner is dead. Whatever the condition of her cortex, her brain stem is certainly alive. She does not need a heart--lung machine. She breathes on her own without the help of a respirator. She digests food, and her body performs other involuntary function without any help. From the CD (as screened in the courtroom in the presence of counsels and others) it appears that she can certainly not be called dead. She was making some sounds, blinking, eating food put in her mouth, and even licking with her tongue morsels on her mouth. [Paras 121 to 124] [1166-B-H; 1167-A]

7.2. However, there appears little possibility of the Petitioner coming out of PVS in which she is in. In all probability, she will continue to be in the state in which she is in till her death. [Para 125] [1167-B]

WITHDRAWAL OF LIFE SUPPORT OF A PATIENT IN PERMANENT VEGETATIVE STATE (PVS)

8.1. There is no statutory provision in India as to the

legal procedure for withdrawing life support to a person in PVS or who is otherwise incompetent to take a decision in this connection. Passive euthanasia should be permitted in our country in certain situations. Hence, following the technique used in Vishakha's case, this Court is laying down the law in this connection which will continue to be the law until Parliament makes a law on the subject.

(i) A decision has to be taken to discontinue life support either by the parents or the spouse or other close relatives, or in the absence of any of them, such a decision can be taken even by a person or a body of persons acting as a next friend. It can also be taken by the doctors attending the patient. However, the decision should be taken bona fide in the best interest of the patient. In the present case, the Petitioner's parents are dead and other close relatives are not interested in her ever since she had the unfortunate assault on her. It is the KEM hospital staff, who have been amazingly caring for her day and night for so many long years, who really are her next friends, and hence it is for the KEM hospital staff to take that decision. The KEM hospital staff have clearly expressed their wish that the Petitioner should be allowed to live. However, assuming that the KEM hospital staff at some future time changes its mind, in such a situation the KEM hospital would have to apply to the Bombay High Court for approval of the decision to withdraw life support.

(ii) Hence, even if a decision is taken by the near relatives or doctors or next friend to withdraw life support, such a decision requires approval from the High Court concerned as laid down in Airedale's case. This is even more necessary since cannot rule out the possibility of mischief being done by

relatives or others for inheriting the property of the patient. [Para 126] [1167-C-H; 1168-A-H; 1169-A]

8.2. In the opinion of this Court, if it is left solely to the patient's relatives or to the doctors or next friend to decide whether to withdraw the life support of an incompetent person there is always a risk that this may be misused by some unscrupulous persons who wish to inherit or otherwise grab the property of the patient. Considering the low ethical levels prevailing in our society today and the rampant commercialization and corruption, one cannot rule out the possibility that unscrupulous persons with the help of some unscrupulous doctors may fabricate material to show that it is a terminal case with no chance of recovery. There are doctors and doctors. While many doctors are upright, there are others who can do anything for money. The commercialization of society has crossed all limits. Hence one have to guard against the potential of misuse. While giving great weight to the wishes of the parents, spouse, or other close relatives or next friend of the incompetent patient and also giving due weight to the opinion of the attending doctors, one cannot leave it entirely to their discretion whether to discontinue the life support or not. This Court agrees with the decision of the Lord Keith in Airedale's case that the approval of the High Court should be taken in this connection. This is in the interest of the protection of the patient, protection of the doctors, relative and next friend, and for reassurance of the patient's family as well as the public. This is also in consonance with the doctrine of parens patriae which is a well known principle of law. [Para 127] [1169-B-G]

DOCTRINE OF PARENS PATRIAE

9.1. The doctrine of Parens Patriae (father of the country) had originated in British law as early as the 13th century. It implies that the King is the father of the country

and is under obligation to look after the interest of those who are unable to look after themselves. The idea behind Parens Patriae is that if a citizen is in need of someone who can act as a parent who can make decisions and take some other action, sometimes the State is best qualified to take on this role. The duty of the King in feudal times to act as parens patriae (father of the country) has been taken over in modern times by the State. [Paras 128, 129] [1169-H; 1170-A, B, G]

9.2. In the case of an incompetent person who is unable to take a decision whether to withdraw life support or not, it is the Court alone, as parens patriae, which ultimately must take this decision, though, no doubt, the views of the near relatives, next friend and doctors must be given due weight. [Paras 132] [1171-C]

Charan Lal Sahu v. Union of India **(1990) 1 SCC 613 and** *State of Kerala v. N.M. Thomas* **1976(1) SCR 906 – referred to.**

Heller v. DOE **(509) US 312 – referred to.**

UNDER WHICH PROVISION OF THE LAW CAN THE COURT GRANT APPROVAL FOR WITHDRAWING LIFE SUPPORT TO AN INCOMPETENT PERSON

10.1. The High Court, under Article 226 of the Constitution, can grant approval for withdrawal of life support to such an incompetent person. The High Court under Article 226 of the Constitution is not only entitled to issue writs, but is also entitled to issue directions or orders. [Paras 133, 134] [1171-E, H; 1172-A]

10.2. No doubt, the ordinary practice in our High Courts since the time of framing of the Constitution in 1950 is that petitions filed under Article 226 of the Constitution pray for a writ of the kind referred to in the

provision. However, a petition can also be made to the High Court under Article 226 of the Constitution praying for an order or direction, and not for any writ. Article 226 gives abundant power to the High Court to pass suitable orders on the application filed by the near relatives or next friend or the doctors/hospital staff praying for permission to withdraw the life support to an incompetent person of the kind above mentioned. [Para 137] [1172-G-H; 1173-A-B]

Dwarka Nath v. ITO **AIR 1966 SC 81 and** *Shri Anadi Mukta Sadguru v. V. R. Rudani* **AIR 1989 SC 1607 – referred to.**

PROCEDURE TO BE ADOPTED BY THE HIGH COURT WHEN SUCH AN APPLICATION IS FILED

11.1. When such an application is filed the Chief Justice of the High Court should forthwith constitute a Bench of at least two Judges who should decide to grant approval or not. Before doing so the Bench should seek the opinion of a committee of three reputed doctors to be nominated by the Bench after consulting such medical authorities/medical practitioners as it may deem fit. Preferably one of the three doctors should be a neurologist, one should be a psychiatrist, and the third a physician. For this purpose a panel of doctors in every city may be prepared by the High Court in consultation with the State Government/Union Territory and their fees for this purpose may be fixed. [Para 138] [1173-C-E]

11.2. The committee of three doctors nominated by the Bench should carefully examine the patient and also consult the record of the patient as well as taking the views of the hospital staff and submit its report to the High Court Bench. [Para 139] [1173-E-F]

11.3. Simultaneously with appointing the committee of doctors, the High Court Bench shall also issue notice to the State and close relatives e.g. parents, spouse, brothers/sisters etc. of the patient, and in their absence his/her next friend, and supply a copy of the report of the doctor's committee to them as soon as it is available. After hearing them, the High Court bench should give its verdict. The above procedure should be followed all over India until Parliament makes legislation on this subject. [Para 140] [1173-F-H]

11.4. The High Court should give its decision speedily at the earliest, since delay in the matter may result in causing great mental agony to the relatives and persons close to the patient. [Para 141] [1174-A]

11.5. The High Court should give its decision assigning specific reasons in accordance with the principle of 'best interest of the patient' laid down by the House of Lords in Airedale's case. The views of the near relatives and committee of doctors should be given due weight by the High Court before pronouncing a final verdict which shall not be summary in nature. [Para 142] [1174-B-C]

Airedale NHS Trust v. Bland **(1993) All E.R. 82 (H.L.) – referred to.**

Case Law Reference:

1996(2) SCC 648	**referred to**	**Paras 4, 98**
(1993) 3 SCR 519 [Canada Supreme Court]	**referred to**	**Para 50**
(1993) All E.R. 82 (H.L.)	**referred to**	**Para 59**
1990(3) All E.R. 930	**referred to**	**Para 77**
521 U.S. 702 (1997)	**referred to**	**Para 79**

521 U.S. 793 (1997)	**referred to**	**Para 79**
MDH 497 U.S. 261 (1990)	**referred to**	**Para 83**
211 N.Y. 125, 129-30, 105 N.E. 92, 93 (1914)	**referred to**	**Para 87**
70 N.J.10, 355 A. 2d 647	**referred to**	**Para 89**
98 NJ 321, 486 A.2d 1209 (1985)	**referred to**	**Para 90**
1994(3) SCC 394	**referred to**	**Para 98**
344 S.W.2d 120, 133 (Mo. 1961)	**referred to**	**Para 109**
101 S.W. 459, 462 (Tex. Civ. App. 1907)	**referred to**	**Para 109**
(1990) 1 SCC 613	**referred to**	**Para 129**
(509) US 312	**referred to**	**Para 130**
1976(1) SCR 906	**referred to**	**Para 131**
AIR 1966 SC 81	**referred to**	**Para 135**
AIR 1989 SC 1607	**referred to**	**Para 136**

CRIMINAL ORIGINAL JURISDICTION : Writ Petition (Crl.) No. 115 of 2009.

Under Article 32 of the Constitution of India.

G.E. Vahanvati, Attorney General, T.R. Andhyarujina, Shekhar, Naphade, Pallav Shishodia, Chinmoy P. Sharma, Soumik Ghosal, Shubhangi Tuli, Divya Jain, Vimal Chandra S. Dave, Sunaina Dutta, Suchitra Atul Chitale, Chinmoy Khaldkar, Sanjay V. Kharde, Asha Gopalan Nair for the appearing parties.

The Judgment of the Court was delivered by

MARKANDEY KATJU, J.

“Marte hain aarzoo mein marne ki

Maut aati hai par nahin aati”

-- Mirza Ghalib

1. Heard Mr. Shekhar Naphade, learned senior counsel for the petitioner, learned Attorney General for India for the Union of India Mr. Vahanvati, Mr. T. R. Andhyarujina, learned Senior Counsel, whom we had appointed as amicus curiae, Mr. Pallav Sisodia, learned senior counsel for the Dean, KEM Hospital, Mumbai, and Mr. Chinmay Khaldkar, learned counsel for the State of Maharashtra.

2. Euthanasia is one of the most perplexing issues which the courts and legislatures all over the world are facing today. This Court, in this case, is facing the same issue, and we feel like a ship in an uncharted sea, seeking some guidance by the light thrown by the legislations and judicial pronouncements of foreign countries, as well as the submissions of learned counsels before us. The case before us is a writ petition under Article 32 of the Constitution, and has been filed on behalf of the petitioner Aruna Ramachandra Shanbaug by one Ms. Pinki Virani of Mumbai, claiming to be a next friend.

3. It is stated in the writ petition that the petitioner Aruna Ramachandra Shanbaug was a staff Nurse working in King Edward Memorial Hospital, Parel, Mumbai. On the evening of 27th November, 1973 she was attacked by a sweeper in the hospital who wrapped a dog chain around her neck and yanked her back with it. He tried to rape her but finding that she was menstruating, he sodomized her. To immobilize her during this act he twisted the chain around her neck. The next day on 28th November, 1973 at 7.45 a.m. a cleaner found her lying on the floor with blood all over in an unconscious condition. It is alleged that due to strangulation by the dog chain the supply of oxygen to the brain stopped and the brain got damaged. It is alleged

that the Neurologist in the Hospital found that she had plantars' extensor, which indicates damage to the cortex or some other part of the brain. She also had brain stem contusion injury with associated cervical cord injury. It is alleged at page 11 of the petition that 36 years have expired since the incident and now Aruna Ramachandra Shanbaug is about 60 years of age. She is featherweight, and her brittle bones could break if her hand or leg are awkwardly caught, even accidentally, under her lighter body. She has stopped menstruating and her skin is now like papier mache' stretched over a skeleton. She is prone to bed sores. Her wrists are twisted inwards. Her teeth had decayed causing her immense pain. She can only be given mashed food, on which she survives. It is alleged that Aruna Ramachandra Shanbaug is in a persistent negetative state (p.v.s.) and virtually a dead person and has no state of awareness, and her brain is virtually dead. She can neither see, nor hear anything nor can she express herself or communicate, in any manner whatsoever. Mashed food is put in her mouth, she is not able to chew or taste any food. She is not even aware that food has been put in her mouth. She is not able to swallow any liquid food, which shows that the food goes down on its own and not because of any effort on her part. The process of digestion goes on in this way as the mashed food passes through her system. However, Aruna is virtually a skeleton. Her excreta and the urine is discharged on the bed itself. Once in a while she is cleaned up but in a short while again she goes back into the same sub-human condition. Judged by any parameter, Aruna cannot be said to be a living person and it is only on account of mashed food which is put into her mouth that there is a facade of life which is totally devoid of any human element. It is alleged that there is not the slightest possibility of any improvement in her condition and her body lies on the bed in the KEM Hospital, Mumbai like a dead animal, and this has been the position for the last 36 years. The prayer of the petitioner is that the respondents be directed to stop feeding Aruna, and let her die peacefully.

4. We could have dismissed this petition on the short ground that under Article 32 of the Constitution of India (unlike Article 226) the petitioner has to prove violation of a fundamental right, and it has been held by the Constitution Bench decision of this Court in *Gian Kaur vs. State of Punjab,* 1996(2) SCC 648 (vide paragraphs 22 and 23) that the right to life guaranteed by Article 21 of the Constitution does not include the right to die. Hence the petitioner has not shown violation of any of her fundamental rights. However, in view of the importance of the issues involved we decided to go deeper into the merits of the case.

5. Notice had been issued by this Court on 16.12.2009 to all the respondents in this petition. A counter affidavit was earlier filed on behalf of the respondent nos.3 and 4, the Mumbai Municipal Corporation and the Dean, KEM Hospital by Dr. Amar Ramaji Pazare, Professor and Head in the said hospital, stating in paragraph 6 that Aruna accepts the food in normal course and responds by facial expressions. She responds to commands intermittently by making sounds. She makes sounds when she has to pass stool and urine which the nursing staff identifies and attends to by leading her to the toilet. Thus, there was some variance between the allegations in the writ petition and the counter affidavit of Dr. Pazare.

6. Since there was some variance in the allegation in the writ petition and the counter affidavit of Dr. Pazare, we, by our order dated 24 January, 2011 appointed a team of three very distinguished doctors of Mumbai to examine Aruna Shanbaug thoroughly and submit a report about her physical and mental condition. These three doctors were :

(1) Dr. J. V. Divatia, Professor and Head, Department of Anesthesia, Critical Care and Pain at Tata Memorial Hospital, Mumbai;

(2) Dr. Roop Gursahani, Consultant Neurologist at P.D.Hinduja, Mumbai; and

(3) Dr. Nilesh Shah, Professor and Head, Department of Psychiatry at Lokmanya Tilak Municipal Corporation Medical College and General Hospital.

7. In pursuance of our order dated 24th January, 2011, the team of three doctors above mentioned examined Aruna Shanbuag in KEM Hospital and has submitted us the following report:

" Report of Examination of Ms. Aruna Ramachandra Shanbaug Jointly prepared and signed by

1. Dr. J.V. Divatia

(Professor and Head, Department of Anesthesia, Critical Care and Pain, at Tata Memorial Hospital, Mumbai)

2. Dr. Roop Gursahani

(Consultant Neurologist at P.D. Hinduja Hospital, Mumbai)

3. Dr. Nilesh Shah

(Professor and Head, Department of Psychiatry at Lokmanya Tilak Municipal Corporation Medical College and General Hospital).

I. Background

As per the request of Hon. Justice Katju and Hon. Justice Mishra of the Supreme Court of India, Ms. Aruna Ramachandra Shanbaug, a 60-year-old female patient was examined on 28th January 2011, morning and 3rd February 2011, in the side-room of ward-4, of the K. E. M. Hospital by the team of 3 doctors viz. Dr. J.V. Divatia (Professor and Head, Department of Anesthesia, Critical Care and Pain at Tata Memorial Hospital, Mumbai), Dr. Roop Gursahani (Consultant Neurologist at P.D. Hinduja Hospital, Mumbai) and Dr. Nilesh Shah (Professor

and Head, Department of Psychiatry at Lokmanya Tilak Municipal Corporation Medical College and General Hospital).

This committee was set up because the Court found some variance between the allegations in the writ petition filed by Ms. Pinki Virani on behalf of Aruna Ramchandras Shanbaug and the counter affidavit of Dr. Pazare. This team of three doctors was appointed to examine Aruna Ramachandra Shanbaug thoroughly and give a report to the Court about her physical and mental condition

It was felt by the team of doctors appointed by the Supreme Court that longitudinal case history and observations of last 37 years along with findings of examination will give a better, clear and comprehensive picture of the patient's condition.

This report is based on:

1. The longitudinal case history and observations obtained from the Dean and the medical and nursing staff of K. E. M. Hospital,

2. Case records (including nursing records) since January 2010

3. Findings of the physical, neurological and mental status examinations performed by the panel.

4. Investigations performed during the course of this assessment (Blood tests, CT head, Electroencephalogram)

II. Medical history

Medical history of Ms. Aruna Ramachandra Shanbaug was obtained from the Dean, the

Principal of the School of Nursing and the medical and nursing staff of ward-4 who has been looking after her.

It was learnt from the persons mentioned above that

1. Ms. Aruna Ramachandra Shanbaug was admitted in the hospital after she was assaulted and strangulated by a sweeper of the hospital on November 27, 1973.

2. Though she survived, she never fully recovered from the trauma and brain damage resulting from the assault and strangulation.

3. Since last so many years she is in the same bed in the side-room of ward-4.

4. The hospital staff has provided her an excellent nursing care since then which included feeding her by mouth, bathing her and taking care of her toilet needs. The care was of such an exceptional nature that she has not developed a single bed-sore or fracture in spite of her bed-ridden state since 1973.

5. According to the history from them, though she is not very much aware of herself and her surrounding, she somehow recognizes the presence of people around her and expresses her like or dislike by making certain types of vocal sounds and by waving her hands in certain manners. She appears to be happy and smiles when she receives her favorite food items like fish and chicken soup. She accepts feed which she likes but may spit out food which she doesn't like. She was able to take oral feeds till 16th September 2010, when she developed a febrile illness, probably malaria. After that, her oral intake reduced

and a feeding tube (Ryle's tube) was passed into her stomach via her nose. Since then she receives her major feeds by the Ryle's tube, and is only occasionally able to accept the oral liquids. Malaria has taken a toll in her physical condition but she is gradually recuperating from it.

6. Occasionally, when there are many people in the room she makes vocal sounds indicating distress. She calms down when people move out of her room. She also seems to enjoy the devotional songs and music which is played in her room and it has calming effect on her.

7. In an annual ritual, each and every batch of nursing students is introduced to Ms. Aruna Ramachandra Shanbaug, and is told that "She was one of us"; "She was a very nice and efficient staff nurse but due to the mishap she is in this bed-ridden state".

8. The entire nursing staff member and other staff members have a very compassionate attitude towards Ms. Aruna Ramachandra Shanbaug and they all very happily and willingly take care of her. They all are very proud of their achievement of taking such a good care of their bed-ridden colleague and feel very strongly that they want to continue to take care of her in the same manner till she succumbs naturally. They do not feel that Ms. Aruna Ramachandra Shanbaug is living a painful and miserable life.

III. Examination

IIIa. Physical examination

She was conscious, unable to co-operate and

appeared to be unaware of her surroundings.

Her body was lean and thin. She appeared neat and clean and lay curled up in the bed with movements of the left hand and made sounds, especially when many people were present in the room.

She was afebrile, pulse rate was 80/min, regular, and good volume. Her blood pressure recorded on the nursing charts was normal. Respiratory rate was 15/min, regular, with no signs of respiratory distress or breathlessness.

There was no pallor, cyanosis, clubbing or icterus. She was edentulous (no teeth).

Skin appeared to be generally in good condition, there were no bed sores, bruises or evidence of old healed bed sores. There were no skin signs suggestive of nutritional deficiency or dehydration.

Her wrists had developed severe contractures, and were fixed in acute flexion. Both knees had also developed contractures (right more than left).

A nasogastric feeding tube (Ryle?s tube) was in situ. She was wearing diapers.

Abdominal, respiratory and cardiovascular examination was unremarkable.

IIIb. Neurological Examination

When examined she was conscious with eyes open wakefulness but without any apparent awareness (see Table 1 for detailed assessment of awareness). From the above examination, she has evidence of intact auditory, visual, somatic and

motor primary neural pathways. However no definitive evidence for awareness of auditory, visual, somatic and motor stimuli was observed during our examinations.

There was no coherent response to verbal commands or to calling her name. She did not turn her head to the direction of sounds or voices. When roused she made non-specific unintelligible sounds ("uhhh, ahhh") loudly and continuously but was generally silent when undisturbed.

Menace reflex (blinking in response to hand movements in front of eyes) was present in both eyes and hemifields but brisker and more consistent on the left. Pupillary reaction was normal bilaterally. Fundi could not be seen since she closed her eyes tightly when this was attempted. At rest she seemed to maintain preferential gaze to the left but otherwise gaze was random and undirected (roving) though largely conjugate. Facial movements were symmetric. Gag reflex (movement of the palate in response to insertion of a tongue depressor in the throat) was present and she does not pool saliva. She could swallow both teaspoonfuls of water as well as a small quantity of mashed banana. She licked though not very completely sugar smeared on her lips, suggesting some tongue control.

She had flexion contractures of all limbs and seemed to be incapable of turning in bed spontaneously. There was what appeared to be minimal voluntary movement with the left upper limb (touching her wrist to the eye for instance, perhaps as an attempt to rub it). When examined/disturbed, she seemed to curl up even further in her flexed

foetal position. Sensory examination was not possible but she did seem to find passive movement painful in all four limbs and moaned continuously during the examination. Deep tendon reflexes were difficult to elicit elsewhere but were present at the ankles. Plantars were withdrawal/ extensor.

Thus neurologically she appears to be in a state of intact consciousness without awareness of self/environment. No cognitive or communication abilities could be discerned. Visual function if present is severely limited. Motor function is grossly impaired with quadriparesis.

IIIc. Mental Status Examination

1. Consciousness, General Appearance, Attitude and Behavior :

Ms. Aruna Ramachandra Shanbaug was resting quietly in her bed, apparently listening to the devotional music, when we entered the room. Though, her body built is lean, she appeared to be well nourished and there were no signs of malnourishment. She appeared neat and clean. She has developed contractures at both the wrist joints and knee joints and so lied curled up in the bed with minimum restricted physical movements.

She was conscious but appeared to be unaware of herself and her surroundings. As soon as she realized the presence of some people in her room, she started making repetitive vocal sounds and moving her hands. This behavior subsided as we left the room. She did not have any involuntary movements. She did not demonstrate any catatonic, hostile or violent behavior.

Her eyes were wide open and from her behavior it appeared that she could see and hear us, as when one loudly called her name, she stopped making vocal sounds and hand movements for a while. She was unable to maintain sustained eye-to eye contact but when the hand was suddenly taken near her eyes, she was able to blink well.

When an attempt was made to feed her by mouth, she accepted a spoonful of water, some sugar and mashed banana. She also licked the sugar and banana paste sticking on her upper lips and swallowed it. Thus, at times she could cooperate when fed.

2. **Mood and affect :**

It was difficult to assess her mood as she was unable to communicate or express her feelings. She appeared to calm down when she was touched or caressed gently. She did not cry or laugh or expressed any other emotions verbally or non-verbally during the examination period. When not disturbed and observed quietly from a distance, she did not appear to be in severe pain or misery. Only when many people enter her room, she appears to get a bit disturbed about it.

3. **Speech and thoughts :**

She could make repeated vocal sounds but she could not utter or repeat any comprehensible words or follow and respond to any of the simple commands (such as "show me your tongue"). The only way she expressed herself was by making some sounds. She appeared to have minimal language comprehension or expression.

4. **Perception :**

She did not appear to be having any perceptual abnormality like hallucinations or illusions from her behavior.

5. **Orientation, memory and intellectual capacity:**

Formal assessment of orientation in time, place and person, memory of immediate, recent and remote events and her intellectual capacity could not be carried out.

6. **Insight :**

As she does not appear to be fully aware of herself and her surroundings, she is unlikely to have any insight into her illness.

IV. Reports of Investigations

IVa. CT Scan Head (Plain)

This is contaminated by movement artefacts. It shows generalized prominence of supratentorial sulci and ventricles suggestive of generalized cerebral atrophy. Brainstem and cerebellum seem normal. Ischemic foci are seen in left centrum semi-ovale and right external capsule. In addition a small left parieto-occipital cortical lesion is also seen and is probably ischemic.

IVb. EEG

The dominant feature is a moderately rhythmic alpha frequency at 8-10 Hz and 20-70 microvolts which is widely distributed and is equally prominent both anteriorly and posteriorly. It is not responsive to eye-opening as seen on the video. Beta at 18-

25 Hz is also seen diffusely but more prominently anteriorly. No focal or paroxysmal abnormalities were noted

IVc. Blood

Reports of the hemoglobin, white cell count, liver function tests, renal function tests, electrolytes, thyroid function, Vitamin B12 and 1,25 dihydroxy Vit D3 levels are unremarkable. (Detailed report from KEM hospital attached.)

V. Diagnostic impression

1) From the longitudinal case history and examination it appears that Ms. Aruna Ramachandra Shanbaug has developed non-progressive but irreversible brain damage secondary to hypoxic-ischemic brain injury consistent with the known effects of strangulation. Most authorities consider a period exceeding 4 weeks in this condition, especially when due to hypoxic-ischemic injury as confirming irreversibility. In Ms. Aruna's case, this period has been as long as 37 years, making her perhaps the longest survivor in this situation.

2) She meets most of the criteria for being in a permanent vegetative state (PVS). PVS is defined as a clinical condition of unawareness (Table 1) of self and environment in which the patient breathes spontaneously, has a stable circulation and shows cycles of eye closure and opening which may simulate sleep and waking (Table 2). While she has evidence of intact auditory, visual, somatic and motor primary neural pathways, no definitive evidence for awareness of auditory, visual, somatic and motor stimuli was observed

during our examinations.

VI. Prognosis

Her dementia has not progressed and has remained stable for last many years and it is likely to remain same over next many years. At present there is no treatment available for the brain damage she has sustained.

VII. Appendix

VII a. Table 1. CLINICAL ASSESSMENT TO ESTABLISH UNAWARENESS

(Wade DT, Johnston C. British Med Journal 1999; 319:841-844) DOMAIN OBSERVED]	STIMULUS	RESPONSE
AUDITORY AWARENESS	Sudden loud noise (clap)	Startle present, ceases other movements
	Meaningful noise (*rattled steel tumbler and spoon, film songs of 1970s)*	Non-specific head and body movements
	Spoken commands *("close your eyes",* *"lift left hand ": in English, Marathi and Konkani)*	Unable to obey commands. No specific or reproducible response
VISUAL AWARENESS	Bright light to eyes	Pupillary responses present
	Large moving object in front of eyes (*bright red torch, plastic rattle)*	Tracking movements: present but inconsistent and poorly reproducible
	Visual threat *(fingers suddenly moved toward eyes)*	Blinks, but more consistent on left than right
	Written command (*English, Marathi: close your eyes*)	No response
SOMATIC AWARENESS	Painful stimuli to limbs *(light prick with sharp end of tendon hammer)*	Withdrawal, maximal in left upper limb
	Painful stimuli to face	Distress but no co-ordinated response to remove stimulus
	Routine sensory stimuli during care	

(*changing position in bed and feeding*)		Generalized non specific response presence but no coordinated attempt to assist in process
MOTOR OUTPUT	Spontaneous	Non-specific undirected activities. Goal directed – lifting left hand to left side of face, apparently to rub her left eye.
Responsive		Non-specific undirected without any goal directed activities.

Conclusion:

From the above examination, she has evidence of intact auditory, visual, somatic and motor primary neural pathways. However no definitive evidence for awareness of auditory, visual, somatic and motor stimuli was observed during our examinations.

VIIb. Table 2. Application of Criteria for Vegetative State

(Bernat JL. Neurology clinical Practice 2010; 75 (suppl. 1): S33-S38)**Criteria**	**Examination findings : whether she meets Criteria (Yes /No / Probably)**
Unaware of self and environment	Yes, Unaware
No interaction with others	Yes, no interaction
No sustained, reproducible or purposeful voluntary behavioural response to visual, auditory, tactile or noxious stimuli	Yes, no sustained, reproducible or purposeful behavioural response, but : 1. Resisted examination of fundus 2. Licked sugar off lips
No language comprehension or expression	Yes, no comprehension
No blink to visual threat	Blinks, but more consistent on left than right
Present sleep wake cycles	Yes (according to nurses)
Preserved autonomic and hypothalamic function	Yes
Preserved cranial nerve reflexes	Yes
Bowel and bladder incontinence	Yes

VIII. References

1. Multi-Society Task Force on PVS. Medical aspects of the persistent vegetative state. N Engl J Med 1994; 330: 1499-508

2. Wade DT, Johnston C. The permanent vegetative state: practical guidance on diagnosis and management. Brit Med J 1999; 319:841–4

3. Giacino JT, Ashwal S, Childs N, et al. The minimally conscious state : Definition and diagnostic criteria. Neurology 2002;58:349–353

4. Bernat JL. Current controversies in states of chronic unconsciousness. Neurology 2010;75;S33”

8. On 18th February, 2011, we then passed the following order :

“In the above case Dr. J.V. Divatia on 17.02.2011 handed over the report of the team of three doctors whom we had appointed by our order dated 24th January, 2011. He has also handed over a CD in this connection. Let the report as well as the CD form part of the record.

On mentioning, the case has been adjourned to be listed on 2nd March, 2011 at the request of learned Attorney General of India, Mr. T.R. Andhyarujina, learned Senior Advocate, whom we have appointed as amicus curiae in the case as well as Mr. Shekhar Naphade, learned Senior Advocate for the petitioner.

We request the doctors whom we had appointed viz., Dr. J.V. Divatia, Dr. Roop Gurshani and Dr. Nilesh Shah to appear before us on 2nd March, 2011 at 10.30 A.M. in the Court, since it is quite possible that we may like to ask them questions about the report which they have submitted, and in general about their views in connection

with euthanasia.

On perusal of the report of the committee of doctors to us we have noted that there are many technical terms which have been used therein which a non-medical man would find it difficult to understand. We, therefore, request the doctors to submit a supplementary report by the next date of hearing (by e-mailing copy of the same two days before the next date of hearing) in which the meaning of these technical terms in the report is also explained.

The Central Government is directed to arrange for the air travel expenses of all the three doctors as well as their stay in a suitable accommodation at Delhi and also to provide them necessary conveyance and other facilities they require, so that they can appear before us on 02.03.2011.

An honorarium may also be given to the doctors, if they so desire, which may be arranged mutually with the learned Attorney General.

The Dean of King Edward Memorial Hospital as well as Ms. Pinky Virani (who claims to be the next friend of the petitioner) are directed to intimate the brother(s)/ sister(s) or other close relatives of the petitioner that the case will be listed on 2nd March, 2011 in the Supreme Court and they can put forward their views before the Court, if they so desire. Learned counsel for the petitioner and the Registry of this Court shall communicate a copy of this Order forthwith to the Dean, KEM Hospital. The Dean, KEM Hospital is requested to file an affidavit stating his views regarding the prayer in this writ petition, and also the condition of the petitioner.

Copy of this Order shall be given forthwith to learned Attorney General of India, Mr. Shekhar Naphade and Mr. Andhyarujina, learned Senior Advocates.

Let the matter be listed as the first item on 2nd March, 2011".

9. On 2.3.2011, the matter was listed again before us and we first saw the screening of the CD submitted by the team of doctors along with their report. We had arranged for the screening of the CD in the Courtroom, so that all present in Court could see the condition of Aruna Shanbaug. For doing so, we have relied on the precedent of the Nuremburg trials in which a screening was done in the Courtroom of some of the Nazi atrocities during the Second World War. We have heard learned counsel for the parties in great detail. The three doctors nominated by us are also present in Court. As requested by us, the doctors team submitted a supplementary report before us which states :

Supplement To The Report Of The Medical Examination Of Aruna Ramchandra Shanbaug Jointly prepared and signed by

1. Dr. J.V. Divatia
(Professor and Head, Department of Anesthesia, Critical Care and Pain, at Tata Memorial Hospital, Mumbai)

2. Dr. Roop Gursahani
(Consultant Neurologist at P.D. Hinduja Hospital, Mumbai)

3. Dr. Nilesh Shah
(Professor and Head, Department of Psychiatry at Lokmanya Tilak Municipal Corporation Medical College and General Hospital).

Mumbai
February 26, 2011

INDEX

Introduction

This document is a supplement to the Report of Examination of Ms. Aruna Ramachandra Shanbaug, dated February 14, 2011.

On perusal of the report, the Hon. Court observed that there were many technical terms which a non-medical man would find it difficult to understand, and requested us to submit a supplementary report in which the meaning of these technical terms in the report is also explained.

We have therefore prepared this Supplement to include a glossary of technical terms used in the earlier Report, and also to clarify some of the terminology related to brain damage. Finally, we have given our opinion in the case of Aruna Shanbaug.

Terminology

The words coma, brain death and vegetative state are often used in common language to describe severe brain damage. However, in medical terminology, these terms have specific meaning and significance.

Brain death

A state of prolonged irreversible cessation of all brain activity, including lower brain stem function with the complete absence of voluntary movements, responses to stimuli, brain stem reflexes, and spontaneous respirations.

Explanation: This is the most severe form of brain

damage. The patient is unconscious, completely unresponsive, has no reflex activity from centres in the brain, and has no breathing efforts on his own. However the heart is beating. This patient can only be maintained alive by advanced life support (breathing machine or ventilator, drugs to maintain blood pressure, etc). These patients can be legally declared dead ('brain dead') to allow their organs to be taken for donation.

Aruna Shanbaug is clearly not brain dead.

Coma

Patients in coma have complete failure of the arousal system with no spontaneous eye opening and are unable to be awakened by application of vigorous sensory stimulation.

Explanation: These patients are unconscious. They cannot be awakened even by application of a painful stimulus. They have normal heart beat and breathing, and do not require advanced life support to preserve life.

Aruna Shanbaug is clearly not in Coma.

Vegetative State (VS)

The complete absence of behavioral evidence for self or environmental awareness. There is preserved capacity for spontaneous or stimulus-induced arousal, evidenced by sleep–wake cycles. .i.e. patients are awake, but have no awareness.

Explanation: Patients appear awake. They have normal heart beat and breathing, and do not require advanced life support to preserve life. They cannot produce a purposeful, co-ordinated, voluntary response in a sustained manner, although they may have primitive reflexive responses to light, sound, touch or pain. They cannot understand,

communicate, speak, or have emotions. They are unaware of self and environment and have no interaction with others. They cannot voluntarily control passing of urine or stools. They sleep and awaken. As the centres in the brain controlling the heart and breathing are intact, there is no threat to life, and patients can survive for many years with expert nursing care. The following behaviours may be seen in the vegetative state :

Sleep-wake cycles with eyes closed, then open

Patient breathes on her own

Spontaneous blinking and roving eye movements

Produce sounds but no words

Brief, unsustained visual pursuit (following an object with her eyes)

Grimacing to pain, changing facial expressions

Yawning; chewing jaw movements

Swallowing of her own spit

Nonpurposeful limb movements; arching of back

Reflex withdrawal from painful stimuli

Brief movements of head or eyes toward sound or movement without apparent localization or fixation

Startles with a loud sound

Almost all of these features consistent with the diagnosis of permanent vegetative state were present during the medical examination of Aruna Shanbaug.

Minimally Conscious State

Some patients with severe alteration in consciousness have neurologic findings that do not meet criteria for VS. These patients demonstrate some behavioral evidence of conscious awareness but remain unable to reproduce this behavior consistently. This condition is referred to here as the minimally conscious state (MCS). MCS is distinguished from VS by the partial preservation of conscious awareness.

To make the diagnosis of MCS, limited but clearly discernible evidence of self or environmental awareness must be demonstrated on a reproducible or sustained basis by one or more of the following behaviors:

• Following simple commands.

• Gestural or verbal yes/no responses (regardless of accuracy).

• Intelligible sounds

• Purposeful behavior, including movements or emotional behaviors (smiling, crying) that occur in relation to relevant environmental stimuli and are not due to reflexive activity. Some examples of qualifying purposeful behavior include:

– appropriate smiling or crying in response to the linguistic or visual content of emotional but not to neutral topics or stimuli

– vocalizations or gestures that occur in direct response to the linguistic content of questions

– reaching for objects that demonstrates a clear relationship between object location and direction of reach

– touching or holding objects in a manner that accommodates the size and shape of the object

– pursuit eye movement or sustained fixation that occurs in direct response to moving or salient stimuli

None of the above behaviours suggestive of a Minimally Conscious State were observed during the examination of Aruna Shanbaug.

GLOSSARY OF TECHNICAL TERMS USED IN THE MAIN REPORT

(In Alphabetical order) Term in text	**Meaning**
Affect	Feeling conveyed though expressions and behavior
Afebrile	No fever
Auditory	Related to hearing
Bedsore	A painful wound on the body caused by having to lie in bed for a long time
Bilaterally	On both sides (right and left)
Bruise	An injury or mark where the skin has not been broken but is darker in colour, often as a result of being hit by something
Catatonic	Describes someone who is stiff and not moving or reacting, as if dead
Cerebral atrophy	Shrinking of the globe (cortex) of the brain
Clubbing	Bulging or prominence of the nailbed, making base of the nails look thick. This is often due to longstanding infection inside the lungs.
Cognitive	Related to ability to understand and process information in the brain
Conjugate	Synchronised movement (of the eyeball)
Conscious	Awake with eyes open. By itself the term conscious does not convey any information about awareness of self and surroundings, or the ability to understand, communicate, have emotions, etc.
Contractures	Muscles or tendons that have become shortened and taut over a period of time. This causes deformity and restriction of movements.
CT Scan	A specialized X-ray test where images of the brain (or other part of the body) are obtained in cross-section at different levels. This allows clear visualization of different parts of the brain
Cyanosis	Bluish discoloration of the nails, lips or skin. It may be due to low levels of oxygen in the blood
Deep tendon reflexes	Reflex response of the fleshy part of certain muscles when its tendon is hit lightly with an examination hammer
Dementia	Disorder in which there is a cognitive defect, i.e. the patient is unable to understand and process information in the brain
Electroencephalography, (EEG)	Recording of the electrical activity of the brain
Febrile illness	Illness with fever
Fracture	A crack or a break in bones
Fundi	Plural of fundus. Fundus of the eye is the interior surface of the eye, opposite the lens. It is examined

	with an instrument called the ophthalmoscope
Gag reflex	Movement of the palate in response to insertion of a tongue depressor in the throat
Hallucinations	Perception in the absence of stimuli. (e.g. hearing voices which are not there or which are inaudible to others)
Hemifields	Right or left part of the field of vision
Hypoxic	Related to reduced oxygen levels in the blood
Icterus	Yellowish discoloration of the skin and eyeballs. This is commonly known as jaundice, and may be caused by liver disease
Illusions	Misperception of stimuli (seeing a rope as a snake)
Immediate memory	Memory of events which have occurred just a few minutes ago
Insight	Person's understanding of his or her own illness
Intellectual capacity	Ability to solve problems. The ability to learn, understand and make judgments or have opinions that are based on reason
Involuntary movements	Automatic movements over which patient has no control
Ischemic	Related to restriction or cutting off of the blood flow to any part of the body
Malnourishment	Weak and in bad health because of having too little food or too little of the types of food necessary for good health
Menace reflex	Blinking in response to hand movements in front of eyes
Mood	The way one feels at a particular time
Motor	Related to movement
Movement artefacts	Disturbance in the image seen in the CT scan due to patient movement
Oral feed	Food given through mouth
Orientation	Awareness about the time, place and person
Pallor	Pale appearance of the skin. Usually this is due to a low red blood cell count or low haemoglobin level in the blood.
Passive movement	Movement of a limb or part of the body done by the doctor without any effort by the patient
Perception	Sensory experiences (such as seeing, hearing etc.)
Perceptual abnormalities	Abnormal sensory experiences, e.g, seeing things that do not exist, hearing sounds when there are none
Plantars	Reflex response of the toes when a sharp painful stimulus is applied to the sole of the foot. The normal response is curling downwards of the toes.
Plantars were withdrawal/ extensor	When a painful stimulus was applied to the sole of the foot the toes spread out and there was reflex movement of the leg (withdrawal) or upward curling of the great toe and other toes (extensor). This is an abnormal response indicating damage in the pathway in the brain or to the

	area in the brain controlling function of the legs.
Primary neural pathways	Course of the nerves from a part of the body to the area in the brain responsible for the function of that part
Pupillary reaction	The pupillary light reflex controls the diameter of the pupil, in response to the intensity of light. Greater intensity light causes the pupil to become smaller (allowing less light in), whereas

Opinion

In our view, the issues in this case (and other similar cases) are:

1. In a person who is in a permanent vegetative state (PVS), should withholding or withdrawal of life sustaining therapies (many authorities would include placement of an artificial feeding tube as a life sustaining intervention) be permissible or 'not unlawful' ?

2. If the patient has previously expressed a wish not to have life-sustaining treatments in case of futile care or a PVS, should his / her wishes be respected when the situation arises?

3. In case a person has not previously expressed such a wish, if his family or next of kin makes a request to withhold or withdraw futile life-sustaining treatments, should their wishes be respected?

4. Aruna Shanbaug has been abandoned by her family and is being looked after for the last 37 years by the staff of KEM Hospital. Who should take decisions on her behalf?

Questions such as these come up at times in the course

of medical practice. We realize that answers to these questions are difficult, and involve several ethical, legal and social issues. Our opinion is based on medical facts and on the principles of medical ethics. We hope that the Honourable Court will provide guidance and clarity in this matter.

Two of the cardinal principles of medical ethics are Patient Autonomy and Beneficiance.

1. Autonomy means the right to self-determination, where the informed patient has a right to choose the manner of his treatment. To be autonomous the patient should be competent to make decisions and choices. In the event that he is incompetent to make choices, his wishes expressed in advance in the form of a Living Will, OR the wishes of surrogates acting on his behalf ('substituted judgment') are to be respected.

The surrogate is expected to represent what the patient may have decided had he / she been competent, or to act in the patient's best interest. It is expected that a surrogate acting in the patient's best interest follows a course of action because it is best for the patient, and is not influenced by personal convictions, motives or other considerations.

2. Beneficence is acting in what is (or judged to be) in patient's best interest. Acting in the patient's best interest means following a course of action that is best for the patient, and is not influenced by personal convictions, motives or other considerations. In some cases, the doctor's expanded goals may include allowing the natural dying process (neither hastening nor delaying death, but 'letting nature take its course'), thus avoiding or reducing the sufferings of the patient and his family, and providing emotional support. This is not to be confused with euthanasia, which involves the doctor's deliberate and

intentional act through administering a lethal injection to end the life of the patient.

In the present case under consideration

1. We have no indication of Aruna Shanbaug's views or wishes with respect to life-sustaining treatments for a permanent vegetative state.

2. Any decision regarding her treatment will have to be taken by a surrogate

3. The staff of the KEM hospital have looked after her for 37 years, after she was abandoned by her family. We believe that the Dean of the KEM Hospital (representing the staff of hospital) is an appropriate surrogate.

4. If the doctors treating Aruna Shanbaug and the Dean of the KEM Hospital, together acting in the best interest of the patient, feel that life sustaining treatments should continue, their decision should be respected.

5. If the doctors treating Aruna Shanbaug and the Dean of the KEM Hospital, together acting in the best interest of the patient, feel that withholding or withdrawing life-sustaining treatments is the appropriate course of action, they should be allowed to do so, and their actions should not be considered unlawful.

10. To complete the narration of facts and before we come to the legal issues involved, we may mention that Dr. Sanjay Oak, Dean KEM Hospital Mumbai has issued a statement on 24.1.2011 opposing euthanasia for the petitioner :-

"She means a lot to KEM hospital. She is on liquid diet and loves listening to music. We have never subjected her to intravenous food or fed her via a tube. All these years, she hasn't had even one bedsore. When those looking after her do not have a problem, I don't understand why a

third party who has nothing to do with her [Pinky Virani who has moved the apex court to seek euthanasia for Shanbaug] needs to worry," added Dr Oak, who, when he took over as dean of KEM hospital in 2008, visited her first to take her blessings. "I call on her whenever I get time. I am there whenever she has dysentery or any another problem. She is very much alive and we have faith in the judiciary," said Dr Oak."

11. Dr. Sanjay Oak has subsequently filed an affidavit in this Court which states :

"a) Smt. Aruna Ramchandra Shanbaug has been admitted in a single room in Ward No.4 which is a ward of general internal medicine patients and she has been there for last 37 years. She is looked after entirely by doctors, nurses and para-medical staff of KEM Hospital. She has been our staff nurse and the unfortunate tragic incidence has happened with her in KEM Hospital and I must put on record that the entire medical, administrative, nursing and para-medical staff is extremely attached to her and consider her as one of us. Her relatives and a gentleman (her fiancee) used to visit her in the initial period of her illness but subsequently she has been left to the care of KEM staff. I visit her frequently and my last visit to her was on 22nd February, 2011. I give my observations as a Clinician about Smt. Aruna Shanbaug as under :

b) It would be incorrect to say that Smt. Aruna Shanbaug is an appropriate case for Coma. It appears that for a crucial, critical period her brain was deprived of Oxygen supply and this has resulted in her present state similar to that of Cerebral Palsy in the newborn child. It is a condition where brain looses it's co-ordinatory, sensory as well as motor functions and this includes loss of speech and perception. This has resulted into a state which in a layman's words **"Aruna lives in her own world for last**

37 years". She is lying in a bed in a single room for 33 years. She has not been able to stand or walk, nor have we attempted to do that of late because we fear that she is fragile and would break her bones if she falls. Her extremities and fingers have developed contractures and subsequent to non-use; there is wasting of her body muscles. Her eyes are open and she blinks frequently; however, these movements are not pertaining to a specific purpose or as a response to a question. At times she is quiet and at times she shouts or shrieks. However, I must say that her shouts and shrieks are completely oblivious to anybody's presence in her room. It is not true that she shouts after seeing a man. I do not think Aruna can distinguish between a man and a woman, nor can she even distinguish between ordinate and inordinate object. We play devotional songs rendered by Sadguru Wamanrao Pai continuously in her room and she lies down on her bed listening to them. She expresses her displeasure by grimaces and shouts if the tape recorder is switched off. All these years she was never fed by tube and whenever a nurse used to take food to her lips, she used to swallow it. It is only since September 2010 she developed Malaria and her oral intake dropped. In order to take care of her calorie make need, nurses cadre resorted to naso-gastric tube feed and now she is used to NG feeding. However, if small morsels are held near her lips, Aruna accepts them gladly. It appears that she relishes fish and occasionally smiles when she is given non-vegetarian food. However, I am honest in admitting that her smiles are not purposeful and it would be improper to interpret them as a signal of gratification. I must put on record that in the world history of medicine there would not be another single case where such a person is cared and nurtured in bed for 33 long years and has not developed a single bed sore. This speaks of volumes of excellence of nursing care that KEM Nursing staff has given to her.

c) This care is given not as a part of duty but as a part of feeling of oneness. With every new batch of entrants, the student nurses are introduced to her and they are told that she was one of us and she continues to be one of us and then they whole-heartedly take care of Aruna. In my opinion, this one is finest example of love, professionalism, dedication and commitment to one of our professional colleagues who is ailing and cannot support herself. Not once, in this long sojourn of 33 years, anybody has thought of putting an end to her so called vegetative existence. There have been several Deans and Doctors of KEM Hospital who have cared her in succession. Right from illustrious Dr. C.K. Deshpande in whose tenure the incidence happened in 1973, Dr. G.B. Parulkar, Dr. Smt. Pragna M. Pai, Dr. R.J. Shirahatti, Dr. Smt. N.A. Kshirsagar, Dr. M.E. Yeolekar and now myself Dr. Sanjay N. Oak, all of us have visited her room time and again and have cared for her and seen her through her ups and downs. The very idea of withholding food or putting her to sleep by active medication (mercy killing) is extremely difficult for anybody working in Seth GSMC & KEM Hospital to accept and I sincerely make a plea to the Learned Counsel and Hon'ble Judges of Supreme Court of India that this should not be allowed. Aruna has probably crossed 60 years of life and would one day meet her natural end. The Doctors, Nurses and staff of KEM, are determined to take care of her till her last breath by natural process.

d) I do not think it is proper on my part to make a comment on the entire case. However, as a clinical surgeon for last 3 decades and as an administrator of the hospitals for last 7 years and as a student of legal system of India (as I hold "Bachelor of Law" degree from Mumbai University), I feel that entire society has not matured enough to accept the execution of an Act of Euthanasia or Mercy Killing. I fear that this may get misused and our

monitoring and deterring mechanisms may fail to prevent those unfortunate incidences. To me any mature society is best judged by it's capacity and commitment to take care of it's "invalid" ones. They are the children of Lesser God and in fact, developing nation as we are, we should move in a positive manner of taking care of several unfortunate ones who have deficiencies, disabilities and deformities."

12. The Hospital staff of KEM Hospital, Mumbai e.g. the doctors, sister-in-charge ward no. 4 KEM hospital Lenny Cornielo, Assistant Matron Urmila Chauhan and others have also issued statements that they were looking after Aruna Shanbaug and want her to live. "Aruna is the bond that unites us", the KEM Hospital staff has stated. One retired nurse, Tidi Makwana, who used to take care of Aruna while in service, has even offered to continue to take care of her without any salary and without charging any traveling expenses.

13. We have referred to these statements because it is evident that the KEM Hospital staff right from the Dean, including the present Dean Dr. Sanjay Oak and down to the staff nurses and para-medical staff have been looking after Aruna for 38 years day and night. What they have done is simply marvelous. They feed Aruna, wash her, bathe her, cut her nails, and generally take care of her, and they have been doing this not on a few occasions but day and night, year after year. The whole country must learn the meaning of dedication and sacrifice from the KEM hospital staff. In 38 years Aruna has not developed one bed sore.

14. It is thus obvious that the KEM hospital staff has developed an emotional bonding and attachment to Aruna Shanbaug, and in a sense they are her real family today. Ms. Pinki Virani who claims to be the next friend of Aruna Shanbaug and has filed this petition on her behalf is not a relative of Aruna Shanbaug nor can she claim to have such close emotional bonding with her as the KEM hospital staff. Hence, we are treating the KEM hospital staff as the next friend of Aruna

Shanbaug and we decline to recognize Ms. Pinki Virani as her next friend. No doubt Ms. Pinki Virani has written a book about Aruna Shanbaug and has visited her a few times, and we have great respect for her for the social causes she has espoused, but she cannot claim to have the extent of attachment or bonding with Aruna which the KEM hospital staff, which has been looking after her for years, claims to have.

SUBMISSIONS OF LEARNED COUNSEL FOR THE PARTIES

15. Mr. Shekhar Naphade, learned senior counsel for the petitioner has relied on the decision of this Court in *Vikram Deo Singh Tomar vs. State of Bihar* 1988 (Supp) SCC 734 (vide para 2) where it was observed by this Court :

> "We live in an age when this Court has demonstrated, while interpreting Article 21 of the Constitution, that every person is entitled to a quality of life consistent with his human personality. The right to live with human dignity is the fundamental right of every Indian citizen".

16. He has also relied on the decision of this Court in *P. Rathinam vs. Union of India and another* (1994) 3 SCC 394 in which a two-Judge bench of this Court quoted with approval a passage from an article by Dr. M. Indira and Dr. Alka Dhal in which it was mentioned :

> "Life is not mere living but living in health. Health is not the absence of illness but a glowing vitality".

17. The decision in *Rathinam's* case (supra) was, however, overruled by a Constitution Bench decision of this Court in *Gian Kaur vs. State of Punjab* (1996) 2 SCC 648.

18. Mr. Naphade, however, has invited our attention to paras 24 & 25 of the aforesaid decision in which it was observed :

"(24) Protagonism of euthanasia on the view that existence in persistent vegetative state (PVS) is not a benefit to the patient of a terminal illness being unrelated to the principle of 'sanctity of life' or the right to live with dignity' is of no assistance to determine the scope of Article 21 for deciding whether the guarantee of right to life' therein includes the right to die'. The right to life' including the right to live with human dignity would mean the existence of such a right upto the end of natural life. This also includes the right to a dignified life upto the point of death including a dignified procedure of death. In other words, this may include the right of a dying man to also die with dignity when his life is ebbing out. But the 'right to die' with dignity at the end of life is not to be confused or equated with the right to die' an unnatural death curtailing the natural span of life.

(25) A question may arise, in the context of a dying man, who is, terminally ill or in a persistent vegetative state that he may be permitted to terminate it by a premature extinction of his life in those circumstances. This category of cases may fall within the ambit of the 'right to die' with dignity as a part of right to live with dignity, when death due to termination of natural life is certain and imminent and the process of natural death has commenced. These are not cases of extinguishing life but only of accelerating conclusion of the process of natural death which has already commenced. The debate even in such cases to permit physician assisted termination of life is inconclusive. It is sufficient to reiterate that the argument to support the view of permitting termination of life in such cases to reduce the period of suffering during the process of certain natural death is not available to interpret Article 21 to include therein the right to curtail the natural span of life".

He has particularly emphasized paragraph 25 of the said judgment in support of his submission that Aruna Shanbaug

should be allowed to die.

19. We have carefully considered paragraphs 24 and 25 in *Gian Kaur's* case (supra) and we are of the opinion that all that has been said therein is that the view in *Rathinam's* case (supra) that the right to life includes the right to die is not correct. We cannot construe *Gian Kaur's* case (supra) to mean anything beyond that. In fact, it has been specifically mentioned in paragraph 25 of the aforesaid decision that "the debate even in such cases to permit physician assisted termination of life is inconclusive". Thus it is obvious that no final view was expressed in the decision in Gian Kaur's case beyond what we have mentioned above.

20. Mr. Naphade, learned senior counsel submitted that Ms. Pinky Virani is the next friend of Aruna as she has written a book on her life called **'Aruna's story'** and has been following Aruna's case from 1980 and has done whatever possible and within her means to help Aruna. Mr. Naphade has also invited our attention to the report of the Law Commission of India, 2006 on **'Medical Treatment to Terminally Ill Patients'**. We have perused the said report carefully.

21. Learned Attorney General appearing for the Union of India after inviting our attention to the relevant case law submitted as under :

(i) Aruna Ramchandra Shanbaug has the right to live in her present state.

(ii) The state that Aruna Ramchandra Shanbaug is presently in does not justify terminating her life by withdrawing hydration/food/medical support.

(iii) The aforesaid acts or series of acts and/or such omissions will be cruel, inhuman and intolerable.

(iv) Withdrawing/withholding of hydration/food/medical

support to a patient is unknown to Indian law and is contrary to law.

(v) In case hydration or food is withdrawn/withheld from Aruna Ramchandra Shanbaug, the efforts which have been put in by batches after batches of nurses of KEM Hospital for the last 37 years will be undermined.

(vi) Besides causing a deep sense of resentment in the nursing staff as well as other well wishers of Aruna Ramchandra Shanbaug in KEM Hospital including the management, such acts/omissions will lead to disheartenment in them and large scale disillusionment.

(vii) In any event, these acts/omissions cannot be permitted at the instance of Ms. Pinky Virani who desires to be the next friend of Aruna Ramchandra Shanbaug without any locus.

Learned Attorney General stated that the report of the Law Commission of India on euthanasia has not been accepted by the Government of India. He further submitted that Indian society is emotional and care-oriented. We do not send our parents to old age homes, as it happens in the West. He stated that there was a great danger in permitting euthanasia that the relatives of a person may conspire with doctors and get him killed to inherit his property. He further submitted that tomorrow there may be a cure to a medical state perceived as incurable today.

22. Mr. T. R. Andhyarujina, learned senior counsel whom we had appointed as Amicus Curiae, in his erudite submissions explained to us the law on the point. He submitted that in general in common law it is the right of every individual to have the control of his own person free from all restraints or interferences of others. Every human being of adult years and sound mind has a right to determine what shall be done with

his own body. In the case of medical treatment, for example, a surgeon who performs an operation without the patient's consent commits assault or battery.

23. It follows as a corollary that the patient possesses the right not to consent i.e. to refuse treatment. (In the United States this right is reinforced by a Constitutional right of privacy). This is known as the principle of self-determination or informed consent.

24. Mr. Andhyarujina submitted that the principle of self-determination applies when a patient of sound mind requires that life support should be discontinued. The same principle applies where a patient's consent has been expressed at an earlier date before he became unconscious or otherwise incapable of communicating it as by a 'living will' or by giving written authority to doctors in anticipation of his incompetent situation.

Mr. Andhyarujina differed from the view of the learned Attorney General in that while the latter opposed even passive euthanasia, Mr. Andhyarujina was in favour of passive euthanasia provided the decision to discontinue life support was taken by responsible medical practitioners.

25. If the doctor acts on such consent there is no question of the patient committing suicide or of the doctor having aided or abetted him in doing so. It is simply that the patient, as he is entitled to do, declines to consent to treatment which might or would have the effect of prolonging his life and the doctor has in accordance with his duties complied with the patient's wishes.

26. The troublesome question is what happens when the patient is in no condition to be able to say whether or not he consents to discontinuance of the treatment and has also given no prior indication of his wishes with regard to it as in the case of Aruna. In such a situation the patient being incompetent to

express his self-determination the approach adopted in some of the American cases is of "substituted judgment" or the judgment of a surrogate. This involves a detailed inquiry into the patient's views and preferences. The surrogate decision maker has to gather from material facts as far as possible the decision which the incompetent patient would have made if he was competent. However, such a test is not favoured in English law in relation to incompetent adults.

27. Absent any indication from a patient who is incompetent the test which is adopted by Courts is what is in the best interest of the patient whose life is artificially prolonged by such life support. This is not a question whether it is in the best interest of the patient that he should die. The question is whether it is in the best interest of the patient that his life should be prolonged by the continuance of the life support treatment. This opinion must be formed by a responsible and competent body of medical persons in charge of the patient.

28. The withdrawal of life support by the doctors is in law considered as an omission and not a positive step to terminate the life. The latter would be euthanasia, a criminal offence under the present law in UK, USA and India.

29. In such a situation, generally the wishes of the patient's immediate family will be given due weight, though their views cannot be determinative of the carrying on of treatment as they cannot dictate to responsible and competent doctors what is in the best interest of the patient. However, experience shows that in most cases the opinions of the doctors and the immediate relatives coincide.

30. Whilst this Court has held that there is no right to die (suicide) under Article 21 of the Constitution and attempt to suicide is a crime vide Section 309 IPC, the Court has held that the right to life includes the right to live with human dignity, and in the case of a dying person who is terminally ill or in a permanent vegetative state he may be permitted to terminate

it by a premature extinction of his life in these circumstances and it is not a crime vide *Gian Kaur's* case (supra).

31. Mr. Andhyarujina submitted that the decision to withdraw the life support is taken in the best interests of the patient by a body of medical persons. It is not the function of the Court to evaluate the situation and form an opinion on its own. In England for historical reasons the parens patriae jurisdiction over adult mentally incompetent persons was abolished by statute and the Court has no power now to give its consent. In this situation, the Court only gives a declaration that the proposed omission by doctors is not unlawful.

32. In U.K., the Mental Capacity Act, 2005 now makes provision relating to persons who lack capacity and to determine what is in their best interests and the power to make declaration by a special Court of Protection as to the lawfulness of any act done in relation to a patient.

33. Mr. Andhyarujina submitted that the withdrawal of nutrition by stopping essential food by means of nasogastric tube is not the same as unplugging a ventilator which artificially breathes air into the lungs of a patient incapable of breathing resulting in instant death. In case of discontinuance of artificial feeding the patient will as a result starve to death with all the sufferings and pain and distress associated with such starving. This is a very relevant consideration in a PVS patient like Aruna who is not totally unconscious and has sensory conditions of pain etc. unlike *Antony Bland in Airedale vs. Director MHD* (1993) 2 WLR 316 who was totally unconscious. Would the doctor be able to avoid such pain or distress by use of sedatives etc.? In such a condition would it not be more appropriate to continue with the nasogastric feeding but not take any other active steps to combat any other illness which she may contract and which may lead to her death?

34. Mr. Andhyarujina further submitted that in a situation like that of Aruna, it is also necessary to recognize the deep

agony of nurses of the hospital who have with deep care looked after her for over 37 years and who may not appreciate the withdrawal of the life support. It may be necessary that their views should be considered by the Court in some appropriate way.

35. Mr. Andhyarujina, in the course of his submission stated that some Courts in USA have observed that the view of a surrogate may be taken to be the view of the incompetent patient for deciding whether to withdraw the life support, though the House of Lords in *Airedale's* case has not accepted this. He submitted that relatives of Aruna do not seem to have cared for her and it is only the nursing staff and medical attendants of KEM hospital who have looked after her for 37 years. He has also submitted that though the humanistic intention of Ms. Pinky Virani cannot be doubted, it is the opinion of the attending doctors and nursing staff which is more relevant in this case as they have looked after her for so many years.

36. Mr. Pallav Shishodia, learned senior counsel for the Dean, KEM hospital, Mumbai submitted that Ms. Pinky Virani has no locus standi in the matter and it is only the KEM hospital staff which could have filed such a writ petition.

37. We have also heard learned counsel for the State of Maharashtra, Mr. Chinmoy Khaldkar and other assisting counsel whose names have been mentioned in this judgment. They have been of great assistance to us as we are deciding a very sensitive and delicate issue which while requiring a humanistic approach, also requires great case and caution to prevent misuse. We were informed that not only the learned counsel who argued the case before us, but also the assistants (whose names have been mentioned in the judgment) have done research on the subject for several weeks, and indeed this has made our task easier in deciding this case. They therefore deserve our compliment and thanks.

Legal Issues : Active and Passive Euthanasia

38. Coming now to the legal issues in this case, it may be noted that euthanasia is of two types : active and passive. Active euthanasia entails the use of lethal substances or forces to kill a person e.g. a lethal injection given to a person with terminal cancer who is in terrible agony. Passive euthanasia entails withholding of medical treatment for continuance of life, e.g. withholding of antibiotics where without giving it a patient is likely to die, or removing the heart lung machine, from a patient in coma.

39. The general legal position all over the world seems to be that while active euthanasia is illegal unless there is legislation permitting it, passive euthanasia is legal even without legislation provided certain conditions and safeguards are maintained.

40. A further categorization of euthanasia is between voluntary euthanasia and non voluntary euthanasia. Voluntary euthanasia is where the consent is taken from the patient, whereas non voluntary euthanasia is where the consent is unavailable e.g. when the patient is in coma, or is otherwise unable to give consent. While there is no legal difficulty in the case of the former, the latter poses several problems, which we shall address.

ACTIVE EUTHANASIA

41. As already stated above active euthanasia is a crime all over the world except where permitted by legislation. In India active euthanasia is illegal and a crime under section 302 or at least section 304 IPC. Physician assisted suicide is a crime under section 306 IPC (abetment to suicide).

42. Active euthanasia is taking specific steps to cause the patient's death, such as injecting the patient with some lethal substance, e.g. sodium pentothal which causes a person deep sleep in a few seconds, and the person instantaneously and painlessly dies in this deep sleep.

43. A distinction is sometimes drawn between euthanasia and physician assisted dying, the difference being in who administers the lethal medication. In euthanasia, a physician or third party administers it, while in physician assisted suicide it is the patient himself who does it, though on the advice of the doctor. In many countries/States the latter is legal while the former is not.

44. The difference between "active" and "passive" euthanasia is that in active euthanasia, something is done to end the patient's life' while in passive euthanasia, something is not done that would have preserved the patient's life.

45. An important idea behind this distinction is that in "passive euthanasia" the doctors are not actively killing anyone; they are simply not saving him. While we usually applaud someone who saves another person's life, we do not normally condemn someone for failing to do so. If one rushes into a burning building and carries someone out to safety, he will probably be called a hero. But if one sees a burning building and people screaming for help, and he stands on the sidelines -- whether out of fear for his own safety, or the belief that an inexperienced and ill-equipped person like himself would only get in the way of the professional firefighters, or whatever -- if one does nothing, few would judge him for his inaction. One would surely not be prosecuted for homicide. (At least, not unless one started the fire in the first place.)

46. Thus, proponents of euthanasia say that while we can debate whether active euthanasia should be legal, there can be no debate about passive euthanasia: You cannot prosecute someone for failing to save a life. Even if you think it would be good for people to do X, you cannot make it illegal for people to not do X, or everyone in the country who did not do X today would have to be arrested.

47. Some persons are of the view that the distinction is not valid. They give the example of the old joke about the child

who says to his teacher, "Do you think it's right to punish someone for something that he didn't do?" "Why, of course not," the teacher replies. "Good," the child says, "because I didn't do my homework."

48. In fact we have many laws that penalize people for what they did not do. A person cannot simply decide not to pay his income taxes, or not bother to send his/her children to school (where the law requires sending them), or not to obey a policeman's order to put down one's gun.

49. However, we are of the opinion that the distinction is valid, as has been explained in some details by Lord Goff in Airedale's case (infra) which we shall presently discuss.

LEGISLATION IN SOME COUNTRIES RELATING TO EUTHANASIA OR PHYSICIAN ASSISTED DEATH

50. Although in the present case we are dealing with a case related to passive euthanasia, it would be of some interest to note the legislations in certain countries permitting active euthanasia. These are given below.

Netherlands:

Euthanasia in the Netherlands is regulated by the "Termination of Life on Request and Assisted Suicide (Review Procedures) Act", 2002. It states that euthanasia and physician-assisted suicide are not punishable if the attending physician acts in accordance with the criteria of due care. These criteria concern the patient's request, the patient's suffering (unbearable and hopeless), the information provided to the patient, the presence of reasonable alternatives, consultation of another physician and the applied method of ending life. To demonstrate their compliance, the Act requires physicians to report euthanasia to a review committee.

The legal debate concerning euthanasia in the Netherlands took off with the "Postma case" in 1973, concerning a physician who had facilitated the death of her mother following repeated explicit requests for euthanasia. While the physician was convicted, the court's judgment set out criteria when a doctor would not be required to keep a patient alive contrary to his will. This set of criteria was formalized in the course of a number of court cases during the 1980s.

Termination of Life on Request and Assisted Suicide (Review Procedures) Act took effect on April 1, 2002. It legalizes euthanasia and physician assisted suicide in very specific cases, under very specific circumstances. The law was proposed by Els Borst, the minister of Health. The procedures codified in the law had been a convention of the Dutch medical community for over twenty years.

The law allows a medical review board to suspend prosecution of doctors who performed euthanasia when each of the following conditions is fulfilled:

* the patient's suffering is unbearable with no prospect of improvement

* the patient's request for euthanasia must be voluntary and persist over time (the request cannot be granted when under the influence of others, psychological illness, or drugs)

* the patient must be fully aware of his/her condition, prospects and options

* there must be consultation with at least one other independent doctor who needs to confirm the conditions mentioned above

* the death must be carried out in a medically appropriate

fashion by the doctor or patient, in which case the doctor must be present

* the patient is at least 12 years old (patients between 12 and 16 years of age require the consent of their parents)

The doctor must also report the cause of death to the municipal coroner in accordance with the relevant provisions of the Burial and Cremation Act. A regional review committee assesses whether a case of termination of life on request or assisted suicide complies with the due care criteria. Depending on its findings, the case will either be closed or, if the conditions are not met, brought to the attention of the Public Prosecutor. Finally, the legislation offers an explicit recognition of the validity of a written declaration of the will of the patient regarding euthanasia (a "euthanasia directive"). Such declarations can be used when a patient is in a coma or otherwise unable to state if they wish to be euthanized.

Euthanasia remains a criminal offense in cases not meeting the law's specific conditions, with the exception of several situations that are not subject to the restrictions of the law at all, because they are considered normal medical practice. These are :

* stopping or not starting a medically useless (futile) treatment

* stopping or not starting a treatment at the patient's reques

* speeding up death as a side-effect of treatment necessary for alleviating serious suffering

Euthanasia of children under the age of 12 remains technically illegal; however, Dr. Eduard Verhagen has documented several cases and, together with colleagues and prosecutors, has developed a protocol to be followed in those cases. Prosecutors will refrain from pressing

charges if this Groningen Protocol is followed.

Switzerland:

Switzerland has an unusual position on assisted suicide: it is legally permitted and can be performed by non-physicians. However, euthanasia is illegal, the difference between assisted suicide and euthanasia being that while in the former the patient administers the lethal injection himself, in the latter a doctor or some other person administers it.

Article 115 of the Swiss penal code, which came into effect in 1942 (having been approved in 1937), considers assisting suicide a crime if, and only if, the motive is selfish. The code does not give physicians a special status in assisting suicide; although, they are most likely to have access to suitable drugs. Ethical guidelines have cautioned physicians against prescribing deadly drugs.

Switzerland seems to be the only country in which the law limits the circumstances in which assisted suicide is a crime, thereby decriminalising it in other cases, without requiring the involvement of a physician. Consequently, non-physicians have participated in assisted suicide. However, legally, active euthanasia e.g. administering a lethal injection by a doctor or some other person to a patient is illegal in Switzerland (unlike in Holland where it is legal under certain conditions).

The Swiss law is unique because (1) the recipient need not be a Swiss national, and (2) a physician need not be involved. Many persons from other countries, especially Germany, go to Switzerland to undergo euthanasia.

Belgium:

Belgium became the second country in Europe after

Netherlands to legalize the practice of euthanasia in September 2002.

The Belgian law sets out conditions under which suicide can be practised without giving doctors a licence to kill.

Patients wishing to end their own lives must be conscious when the demand is made and repeat their request for euthanasia. They have to be under "constant and unbearable physical or psychological pain" resulting from an accident or incurable illness.

The law gives patients the right to receive ongoing treatment with painkillers -- the authorities have to pay to ensure that poor or isolated patients do not ask to die because they do not have money for such treatment.

Unlike the Dutch legislation, minors cannot seek assistance to die.

In the case of someone who is not in the terminal stages of illness, a third medical opinion must be sought.

Every mercy killing case will have to be filed at a special commission to decide if the doctors in charge are following the regulations.

U.K., Spain, Austria, Italy, Germany, France, etc.

In none of these countries is euthanasia or physician assisted death legal. In January 2011 the French Senate defeated by a 170-142 vote a bill seeking to legalize euthanasia. In England, in May 2006 a bill allowing physician assisted suicide, was blocked, and never became law.

United States of America:

Active Euthanasia is illegal in all states in U.S.A., but

physician assisted dying is legal in the states of Oregon, Washington and Montana. As already pointed out above, the difference between euthanasia and physician assisted suicide lies in who administers the lethal medication. In the former, the physician or someone else administers it, while in the latter the patient himself does so, though on the advice of the doctor.

Oregon:

Oregon was the first state in U.S.A. to legalize physician assisted death.

The Oregon legislature enacted the Oregon Death with Dignity Act, in 1997. Under the Death With Dignity Act, a person who sought physician-assisted suicide would have to meet certain criteria:

* He must be an Oregon resident, at least 18 years old, and must have decision making capacity.

* The person must be terminally ill, having six months or less to live.

* The person must make one written and two oral requests for medication to end his/her life, the written one substantially in the form provided in the Act, signed, dated, witnessed by two persons in the presence of the patient who attest that the person is capable, acting voluntarily and not being coerced to sign the request. There are stringent qualifications as to who may act as a witness.

* The patient's decision must be an 'informed' one, and the attending physician is obligated to provide the patient with information about the diagnosis, prognosis, potential risks, and probable consequences of taking the prescribed medication, and alternatives, including, but not limited to comfort care, hospice care and pain control.

Another physician must confirm the diagnosis, the patient's decision making capacity, and voluntariness of the patient's decisions.

* Counselling has to be provided if the patient is suffering from depression or a mental disorder which may impact his judgment.

* There has to be a waiting period of 15 days, next of kin have to be notified, and State authorities have to be informed.

* The patient can rescind his decision at any time

In response to concerns that patients with depression may seek to end their lives, the 1999 amendment provides that the attending physician must determine that the patient does not have 'depression causing impaired judgment' before prescribing the medication.

Under the law, a person who met all requirements could receive a prescription of a barbiturate that would be sufficient to cause death. However, the lethal injection must be administered by the patient himself, and physicians are prohibited from administering it.

The landmark case to declare that the practice of euthanasia by doctors to help their patients shall not be taken into cognizance was *Gonzalez vs Oregon* decided in 2006.

After the Oregon Law was enacted about 200 persons have had euthanasia in Oregon.

Washington:

Washington was the second state in U.S.A. which allowed the practice of physician assisted death in the year 2008 by passing the Washington Death with Dignity Act, 2008.

Montana:

Montana was the third state (after Oregon and Washington) in U.S.A. to legalize physician assisted deaths, but this was done by the State judiciary and not the legislature. On December 31, 2009, the Montana Supreme Court delivered its verdict in the case of Baxter v. Montana permitting physicians to prescribe lethal indication. The court held that there was "nothing in Montana Supreme Court precedent or Montana statutes indicating that physician aid in dying is against public policy."

Other States in U.S.A.:

In no other State in U.S.A. is euthanasia or physician assisted death legal. Michigan banned euthanasia and assisted suicide in 1993, after Dr. Kevorkian (who became known as 'doctor death') began encouraging and assisting in suicides. He was convicted in 1999 for an assisted suicide displayed on television, his medical licence cancelled, and he spent 8 years in jail.

In 1999 the State of Texas enacted the Texas Futile Care Law which entitles Texas hospitals and doctors, in some situations, to withdraw life support measures, such as mechanical respiration, from terminally ill patient when such treatment is considered futile and inappropriate. However, Texas has not legalized euthanasia or physician assisted death. In California, though 75 of people support physician assisted death, the issue is highly controversial in the State legislature. Forty States in USA have enacted laws which explicitly make it a crime to provide another with the means of taking his or her life.

In 1977 California legalized living wills, and other States soon followed suit. A living will (also known as advance directive or advance decision) is an instruction given by

an individual while conscious specifying what action should be taken in the event he/she is unable to make a decision due to illness or incapacity, and appoints a person to take such decisions on his/her behalf. It may include a directive to withdraw life support on certain eventualities.

Canada:

In Canada, physician assisted suicide is illegal vide Section 241(b) of the Criminal Code of Canada.

The leading decision of the Canadian Supreme Court in this connection is *Sue Rodriguez v. British Columbia (Attorney General),* (1993) 3 SCR 519. Rodriguez, a woman of 43, was diagnosed with Amyotrophic Lateral Sclerosis (ALS), and requested the Canadian Supreme Court to allow someone to aid her in ending her life. Her condition was deteriorating rapidly, and the doctors told her that she would soon lose the ability to swallow, speak, walk, and move her body without assistance. Thereafter she would lose her capacity to breathe without a respirator, to eat without a gastrotomy, and would eventually be confined to bed. Her life expectancy was 2 to 14 months.

The Canadian Supreme Court was deeply divided. By a 5 to 4 majority her plea was rejected. Justice Sopinka, speaking for the majority (which included Justices La Forest, Gonthier, Iacobucci and Major) observed :

> "Sanctity of life has been understood historically as excluding freedom of choice in the self infliction of death, and certainly in the involvement of others in carrying out that choice. At the very least, no new consensus has emerged in society opposing the right of the State to regulate the involvement of others in exercising power over individuals ending their lives."

The minority, consisting of Chief Justice Lamer and Justices L'Heureux-Dube, Cory and McLachlin, dissented.

PASSIVE EUTHANASIA

51. Passive euthanasia is usually defined as withdrawing medical treatment with a deliberate intention of causing the patient's death. For example, if a patient requires kidney dialysis to survive, not giving dialysis although the machine is available, is passive euthanasia. Similarly, if a patient is in coma or on a heart lung machine, withdrawing of the machine will ordinarily result in passive euthanasia. Similarly not giving life saving medicines like antibiotics in certain situations may result in passive euthanasia. Denying food to a person in coma or PVS may also amount to passive euthanasia.

52. As already stated above, euthanasia can be both voluntary or non voluntary. In voluntary passive euthanasia a person who is capable of deciding for himself decides that he would prefer to die (which may be for various reasons e.g., that he is in great pain or that the money being spent on his treatment should instead be given to his family who are in greater need, etc.), and for this purpose he consciously and of his own free will refuses to take life saving medicines. In India, if a person consciously and voluntarily refuses to take life saving medical treatment it is not a crime. Whether not taking food consciously and voluntarily with the aim of ending one's life is a crime under section 309 IPC (attempt to commit suicide) is a question which need not be decided in this case.

53. Non voluntary passive euthanasia implies that the person is not in a position to decide for himself e.g., if he is in coma or PVS. The present is a case where we have to consider non voluntary passive euthanasia i.e. whether to allow a person to die who is not in a position to give his/her consent.

54. There is a plethora of case law on the subject of the Courts all over the world relating to both active and passive

euthanasia. It is not necessary to refer in detail to all the decisions of the Courts in the world on the subject of euthanasia or physically assisted dead (p.a.d.) but we think it appropriate to refer in detail to certain landmark decisions, which have laid down the law on the subject.

THE AIREDALE CASE : (Airedale NHS Trust v. Bland (1993) All E.R. 82) (H.L.)

55. In the *Airedale* case decided by the House of Lords in the U.K., the facts were that one Anthony Bland aged about 17 went to the Hillsborough Ground on 15th April 1989 to support the Liverpool Football Club. In the course of the disaster which occurred on that day, his lungs were crushed and punctured and the supply to his brain was interrupted. As a result, he suffered catastrophic and irreversible damage to the higher centres of the brain. For three years, he was in a condition known as 'persistent vegetative state (PVS). This state arises from the destruction of the cerebral cortex on account of prolonged deprivation of oxygen, and the cerebral cortex of Anthony had resolved into a watery mass. The cortex is that part of the brain which is the seat of cognitive function and sensory capacity. Anthony Bland could not see, hear or feel anything. He could not communicate in any way. His consciousness, which is an essential feature of an individual personality, had departed forever. However, his brain-stem, which controls the reflective functions of the body, in particular the heart beat, breathing and digestion, continued to operate. He was in persistent vegetative state (PVS) which is a recognized medical condition quite distinct from other conditions sometimes known as "irreversible coma", "the Guillain-Barre syndrome", "the locked-in syndrome" and "brain death".

56. The distinguishing characteristic of PVS is that the brain stem remains alive and functioning while the cortex has lost its function and activity. Thus the PVS patient continues to breathe unaided and his digestion continues to function. But

although his eyes are open, he cannot see. He cannot hear. Although capable of reflex movement, particularly in response to painful stimuli, the patient is uncapable of voluntary movement and can feel no pain. He cannot taste or smell. He cannot speak or communicate in any way. He has no cognitive function and thus can feel no emotion, whether pleasure or distress. The absence of cerebral function is not a matter of surmise; it can be scientifically demonstrated. The space which the brain should occupy is full of watery fluid.

57. In order to maintain Mr. Bland in his condition, feeding and hydration were achieved by artificial means of a nasogastric tube while the excretory functions were regulated by a catheter and enemas. According to eminent medical opinion, there was no prospect whatsoever that he would ever make a recovery from his condition, but there was every likelihood that he would maintain this state of existence for many years to come provided the artificial means of medical care was continued.

58. In this state of affairs the medical men in charge of Anthony Bland case took the view, which was supported by his parents, that no useful purpose would be served by continuing medical care, and that artificial feeding and other measures aimed at prolonging his existence should be stopped. Since however, there was a doubt as to whether this course might constitute a criminal offence, the hospital authorities sought a declaration from the British High Court to resolve these doubts.

59. The declaration was granted by the Family Division of the High Court on 19.11.1992 and that judgment was affirmed by the Court of Appeal on 9.12.1992. A further appeal was made to the House of Lords which then decided the case.

60. The broad issued raised before the House of Lords in the *Airedale* case (supra) was "In what circumstances, if ever, can those having a duty to feed an invalid lawfully stop doing so?" In fact this is precisely the question raised in the present

case of Aruna Shanbaug before us.

61. In *Airedale's* case (supra), Lord Keith of Kinkel, noted that it was unlawful to administer treatment to an adult who is conscious and of sound mind, without his consent. Such a person is completely at liberty to decline to undergo treatment, even if the result of his doing so will be that he will die. This extends to the situation where the person in anticipation of his entering into a condition such as PVS, gives clear instructions that in such an event he is not to be given medical care, including artificial feeding, designed to keep him alive.

62. It was held that if a person, due to accident or some other cause becomes unconscious and is thus not able to give or withhold consent to medical treatment, in that situation it is lawful for medical men to apply such treatment as in their informed opinion is in the best interests of the unconscious patient. That is what happened in the case of Anthony Bland when he was first dealt with by the emergency services and later taken to hospital.

63. When the incident happened the first imperative was to prevent Anthony from dying, as he would certainly have done in the absence of the steps that were taken. For a time, no doubt, there was some hope that he might recover sufficiently for him to be able to live a life that had some meaning. Some patients who have suffered damage to the cerebral cortex have, indeed, made a complete recovery. It all depends on the degree of damage. But sound medical opinion takes the view that if a P.V.S. patient shows no signs of recovery after six months, or at most a year, then there is no prospect whatever of any recovery.

64. There are techniques available which make it possible to ascertain the state of the cerebral cortex, and in Anthony Bland's case these indicated that, it had degenerated into a mass of watery fluid. In this situation the question before the House of Lords was whether the doctors could withdraw medical

treatment or feeding Anthony Bland thus allowing him to die.

65. It was held by Lord Keith that a medical practitioner is under no duty to continue to treat such a patient where a large body of informed and responsible medical opinion is to the effect that no benefit at all would be conferred by continuance of the treatment. Existence in a vegetative state with no prospect of recovery is by that opinion regarded as not being of benefit to the patient.

66. Given that existence in the persistent vegetative state is of no benefit to the patient, the House of Lords then considered whether the principle of the sanctity of life which is the concern of the State (and the Judiciary is one of the arms of the State) required the Court to hold that medical treatment to Bland could not be discontinued.

67. Lord Keith observed that the principle of sanctity of life is not an absolute one. For instance, it does not compel the medical practitioner on pain of criminal sanction to treat a patient, who will die, if he does not, according to the express wish of the patient. It does not authorize forcible feeding of prisoners on hunger strike. It does not compel the temporary keeping alive of patients who are terminally ill where to do so would merely prolong their suffering. On the other hand, it forbids the taking of active measures to cut short the life of a terminally-ill patient (unless there is legislation which permits it).

68. Lord Keith observed that although the decision whether or not the continued treatment and cure of a PVS patient confers any benefit on him is essentially one for the medical practitioners in charge of his case to decide, *as a matter of routine the hospital/medical practitioner should apply to the Family Division of the High Court for endorsing or reversing the said decision. This is in the interest of the protection of the patient, protection of the doctors, and for the reassurance of the patient's family and the public*.

69. In *Airdale's* case (Supra) another Judge on the Bench, Lord Goff of Chievely observed:-

"The central issue in the present case has been aptly stated by the Master of the Rolls to be whether artificial feeding and antibiotic drugs may lawfully be withheld from an insensate patient with no hope of recovery when it is known that if that is done the patient will shortly thereafter die. The Court of Appeal, like the President, answered this question generally in the affirmative, and (in the declarations made or approved by them) specifically also in the affirmative in relation to Anthony Bland . I find myself to be in agreement with the conclusions so reached by all the judges below, substantially for the reasons given by them. But the matter is of such importance that I propose to express my reasons in my own words.

I start with the simple fact that, in law, Anthony is still alive. It is true that his condition is such that it can be described as a living death; but he is nevertheless still alive. This is because, as a result of developments in modern medical technology, doctors no longer associate death exclusively with breathing and heart beat, and it has come to be accepted that death occurs when the brain, and in particular the brain stem, has been destroyed (see Professor Ian Kennedy's Paper entitled "Switching off Life Support Machines: The Legal Implications" reprinted in Treat Me Right, Essays in Medical Law and Ethics, (1988)), especially at pp. 351-2, and the material there cited). There has been no dispute on this point in the present case, and it is unnecessary for me to consider it further. The evidence is that Anthony's brain stem is still alive and functioning and it follows that, in the present state of medical science, he is still alive and should be so regarded as a matter of law.

It is on this basis that I turn to the applicable principles of

law. Here, the fundamental principle is the principle of the sanctity of human life – a principle long recognized not only in our own society but also in most, if not all, civilized societies throughout the modern world, as is indeed evidenced by its recognition both in article 2 of the European Convention of Human Rights, and in article 6 of the International Covenant of Civil and Political Rights.

But this principle, fundamental though it is, is not absolute. Indeed there are circumstances in which it is lawful to take another man's life, for example by a lawful act of self-defence, or (in the days when capital punishment was acceptable in our society) by lawful execution. We are not however concerned with cases such as these. We are concerned with circumstances in which it may be lawful to withhold from a patient medical treatment or care by means of which his life may be prolonged. But here too there is no absolute rule that the patient's life must be prolonged by such treatment or care, if available, regardless of the circumstances.

First, it is established that the principle of self-determination requires that respect must be given to the wishes of the patient, so that if an adult patient of sound mind refuses, however unreasonably, to consent to treatment or care by which his life would or might be prolonged, the doctors responsible for his care must give effect to his wishes, even though they do not consider it to be in his best interests to do so (see *Schloendorff v . Society of New York Hospital* 105 N.E. 92, 93, per Cardozo J. (1914); S. v . McC. (Orse S.) and M (D.S. Intervene); W v . W [1972] A.C. 24, 43, per Lord Reid; and *Sidaway v . Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871, 882, per Lord Scarman). To this extent, the principle of the sanctity of human life must yield to the principle of self-determination (see Court of Appeal Transcript in the

present case, at p. 38F per Hoffmann L.J.), and, for present purposes perhaps more important, the doctor's duty to act in the best interests of his patient must likewise be qualified. On this basis, it has been held that a patient of sound mind may, if properly informed, require that life support should be discontinued: see *Nancy B. v. Hotel Dieu de Quebec* (1992) 86 D.L.R. (4th) 385. Moreover the same principle applies where the patient's refusal to give his consent has been expressed at an earlier date, before he became unconscious or otherwise incapable of communicating it; though in such circumstances especial care may be necessary to ensure that the prior refusal of consent is still properly to be regarded as applicable in the circumstances which have subsequently occurred (see, e.g. In re T. (Adult: Refusal of treatment) [1992] 3 W.L.R. 782). I wish to add that, in *cases of this kind, there is no question of the patient having committed suicide, nor therefore of the doctor having aided or abetted him in doing so.* It is simply that the patient has, as he is entitled to do, declined to consent to treatment which might or would have the effect of prolonging his life, and the doctor has, in accordance with his duty, complied with his patient's wishes.

But in many cases not only may the patient be in no condition to be able to say whether or not he consents to the relevant treatment or care, but also he may have given no prior indication of his wishes with regard to it. In the case of a child who is a ward of court, the court itself will decide whether medical treatment should be provided in the child's best interests, taking into account medical opinion. But the court cannot give its consent on behalf of an adult patient who is incapable of himself deciding whether or not to consent to treatment. I am of the opinion that *there is nevertheless no absolute obligation upon the doctor who has the patient in his care to prolong his life, regardless of the circumstances.* Indeed, it would be most

startling, and could lead to the most adverse and cruel effects upon the patient, if any such absolute rule were held to exist. It is scarcely consistent with the primacy given to the principle of self-determination in those cases in which the patient of sound mind has declined to give his consent, that the law should provide no means of enabling treatment to be withheld in appropriate circumstances where the patient is in no condition to indicate, if that was his wish, that he did not consent to it. The point was put forcibly in the judgment of the Supreme Judicial Court of Massachusetts in *Superintendent of Belchertown State School v. Saikewicz* (1977) 370 N.E. 2d. 417, 428, as follows:

"To presume that the incompetent person must always be subjected to what many rational and intelligent persons may decline is to downgrade the status of the incompetent person by placing a lesser value on his intrinsic human worth and vitality."

I must however stress, at this point, that the law draws a crucial distinction between cases in which a doctor decides not to provide, or to continue to provide, for his patient treatment or care which could or might prolong his life, and those in which he decides, for example by administering a lethal drug, actively to bring his patient's life to an end. As I have already indicated, the former may be lawful, either because the doctor is giving effect to his patient's wishes by withholding the treatment or care, or even in certain circumstances in which (on principles which I shall describe) the patient is incapacitated from stating whether or not he gives his consent. But *it is not lawful for a doctor to administer a drug to his patient to bring about his death, even though that course is prompted by a humanitarian desire to end his suffering, however great that suffering may be*: see *Reg. v. Cox* (Unreported), Ognall J., Winchester Crown Court, 18 September 1992.

So to act is to cross the Rubicon which runs between on the one hand the care of the living patient and on the other hand euthanasia - actively causing his death to avoid or to end his suffering. Euthanasia is not lawful at common law. It is of course well known that there are many responsible members of our society who believe that euthanasia should be made lawful; but that result could, I believe, only be achieved by legislation which expresses the democratic will that so fundamental a change should be made in our law, and can, if enacted, ensure that such legalised killing can only be carried out subject to appropriate supervision and control. It is true that the drawing of this distinction may lead to a charge of hypocrisy; because it can be asked why, if the doctor, by discontinuing treatment, is entitled in consequence to let his patient die, it should not be lawful to put him out of his misery straight away, in a more humane manner, by a lethal injection, rather than let him linger on in pain until he dies. But the law does not feel able to authorize euthanasia, even in circumstances such as these; for once euthanasia is recognized as lawful in these circumstances, it is difficult to see any logical basis for excluding it in others.

At the heart of this distinction lies a theoretical question. Why is it that the doctor who gives his patient a lethal injection which kills him commits an unlawful act and indeed is guilty of murder, whereas a doctor who, by discontinuing life support, allows his patient to die, may not act unlawfully - and will not do so, if he commits no breach of duty to his patient? Professor Glanville Williams has suggested (see his Textbook of Criminal Law, 2nd ed., p. 282) that the reason is that *what the doctor does when he switches off a life support machine 'is in substance not an act but an omission to struggle, and that 'the omission is not a breach of duty by the doctor because he is not obliged to continue in a hopeless case'*.

I agree that the doctor's conduct in discontinuing life support can properly be categorized as an omission. It is true that it may be difficult to describe what the doctor actually does as an omission, for example where he takes some positive step to bring the life support to an end. But *discontinuation of life support is, for present purposes, no different from not initiating life support in the first place.* In each case, the doctor is simply allowing his patient to die in the sense that he is desisting from taking a step which might, in certain circumstances, prevent his patient from dying as a result of his pre-existing condition; and as a matter of general principle an omission such as this will not be unlawful unless it constitutes a breach of duty to the patient. I also agree that the doctor's conduct is to be differentiated from that of, for example, an interloper who maliciously switches off a life support machine because, although the interloper may perform exactly the same act as the doctor who discontinues life support, his doing so constitutes interference with the life-prolonging treatment then being administered by the doctor. Accordingly, whereas the doctor, in discontinuing life support, is simply allowing his patient to die of his pre-existing condition, the interloper is actively intervening to stop the doctor from prolonging the patient's life, and such conduct cannot possibly be categorised as an omission.

The distinction appears, therefore, to be useful in the present context in that it can be invoked to explain how discontinuance of life support can be differentiated from ending a patient's life by a lethal injection. But in the end the reason for that difference is that, whereas the law considers that discontinuance of life support may be consistent with the doctor's duty to care for his patient, it does not, for reasons of policy, consider that it forms any part of his duty to give his patient a lethal injection to put him out of his agony.

I return to the patient who, because for example he is of

unsound mind or has been rendered unconscious by accident or by illness, is incapable of stating whether or not he consents to treatment or care. In such circumstances, it is now established that a doctor may lawfully treat such a patient if he acts in his best interests, and indeed that, if the patient is already in his care, he is under a duty so to treat him: see In re F [1990] 2 AC 1, in which the legal principles governing treatment in such circumstances were stated by this House. For my part I can see no reason why, as a matter of principle, a decision by a doctor whether or not to initiate, or to continue to provide, treatment or care which could or might have the effect of prolonging such a patient's life, should not be governed by the same fundamental principle. Of course, in the great majority of cases, the best interests of the patient are likely to require that treatment of this kind, if available, should be given to a patient. But this may not always be so. To take a simple example given by Thomas J. in Re J.H.L. (Unreported) (High Court of New Zealand) 13 August 1992, at p. 35), to whose judgment in that case I wish to pay tribute, it cannot be right that a doctor, who has under his care a patient suffering painfully from terminal cancer, should be under an absolute obligation to perform upon him major surgery to abate another condition which, if unabated, would or might shorten his life still further. The doctor who is caring for such a patient cannot, in my opinion, be under an absolute obligation to prolong his life by any means available to him, regardless of the quality of the patient's life. Common humanity requires otherwise, as do medical ethics and good medical practice accepted in this country and overseas. As I see it, the doctor's decision whether or not to take any such step must (subject to his patient's ability to give or withhold his consent) be made in the best interests of the patient. It is this principle too which, in my opinion, underlies the established rule that a doctor may, when caring for a patient who is, for

example, dying of cancer, lawfully administer painkilling drugs despite the fact that he knows that an incidental effect of that application will be to abbreviate the patient's life. Such a decision may properly be made as part of the care of the living patient, in his best interests; and, on this basis, the treatment will be lawful. Moreover, where the doctor's treatment of his patient is lawful, the patient's death will be regarded in law as exclusively caused by the injury or disease to which his condition is attributable.

It is of course the development of modern medical technology, and in particular the development of life support systems, which has rendered cases such as the present so much more relevant than in the past. Even so, where (for example) a patient is brought into hospital in such a condition that, without the benefit of a life support system, he will not continue to live, the decision has to be made whether or not to give him that benefit, if available. That decision can only be made in the best interests of the patient. No doubt, his best interests will ordinarily require that he should be placed on a life support system as soon as necessary, if only to make an accurate assessment of his condition and a prognosis for the future. But if he neither recovers sufficiently to be taken off it nor dies, the question will ultimately arise *whether he should be kept on it indefinitely.* As I see it, that question (assuming the continued availability of the system) can only be answered by reference to the best interests of the patient himself, having regard to established medical practice. Indeed, if the justification for treating a patient who lacks the capacity to consent lies in the fact that the treatment is provided in his best interests, it must follow that the *treatment* may, and *indeed ultimately should, be discontinued where it is no longer in his best interests to provide it.* The question which lies at the heart of the present case is, as I see it, whether on that principle the doctors responsible for the treatment and care of Anthony Bland can justifiably discontinue the

process of artificial feeding upon which the prolongation of his life depends.

It is crucial for the understanding of this question that the question itself should be correctly formulated. The *question is not whether the doctor should take a course which will kill his patient, or even take a course which has the effect of accelerating his death. The question is whether the doctor should or should not continue to provide his patient with medical treatment or care which, if continued, will prolong his patient's life.* The question is sometimes put in striking or emotional terms, which can be misleading. For example, in the case of a life support system, it is sometimes asked: Should a doctor be entitled to switch it off, or to pull the plug? And then it is asked: Can it be in the best interests of the patient that a doctor should be able to switch the life support system off, when this will inevitably result in the patient's death? Such an approach has rightly been criticised as misleading, for example by Professor Ian Kennedy (in his paper in Treat Me Right, Essays in Medical Law and Ethics (1988), and by Thomas J. in Re J.H.L. at pp. 21- 22. This is because *the question is not whether it is in the best interests of the patient that he should die. The question is whether it is in the best interests of the patient that his life should be prolonged by the continuance of this form of medical treatment or care*.

The correct formulation of the question is of particular importance in a case such as the present, where the patient is totally unconscious and where there is no hope whatsoever of any amelioration of his condition. In circumstances such as these, it may be difficult to say that it is in his best interests that the treatment should be ended. But if the question is asked, as in my opinion it should be, whether it is in his best interests that treatment which has the effect of artificially prolonging his life should

be continued, that question can sensibly be answered to the effect that it is not in his best interests to do so.

(emphasis supplied)

70. In a Discussion Paper on Treatment of Patients in Persistent Vegetative State issued in September 1992 by the Medical Ethics Committee of the British Medical Association certain safeguards were mentioned which should be observed before constituting life support for such patients:-

"(1) Every effort should be made at rehabilitation for at least six months after the injury; (2) The diagnosis of irreversible PVS should not be considered confirmed until at least twelve months after the injury, with the effect that any decision to withhold life prolonging treatment will be delayed for that period; (3) The diagnosis should be agreed by two other independent doctors; and (4) Generally, the wishes of the patient's immediate family will be given great weight."

71. Lord Goff observed that discontinuance of artificial feeding in such cases is not equivalent to cutting a mountaineer's rope, or severing the air pipe of a deep sea diver. The true question is not whether the doctor should take a course in which he will actively kill his patient, but rather whether he should continue to provide his patient with medical treatment or care which, if continued, will prolong his life.

72. Lord Browne-Wilkinson was of the view that removing the nasogastric tube in the case of Anthony Bland cannot be regarded as a positive act causing the death. The tube itself, without the food being supplied through it, does nothing. Its non removal itself does not cause the death since by itself, it does not sustain life. Hence removal of the tube would not constitute the actus reus of murder, since such an act would not cause the death.

73. Lord Mustill observed:-

"Threaded through the technical arguments addressed to the House were the strands of a much wider position, that it is in the best interests of the community at large that *Anthony Bland's life should now end*. The doctors *have done all they can. Nothing will be gained by going* on and much will be lost. The distress of the family will get steadily worse. The strain on the *devotion of a medical staff charged with the care* of a patient whose condition will never improve, who may live for years and who does not even recognize that he is being cared for, will continue to mount. The large resources of skill, *labour and money now being devoted to Anthony Bland* might in the opinion of many be more fruitfully employed in improving the condition of other patients, who if treated may have useful, healthy and enjoyable lives for years to come."

74. Thus all the Judges of the House of Lords in the *Airedale* case (supra) were agreed that Anthony Bland should be allowed to die.

75. Airedale (1993) decided by the House of Lords has been followed in a number of cases in U.K., and the law is now fairly well settled that in the case of incompetent patients, if the doctors act on the basis of informed medical opinion, and withdraw the artificial life support system if it is in the patient's best interest, the said act cannot be regarded as a crime.

76. The question, however, remains as to who is to decide what is the patient's best interest where he is in a persistent vegetative state (PVS)? Most decisions have held that the decision of the parents, spouse, or other close relative, should carry weight if it is an informed one, but it is not decisive (several of these decisions have been referred to in Chapter IV of the 196th Report of the Law Commission of India on Medical Treatment to Terminally ill Patients).

77. It is ultimately for the Court to decide, as parens patriae, as to what is is in the best interest of the patient, though the wishes of close relatives and next friend, and opinion of medical practitioners should be given due weight in coming to its decision. As stated by Balcombe, J. in In Re J (A Minor Wardship : Medical Treatment) 1990(3) All E.R. 930, the Court as representative of the Sovereign as parens patriae will adopt the same standard which a reasonable and responsible parent would do.

78. The parens patriae (father of the country) jurisdiction was the jurisdiction of the Crown, which, as stated in Airedale, could be traced to the 13th Century. This principle laid down that as the Sovereign it was the duty of the King to protect the person and property of those who were unable to protect themselves. The Court, as a wing of the State, has inherited the parens patriae jurisdiction which formerly belonged to the King.

U.S. decisions

79. The two most significant cases of the U.S. Supreme Court that addressed the issue whether there was a federal constitutional right to assisted suicide arose from challenges to State laws banning physician assisted suicide brought by terminally ill patients and their physicians. These were *Washington vs. Glucksberg* 521 U.S. 702 (1997) and Vacco vs. Quill 521 U.S. 793 (1997).

80. In Glucksberg's case, the U.S. Supreme Court held that the asserted right to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment. The Court observed :

> "The decision to commit suicide with the assistance of another may be just as personal and profound as the decision to refuse unwanted medical treatment, but it has never enjoyed similar legal protection. Indeed the two acts

> are widely and reasonably regarded as quite distinct."

81. The Court went on to conclude that the Washington statute being challenged was rationally related to five legitimate government interest : protection of life, prevention of suicide, protection of ethical integrity of the medical profession, protection of vulnerable groups, and protection against the "slippery slope" towards euthanasia. The Court then noted that perhaps the individual States were more suited to resolving or at least addressing the myriad concerns raised by both proponents and opponents of physician assisted suicide. The Court observed :

> "Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality and practicality of physician assisted suicide. Our holding permits this debate to continue, as it should in a democratic society."

82. In *Vacco's* case (supra) the U.S. Supreme Court again recognized the distinction between refusing life saving medical treatment and giving lethal medication. The Court disagreed with the view of the Second Circuit Federal Court that ending or refusing lifesaving medical treatment is nothing more nor less than assisted suicide. The Court held that "the distinction between letting a patient die and making that patient die is important, logical, rational, and well established". The Court held that the State of New York could validly ban the latter.

83. In *Cruzan v. Director, MDH,* 497 U.S. 261(1990) decided by the U.S. Supreme Court the majority opinion was delivered by the Chief Justice Rehnquist.

84. In that case, the petitioner Nancy Cruzan sustained injuries in an automobile accident and lay in a Missouri State hospital in what has been referred to as a persistent vegetative state (PVS), a condition in which a person exhibits motor reflexes but evinces no indication of significant cognitive

function. The state of Missouri was bearing the cost of her care. Her parents and co-guardians applied to the Court for permission to withdraw her artificial feeding and hydration equipment and allow her to die. While the trial Court granted the prayer, the State Supreme Court of Missouri reversed, holding that under a statute in the State of Missouri it was necessary to prove by clear and convincing evidence that the incompetent person had wanted, while competent, withdrawal of life support treatment in such an eventuality. The only evidence led on that point was the alleged statement of Nancy Cruzan to a housemate about a year before the accident that she did not want life as a 'vegetable'. The State Supreme Court was of the view that this did not amount to saying that medical treatment or nutrition or hydration should be withdrawn.

85. Chief Justice Rehnquist delivering the opinion of the Court (in which Justices White, O'Connor, Scalia, and Kennedy, joined) in his judgment first noted the facts:-

> "On the night of January 11, 1983, Nancy Cruzan lost control of her car as she traveled down Elm Road in Jasper County, Missouri. The vehicle overturned, and Cruzan was discovered lying face down in a ditch without detectable respiratory or cardiac function. Paramedics were able to restore her breathing and heartbeat at the accident site, and she was transported to a hospital in an unconscious state. An attending neurosurgeon diagnosed her as having sustained probable cerebral contusions compounded by significant anoxia (lack of oxygen). The Missouri trial court in this case found that permanent brain damage generally results after 6 minutes in an anoxic state; it was estimated that Cruzan was deprived of oxygen from 12 to 14 minutes. She remained in a coma for approximately three weeks, and then progressed to an unconscious state in which she was able to orally ingest some nutrition. In order to ease feeding and further the recovery, surgeons implanted a gastrostomy feeding and hydration tube in Cruzan with the

> consent of her then husband. Subsequent rehabilitative efforts proved unavailing. She now lies in a Missouri state hospital in what is commonly referred to as a persistent vegetative state: generally, a condition in which a person exhibits motor reflexes but evinces no indications of significant cognitive function. 1 The State of Missouri is bearing the cost of her care. [497 U.S. 261, 267]
>
> After it had become apparent that Nancy Cruzan had virtually no chance of regaining her mental faculties, her parents asked hospital employees to terminate the artificial nutrition and hydration procedures. All agree that such a [497 U.S. 261, 268] removal would cause her death. The employees refused to honor the request without court approval. The parents then sought and received authorization from the state trial court for termination."

86. While the trial Court allowed the petition the State Supreme Court of Missouri reversed. The US Supreme Court by majority affirmed the verdict of the State Supreme Court

87. Chief Justice Rehnquist noted that in law even touching of one person by another without consent and without legal justification was a battery, and hence illegal. The notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment. As observed by Justice Cardozo, while on the Court of Appeals of New York "Every human being of adult years and sound mind has a right to determine what shall be done with his own body, and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages." vide *Schloendorff vs. Society of New York Hospital,* 211 N.Y. 125, 129-30, 105 N.E. 92, 93 (1914). Thus the informed consent doctrine has become firmly entrenched in American Tort Law. The logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is to refuse treatment.

88. The question, however, arises in cases where the patient is unable to decide whether the treatment should continue or not e.g. if he is in coma or PVS. Who is to give consent to terminate the treatment in such a case? The learned Chief Justice referred to a large number of decisions of Courts in U.S.A. in this connection, often taking diverse approaches.

89. *In re Quinlan* 70 N.J.10, 355 A. 2d 647, Karen Quinlan suffered severe brain damage as a result of anoxia, and entered into PVS. Her father sought judicial approval to disconnect her respirator. The New Jersey Supreme Court granted the prayer, holding that Karen had a right of privacy grounded in the U.S. Constitution to terminate treatment. The Court concluded that the way Karen's right to privacy could be exercised would be to allow her guardian and family to decide whether she would exercise it in the circumstances.

90. *In re Conroy* 98 NJ 321, 486 A.2d 1209 (1985), however, the New Jersey Supreme Court, in a case of an 84 year old incompetent nursing home resident who had suffered irreversible mental and physical ailments, contrary to its decision in Quinlan's case, decided to base its decision on the common law right to self determination and informed consent. This right can be exercised by a surrogate decision maker when there was a clear evidence that the incompetent person would have exercised it. Where such evidence was lacking the Court held that an individual's right could still be invoked in certain circumstances under objective 'best interest' standards. Where no trustworthy evidence existed that the individual would have wanted to terminate treatment, and a person's suffering would make the administration of life sustaining treatment inhumane, a pure objective standard could be used to terminate the treatment. If none of these conditions obtained, it was best to err in favour of preserving life.

91. What is important to note in *Cruzan's* case (supra) is that there was a statute of the State of Missouri, unlike in Airedale's case (where there was none), which required clear

and convincing evidence that while the patient was competent she had desired that if she becomes incompetent and in a PVS her life support should be withdrawn.

92. In *Cruzan's* case (supra) the learned Chief Justice observed :

> "Not all incompetent patients will have loved ones available to serve as surrogate decision makers. And even where family members are present, there will be, of course, some unfortunate situations in which family members will not act to protect a patient. A State is entitled to guard against potential abuses in such situations."

93. The learned Chief Justice further observed :

> "An erroneous decision not to terminate results in maintenance of the status quo; the possibility of subsequent developments such as advancements in medical science, the discovery of new evidence regarding the patient's intent, changes in the law, or simply the unexpected death of the patient despite the administration of life-sustaining treatment, at least create the potential that a wrong decision will eventually be corrected or its impact mitigated. An erroneous decision to withdraw life-sustaining treatment, however, is not susceptible of correction."

94. No doubt Mr. Justice Brennan (with whom Justices Marshall and Blackmun joined) wrote a powerful dissenting opinion, but it is not necessary for us to go into the question whether the view of the learned Chief Justice or that of Justice Brennan, is correct.

95. It may be clarified that foreign decisions have only persuasive value in our country, and are not binding authorities on our Courts. Hence we can even prefer to follow the minority view, rather than the majority view, of a foreign decision, or

follow an overruled foreign decision.

96. Cruzan's case (supra) can be distinguished on the simple ground that there was a statute in the State of Missouri, whereas there was none in the Airedale's case nor in the present case before us. We are, therefore, of the opinion that the Airedale's case (supra) is more apposite as a precedent for us. No doubt foreign decisions are not binding on us, but they certainly have persuasive value.

LAW IN INDIA

97. In India abetment of suicide (Section 306 Indian Penal Code) and attempt to suicide (Section 309 of Indian Penal Code) are both criminal offences. This is in contrast to many countries such as USA where attempt to suicide is not a crime.

98. The Constitution Bench of the Indian Supreme Court in *Gian Kaur vs. State of Punjab,* 1996(2) SCC 648 held that both euthanasia and assisted suicide are not lawful in India. That decision overruled the earlier two Judge Bench decision of the Supreme Court in *P. Rathinam vs. Union of India,* 1994(3) SCC 394. The Court held that the right to life under Article 21 of the Constitution does not include the right to die (vide para 33). In *Gian Kaur's* case (supra) the Supreme Court approved of the decision of the House of Lords in *Airedale's* case (supra), and observed that euthanasia could be made lawful only by legislation.

99. Sections 306 and 309 IPC read as under :

> **"306. Abetment of suicide** - If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.
>
> **309. Attempt to commit suicide -** Whoever attempts to commit suicide and does any act towards the commission of such offence, shall be punished with simple imprisonment for a term which may extend to one year or with fine, or with both."

100. We are of the opinion that although Section 309 Indian Penal Code (attempt to commit suicide) has been held to be constitutionally valid in *Gian Kaur's* case (supra), the time has come when it should be deleted by Parliament as it has become anachronistic. A person attempts suicide in a depression, and hence he needs help, rather than punishment. We therefore recommend to Parliament to consider the feasibility of deleting Section 309 from the Indian Penal Code.

101. It may be noted that in *Gian Kaur's* case (supra) although the Supreme Court has quoted with approval the view of the House of Lords in *Airedale's* case (supra), it has not clarified who can decide whether life support should be discontinued in the case of an incompetent person e.g. a person in coma or PVS. This vexed question has been arising often in India because there are a large number of cases where persons go into coma (due to an accident or some other reason) or for some other reason are unable to give consent, and then the question arises as to who should give consent for withdrawal of life support.

102. This is an extremely important question in India because of the unfortunate low level of ethical standards to which our society has descended, its raw and widespread commercialization, and the rampant corruption, and hence, the Court has to be very cautious that unscrupulous persons who wish to inherit the property of someone may not get him eliminated by some crooked method.

103. Also, since medical science is advancing fast, doctors must not declare a patient to be a hopeless case unless there appears to be no reasonable possibility of any

improvement by some newly discovered medical method in the near future. In this connection we may refer to a recent news item which we have come across on the internet of an Arkansas man Terry Wallis, who was 19 years of age and newly married with a baby daughter when in 1984 his truck plunged through a guard rail, falling 25 feet. He went into coma in the crash in 1984, but after 24 years he has regained consciousness. This was perhaps because his brain spontaneously rewired itself by growing tiny new nerve connections to replace the ones sheared apart in the car crash. Probably the nerve fibers from Terry Wallis' cells were severed but the cells themselves remained intact, unlike Terri Schiavo, whose brain cells had died (see Terri Schiavo's case on Google).

104. However, we make it clear that it is experts like medical practitioners who can decide whether there is any reasonable possibility of a new medical discovery which could enable such a patient to revive in the near future.

WHEN CAN A PERSON IS SAID TO BE DEAD

105. It is alleged in the writ petition filed by Ms. Pinky Virani (claiming to be the next friend of Aruna Shanbaug) that in fact Aruna Shanbaug is already dead and hence by not feeding her body any more we shall not be killing her. The question hence arises as to when a person can be said to be dead ?

106. A person's most important organ is his/her brain. This organ cannot be replaced. Other body parts can be replaced e.g. if a person's hand or leg is amputed, he can get an artificial limb. Similarly, we can transplant a kidney, a heart or a liver when the original one has failed. However, we cannot transplant a brain. If someone else's brain is transplanted into one's body, then in fact, it will be that other person living in one's body. The entire mind, including one's personality, cognition, memory, capacity of receiving signals from the five senses and capacity of giving commands to the other parts of the body, etc. are the functions of the brain. Hence one is one's brain. It follows that

one is dead when one's brain is dead.

107. As is well-known, the brain cells normally do not multiply after the early years of childhood (except in the region called hippocampus), unlike other cells like skin cells, which are regularly dying and being replaced by new cells produced by multiplying of the old cells. This is probably because brain cells are too highly specialized to multiply. Hence if the brain cells die, they usually cannot be replaced (though sometimes one part of the brain can take over the function of another part in certain situations where the other part has been irreversibly damaged).

108. Brain cells require regular supply of oxygen which comes through the red cells in the blood. If oxygen supply is cut off for more than six minutes, the brain cells die and this condition is known as anoxia. Hence, if the brain is dead a person is said to be dead.

BRAIN DEATH

109. The term 'brain death' has developed various meanings. While initially, death could be defined as a cessation of breathing, or, more scientifically, a cessation of heart-beat, recent medical advances have made such definitions obsolete. In order to understand the nature and scope of brain death, it is worthwhile to look at how death was understood. Historically, as the oft-quoted definition in Black's Law Dictionary suggests, death was:

"The cessation of life; the ceasing to exist; defined by physicians as a total stoppage of the circulation of the blood, and a cessation of the animal and vital functions consequent thereon, such as respiration, pulsation, etc.".[1] This definition saw its echo in numerous other texts and legal case law. This includes many American precedents- such as *Schmidt v. Pierce,* 344 S.W.2d 120, 133 (Mo. 1961) ("Black's Law

1. Black's Law Dictionary 488(4th ed., rev. 1968).

Dictionary, 4th Ed., defines death as 'the cessation of life; the ceasing to exist ....'"); and *Sanger v. Butler,* 101 S.W. 459, 462 (Tex. Civ. App. 1907) ("The Encyclopaedic Dictionary, among others, gives the following definitions of [death]: 'The state of being dead; the act or state of dying; the state or condition of the dead.' The Century Dictionary defines death as 'cessation of life; that state of a being, animal or vegetable, in which there is a total and permanent cessation of all the vital functions.'").[2]

110. This understanding of death emerged from a cardiopulmonary perspective. In such cases, the brain was usually irrelevant -- being understood that the cessation of circulation would automatically lead to the death of brain cells, which require a great deal of blood to survive.

111. The invention of the ventilator and the defibrillator in the 1920s altered this understanding, it being now possible that the cessation of respiration and circulation, though critical, would no longer be irreversible[3]. Hence, a present-day understanding of death as the irreversible end of life must imply total brain failure, such that neither breathing, nor circulation is possible any more. The question of the length of time that may determine such death is significant, especially considering a significant increase in organ donations across jurisdictions over the last few years.

112. Brain death, may thus, be defined as "the irreversible cessation of all functions of the entire brain, including the brain stem".[4] It is important to understand that this definition goes beyond acknowledging consciousness -- a person who is incapable of ever regaining consciousness will not be

2. Goldsmith, Jason, Wanted! Dead and/or Alive: Choosing Amongst the Many Not-so-Unifrom Definitions of Death, 61 U. Miami L. Rev 871. (2007).

3. Samantha Weyrauch, Acceptance of Whole Brain Death Criteria for Determination of Death: A Comparative Analysis of the United States and Japan, 17 UCLA Pac. Basin L.J. 91, 96. (1999).

4. Section 1, Universal Determination of Death Act, (The United State Legislation).

considered to be brain dead as long as parts of the brain e.g. brain stem that regulate involuntary activity (such as response to light, respiration, heartbeat etc.) still continue to function. Likewise, if consciousness, albeit severely limited, is present, then a person will be considered to be alive even if he has suffered brain stem death, wherein breathing and heartbeat can no longer be regulated and must be mechanically determined. Hence, the international standard for brain death is usually considered to include "whole-brain death", i.e., a situation where the higher brain (i.e. the part of the brain that regulates consciousness and thought), the cerebellum or mid-brain, and the brain-stem have all ceased to demonstrate any electrical activity whatsoever for a significant amount of time. To say, in most cases, that only the death of the higher brain would be a criteria for 'brain death' may have certain serious consequences -- for example, a foetus, technically under this definition, would not be considered to be alive at all. Similarly, as per this, different definitions of death would apply to human and non-human organisms.

113. Brain death, thus, is different from a persistent vegetative state, where the brain stem continues to work, and so some degree of reactions may occur, though the possibility of regaining consciousness is relatively remote. Even when a person is incapable of any response, but is able to sustain respiration and circulation, he cannot be said to be dead. The mere mechanical act of breathing, thus, would enable him or her to be "alive".

114. The first attempt to define death in this manner came about in 1968, as a result of a Harvard Committee constituted for the purpose.[5] This definition, widely criticized for trying to maximize organ donations, considered death to be a situation wherein *"individuals who had sustained traumatic brain injury*

5. Ad Hoc Comm. of the Harvard Med. Sch. to Examine the Definition of Brain Death, A Definition of Irreversible Coma, 205 JAMA 337, 337-40 (1968).

that caused them to be in an irreversible coma, and had lost the ability to breathe spontaneously"[6], would be considered dead. This criticism led to the Presidents' Committee, set up for the purpose, in 1981, defining death more vaguely as the point *"where the body's physiological system ceases to contribute a uniform whole"*.

This definition of whole brain death, however, is not without its critics. Some argue that the brain is not always responsible for all bodily functioning- digestion, growth, and some degree of movement (regulated by the spinal cord) may not require any electrical activity in the brain. In order to combat this argument, and further explain what brain death could include, the President's Committee on Bio-ethics in the United States of America in 2008 came up with a new definition of brain death, according to which a person was considered to be brain dead when he could no longer perform the fundamental human work of an organism. These are:

"(1) "openness to the world, that is receptivity to stimuli and signals from the surrounding environment,"

(2) "the ability to act upon the world to obtain selectively what it needs.

and (3) "the basic felt need that drives the organism to act ... to obtain what it needs."[7]

115. When this situation is reached, it is possible to assume that the person is dead, even though he or she, through mechanical stimulation, may be able to breathe, his or her heart might be able to beat, and he or she may be able to take some form of nourishment. It is important, thus, that it be medically proved that a situation where any human functioning would be impossible should have been reached for there to be a

6. Seema K. Shah, Franklin Miller, Can We Handle The Truth? Legal Fictions in the Determination of Death. 36 AM. J.L. & Med. 540 (2010).

7. Ibid.

declaration of brain death--situations where a person is in a persistent vegetative state but can support breathing, cardiac functions, and digestion without any mechanical aid are necessarily those that will not come within the ambit of brain death.

116. In legal terms, the question of death would naturally assume significance as death has a set of legal consequences as well. As per the definition in the American Uniform Definition of Death Act, 1980. an individual who *"sustain[s] . . . irreversible cessation of all functions of the entire brain, including the brain stem, is dead."* This stage, thus, is reached at a situation where not only consciousness, but every other aspect of life regulated from the brain can no longer be so regulated.

117. In the case of 'euthanasia', however, the situation is slightly different. In these cases, it is believed, that a determination of when it would be right or fair to disallow resuscitation of a person who is incapable of expressing his or her consent to a termination of his or her life depends on two circumstances:

a. when a person is only kept alive mechanically, i.e. when not only consciousness is lost, but the person is only able to sustain involuntary functioning through advanced medical technology--such as the use of heart-lung machines, medical ventilators etc.

b. when there is no plausible possibility of the person ever being able to come out of this stage. Medical "miracles" are not unknown, but if a person has been at a stage where his life is only sustained through medical technology, and there has been no significant alteration in the person's condition for a long period of time—at least a few years--then there can be a fair case made out for passive euthanasia.

To extend this further, especially when a person is incapable

of being able to give any consent, would amount to committing judicial murder.

118. In this connection we may refer to the Transplantation of Human Organs Act, 1994 enacted by the Indian Parliament. Section 2(d) of the Act states :

> "brain-stem death" means the stage at which all functions of the brain-stem have permanently and irreversibly ceased and is so certified under sub-section (6) of section 3:"

119. Section 3(6) of the said Act states:

"(6) Where any human organ is to be removed from the body of a person in the event of his brain-stem death, no such removal shall be undertaken unless such death is certified, in such form and in such manner and on satisfaction of such conditions and requirements as may be prescribed, by a Board of medical experts consisting of the following, namely:-

(i) the registered medical practitioner, in charge of the hospital in which brain-stem death has occurred;

(ii) an independent registered medical practitioner, being a specialist, to be nominated by the registered medical practitioner specified in clause (i), from the panel of names approved by the Appropriate Authority;

(iii) a neurologist or a neurosurgeon to be nominated by the registered medical practitioner specified in clause (i), from the panel of names approved by the Appropriate Authority; and

(iv) the registered medical practitioner treating the person whose brain-stem death has occurred".

120. Although the above Act was only for the purpose of

regulation of transplantation of human organs it throws some light on the meaning of brain death.

121. From the above angle, it cannot be said that Aruna Shanbaug is dead. Even from the report of Committee of Doctors which we have quoted above it appears that she has some brain activity, though very little.

122. She recognizes that persons are around her and expresses her like or dislike by making some vocal sound and waving her hand by certain movements. She smiles if she receives her favourite food, fish and chicken soup. She breathes normally and does not require a heart lung machine or intravenous tube for feeding. Her pulse rate and respiratory rate and blood pressure are normal. She was able to blink well and could see her doctors who examined her. When an attempt was made to feed her through mouth she accepted a spoonful of water, some sugar and mashed banana. She also licked the sugar and banana paste sticking on her upper lips and swallowed it. She would get disturbed when many people entered her room, but she appeared to calm down when she was touched or caressed gently.

123. Aruna Shanbaug meets most of the criteria for being in a permanent vegetative state which has resulted for 37 years. However, her dementia has not progressed and has remained stable for many years.

124. From the above examination by the team of doctors, it cannot be said that Aruna Shanbaug is dead. Whatever the condition of her cortex, her brain stem is certainly alive. She does not need a heart--lung machine. She breathes on her own without the help of a respirator. She digests food, and her body performs other involuntary function without any help. From the CD (which we had screened in the courtroom on 2.3.2011 in the presence of counsels and others) it appears that she can certainly not be called dead. She was making some sounds,

blinking, eating food put in her mouth, and even licking with her tongue morsels on her mouth.

125. However, there appears little possibility of her coming out of PVS in which she is in. In all probability, she will continue to be in the state in which she is in till her death. The question now is whether her life support system (which is done by feeding her) should be withdrawn, and at whose instance?

WITHDRAWAL OF LIFE SUPPORT OF A PATIENT IN PERMANENT VEGETATIVE STATE (PVS)

126. There is no statutory provision in our country as to the legal procedure for withdrawing life support to a person in PVS or who is otherwise incompetent to take a decision in this connection. We agree with Mr. Andhyarujina that passive euthanasia should be permitted in our country in certain situations, and we disagree with the learned Attorney General that it should never be permitted. Hence, following the technique used in *Vishakha's* case (supra), we are laying down the law in this connection which will continue to be the law until Parliament makes a law on the subject.

(i) A decision has to be taken to discontinue life support either by the parents or the spouse or other close relatives, or in the absence of any of them, such a decision can be taken even by a person or a body of persons acting as a next friend. It can also be taken by the doctors attending the patient. However, the decision should be taken bona fide in the best interest of the patient.

In the present case, we have already noted that Aruna Shanbaug's parents are dead and other close relatives are not interested in her ever since she had the unfortunate assault on her. As already noted above, it is the KEM hospital staff, who have been amazingly caring for her day and night for so

many long years, who really are her next friends, and not Ms. Pinky Virani who has only visited her on few occasions and written a book on her. Hence it is for the KEM hospital staff to take that decision. The KEM hospital staff have clearly expressed their wish that Aruna Shanbaug should be allowed to live.

Mr. Pallav Shisodia, learned senior counsel, appearing for the Dean, KEM Hospital, Mumbai, submitted that Ms. Pinky Virani has no locus standi in this case. In our opinion it is not necessary for us to go into this question since we are of the opinion that it is the KEM Hospital staff who is really the next friend of Aruna Shanbaug.

We do not mean to decry or disparage what Ms. Pinky Virani has done. Rather, we wish to express our appreciation of the splendid social spirit she has shown. We have seen on the internet that she has been espousing many social causes, and we hold her in high esteem. All that we wish to say is that however much her interest in Aruna Shanbaug may be it cannot match the involvement of the KEM hospital staff who have been taking care of Aruna day and night for 38 years.

However, assuming that the KEM hospital staff at some future time changes its mind, in our opinion in such a situation the KEM hospital would have to apply to the Bombay High Court for approval of the decision to withdraw life support.

(ii) Hence, even if a decision is taken by the near relatives or doctors or next friend to withdraw life support, such a decision requires approval from the High Court concerned as laid down in *Airedale's* case (supra).

> In our opinion, this is even more necessary in our country as we cannot rule out the possibility of mischief being done by relatives or others for inheriting the property of the patient.

127. In our opinion, if we leave it solely to the patient's relatives or to the doctors or next friend to decide whether to withdraw the life support of an incompetent person there is always a risk in our country that this may be misused by some unscrupulous persons who wish to inherit or otherwise grab the property of the patient. Considering the low ethical levels prevailing in our society today and the rampant commercialization and corruption, we cannot rule out the possibility that unscrupulous persons with the help of some unscrupulous doctors may fabricate material to show that it is a terminal case with no chance of recovery. There are doctors and doctors. While many doctors are upright, there are others who can do anything for money (see George Bernard Shaw's play 'The Doctors Dilemma'). The commercialization of our society has crossed all limits. Hence we have to guard against the potential of misuse (see Robin Cook's novel 'Coma'). In our opinion, while giving great weight to the wishes of the parents, spouse, or other close relatives or next friend of the incompetent patient and also giving due weight to the opinion of the attending doctors, we cannot leave it entirely to their discretion whether to discontinue the life support or not. We agree with the decision of the Lord Keith in Airedale's case (supra) that the approval of the High Court should be taken in this connection. This is in the interest of the protection of the patient, protection of the doctors, relative and next friend, and for reassurance of the patient's family as well as the public. This is also in consonance with the doctrine of parens patriae which is a well known principle of law.

DOCTRINE OF PARENS PATRIAE

128. The doctrine of Parens Patriae (father of the country)

had originated in British law as early as the 13th century. It implies that the King is the father of the country and is under obligation to look after the interest of those who are unable to look after themselves. The idea behind Parens Patriae is that if a citizen is in need of someone who can act as a parent who can make decisions and take some other action, sometimes the State is best qualified to take on this role.

129. In the Constitution Bench decision of this Court in *Charan Lal Sahu vs. Union of India* (1990) 1 SCC 613 (vide paras 35 and 36), the doctrine has been explained in some details as follows :

> "In the "Words and Phrases" Permanent Edition, Vol. 33 at page 99, it is stated that parens patriae is the inherent power and authority of a legislature to provide protection to the person and property of persons non sui juris, such as minor, insane, and incompetent persons, but the words parens patriae meaning thereby 'the father of the country', were applied originally to the King and are used to designate the State referring to its sovereign power of guardianship over persons under disability. Parens patriae jurisdiction, it has been explained, is the right of the sovereign and imposes a duty on the sovereign, in public interest, to protect persons under disability who have no rightful protector. The connotation of the term parens patriae differs from country to country, for instance, in England it is the King, in America it is the people, etc. The government is within its duty to protect and to control persons under disability".

The duty of the King in feudal times to act as parens patriae (father of the country) has been taken over in modern times by the State.

130. In *Heller vs. DOE* (509) US 312 Mr. Justice Kennedy speaking for the U.S. Supreme Court observed :

"the State has a legitimate interest under its parens patriae powers in providing care to its citizens who are unable to care for themselves".

131. In *State of Kerala vs. N.M. Thomas,* 1976(1) SCR 906 (at page 951) Mr. Justice Mathew observed :

" The Court also is 'state' within the meaning of Article 12 (of the Constitution).".

132. In our opinion, in the case of an incompetent person who is unable to take a decision whether to withdraw life support or not, it is the Court alone, as parens patriae, which ultimately must take this decision, though, no doubt, the views of the near relatives, next friend and doctors must be given due weight.

UNDER WHICH PROVISION OF THE LAW CAN THE COURT GRANT APPROVAL FOR WITHDRAWING LIFE SUPPORT TO AN INCOMPETENT PERSON

133. In our opinion, it is the High Court under Article 226 of the Constitution which can grant approval for withdrawal of life support to such an incompetent person. Article 226(1) of the Constitution states :

"Notwithstanding anything in article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose".

134. A bare perusal of the above provisions shows that the High Court under Article 226 of the Constitution is not only entitled to issue writs, but is also entitled to issue directions or

orders.

135. In *Dwarka Nath vs. ITO* AIR 1966 SC 81(vide paragraph 4) this Court observed :

"This article is couched in comprehensive phraseology and it ex facie confers a wide power on the High Courts to reach injustice wherever it is found. The Constitution designedly used a wide language in describing the nature of the power, the purpose for which and the person or authority against whom it can be exercised. It can issue writs in the nature of prerogative writs as understood in England; but the scope of those writs also is widened by the use of the expression "nature", for the said expression does not equate the writs that can be issued in India with those in England, but only draws an analogy from them. That apart, High Courts can also issue directions, orders or writs other than the prerogative writs. It enables the High Courts to mould the reliefs to meet the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under Art. 226 of the Constitution with that of the English Courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary form of Government to a vast country like India functioning under a federal structure."

136. The above decision has been followed by this Court in *Shri Anadi Mukta Sadguru vs. V. R. Rudani* AIR 1989 SC 1607 (vide para 18).

137. No doubt, the ordinary practice in our High Courts since the time of framing of the Constitution in 1950 is that petitions filed under Article 226 of the Constitution pray for a writ of the kind referred to in the provision. However, from the very language of the Article 226, and as explained by the above decisions, a petition can also be made to the High Court under

Article 226 of the Constitution praying for an order or direction, and not for any writ. Hence, in our opinion, Article 226 gives abundant power to the High Court to pass suitable orders on the application filed by the near relatives or next friend or the doctors/hospital staff praying for permission to withdraw the life support to an incompetent person of the kind above mentioned.

PROCEDURE TO BE ADOPTED BY THE HIGH COURT WHEN SUCH AN APPLICATION IS FILED

138. When such an application is filed the Chief Justice of the High Court should forthwith constitute a Bench of at least two Judges who should decide to grant approval or not. Before doing so the Bench should seek the opinion of a committee of three reputed doctors to be nominated by the Bench after consulting such medical authorities/medical practitioners as it may deem fit. Preferably one of the three doctors should be a neurologist, one should be a psychiatrist, and the third a physician. For this purpose a panel of doctors in every city may be prepared by the High Court in consultation with the State Government/Union Territory and their fees for this purpose may be fixed.

139. The committee of three doctors nominated by the Bench should carefully examine the patient and also consult the record of the patient as well as taking the views of the hospital staff and submit its report to the High Court Bench.

140. Simultaneously with appointing the committee of doctors, the High Court Bench shall also issue notice to the State and close relatives e.g. parents, spouse, brothers/sisters etc. of the patient, and in their absence his/her next friend, and supply a copy of the report of the doctor's committee to them as soon as it is available. After hearing them, the High Court bench should give its verdict. The above procedure should be followed all over India until Parliament makes legislation on this subject.

141. The High Court should give its decision speedily at the earliest, since delay in the matter may result in causing great mental agony to the relatives and persons close to the patient.

142. The High Court should give its decision assigning specific reasons in accordance with the principle of 'best interest of the patient' laid down by the House of Lords in *Airedale's* case (supra). The views of the near relatives and committee of doctors should be given due weight by the High Court before pronouncing a final verdict which shall not be summary in nature.

143. With these observations, this petition is dismissed.

144. Before parting with the case, we would like to express our gratitude to Mr. Shekhar Naphade, learned senior counsel for the petitioner, assisted by Ms. Shubhangi Tuli, Ms. Divya Jain and Mr. Vimal Chandra S. Dave, advocates, the learned Attorney General for India Mr. G. E. Vahanvati, assisted by Mr. Chinmoy P. Sharma, advocate, Mr. T. R. Andhyarujina, learned Senior Counsel, whom we had appointed as amicus curiae assisted by Mr. Soumik Ghoshal, advocate, Mr. Pallav Shishodia, learned senior counsel, assisted by Ms. Sunaina Dutta and Mrs. Suchitra Atul Chitale, advocates for the KEM Hospital, Mumbai and Mr. Chinmoy Khaldkar, counsel for the State of Maharashtra, assisted by Mr. Sanjay V. Kharde and Ms. Asha Gopalan Nair, advocates, who were of great assistance to us. We wish to express our appreciation of Mr. Manav Kapur, Advocate, who is Law-Clerk-cum-Research Assistant of one of us (Katju, J.) as well as Ms. Neha Purohit, Advocate, who is Law-Clerk-cum-Research Assistant of Hon'ble Justice Gyan Sudha Mishra. We also wish to mention the names of Mr. Nithyaesh Nataraj and Mr. Vaibhav Rangarajan, final year law students in the School of Excellence, Dr. B.R. Ambedkar Law University, Chennai, who were the interns of one of us (Katju, J.) and who were of great help in doing research in this case.

145. We wish to commend the team of doctors of Mumbai who helped us viz. Dr. J. V. Divatia, Professor and Head, Department of Anesthesia, Critical Care and Pain at Tata Memorial Hospital, Mumbai; Dr. Roop Gursahani, Consultant Neurologist at P.D. Hinduja, Mumbai; and Dr. Nilesh Shah, Professor and Head, Department of Psychiatry at Lokmanya Tilak Municipal Corporation Medical College and General Hospital. They did an excellent job.

146. We also wish to express our appreciation of Ms. Pinki Virani who filed this petition. Although we have dismissed the petition for the reasons given above, we regard her as a public spirited person who filed the petition for a cause she bona fide regarded as correct and ethical. We hold her in high esteem.

147. We also commend the entire staff of KEM Hospital, Mumbai (including the retired staff) for their noble spirit and outstanding, exemplary and unprecedented dedication in taking care of Aruna for so many long years. Every Indian is proud of them.

B.B.B. Petition dismissed.

STATE OF U.P.
v.
NARESH AND ORS.
(Criminal Appeal No. 674 of 2006)

MARCH 08, 2011

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

Penal Code, 1860 – ss.302/34, 307/34 and 379/34 – Murder of one person and serious gunshot injuries to another – Conviction of accused-respondents by trial court – Order reversed by High Court – Justification of – Held: Not Justified – The High Court gravely erred in discarding the evidence of PWs merely because they were relatives of the deceased – It further fell into error in not giving due weightage to deposition of a stamped witness, who had suffered gun shot injuries – The High Court made too much of insignificant discrepancies, which were made the basis for acquittal – Judgment of trial court convicting the respondents restored.

Evidence – Witnesses – Related witness – Appreciation of – Held: A mere relationship cannot be a factor to affect credibility of a witness – Evidence of a witness cannot be discarded solely on the ground of his relationship with the victim of the offence.

Evidence – Witnesses – Injured witness – Appreciation of – Held: The testimony of an injured witness is accorded a special status in law – The evidence of the injured witness should be relied upon unless there are grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein.

Evidence – Discrepancies in depositions of witnesses – Effect of – Held: In all criminal cases, normal discrepancies are bound to occur in depositions of witnesses due to normal

errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence – Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon – However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety – Mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier – The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited.

Appeal – Appeal against acquittal – Held: In an appeal against an order of acquittal, the Court has to scrutinize the facts of the case cautiously – Every accused is presumed to be innocent unless his guilt is proved – While dealing with a judgment of acquittal, an appellate court must consider the entire evidence on record so as to arrive at a finding as to whether the views of the trial court were perverse or otherwise unsustainable – Criminal jurisprudence.

According to the prosecution, on 16-10-1979 morning respondent no.1 abused and assaulted PW5 when the latter stopped him from digging a passage from the fields of PW1; that thereupon PW5 lodged a complaint in police station against respondent no.1 at about 9:30 a.m.; that PW5 was accompanied to the police station by PW1 and their uncle 'SR'; that PW5 and 'SR' had a rifle and a gun with them; that later in the day when PW5, PW1 and 'SR' were returning to their village, at about 5 p.m.

the four accused-respondents emerged out from the bushes armed with gun and country made pistols, hurled abuses at them and opened fire due to which 'SR' died on the spot while PW5 was seriously injured, though PW1 escaped unhurt. The accused persons also allegedly snatched away the gun, rifle and ammunitions carried by the victims and ran away from the place of occurrence.

The trial court convicted the accused-respondents under sections 302/34, 307/34 and 379/34 of IPC and sentenced them to life imprisonment. The High Court, however, acquitted the respondents.

In the instant appeals, the appellant-State contended that the High Court erred in reversing the well reasoned judgment of the trial court giving unwarranted attention to minor contradictions on trivial matters and taking into consideration non-existent facts and in view thereof, the judgment of the High Court is liable to be set aside.

Allowing the appeal, the Court

HELD: 1. Though the trial court after considering the evidence on record came to the conclusion that the FIR had been lodged most promptly at about 9.30 p.m. on the same date naming all the four accused, the High Court doubted the FIR and labeled the same to be ante-time or ante-dated. The deposition of PW9-Constable before the court revealed that the dead body had been handed over to him for the purpose of post-mortem on 17-10-1979 at 8 a.m. The post-mortem was conducted on 18-10-1979 at about noon. The dead body remained in sealed condition throughout and nobody had any occasion to touch it. Record further reveals that PW9 was not cross-examined by any of the respondents accused nor any such

question had been put to PW.2 who had conducted the post-mortem in this regard. According to PW2, 'SR' could have died on 16.10.1979 at about 5-7 p.m. He has not been cross-examined as to under what circumstances the post-mortem could not have been conducted at an earlier point of time. [Para 14] [1193-E-H; 1194-A]

2. The High Court believed the theory put forward by the defence that the guns looted from the victims had been recovered from the dacoits who were killed in an encounter on 14-15 November, 1979 and therefore, there had been some manipulation in the prosecution's case. None of the respondents accused had, however, taken this defence in their statement under 313 Cr.P.C. Respondent no.1 had stated that he was not aware of the same. When a specific question was put to him he replied that he had also heard that in an encounter 6 dacoits had been killed in District Etah and some arms and ammunitions had been recovered from them. He had not stated anywhere that the said arms and ammunitions had been looted by those dacoits or had been recovered from them. This suggestion was also put to PW.5 when examined on 30.8.1980 and he has stated that he had not been aware that their rifle and gun had been recovered from the dacoits killed in an encounter in District Etah. [Para 15] [1194-B-E]

3. The High Court doubted the case of the prosecution for non-recovery of the arms from the respondents accused. The High Court failed to appreciate that as the incident occurred on 16.10.1979 and none of these accused were traceable, the Investigating Officer filed an application for initiating proceedings under Sections 82-83 Cr.P.C. on 21.10.1979. Proceedings of attachment of immovable property were drawn on 25.10.1979. In consequence thereof, two

accused surrendered in the court on 25.10.1979 and the remaining two surrendered on 29.10.1979. Meanwhile, PW7-S.I., the I.O. stood transferred to another police station and the investigation could not be carried out smoothly. Thus, such a ground would not be sufficient to discredit the prosecution case. [Para 16] [1194-G-H; 1195-A-B]

4. The High Court gave undue weightage to the suggestion made by defence that 'SS', Inspector of U.P. Police, brother of PW.5 had been an instrument to the manipulation of the record, though such a suggestion was denied by PW7-S.I, the I.O., stating that 'SS' did not meet him on 17.10.1979, but he had met him at a later stage but he could not give the exact date of meeting. The High Court had unnecessarily doubted his statement without realising that his statement had been recorded in the court on 30.8.1980 after about 11 months. The High Court gave undue importance to the minor contradictions in the statement of PW.1 and PW.5 as one of them had stated that the I.O. reached the place of occurrence at 10.15 p.m. and another has stated that he reached about mid night. The incident occurred in mid October 1979. This is the time when the winter starts and in such a fact-situation no person is supposed to keep record of exact time particularly in a rural area. Everybody deposes according to his estimate. More so, the statement had been recorded after a long lapse of time. Therefore, a margin of 1-1/2 hours remained merely a trivial issue. The High Court had taken a very serious note of the statement of PW.5 in respect of the first incident wherein he had stated that Respondent no.1 had initially abused him and then beaten him with danda but in the FIR he had stated that Respondent no.1 had given blow with butt-end of the spade. There was minor contradiction in the statements of PW.1 and PW.5 in respect of the first incident of the same date and minor variations in their

statements which persuaded the High Court to disbelieve the presence of PW.1 in the morning incident. [Para 17] [1195-C-H; 1196-A]

5. The trial Court had taken note of the first incident that occurred in the morning and considered the same in correct prospective, that in the morning incident PW.5 got an injury on his arm as has been found by Dr. (PW.3) and not on the head. The statement made by PW.5 may not be correct in this regard for the reason that he could not remember that he got the injury on his arm and not on the head. This version is duly supported by the NCR shown by (Ex. Ka.6). Had there been any concoction in the said NCR (Ex. Ka.6), either with the police personnel at Police Station or at the behest of Inspector 'SS', brother of PW.5, then there could not have been any discrepancy in the contents thereof. So far as this minor contradiction was concerned, PW6-Constable was not at all cross-examined in this respect. No suggestion was put to PW.6, who was examined much later than PW.1 in this regard. In respect of the first incident, PW.7-I.O. has stated that he had seen the pits made by Respondent no.1 on the western side of the Chak Road in front of his house. It had not been a suggestion of any person that the pits had been made by any person from the complainant party. Presence of the pits was an important circumstance supporting the prosecution version so far as the morning incident was concerned and the High Court erred gravely by not taking note of this specific finding by the trial Court. [Para 18] [1196-B-F]

6. The High Court also fell in error that whilst reaching from the place of occurrence to the police station, the complainant party covered the distance in one hour but while coming back in the evening they had taken a longer time. The time gap was not so much that it could give rise to any kind of suspicion. Such a trivial issue could not have been a ground for acquitting the

accused. More so, no question in this regard was put to either of the star witnesses, when they were cross-examined. [Para 20] [1197-B]

7. The High Court further found a material contradiction in the statements of PW.1 and PW.5 and made this one of the grounds for the acquittal of the accused observing: "To meet the situation PW5 claims that he fell unconscious little after receipt of his injury, whereas PW1 stated that he immediately fell unconscious. Therefore, it is not possible for him to see and notice his assailants. For the said contradictions the testimony of this witness cannot be given adequate weightage." In the facts of this case, time gap could be only of few minutes, thus, it was not even worth taking note of by the High Court. [Para 21] [1197-C-F]

8. The High Court also doubted the prosecution version on the ground that PW.1 did not suffer any injury in the said incident without appreciating his deposition that all of them were walking at some distance and he was about 7-8 steps behind 'SR' and PW.5 and immediately after seeing the accused persons, he ran backward. After taking 15-20 steps, he saw that persons working in the surrounding fields had started coming and then he stopped, and saw the accused taking away the arms and ammunitions from 'SR' and PW.5. [Para 22] [1197-G-H; 1198-A]

9. The High Court disbelieved PW.5, who had suffered the gun shot injuries. His evidence could not have been brushed aside by the High Court without assigning cogent reasons. Mere contradictions on trivial matters could not render his deposition untrustworthy. The evidence of an injured witness must be given due weightage being a stamped witness, thus, his presence cannot be doubted. His statement is generally considered to be very reliable and it is unlikely that he

has spared the actual assailant in order to falsely implicate someone else. The testimony of an injured witness has its own relevancy and efficacy as he has sustained injuries at the time and place of occurrence and this lends support to his testimony that he was present during the occurrence. Thus, the testimony of an injured witness is accorded a special status in law. The witness would not like or want to let his actual assailant go unpunished merely to implicate a third person falsely for the commission of the offence. Thus, the evidence of the injured witness should be relied upon unless there are grounds for the rejection of his evidence on the basis of major contradictions and discrepancies therein. [Para 23] [1198-A-E]

Jarnail Singh v. State of Punjab **(2009) 9 SCC 719;** *Balraje @ Trimbak v. State of Maharashtra* **(2010) 6 SCC 673 and** *Abdul Sayed v. State of Madhya Pradesh* **(2010) 10 SCC 259 – relied on.**

10. The High Court disbelieved both the witnesses PW.1 and PW.5 as being closely related to the deceased and for not examining any independent witnesses. In a case like this, it may be difficult for the prosecution to procure an independent witness, wherein the accused had killed one person at the spot and seriously injured the other. The independent witness may not muster the courage to come forward and depose against such accused. A mere relationship cannot be a factor to affect credibility of a witness. Evidence of a witness cannot be discarded solely on the ground of his relationship with the victim of the offence. The plea relating to relatives' evidence remains without any substance in case the evidence has credence and it can be relied upon. In such a case the defence has to lay foundation if plea of false implication is made and the Court has to analyse the evidence of related witnesses carefully to find out

whether it is cogent and credible. [Para 24] [1198-F-H; 1199-A-B]

Jarnail Singh v. State of Punjab **(2009) 9 SCC 719;** *Vishnu & Ors. v. State of Rajasthan* **(2009) 10 SCC 477 and** *Balraje @ Trimbak v. State of Maharashtra* **(2010) 6 SCC 673 – relied on.**

11. In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence. "Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility." Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited. [Para 25] [1199-C-H]

State Represented by Inspector of Police v. Saravanan

& Anr. **AIR 2009 SC 152;** *Arumugam v. State* **AIR 2009 SC 331;** *Mahendra Pratap Singh v. State of Uttar Pradesh* **(2009) 11 SCC 334 and** *Dr. Sunil Kumar Sambhudayal Gupta & Ors. v. State of Maharashtra,* **JT 2010 (12) SC 287 – relied on**

12. The High Court also fell into error in giving significance to a trivial issue, namely, that in respect of the morning incident all the accused had not been named in the complaint/NCR. It is settled legal proposition that FIR is not an encyclopedia of the entire case. It may not and need not contain all the details. Naming of the accused therein may be important but not naming of the accused in FIR may not be a ground to doubt the contents thereof in case the statement of the witness is found to be trustworthy. The court has to determine after examining the entire factual scenario whether a person has participated in the crime or has falsely been implicated. The informant fully acquainted with the facts may lack necessary skill or ability to reproduce details of the entire incident without anything missing from this. Some people may miss even the most important details in narration. Therefore, in case the informant fails to name a particular accused in the FIR, this ground alone cannot tilt the balance of the case in favour of the accused. [Para 26] [1200-C-F]

Rohtash v. State of Rajasthan **(2006) 12 SCC 64;** *Ranjit Singh & Ors. v. State of Madhya Pradesh* **JT 2010 12 SC 167 – relied on.**

13. In an appeal against an order of acquittal, the Court has to scrutinize the facts of the case cautiously. Every accused is presumed to be innocent unless his guilt is proved. The presumption of innocence is a human right subject to the statutory exceptions. The said principle forms the basis of criminal jurisprudence in India. The law in this regard is well settled that while

dealing with a judgment of acquittal, an appellate court must consider the entire evidence on record so as to arrive at a finding as to whether the views of the trial court were perverse or otherwise unsustainable. An appellate court must also consider whether the court below has placed the burden of proof incorrectly or failed to take into consideration any admissible evidence or had taken into consideration evidence brought on record contrary to law? In exceptional cases, where there are compelling circumstances and the judgment in appeal is found to be perverse, the appellate court can interfere with the order of acquittal. So, in order to warrant interference by the appellate court, a finding of fact recorded by the court below must be outweighed by evidence or such finding if outrageously defies logic as to suffer from the vice of irrationality. [Para 27] [1200-F-H; 1201-A-C]

Babu v. State of Kerala **(2010) 9 SCC 189 and** *Dr. Sunil Kumar Sambhudayal Gupta & Ors. v. State of Maharashtra* **JT 2010 (12) SC 287 – relied on.**

14. The Court has to strike a balance in the interest of all the parties concerned. Thus, there is an obligation on the court neither to give a long latitude to the prosecution, nor construe the law in favour of the accused. In the instant case, the High Court gravely erred in discarding the evidence of PW.1 and P.W.5 as a result of merely being relatives of the deceased, 'SR'. The High Court further fell into error in not giving due weightage to the deposition of PW.5, a stamped witness, who had suffered gun shot injuries. The High Court made too much of insignificant discrepancies, which were made the basis for acquittal. Thus, the findings recorded by the High Court are perverse and cannot be sustained in the eyes of law. [Para 28] [1201-F-G]

15. The judgment passed by the High Court is set aside and the judgment of the trial court convicting the

respondents under Sections 302/34, 307/34 and 379/37 of IPC and the sentences so imposed, is restored. [Para 29] [1201-H; 1202-A]

Case Law Reference:

(2009) 9 SCC 719	**relied on**	**Para 23**
(2010) 6 SCC 673	**relied on**	**Para 23**
(2010) 10 SCC 259	**relied on**	**Para 23**
(2009) 10 SCC 477	**relied on**	**Para 24**
AIR 2009 SC 152	**relied on**	**Para 25**
AIR 2009 SC 331	**relied on**	**Para 25**
(2009) 11 SCC 334	**relied on**	**Para 25**
JT 2010 (12) SC 287	**relied on**	**Para 25**
(2006) 12 SCC 64	**relied on**	**Para 26**
JT 2010 12 SC 167	**relied on**	**Para 26**
(2010) 9 SCC 189	**relied on**	**Para 27**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 674 of 2006.

From the Judgment & Order dated 19.05.2004 of the High Court of Judicature at Allahabad in Criminal Appeal No. 2866 of 1980.

R.K. Gupta, Mukesh Verma, Pradeep Misra, Suraj Singh for the Appellant.

Manoj Prasad, Sadashiv Gupta, Vishal Somany for the Respondents.

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 19.5.2004 passed by the High Court of Judicature at Allahabad in Criminal Appeal No.2866/1980, acquitting the respondents by reversing the judgment and order dated 9.12.1980, passed by the Sessions Judge in Sessions Trial Nos.181 and 182 of 1980, convicting the said respondents under sections 302/34, 307/34 and 379/34 of the Indian Penal Code, 1860 (hereinafter called the `IPC') and sentencing them under the first count to life imprisonment, under the second count to rigorous imprisonment for 5 years and under the third count to rigorous imprisonment for 2 years. However, all the sentences were directed to run concurrently.

2. Facts and circumstances giving rise to this appeal are that on 16.10.1979, in the morning Naresh, respondent no.1 herein, started digging the (Chak Road) to create a passage from the field of the informant Subedar (PW.1). He was stopped by Balak Ram (PW.5). Naresh, respondent no.1, not only abused Balak Ram (PW.5), but also assaulted him and threatened him that he would face dire consequences. With regard to this, Balak Ram (PW.5) lodged the complaint of the incident at about 9.30 a.m. in Police Station, Kampil, District Farukhabad. Balak Ram (PW.5) was accompanied to the police station by the informant Subedar (PW.1) and their uncle Sri Ram (deceased). Balak Ram (PW.5) and Sri Ram (deceased) had a rifle and a gun with them.

3. After lodging the complaint in the police station, Kampil, one of them, went to the market to make some purchases and, subsequently, they returned to their village in the evening. While coming back to their village Karanpur, from Kampil, at about 5 p.m. on Kampil - Aliganj Road, as soon as they approached the fields of Gajraj and Ganga Ram; they found the four accused (respondents herein) emerging out from the bushes armed with gun and country made pistols. They hurled abuse at them and also opened fire. Sri Ram and Balak Ram (PW.5) received gun

shot injuries. Sri Ram died on the spot, however, Subedar (PW.1) escaped unhurt. After hearing a distress cry, some persons working in the nearby fields rushed towards the place of occurrence. The accused ran away from the place of occurrence snatching the gun, rifle and ammunitions from the victims.

4. After the arrival of the family members of the victims and some villagers at the place of occurrence, Subedar (PW.1) went to the police station in Kampil, at a distance of 6 miles from the place of occurrence, and lodged the First Information Report (hereinafter called the "FIR") at 9.30 p.m. naming all the accused. Injured Balak Ram (PW.5) was sent for a medical examination at Public Health Centre, Kayamganj which was at a distance of 20 k.m from the place of occurrence. He was examined on the same day by Dr. R.C. Gupta (PW.3) at 10.30 p.m. The Investigating Officer reached the place of occurrence at 10.15 p.m. on the same night, however, the inquest could not be prepared at night due to inadequate light.

5. Ultimately, inquest proceedings could be started at 6.30 a.m. on 17.10.1979. The body of Sri Ram (deceased) was sealed and handed over to Sughar Singh, Constable (PW.9) for taking to the mortuary for post-mortem at Fatehgarh. The I.O. prepared the site plan and started investigation. As none of the accused could be traced, proceedings under Sections 82-83 of the Code of Criminal Procedure, 1973 (hereinafter called "Cr.P.C.") were initiated on 21.10.1979. For that purpose, the Magistrate issued notices on 25.10.1979. In view thereof, two accused, namely, Naresh and Shyam Singh surrendered on 25.10.1979 in the court of the Judicial Magistrate. The remaining two accused, namely, Bharat and Jagpal surrendered on 29.10.1979.

6. After completing the investigation, a chargesheet was filed against all the four accused. They denied their involvement in the crime and claimed trial. In order to establish its case

before the trial Court, the prosecution examined 11 witnesses including Subedar (PW.1), informant and Balak Ram (PW.5), injured. After concluding the trial, the trial Court convicted and sentenced all the four accused as mentioned hereinabove.

7. Being aggrieved, all the four convicts preferred Criminal Appeal No.2866/1980, before the High Court which has been allowed vide judgment and order dated 19.5.2004 (impugned) and all the four convicts stood acquitted. Hence, this appeal.

8. During the pendency of this appeal before this Court, Bharat, one of the accused died and his name stood deleted from the array of parties vide order of this Court dated 5.5.2006. Thus, we have to deal with three accused, namely, Naresh, Jagpal and Shyam Singh.

9. Shri R.K. Gupta, learned counsel appearing for the appellant-State has submitted that the High Court has erred in reversing the well reasoned judgment of the trial court giving unwarranted attention to minor contradictions on trivial matters and taking into consideration non-existent facts. The High Court has held that the FIR was ante-timed and ante-dated without giving any reason whatsoever. The High Court held that the FIR was subject to doubt, though such a finding does not get any support from any material on record. The FIR has been lodged most promptly considering the distance between the place of occurrence and the police station. Balak Ram (PW.5) - injured witness had been examined by Dr. R.C. Gupta (PW.3) within a few hours of the incident. Therefore, the finding that the FIR was ante-timed and ante-dated is erroneous and contrary to the documents on record. The High Court without giving any cogent reason held that testimony of Balak Ram (PW.5) who suffered gun shot injuries, was not worth believing. Such a view is contrary to the consistent and persistent view taken by this Court time and again that the presence of injured witness cannot be doubted and his version of events can, even in exceptional circumstances, be relied upon with care and

caution. The High Court reversed the trial court's judgment also on the ground that not a single independent witness has been examined by the prosecution. Such a finding has been recorded without considering the fact that incident occurred in the evening at a considerable distance from the village on the road and some persons had arrived after hearing the hue and cry by Balak Ram (PW.5) and Subedar (PW.1). By that time, the accused had run away, snatching the arms of the victims. In view thereof, the appeal deserves to be allowed and the judgment and order of the High Court is liable to be set aside.

10. On the contrary, Shri Manoj Prasad, learned counsel appearing for the respondents, has vehemently opposed the appeal contending that the incident occurred three decades ago. The respondents have been acquitted by the High Court after considering all the material on record. In respect of the incident that occurred on the morning of 16.10.1979, Balak Ram (PW.5) lodged the complaint on the basis of which NCR was recorded, wherein only Naresh, accused had been named. The not naming of the other accused is a good ground for rejecting the prosecution case in its entirety. The finding of fact recorded by the High Court cannot be said to be perverse warranting interference by this Court. No recovery of arms and ammunitions had been made from the respondents/accused. The rifle and gun which were allegedly snatched from the victims had been recovered after a long time from the dacoits killed in an encounter in District Etah. The High Court has rightly disbelieved Balak Ram (PW.5) on the basis of material contradictions in his deposition. This Court has laid down definite parameters for interference with the order of acquittal and this case does not fall within those parameters. Thus, there is no cogent reason for this Court to interfere with the same. Prosecution suppressed the true genesis of the incident and enroped the respondents due to pre-existing enmity. The prosecution failed to prove its case beyond reasonable doubt. Thus, no interference is warranted, the appeal lacks merit and is liable to be dismissed.

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

12. The admitted facts of the case remained that the incident occurred on the morning of 16.10.1979 in respect of which the NCR was recorded by the police station in Kampil, naming Naresh as one of the accused. The FIR, in respect of the incident that occurred on the same day in the evening, was lodged within 3-1/2 hours of the time of incident at police station, Kampil at a distance of about 6 miles from the place of occurrence; the I.O. reached the place of occurrence at 10.15 p.m. Balak Ram (PW.5) injured, had been examined in the Public Health Centre, Kayamganj at 10.30 p.m. on the same day by Dr. R.C. Gupta (PW.3) at a distance of 20 k.m. from the place of occurrence.

13. Dr. R.C. Gupta (PW.3) found the following injuries on the person of Balak Ram (PW.5):

(i) Two abrasions in a area of 1 cm x ¼ cm over outer side of right forearm, lower part. Scab not formed.

(ii) Gun shot wound of entry 4 cm x 2 cm x through and through over inner aspect of right thigh middle part. Margins are irregular and inverted. Blackening and tattooing around the wound absent. Direction is down and lateral. Oozing of fresh blood from the wound present. Advised X-ray.

(iii) Guns shot wound of exit 17 cm x 8 cm x through and through over outer side of right thigh 5 cm above the right knee joint. Margins are irregular and everted. Blackening and tattooing absent. Oozing of fresh blood present. Advised X-ray.

Injury No.1 is caused by friction. Injury Nos.2 and 3 are caused by projectile firearm. Injury No.1 is simple in nature. Injury nos.2 and 3 are kept under observation. Advised X-ray right thigh. Duration fresh.

Dr. Anil Kumar Dubey (PW.2) conducted the post-mortem examination on the body of Sri Ram (deceased) and found the following ante-mortem external injury on his corpse:-

(i) Circular gun shot wound of entry 1" in diameter and chest cavity deep situated on the right side of the back of the chest, 3" below the lower angle of the right scapula and 3" away from the mid line in the direction of 3 O' clock. The margins of the wound were inverted and charred.

On internal examination of the corpse of Sri Ram, Dr. Dubey found 6th, 7th and 8th ribs broken under the external injury said above. Beneath, he found the pleura and the right lung lacerated. All the four chambers of the heart were empty. He found 2 lbs of free blood in thoracic cavity. The upper lobe of the liver was lacerated. Right side of the diaphragm also was lacerated. The stomach was empty. The intestines had faecal matter and gas. In the thorax Dr. Dubey had found a piece of wadding and 20 small shots respectively Exc.1 and 2.

14. The trial Court after considering the evidence on record came to the conclusion that the FIR had been lodged most promptly at about 9.30 p.m. on the same date naming all the four accused. The High Court doubted the FIR and labeled the same to be ante-timed or ante-dated. Deposition of Constable Sughar Singh (PW.9) before the court revealed that the dead body had been handed over to him for the purpose of post-mortem on 17.10.1979 at 8 a.m. after having panchnama and sealing thereof, he reached Fatehgarh Police line along with Constable Ram Chand in a Tonga and got the entry made in the Rojnamcha. Post-mortem was conducted on 18-10-1979 at about noon on his identification of the dead body. The dead body remained in sealed condition throughout and nobody had any occasion to touch it. Record further reveals that Constable Sughar Singh (PW.9) was not cross-examined by any of the respondents accused nor any such question had been put to Dr. A.K. Dubey (PW.2) who had conducted the post-mortem

in this regard. According to Dr. Dubey, Sri Ram could have died on 16.10.1979 at about 5-7 p.m. He has not been cross-examined as to under what circumstances the post-mortem could not have been conducted at an earlier point of time.

15. The High Court has believed the theory put forward by the defence that the guns looted from the victims had been recovered from the dacoits who were killed in an encounter on 14-15 November, 1979 in Etah District. Therefore, there had been some manipulation in the prosecution's case. None of the respondents accused had taken this defence in their statement under 313 Cr.P.C. Naresh, respondent no.1 had stated that he was not aware of the same. When a specific question was put to him he replied that he had also heard that in an encounter 6 dacoits had been killed in District Etah and some arms and ammunitions had been recovered from them. He had not stated anywhere that the said arms and ammunitions had been looted by those dacoits or had been recovered from them. This suggestion was also put to Balak Ram (PW.5) when examined on 30.8.1980 and he has stated that he had not been aware that their rifle and gun had been recovered from the dacoits killed in an encounter in District Etah. In fact, Inspector Charanpal Singh (PW.11) had deposed first time on 11.11.1980 that 6 dacoits had been killed in an encounter in District Etah and some arms and ammunitions were recovered from them and out of the said recovered arms, namely, rifle – Ex.7, gun – Ex.8 and some ammunitions – Ex.9 were produced in the court.

16. The High Court has doubted the case of the prosecution for non-recovery of the arms from the respondents accused. The High Court failed to appreciate that as the incident occurred on 16.10.1979 and none of these accused were traceable, the Investigating Officer filed an application for initiating proceedings under Sections 82-83 Cr.P.C. on 21.10.1979. Proceedings of attachment of immovable property were drawn on 25.10.1979. In consequence thereof, two

accused surrendered in the court on 25.10.1979 and the remaining two surrendered on 29.10.1979. Meanwhile, S.I. Brijendra Singh (PW.7), the I.O. stood transferred to another police station and the investigation could not be carried out smoothly. Thus, such a ground would not be sufficient to discredit the prosecution case.

17. The High Court has given undue weightage to the suggestion made by defence that Surjan Singh, Inspector of U.P. Police, brother of Balak Ram (PW.5) had been an instrument to the manipulation of the record, though such a suggestion was denied by S.I. Brijendra Singh (PW.7), the I.O., stating that Surjan Singh did not meet him on 17.10.1979, but he had met him at a later stage but he could not give the exact date of meeting. The High Court had unnecessarily doubted his statement without realising that his statement had been recorded in the court on 30.8.1980 after about 11 months. The High Court has given undue importance to the minor contradictions in the statement of Subedar (PW.1) and Balak Ram (PW.5) as one of them had stated that the I.O. reached the place of occurrence at 10.15 p.m. and another has stated that he reached about mid night. The incident occurred in mid October 1979. This is the time when the winter starts and in such a fact-situation no person is supposed to keep record of exact time particularly in a rural area. Everybody deposes according to his estimate. More so, the statement had been recorded after a long lapse of time. Therefore, a margin of 1-1/2 hours remained merely a trivial issue. The High Court had taken a very serious note of the statement of Balak Ram (PW.5) in respect of the first incident wherein he had stated that Naresh, the accused, had initially abused him and then beaten him with danda but in the FIR he had stated that accused Naresh had given blow with butt-end of the spade. There was minor contradiction in the statements of Subedar (PW.1) and Balak Ram (PW.5) in respect of the first incident of the same date and minor variations in their statements which persuaded the High Court to disbelieve the presence of Subedar (PW.1) in

the morning incident.

18. The trial Court had taken note of the first incident that occurred in the morning and considered the same in correct prospective, that in the morning incident Balak Ram (PW.5) got an injury on his arm as has been found by Dr. R.C. Gupta (PW.3) and not on the head. The statement made by Balak Ram (PW.5) may not be correct in this regard for the reason that he could not remember that he got the injury on his arm and not on the head. This version is duly supported by the NCR shown by (Ex. Ka.6). Had there been any concoction in the said NCR (Ex. Ka.6), either with the police personnel at Kampil Police Station or at the behest of Inspector Surjan Singh, brother of Balak Ram (PW.5), then there could not have been any discrepancy in the contents thereof. So far as this minor contradiction was concerned, Constable Shiv Nath Singh (PW.6) was not at all cross-examined in this respect. No suggestion was put to Constable Shiv Nath Singh (PW.6), who was examined much later than Subedar (PW.1) in this regard. In respect of the first incident S.I. Brijendra Singh (PW.7), the I.O., has stated that he had seen the pits made by Naresh, accused on the western side of the Chak Road in front of his house. It had not been a suggestion of any person that the pits had been made by any person from the complainant party. Presence of the pits was an important circumstance supporting the prosecution version so far as the morning incident was concerned and the High Court erred gravely not taking note of this specific finding by the trial Court.

19. The High Court had doubted the prosecution case that if in respect of the first incident NCR had been lodged in the morning, why had the complainant party stayed at Kampil for the whole day? The trial Court had recorded a finding after scrutiny of the evidence that 12 rowdy persons had been taken into custody and that the police officers of that police station remained pre-occupied with that particular dispute and so not

a single constable was available to come with the complainants.

20. The High Court also fell in error that whilst reaching from the place of occurrence to the police station, the complainant party covered the distance in one hour but while coming back in the evening they had taken a longer time. The time gap was not so much that it could give rise to any kind of suspicion. Such a trivial issue could not have been a ground for acquitting the accused. More so, no question in this regard was put to either of the star witnesses, when they were cross-examined.

21. The High Court has further found a material contradiction in the statements of Subedar (PW.1) and Balak Ram (PW.5) and had made this one of the grounds for the acquittal of the accused observing:

> "To meet the situation Balak Ram claims that he fell unconscious little after receipt of his injury, whereas Subedar Singh stated that he immediately fell unconscious. Therefore, it is not possible for him to see and notice his assailants. For the said contradictions the testimony of this witness cannot be given adequate weightage."
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> In the facts of this case, time gap could be only of few minutes, thus, it was not even worth taking note of by the High Court.

22. The High Court has doubted the prosecution version also on the ground that Subedar (PW.1) did not suffer any injury in the said incident without appreciating his deposition that all of them were walking at some distance and he was about 7-8 steps behind Sri Ram (deceased) and Balak Ram (PW.5) and immediately after seeing the accused persons, he ran backward. After taking 15-20 steps, he saw that persons working in the surrounding fields had started coming and then he stopped, and saw the accused taking away the arms and

ammunitions from Sri Ram (deceased) and Balak Ram (PW.5).

23. The High Court has disbelieved Balak Ram (PW.5), who had suffered the gun shot injuries. His evidence could not have been brushed aside by the High Court without assigning cogent reasons. Mere contradictions on trivial matters could not render his deposition untrustworthy.

The evidence of an injured witness must be given due weightage being a stamped witness, thus, his presence cannot be doubted. His statement is generally considered to be very reliable and it is unlikely that he has spared the actual assailant in order to falsely implicate someone else. The testimony of an injured witness has its own relevancy and efficacy as he has sustained injuries at the time and place of occurrence and this lends support to his testimony that he was present during the occurrence. Thus, the testimony of an injured witness is accorded a special status in law. The witness would not like or want to let his actual assailant go unpunished merely to implicate a third person falsely for the commission of the offence. Thus, the evidence of the injured witness should be relied upon unless there are grounds for the rejection of his evidence on the basis of major contradictions and discrepancies therein. [Vide: *Jarnail Singh v. State of Punjab,* (2009) 9 SCC 719; *Balraje @ Trimbak v. State of Maharashtra,* (2010) 6 SCC 673; and *Abdul Sayed v. State of Madhya Pradesh,* (2010) 10 SCC 259].

24. The High Court disbelieved both the witnesses Subedar (PW.1) and Balak Ram (PW.5) as being closely related to the deceased and for not examining any independent witnesses. In a case like this, it may be difficult for the prosecution to procure an independent witness, wherein the accused had killed one person at the spot and seriously injured the other. The independent witness may not muster the courage to come forward and depose against such accused. A mere relationship cannot be a factor to affect credibility of a witness. Evidence of a witness cannot be discarded solely on the ground

of his relationship with the victim of the offence. The plea relating to relatives' evidence remains without any substance in case the evidence has credence and it can be relied upon. In such a case the defence has to lay foundation if plea of false implication is made and the Court has to analyse the evidence of related witnesses carefully to find out whether it is cogent and credible. [Vide *Jarnail Singh* (supra), *Vishnu & Ors. v. State of Rajasthan,* (2009) 10 SCC 477; and *Balraje @ Trimbak* (supra)].

25. In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence. "Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility." Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited. [Vide: *State Represented by Inspector of Police v. Saravanan & Anr.,* AIR 2009 SC 152; *Arumugam v. State,* AIR 2009 SC

331; *Mahendra Pratap Singh v. State of Uttar Pradesh,* (2009) 11 SCC 334; and *Dr. Sunil Kumar Sambhudayal Gupta & Ors. v. State of Maharashtra,* JT 2010 (12) SC 287].

26. The High Court has also fallen into error in giving significance to a trivial issue, namely, that in respect of the morning incident all the accused had not been named in the complaint/NCR.

It is settled legal proposition that FIR is not an encyclopedia of the entire case. It may not and need not contain all the details. Naming of the accused therein may be important but not naming of the accused in FIR may not be a ground to doubt the contents thereof in case the statement of the witness is found to be trustworthy. The court has to determine after examining the entire factual scenario whether a person has participated in the crime or has falsely been implicated. The informant fully acquainted with the facts may lack necessary skill or ability to reproduce details of the entire incident without anything missing from this. Some people may miss even the most important details in narration. Therefore, in case the informant fails to name a particular accused in the FIR, this ground alone cannot tilt the balance of the case in favour of the accused. [Vide: *Rohtash v. State of Rajasthan,* (2006) 12 SCC 64; and *Ranjit Singh & Ors. v. State of Madhya Pradesh,* JT 2010 12 SC 167].

27. We are fully aware of the fact that we are entertaining the appeal against the order of acquittal. Thus, the Court has to scrutinize the facts of the case cautiously and knowing the parameters fixed by this Court in this regard.

Every accused is presumed to be innocent unless his guilt is proved. The presumption of innocence is a human right subject to the statutory exceptions. The said principle forms the basis of criminal jurisprudence in India. The law in this regard is well settled that while dealing with a judgment of acquittal,

an appellate court must consider the entire evidence on record so as to arrive at a finding as to whether the views of the trial court were perverse or otherwise unsustainable. An appellate court must also consider whether the court below has placed the burden of proof incorrectly or failed to take into consideration any admissible evidence or had taken into consideration evidence brought on record contrary to law? In exceptional cases, whether there are compelling circumstances and the judgment in appeal is found to be perverse, the appellate court can interfere with the order of acquittal. So, in order to warrant interference by the appellate court, a finding of fact recorded by the court below must be outweighed evidence or such finding if outrageously defies logic as to suffer from the vice of irrationality. [Vide: *Babu v. State of Kerala,* (2010) 9 SCC 189; and *Dr. Sunil Kumar Sambudayal Gupta & Ors.* (supra)].

28. The instant case is required to be examined in the totality of the circumstances and in the light of the aforesaid legal propositions. The Court has to strike a balance in the interest of all the parties concerned. Thus, there is an obligation on the court neither to give a long latitude to the prosecution, nor construe the law in favour of the accused. In view of the aforesaid analysis of facts and evidence on record, we reach the inescapable conclusion that the High Court has gravely erred in discarding the evidence of Subedar (PW.1) and Balak Ram (P.W.5) as a result of merely being relatives of the deceased, Sri Ram. The High Court further fell into error in not giving due weightage to the deposition of Balak Ram (P.W.5), a stamped witness, who had suffered gun shot injuries. The High Court made too much of insignificant discrepancies, which were made the basis for acquittal. Thus, we are of the considered opinion that the findings recorded by the High Court are perverse and cannot be sustained in the eyes of law.

29. Thus, the appeal is, accordingly, allowed. Judgment and order dated 19.5.2004 passed by the High Court is hereby

set aside and the judgment and order of the trial court dated 9.12.1980 passed in Sessions Trial No. 181 and 182 of 1980 convicting the respondents under Sections 302/34, 307/34 and 379/37 of IPC and the sentences so imposed, is restored. As the respondents have been acquitted by the High Court, the copy of the order be sent to the Chief Judicial Magistrate, Farukhabad, to take the respondents into custody and send them to jail to serve the unserved part of the sentence.

B.B.B. Appeal allowed.