TAMIL NADU HOUSING BOARD
v.
THE SERVICE SOCIETY & ANR.
(Civil Appeal Nos. 2320 of 2011)

MARCH 04, 2011

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

Housing – LIG housing scheme – Acquisition of land by State Government – Formulation of Scheme by Housing Board for development of the land and construction of houses and flats – Allotment of houses in the year 1976 – Fixation of tentative allotment price made up of cost of plot, cost of development and cost of house – Execution of lease-cum-sale agreement between the Board and the allottees – Clause of the agreement contemplating the final price to be fixed within three years from the date of allotment – However, final price determined by the Housing Board in the year 1988 – Final cost increased considerably on account of enhancement of compensation to land owners – Issuance of demand letter to allottees to pay difference in cost by the specified date, failing which interest @ 14%/13% p.a. would be charged – Challenge to, by the Society-allottees of the LIG houses – Dismissed by the State Government – Writ petition – Single Judge of the High Court quashed the demand of Board towards price increase – On writ appeal, Division Bench directed the allottee to pay additional sum towards increased cost of the plot and the specified amount towards the interest with further interest @ 9% p.a. – Cross appeals – Held: Letter of allotment and lease-cum-sale agreement enabled the Housing Board to determine the final price taking into account the final cost of acquisition, cost of development and amenities and cost of the building – The price indicated at the time of allotment was purely tentative – No term or provision in the contract to the effect that if the Board did not determine the final price within three years from the date of

allotment, it would lose the right to determine the final price thereafter or that the tentative price would become the final price – Thus, the Board not barred from fixing the final price on the expiry of three years from the date of allotment – Compensation in regard to the land was pending as also development work could not be completed on account of encroachment of the acquired land – Therefore, while fixing the final price in the year 1988, alongwith land cost component out of the tentative price, the cost of development or cost of construction could be increased – It cannot be said that the Board failed to justify the increase demanded by it – Demand for increase in price on account of final cost made by the Board upheld – Interest payable on the increase should be only 9% p.a., as directed by the High Court.

Preeta Singh v Haryana Urban Development Authority **1996 (8) SCC 756 – referred to.**

Case Law Reference:

1996 (8) SCC 756	**Referred to.**	**Para 21**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2320 of 2011.

From the Judgment & Order dated 7.8.2007 of the High Court of Judicature at Madras in W.A. No. 1566 of 1999.

WITH

C.A. No. 2321 of 2011.

Mohan Parasaran, ASG, T. Harish Kumar, V. Vasudevan, V.Balachandran for the Appellant

V. Balachandran, R. Nedumaran, S. Thananjayan for the Respondents.

The Order of the Court was delivered by

O R D E R

R. V. RAVEENDRAN J.

1. Leave granted.

2. The first respondent ('Society' for short) requested the state government (second respondent) to provide a Low Income Group housing scheme for the benefit of its members who were the employees of Tamil Nadu Electricity Board. The state government directed the Tamil Nadu Housing Board, the appellant herein ('The Board' for short) to execute the said scheme. To meet the requirements of the employees of the Electricity Board as also the staff of the appellant, the state government acquired an extent of 8.38 acres of land in Singanur Village, Coimbatore. The Board formulated a scheme for development of the said land and construction of 145 LIG Houses and 120 LIG flats therein. In pursuance of it, in the year 1976, the Board allotted to several members of the society, LIG Houses, each house comprising a plot measuring about 40' x 26' (1040 sq.ft.) and a proposed construction measuring 316 sq.ft. Though the standard measurement of the proposed plots was 1040 sq.ft, the actual extents of some of the plots were different, that is 1000 sq.ft, 1021 sq.ft, 1150 sq.ft, 1235 sq.ft etc. For convenience we will refer to the facts relating to the allottee of LIG House No.49 which comprised a plot measuring 1000 sq.ft. and a house measuring 316 sq.ft.

3. The tentative allotment price was fixed by the Board as Rs.18,000/- (made up of cost of plot, cost of development and cost of house) and each allottee was required to make an initial deposit of Rs.3000/- and pay the balance in agreed monthly instalments. The Board also entered into a lease-cum-sale agreement in November 1977 with the allottee containing the terms and conditions of lease and the option for sale. Clause 17 of the said agreement providing for sale of the LIG House to the allottee is extracted below:

> "The lessor agrees to sell the property more particularly described in the schedule hereunder to the lessee for such price as the Administrative Officer of the lessor may at any time in his sole discretion fix and at which time the Administrative Officer of the lessor is entitled to consider details regarding development charges, cost of amenities, cost of buildings etc., and whether the price of the land acquired under the Land Acquisition Act together with suitable modifications thereto by the local laws become final by a conclusive adjudication thereon by the concerned tribunals and courts. The final decision of the Administrative Officer of the lessor are to be the final price of the property as determined under these presents is conclusive and binding on the lessee and the lessee agrees to purchase the property from the lessor as the said price on the terms and conditions hereinafter mentioned.
>
> Excepting the fixation of price with reference to the claim of compensation adjudicated or awarded by courts finally and conclusively with regard to the lands acquired under the scheme, the lessor shall fix the price of the property after taking into consideration the development charges, cost of amenities and buildings etc. within a period of three years from the date of allotment and which price is subject only to a revision on account of excess compensation if any awarded by the courts for the lands as aforesaid."

Clause 24 of the agreement required the allottee-cum-lessee to pay interest on the amounts outstanding, at the rate of 9% per annum. The Board did not disclose to the allottees, the break-up of the tentative cost, as to how much for the land, and how much for the development cost and construction.

4. Though clause 17 contemplated the final price being fixed within three years from the date of allotment, the Board did not fix the final price within that period. The Board determined the final price only in the year 1988, nearly 12 years after the allotment and sent a demand letter dated 21.5.1988

informing the allottee that the final cost of the LIG House No.49 was Rs.34,770/- as against the tentative price of Rs.18,000/- and called upon the allottee to remit the difference in cost of Rs.16,770/- (plus Rs.351 payable to the municipal corporation) on or before 30.06.1988. The allottee was required to pay the said amounts on or before 30.06.1988, failing which the amount due would carry interest at 14%/13% per annum from 1.7.1988. The Board also clarified that the increase in the cost was mainly on account of payment of increased compensation for the acquisition of land.

5. Feeling aggrieved, the society, acting on behalf of its members who were the allottees of the LIG houses, filed an appeal before the state government challenging the said demand. The appeal was dismissed by order dated 31.10.1991. The society thereafter filed WP No.15635 of 1991 for quashing the appellate order dated 31.10.1991 of the state government and sought a direction to the Board not to demand from its members, any increase in price as demanded in May 1988. The society contended that having regard to clause 17 of the lease-cum-sale agreement, the final cost had to be determined within three years from the date of allotment; that such a determination not having been done, the tentative price of Rs.18,000/- should be deemed to be the final price; and that the Board could not make a demand for increase in price, after expiry of 12 years. Alternatively, it was submitted that in the event of the court holding that the Board could demand the increase in cost, that should be only in respect of the land cost component and not with reference to the components relating to cost of development and cost of construction. It was lastly contended that the amount determined and demanded by the Board as the final cost was excessive and the Board had failed to justify the final cost demanded by giving any break up or particulars of the claim.

6. The Board resisted the petition contending that the final price was determined with reference to the cost of the

acquisition of the land and the cost of development and cost of construction. It stated that the delay in finalizing the final cost was on account of the pendency of dispute raised by the land owners in regard to increase in compensation for the acquired land and on account of encroachments over part of the acquired land. It contended that the final cost was based on actuals and it was not excessive. It was submitted that only a few of the LIG Houses and flats were allotted to the members of the society and the remaining houses were allotted to its own employees and to members of public; and that except 55 allottees, all others had remitted the amount demanded.

7. A learned single judge of the High Court by order dated 29.4.1999 allowed the writ petition and quashed the appellate order dated 31.10.1991 of the state government and the demand by the Board for increase in price. The Board filed a writ appeal challenging the order of the learned Single Judge.

8. During hearing before the division bench, both sides filed calculation sheets showing the cost of acquisition and the consequential increase in the cost of the LIG house. As per the calculation sheet filed by the society, the balance payable by each allottee towards increase in land cost was Rs.8634/- per plot of 1040 sq.ft. (after adjusting Rs.3000/- paid as initial payment and Rs.500/- paid as EMD) and the interest payable thereon from 17.4.1985 to 6.11.1991 was Rs.5148/- in all Rs.13,782/- towards increase in land cost and interest as on 30.11.1991. The society alleged that the Board had indicated at the time of allotment, that the tentative price of Rs.18000 was made up of Rs.3000/- towards land cost and the balance towards development cost and construction; and that as no increase in regard to development cost/construction was notified to the allottees, within three years of allotment, the price component towards development/construction (which according to the society was Rs.15,000/- out of a total price of Rs.18,000/-) attained finality under clause 17 of the agreement. It was submitted that the amount payable by an

allottee to the Board on account of the increase in cost of land was Rs.13,782/- plus interest at 9% per annum on Rs.8,634/- from 1.12.1991 to date of payment.

9. On the other hand, the calculation sheet filed by the Board showed the total acquisition cost of the land (8 acres 38 cents) including interest upto 31.3.1987 was Rs.35,02,727.24. The Board contended that on that basis, the cost of land and development per ground (an area of 2400 sq.ft) was Rs.40,400/- and each allottee should pay the proportionate cost based on the actual sital area of the LIG House allotted to him and interest in addition.

10. The division bench its judgment dated 7.8.2007, held after referring to the two calculation sheets, that the interests of justice would be met if each allottee is directed to pay an additional sum of Rs.13,780/- towards the increased cost of the plot and Rs.5,148/- towards interest in all Rs.18,928/- as on 30.11.1991 with further interest at 9% per annum. The High Court assumed that all plots measured 1040 sq.ft. It did not indicate any reasons for arriving at the said amount nor did it record any finding as to the correctness of the calculations by the society and the Board.

11. Feeling aggrieved, the Board and the society have filed these two appeals. On the contentions urged, the following questions arise for our consideration :

(i) Whether the Board is barred from fixing the final price on the expiry of three years from the date of allotment, resulting in the tentative price becoming the final price?

(ii) Even if the Board could fix the final price beyond three years, whether only the land cost component could be increased out of the tentative price and not the cost of development or cost of construction?

(iii) Whether the Board failed to justify the increase demanded by it?

Re. question (i)

12. The letter of allotment and the lease-cum-sale agreement enable the Board to take note of the cost of land, cost of development and amenities, and cost of the building to determine the final price. It is not in dispute that when the allotment was made in the year 1976, the layout was yet to be developed, the construction had not yet begun and the compensation for the acquired land was yet to be determined by the Land Acquisition Collector. The price indicated at the time of allotment was therefore purely tentative. The Board did not undertake the scheme as a commercial venture but on 'no loss-no profit basis', with a loan from HUDCO. Therefore obviously it has to pass on the liability for the entire cost to the allottee who opted to buy the LIG house under the scheme. The allotment was on lease-cum-sale basis and until the LIG House was conveyed in favour of the allottee, he continued as a lessee of the Board and does not acquire any ownership rights.

13. The reference to the period of three years in clause 17 was not intended to be prohibition upon fixation of final price thereafter. The work of development of an acquired land into a residential layout and construction of houses therein were expected to be completed within three years, but final determination of the claims for increase in compensation for acquired land was expected to take much longer. Clause 17 therefore provided that the final price will be decided within three years, subject however to further revision with reference to the land cost. If the Board completed the development of the layout and construction of houses within three years and if there are no pending claims, it is bound to fix the final price of the LIG house within three years from the date of allotment (even if the land acquisition cost had not been finalized) and if necessary, revise the final cost subsequently, after determination of land acquisition cost.

14. But where the development of the layout and construction of houses were not completed within three years from the date of allotment, the Board obviously could not determine the final cost within three years as neither of the three components (cost of land, cost of development and cost of construction) would be known to the Board. There is no term or provision in the contract that if the Board does not determine the final price within three years from the date of allotment, the Board would lose the right to determine the final price thereafter or that the tentative price would become the final price. If on account of delay in determination of compensation for land acquisition or delay on the part of the contractors in completing the development works or construction, or if there are any encroachments or if there are pending claims of contractors regarding development or construction, the Board would not be able to determine the final cost within three years. But that did not mean that the tentative cost would become the final cost in the absence of such a provision in the letter of allotment or lease-cum-sale agreement.

Re :question No.(ii)

15. The alternative submission of the society is that even if the price could be increased after three years, having regard to clause 17 of the lease-cum-agreement, what could be increased after three years is only the land cost component and not the cost of the development or building. Clause 17 states that except the fixation of price with reference to the compensation finally awarded by the courts, the board should fix the price of the LIG house after taking into consideration the development charges, cost of amenities and cost of buildings within three years from the date of allotment. If the final price is so fixed, thereafter what could be increased is only the land cost component on account of any increase in compensation that may be awarded by the courts. If the board had earlier fixed the final price, the society's contention might have merited acceptance as the component of price with reference to cost

of development and amenities and cost of building would have attained finality on account of such final determination and only the increase on account of award of compensation for land could be demanded after such determination of final price. But where the final price has not been determined at all, for whatsoever reason, and the final cost was being determined for the first time, the allottee cannot contend that only the increase on account of the land, and not the increase on account of development cost and construction cost, could be demanded. Where the final price has not been fixed, the Board could, after ascertainment of various costs, determine the final price even after three years, and the finality in regard to cost of development and amenities and the cost of construction, referred under clause 17, would not apply.

16. It is not in dispute that the compensation in regard to the land was pending in courts and was finally determined in or about 1985. It is also not in dispute that development work could not also be completed as a portion of the acquired land was under encroachment. Therefore it is not possible to say that when the final price was fixed in the year 1988, it could be only with reference to increase on account of land and not with reference to increase in the development cost or construction cost. The demand letter dated 21.5.1988 of the Board clearly states that the increase in price demanded was mainly due to increase in compensation for the land paid by the Board and only a small portion of the increase was under the other heads.

Re: question No.(iii)

17. The High Court, we find, has not appreciated the controversy in the correct perspective nor decided the matter in issue. The finding of the learned single judge that the Board is not entitled to any increase is contrary to the terms of allotment. The letter of allotment and the lease-cum-sale agreement make it clear that the price mentioned in the letter of allotment was only tentative and final price was to be determined taking into account, the final cost of acquisition,

cost of development and amenities, and cost of the building. The fact that, subsequent to the allotment of the LIG Houses and execution of lease-cum-sale agreements, the land acquisition cost increased substantially was not in dispute. Similarly, if there was any increase in the actual cost of development/construction the allottees had to bear it. The Board could not be made liable to bear the extra cost as it was operating on 'no-profit, no-loss basis' and had obtained a loan from HUDCO to execute the scheme. The division bench referred to the contentions of the parties and extracted the calculation sheets filed by both parties, but did not pronounce upon the correctness of the same. It neither accepted nor rejected the calculation sheets filed by the Board and the Society. The sum of Rs.13,780/- found by it to be increase in cost and Rs.5,148/- as interest, were apparently borrowed from the calculation sheet filed by the Society. But as per the calculation sheet of the society the increase in land cost (over and above the deposit of Rs.3500/-) was Rs.8,634/- and interest upto 30.11.1991 was Rs.5148/-, the total being Rs.13,782/-. The High Court however wrongly assumed that as per the calculation sheet of the Society, the increase in the cost of the plot itself was Rs.13,782/- (rounded of to Rs.13780/-) and the interest of Rs.5,148/- was in addition to Rs.13,782/- and direct such payment. This is without any acceptable basis.

18. The cost of a house constructed by a development authority or Housing Board has the following three components: (a) the cost of the plot; (b) the proportionate share in the cost of development and amenities (like water, electricity, sewage disposal etc.) and (c) cost of construction of the house. Where the construction is taken up in a developed layout, and not in an undeveloped land, item (b) will not be an independent component, but be a part of item (a).

19. If a development authority or board acquires a large tract of land and develops it for residential purposes and forms plots in a portion thereof for construction of houses, utilises

another portion for construction of multi-storeyed apartment buildings and uses the balance for development works like roads, drains, parks, open spaces apart from earmarking some areas for site office/electrical sub-station/police station, etc., then what is chargeable to the allottee of a plot or a house, is not only the cost of the plot area, but also the cost of the proportionate share in the common areas, used for development and amenities and the cost of the development.

20. We may illustrate. If 5 Hectares (50000 sq.m.) of land is acquired for formation of residential plots each measuring 250 sq.m., it is not possible for the authority to carve out 200 plots (each measuring 250 sq.m). This is because, not less than 25% to 30% of the total sital area will be used up for forming roads, footpaths and drains. Another 10% to 20% may be used for common facilities and amenities like park, playground, community hall etc. The common/service areas are not saleable and the board will have to recover the cost thereof by loading the proportionate cost thereof, on the cost of the residential plots. Therefore if 40% is the area used for roads, drains, parks, playgrounds etc., the saleable area or area that can be used for forming plots would be only 60% and the cost of the total land 50000 sq.m. will have to be recovered from the sale of the said 60% area (30,000 sq.m.) which can be carved into 120 plots of 250 sq.m. If the total value of 5 hectares is Rs.60 lakhs, the value of a plot of 250 sq.m. will not be Rs.30000/- (that is Rs.60 lakhs divided by 200) but Rs.50,000/-(that is Rs.60 lakhs divided by 120). An allottee of a plot measuring 250 sq.m. cannot therefore contend that he is liable to pay only the actual proportionate cost of 250 sq.m. of land out of 50000 sq.m. The proper method is to calculate the total common/ service area (used for roads, drains and common amenities) and include the proportionate cost thereof in the price of the plot.

21. When a large undeveloped tract is acquired by a development authority or a Board, considerable amounts will

have to be spent for developing it, to make it suitable for residential use. This will include the cost of levelling the land, forming plots, laying roads and drains, drawing electrical lines, laying water and sewerage pipes, providing electricity and water etc. This cost also will have to be proportionately borne by the allottee as development cost. Some authorities even load the cost with reference to its overheads, that is, a proportionate cost, depending upon the norms, rules and regulations. In *Preeta Singh* vs. *Haryana Urban Development Authority* – 1996 (8) SCC 756, this Court held :

> "It is to be remembered that the respondent HUDA is only a statutory body for catering to the housing requirement of the persons eligible to claim for allotment. They acquire the land, develop it and construct buildings and allot the buildings or the sites, as the case may be. Under these circumstances, the entire expenditure incurred in connection with the acquisition of the land and development thereon is required to be borne by the allottees when the sites or the buildings sold after the development are offered on the date of the sale in accordance with the regulations and also offered on the date of the sale in accordance with the regulations and also conditions of sale."

The calculation sheet of the Society which works out the cost of land with reference to the actual size of the plot ignoring the proportionate share in the cost of the common/service areas (roads, drains, etc.) and the development cost, is therefore liable to be rejected.

22. Whenever allotments are made even before the completion of the development of land and construction, necessarily the cost that is shown by the authority or the board will be tentative. In regard to the land cost, there may be claims for enhancement of compensation before the reference court with appeals to high court and this court. Sometimes the entire process may take 10 to 15 years and till that process is

concluded the final cost of the land cannot be determined. An allottee cannot therefore say that the authority cannot increase the cost after 12 years. Similarly cost of developing of land into residential area requires coordination with different contractors engaged for laying roads, laying drains, developing parks and playgrounds, drawing electricity lines, water lines, sewerage lines etc. Many times, disputes with the contractors lead to delays and litigation. Sometimes though the work may be completed within three years, the settlement of bills and ascertainment of cost may take several years. There may also be encroachments, which will have to be removed which apart from being time consuming and involving litigation, delay the development and finalization of cost of development. As a consequence, the development cost may also shoot up beyond the estimate on account of delays, additional claims of contractors, litigations and other factors. The same applies to the cost of construction of the houses also. Therefore an allottee cannot contend that the increase, if any, should be determined within three years and if the increase is not so determined, the tentative cost would itself become the final cost. Such an interpretation of clause 17 would be illogical and unreasonable. If the Board is able to show that there was sufficient cause for the delay in deciding the final price and that it was beyond its control to determine the final cost earlier (or within three years) it will be entitled to final cost even if the claim is delayed by a few years. The allottee cannot refuse to pay it merely on the ground of delay.

23. On the other hand the authority or Board should also be diligent. Allottees belonging to low income groups should not be made to suffer for the defaults or negligence on the part of the staff of the authority. They should take prompt steps to settle claim regarding compensation. They should also be prompt in executing the development works and construct work. They should ensure that the cost is kept to the minimum. If any allottee approaches court and is able to demonstrate that the development and construction work was completed within three

years, but the authority failed to fix a final cost, it may be possible to infer that there was no increase from the tentative cost and therefore the final cost was not fixed and therefore the tentative cost should be the final cost. Be that as it may.

24. In view of the complex nature of acquisition, development, construction and allotment, it is necessary to safeguard the interests of the allottees and at the same time ensure that there is no loss to the public exchequer or the authority by making it to bear any part of the cost of development or cost of the plot or cost of construction. Normally a claim by the authority or the board for increase should be accepted if the authority or board certifies that what is claimed is the actual final cost, and supports it by a certificate from an independent chartered accountant or its own Accounts Department showing the break up of the cost. A standard certificate should furnish the following :

(a) break up of the tentative allotment price in regard to the plot, development and construction;

(b) break up of the final cost in regard to the plot, development and construction;

(c) a table showing total area, area used for plots, area used for common/service areas like roads, drains, parks and open spaces;

(d) a table showing the acquisition cost; and

(e) a table showing the construction cost.

It is open to the allottee to apply for the particulars and have it verified independently, before rushing to court.

25. Let us now examine whether the amount claimed by the board in this case is excessive. As noticed above in regard to a plot measuring 1000 sq.ft. with a residential house measuring 361 ft. the board had indicated the tentative price

as 18000 in the year 1976. After the compensation for land was decided by courts and after carrying out the development work and construction, the board determined the final cost as Rs.34,770 in the year 1988 and demanded the difference of Rs.16,770/-. The question is whether this claim is excessive.

26. We find that the allottees/society do not dispute that the cost of the land increased considerably on account of enhancement of compensation. The board showed that the total cost of land inclusive of interest upto 31.3.1987 was Rs.35,02,727 for 8 acres and 16422 sq.ft. The said figure was broadly accepted by the society, in its calculation sheet. The society arrived at the cost of a plot measuring 1040 sq.ft. as 3500 (paid as deposits) plus Rs.8634/- which aggregates to Rs.12,134. But as noticed above, this is the proportionate cost worked out for 1040 sq.ft. out of the total cost of an extent of 33,64,902 sq.ft. (8 acres and 16422 sq.ft.). It is not possible for the allottee to contend that he will pay only the proportionate actual cost of his plot. If the cost of the plot has to be worked out, the cost relating to proportionate share in the common/ service areas (roads, parks, playgrounds etc.) should be added. That means at least addition of another 40% to the price worked out for the actual extent of the plot. With reference to the cost worked out by the society, if 40% is added, the increased cost of plot would be around Rs.16,987.60. According to the society the original tentative cost for the plot was Rs.3,000. Therefore the increase in cost would be around 14,000. What is demanded as additional amount is Rs.16,770. The difference is hardly 2770 which may be attributable to the increase in the cost of development/ construction. It cannot therefore be said that the amount claimed under the demand notice dated 21.5.1988 is excessive or unreasonable. Neither party has given the full data or facts or accounts. The allotment was made 35 years back. No purpose would be served by remitting the matter for re-examination. On the facts and circumstances, we are satisfied that the demand is not open to challenge.

27. The only aspect that required to be corrected is the rate of interest. The demand notice dated 21.5.1988 claims interest at the rate of 13% or 14% per annum on the outstanding with effect from 1.7.1988 which is contrary to the provisions of contract. The board will be entitled to only simple interest at 9% per annum. The Division Bench of the High Court has already held that the interest should be only at 9% per annum.

28. We accordingly allow the appeal filed by the Board in part and dismiss the appeal filed by the society. We uphold the demand for increase in price on account of final cost made by the board but confirm that the interest payable on the increase should be only 9% per annum as directed by the High Court. The Board will now calculate the amounts due accordingly and after giving credit to the amounts already paid, demand only the balance due. The respective allottees who are members of the society, shall be permitted to pay the same in six quarterly instalments. If there is any error in arithmetical calculations, it is open to the respective allottee to point out the same to the Board for its consideration.

N.J. Appeal allowed.

UNION OF INDIA AND ANR.
v.
M.M. SHARMA
(Civil Appeal No. 2797 of 2011)

MARCH 30, 2011

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

Service Law – Misconduct – Dismissal – Respondent, First Secretary in Indian Embassy at China, was allegedly found involved in unauthorized and undesirable liaison with foreign nationals of the host country – Appellant-authority, by exercising powers under clause(c) of the second proviso to Article 311(2) of the Constitution, dispensed with enquiry into the conduct of the respondent and dismissed him from service – Respondent challenged the order – Tribunal directed re-consideration of the punishment – Appellant-authority maintained the dismissal order – Respondent again filed application before the Tribunal, which was dismissed – Respondent filed writ petition – High Court set aside the second order of appellant-authority on ground that it was not a reasoned order and directed the appellants to pass fresh order with reasons for imposing penalty of dismissal – Justification of – Held: Not justified – The reasons contained in the records establish that in the facts of this case holding of an enquiry was rightly dispensed with, in the interest of security of the country – A very high level committee, on basis of materials available on record, prima facie came to the conclusion that action could be taken for dismissal of respondent – The charges against the respondent being very serious and also in view of the fact that the respondent was working in a very sensitive post, it cannot be said to be a case of disproportionate punishment to the offence alleged – The power to be exercised under clauses (a), (b) and (c) of the

Second proviso to Article 311(2), being special and extraordinary powers conferred by the Constitution, there was no obligation on the part of the disciplinary authority to communicate the reasons for imposing the penalty of dismissal and not any other penalty – If in terms of the mandate of the Constitution, the communication of the charge and holding of an enquiry could be dispensed with, in view of the interest involving security of the State, there is equally for the same reasons no necessity of communicating the reasons for arriving at the satisfaction as to why the extreme penalty of dismissal is imposed on the delinquent officer – Order passed by the High Court is therefore set aside and the order passed by the Tribunal is restored – Constitution of India, 1950 – Art.311(2), sub-clause(c) of second proviso.

Constitution of India, 1950 – Article 311 – Exercise of power under – Ambit and scope of – Discussed.

Doctrines – Doctrine of 'pleasure" – Recognition of, under the Indian Constitution by way of Article 310 – Held: Under the aforesaid provision, all civil posts under the Government are held at the pleasure of the Government under which they are held and are terminable at its will – But the same is subject to other provisions of the Constitution which include the restrictions imposed by Article 310(2) and Article 311(1) and Article 311(2).

Respondent, First Secretary in Indian Embassy at China, was allegedly found involved in unauthorized and undesirable liaison with foreign nationals of the host country. The appellant-authority, by exercising powers under clause(c) of the second proviso to Article 311(2) of the Constitution, dispensed with enquiry into the conduct of the respondent and dismissed him from service. Respondent challenged the order before the Tribunal. The Tribunal directed re-consideration as to whether the penalty of dismissal could be substituted by any other lesser punishment. The appellant-authority

maintained the dismissal order. Respondent again filed application before the Tribunal. The Tribunal dismissed the application. Respondent filed writ petition. The High Court set aside the second order of appellant-authority on ground that it was not a reasoned order and directed the appellants to pass order afresh with reasons for imposing penalty of dismissal from service. Hence the present appeal.

Allowing the appeal, the Court

HELD:1. Article 311 of the Constitution provides for protection to public servant from punitive action being taken against them by an authority subordinate to one who appointed him, or without holding an inquiry in accordance with law. Exceptions in Article 311 are contained in second proviso in the nature of clauses (a), (b) & (c) which provide that the said Article shall not apply to employees who have been punished for conviction in a criminal case or where inquiry is not practicable to be held for reasons to be recorded in writing or where the President or Governor as the case may be is satisfied that such an order is required to be passed without holding an enquiry in the interest of security of the State. [Para 13] [31-B-C]

2. In India, the doctrine of 'pleasure" is recognized by way of Article 310 of the Constitution. Under the aforesaid provision, all civil posts under the Government are held at the pleasure of the Government under which they are held and are terminable at its will. But the same is subject to other provisions of the Constitution which include the restrictions imposed by Article 310 (2) and Article 311(1) and Article 311(2). Therefore, under the Indian constitution dismissal of civil servants must comply with the procedure laid down in Article 311, and Article 310(1) cannot be invoked independently with the object of justifying a contravention of Article 311(2). There

is an exception provided by way of incorporation of Article 311 (2) with sub-clauses (a), (b) and (c). No such inquiry is required to be conducted for the purposes of dismissal, removal or reduction in rank of persons when the same relates to dismissal on the ground of conviction or where it is not practicable to hold an inquiry for the reasons to be recorded in writing by that authority empowered to dismiss or remove a person or reduce him in rank or where it is not possible to hold an enquiry in the interest of the security of the State. These three exceptions are recognized for dispensing with an inquiry, which is required to be conducted under Article 311 of the Constitution of India when the authority takes a decision for dismissal or removal or reduction in rank in writing. In other words, although there is a pleasure doctrine, however, the same cannot be said to be absolute and the same is subject to the conditions that when a government servant is to be dismissed or removed from service or he is reduced in rank a departmental inquiry is required to be conducted to enquire into his misconduct and only after holding such an inquiry and in the course of such inquiry if he is found guilty then only a person can be removed or dismissed from service or reduced in rank. However, such constitutional provision as set out under Article 311 of the Constitution of India could also be dispensed with under the exceptions provided in Article 311(2) of the constitution where clause (a) relates to a case where upon a conviction of a person by a criminal court on certain charges he could be dismissed or removed from service or reduced in rank without holding an inquiry. Similarly, under clause (c) an inquiry to be held against the government employee could be dispensed with if it is not possible to hold such an inquiry in the interest of the security of the State. Sub-clause (b) on the other hand provides that such an inquiry could be dispensed with by the concerned authority, after recording reasons, for

which it is not practicable to hold an inquiry. The aforesaid power is an absolute power of the disciplinary authority who after following the procedure laid down therein could resort to such extra ordinary power provided it follows the pre-conditions laid down therein meaningfully and effectively. [Para 14] [31-D-H; 32-A-G]

3. Clause (b) of the second proviso to Article 311 (2) of the Constitution of India mandates that in case the disciplinary authority feels and decides that it is not reasonably practical to hold an inquiry against the delinquent officer the reasons for such satisfaction must be recorded in writing before an action is taken. Clause (c) of the second proviso to Article 311 (2) on the other hand does not specifically prescribe for recording of such reasons for the satisfaction but at the same time there must be records to indicate that there are sufficient and cogent reasons for dispensing with the enquiry in the interest of the security of the State. Unless and until such satisfaction, based on reasonable and cogent grounds is recorded it would not be possible for the court or the Tribunal, where such legality of an order is challenged, to ascertain as to whether such an order passed in the interest of security of State is based on reasons and is not arbitrary. If and when such an order is challenged in the court of law the competent authority would have to satisfy the court that the competent authority has sufficient materials on record to dispense with the enquiry in the interest of the security of the State. [Para 15] [32-H; 33-A-D]

4. In the present case, even in the first order passed by the Tribunal it was clearly recorded that it could be held from the records, as available, that there essentially was no arbitrariness in the approach of the Government of India while dealing with an officer who had by his conduct showed that he was not reliable for holding

sensitive or superior positions and therefore invocation of power under Article 311(2)(c) of the Constitution of India also cannot be faulted because of the sensitive nature of the issues. The aforesaid order passed by the Tribunal in the due course has become final and binding as no challenge was made as against the aforesaid observation by any of the parties before any higher forum. The Tribunal, however, by the aforesaid order issued a direction to the Government to consider as to whether the penalty could be substituted by issuing a lesser punishment. In terms of the aforesaid order the competent authority reconsidered the matter and maintained the order of punishment awarded to the respondent holding that it is not possible either to substitute the penalty of the respondent from dismissal to reduction in rank or to grant him any pensionary benefit. The said order therefore indicates that the direction of the Tribunal was duly complied with and an effective and conscious decision was taken by the competent authority to maintain the penalty of dismissal. There are credible and substantial materials on record in terms of clause (c) to second proviso to Article 311(2) of the Constitution. The aforesaid action of invoking the extra ordinary provisions like clause (c) to second proviso to Article 311(2) was also found to be justified by the Tribunal in the earlier stage of litigation itself. Despite the said fact the High Court held that the second order passed by the Tribunal not being a speaking order showing application of mind cannot be upheld and consequently the High Court passed the impugned order thereby setting aside the order passed by the Tribunal with a direction to the appellants to pass a fresh speaking order giving reasons for its decision. The reasons contained in the records establish that in the facts of this case holding of an enquiry was rightly dispensed with in the interest of security of the country. The Tribunal had in the earlier round of litigation upheld the action of the

appellants in dispensing with the enquiry in the interest of the security of the State. The said order of the Tribunal has also become final and binding. [Paras 16 to 20] [33-E-H; 34-A-H; 35-A-B]

5. The allegations against the respondent are very serious which could jeopardize the sovereignty and integrity of India. The records disclose the highly objectionable activities and conduct of the respondent which is unbecoming of a responsible Government servant. The Inquiry Committee took the decision of not disclosing the grounds for taking action against the delinquent officer under clause (c) of the proviso to Article 311(2) of the Constitution because disclosure of the same or holding of an inquiry has the potential to jeopardize national security and relations with a neighbouring country and such disclosure could lead to gross embarrassment to the Government of India. Intelligence Bureau has already conducted an inquiry and findings of the inquiry officer were based on the written statement of the suspected officer and other officers; analysis of phone records; and recovery of photographs from the laptop of the respondent. In that context and in view of the reasons recorded it was concluded that the allegation had far reaching effects and therefore it was decided to dispense with holding of any inquiry in the matter and also to dismiss him from service. A very high level committee considered the entire record and the allegations against the respondent and on the basis of the materials available on record, the committee *prima facie* came to the conclusion that action could be taken for his dismissal under clause (c) to second proviso to Article 311(2) of the Constitution. The aforesaid recommendation is available on record and the High Court could have called for such record and therefrom satisfy itself that there are sufficient and cogent reasons

recorded for taking action under Article 311(2) (c) of the Constitution and also for imposing the penalty for dispensation of the service of the respondent by way of dismissal from the service. [Paras 21, 22] [35-C-H; 36-A-B]

6. The charges against the delinquent officer being very serious and also in view of the fact that the respondent was working in a very sensitive post, it cannot be said to be a case of disproportionate punishment to the offence alleged. The reasons recorded in the official file against the person for dismissing him from service need not be incorporated in the impugned order passed. The High Court while passing the impugned order was fully and effectively aware of the reasons as to why the requirement of holding an enquiry in accordance with law was dispensed with. Being so situated, the High Court could have examined and scrutinised the original records to ascertain for itself as to whether the order imposing the penalty of dismissal of service is justified or not in the light of the allegations and the reports of the fact finding enquiry. The power to be exercised under clauses (a), (b) and (c) being special and extraordinary powers conferred by the Constitution, there was no obligation on the part of the disciplinary authority to communicate the reasons for imposing the penalty of dismissal and not any other penalty. For taking action in due discharge of its responsibility for exercising powers under clause (a) or (b) or (c) it is nowhere provided that the disciplinary authority must provide the reasons indicating application of mind for awarding punishment of dismissal. While no reason for arriving at the satisfaction of the President or the Governor, as the case may be, to dispense with the enquiry in the interest of the security of the State is required to be disclosed in the order, one cannot hold that, in such a situation, the

impugned order passed against the respondent should mandatorily disclose the reasons for taking action of dismissal of his service and not any other penalty. [Paras 23, 24] [36-C-H; 37-A]

7. If in terms of the mandate of the Constitution, the communication of the charge and holding of an enquiry could be dispensed with, in view of the interest involving security of the State, there is equally for the same reasons no necessity of communicating the reasons for arriving at the satisfaction as to why the extreme penalty of dismissal is imposed on the delinquent officer. The order and direction passed by the High Court is therefore set aside and the order passed by the Tribunal is restored. [Paras 25, 26] [37-B-D]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2797 of 2011.

From the Judgment & Order dated 27.9.2010 of the High Court of Delhi at New Delhi in Writ Petition (C) No. 6525 of 2010.

P.P. Malhotra, ASG, J.S. Attri, Gaurav Sharma, M. Tatia, Madhurima Toho, Anil Katiyar for the Appellants

U.K. Singh, Ranjan Kumar, Geetika Sharma for the Respondent.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. Delay condoned.

2. Leave granted.

3. The present appeal is directed against the judgment and order dated 27.09.2010 whereby the Delhi High Court partly allowed the writ petition filed by the respondent herein by

issuing a direction to the appellants to pass a speaking order by giving reasons for imposing the penalty of dismissal from service in exercise of powers under Article 311(2)(c) of the Constitution and not any other penalty.

4. In order to appreciate the contentions raised by the parties hereto some basic facts leading to filing of the aforesaid writ petition in the High Court must be stated.

5. The respondent was posted as First Secretary w.e.f. 02.07.2007 to 03.05.2008 in the Embassy of India, Beijing, China. While on special assignment, the respondent came under adverse notice and was found to be involved in an unauthorized and undesirable liaison with foreign nationals of the host country. The conduct of the respondent was enquired into by the Intelligence Bureau (IB). The Director, upon completion of the said inquiry forwarded a detailed report including findings of the Inquiry Officer. The aforesaid report was considered and it was felt that in view of the seriousness of the case and the adverse implications on the security of the State, it would not be expedient to hold the inquiry due to the following reasons: -

(i) The respondent was on special assignment and entrusted with responsible duties of external intelligence. Any formal inquiry would jeopardize security of India, as it would reveal details of intelligence operation in the host country.

(ii) For a proper disciplinary inquiry to be conducted, witnesses would be required to be examined. In this case witnesses can be either foreign nationals or officers working under cover in Indian Embassy in China and examination thereof would certainly jeopardize the security of the State.

6. Consequently, the competent authority took a decision that the services of the respondent should be dispensed with

by exercising powers under Clause (c) of Second Proviso to Article 311(2) of the Constitution of India. Consequent thereto an order dated 22.12.2009 was issued intimating and stating that the President is satisfied to invoke Clause (c) of Second Proviso to Article 311(2) of the Constitution of India that in the interest of the security of the State it is not expedient to hold the inquiry in the case of the respondent. It was also mentioned in the said order that the President is also satisfied that on the basis of information available the activities of the respondent are such as to warrant his dismissal from the service.

7. The respondent challenged the aforesaid order by filing an Original Application before the Central Administrative Tribunal, Principal Bench, New Delhi (hereinafter referred to as 'the Tribunal') which was registered as OA No. 176 of 2009. In the said Original Application contentions raised inter alia were that the order dated 22.12.2008 passed in exercise of power under Clause (c) of Second Proviso to Article 311(2) of the Constitution of India should be set aside. The aforesaid application was heard and the Tribunal passed an order on 10.12.2009 disposing of the said Original Application by holding that the order does not reveal that there has been application of mind with regard to the nature of punishment to be awarded to the respondent. The Tribunal directed the Government to re-consider whether the aforesaid penalty awarded to the respondent could be substituted by any other punishment.

8. Pursuant to the aforesaid order passed by the Tribunal the matter was placed before the competent authority once again and in compliance of the order of the Tribunal an order was passed by the Cabinet Secretariat, Government of India on 03.06.2010, which reads as follows:

"WHEREAS Shri M.M. Sharma was dismissed from service under the provisions of sub-clause (c) of the second proviso to clause 2 of Article 311 of the

Constitution vide order No/2/2008-DO.II (A) 9Pt.I)-3643 dated 22.12.2008:

AND WHEREAS, Shri M.M. Sharma filed an Original Application No. 176/2009 in the Principal Bench of Central Administrative Tribunal, New Delhi praying for setting aside and quashing the said order of dismissal; dated 22.12.2008.

AND WHEREAS the Hon'ble Tribunal in their order dated 10.12.2009 in the said OA No. 176/2009 directed the Government to consider whether the penalty of dismissal could be substituted by 'reduction in rank' or the ex-officer could be granted any pensionary benefits.

AND WHEREAS, the Government, in pursuance of observations of Hon'ble Tribunal re-considered the case of dismissal of Shri M.M. Sharma.

NOW, THEREFORE, the President orders that it is not possible either to substitute the penalty of Shri M.M. Sharma from 'dismissal' to 'reduction in rank' or to grant him any pensionary benefits.

(BY ORDER AND IN THE NAME OF THE PRESIDENT)

(K.B.S. KATOCH)

ADDITIONAL SECRETARY TO THE GOVT. OF INDIA"

9. The aforesaid order passed by the President came to be challenged before the Tribunal by the respondent by filing an Original Application which was registered as OA No. 2440 of 2010. The aforesaid application was taken up for hearing and the same was disposed of by the Tribunal vide its Judgment and Order dated 04.08.2010. By the aforesaid Judgment and Order, the Tribunal dismissed the Original Application holding that the matter called for no interference in the hands of the

Tribunal. While coming to the aforesaid conclusion the Tribunal hold that invocation of power under Article 311(2) (c) of the Constitution of India cannot be faulted with because of the sensitive nature of the issues involved, which have become final and binding on the parties. It was also held that only question that was required to be decided by the competent authority was to re-consider the nature of penalty imposed on the respondent.

10. Since the Tribunal held the appellants have re-considered the question of punishment reiterating that it is not possible either to substitute the penalty of the respondent from 'dismissal' to 'reduction in rank' or to grant him any pensionary benefits, therefore, the same indicates and establishes the satisfaction for arriving at the decision of the competent authority to maintain the penalty of dismissal.

11. The aforesaid order was challenged by the respondent before the High Court of Delhi by filing a writ petition in which the High Court partly allowed the writ petition holding that the order which was passed by the competent authority on 03.06.2010 was not a reasoned order. The High Court therefore issued a direction that the appellants must pass a reasoned order showing its application of mind. The High Court set aside the order dated 04.08.2010 passed by the Tribunal and directed the appellants to give reasons for levying the penalty of dismissal from service and pass a fresh order. The aforesaid Judgment and Order passed by the High Court is under challenge in this appeal on which we heard the learned counsel appearing for the parties and also scrutinised the entire records.

12. Within the scheme of the Constitution of India, provisions relating to public service may be found in Articles 309, 310 and 311. It is important to note that these provisions (namely Articles 310 and 311) afford protection to public servants from penalty in the nature of dismissal, removal, or reduction which cannot be imposed without holding a proper

inquiry or giving a hearing. An explicit articulation of "protection" in Article 311 of the Constitution itself gives an impression of complete 'protection' to the civil servants.

13. Article 311 provides for protection to public servant from punitive action being taken against them by an authority subordinate to one who appointed him, or without holding an inquiry in accordance with law. Exceptions in Article 311 are contained in second proviso in the nature of clauses (a), (b) & (c) which provide that the said Article shall not apply to employees who have been punished for conviction in a criminal case or where inquiry is not practicable to be held for reasons to be recorded in writing or where the President or Governor as the case may be is satisfied that such an order is required to be passed without holding an enquiry in the interest of security of the State.

14. In order to appreciate the ambit or scope of power to be exercised under Article 311 of the Constitution of India it is to be noticed that in India we apply the doctrine of 'pleasure", which is recognized under our constitution by way of Article 310 of the Constitution of India. Under the aforesaid provision, all civil posts under the Government are held at the pleasure of the Government under which they are held and are terminable at its will. The aforesaid power is what the doctrine of pleasure is, which was recognized in the United Kingdom and also received the constitutional sanction under our Constitution in the form of Article 310 of the Constitution of India. But in India the same is subject to other provisions of the Constitution which include the restrictions imposed by Article 310 (2) and Article 311(1) and Article 311(2). Therefore, under the Indian constitution dismissal of civil servants must comply with the procedure laid down in Article 311, and Article 310(1) cannot be invoked independently with the object of justifying a contravention of Article 311(2). There is an exception provided by way of incorporation of Article 311 (2) with sub-clauses (a), (b) and (c). No such inquiry is required to be conducted for the

purposes of dismissal, removal or reduction in rank of persons when the same relates to dismissal on the ground of conviction or where it is not practicable to hold an inquiry for the reasons to be recorded in writing by that authority empowered to dismiss or remove a person or reduce him in rank or where it is not possible to hold an enquiry in the interest of the security of the State. These three exceptions are recognized for dispensing with an inquiry, which is required to be conducted under Article 311 of the Constitution of India when the authority takes a decision for dismissal or removal or reduction in rank in writing. In other words, although there is a pleasure doctrine, however, the same cannot be said to be absolute and the same is subject to the conditions that when a government servant is to be dismissed or removed from service or he is reduced in rank a departmental inquiry is required to be conducted to enquire into his misconduct and only after holding such an inquiry and in the course of such inquiry if he is found guilty then only a person can be removed or dismissed from service or reduced in rank. However, such constitutional provision as set out under Article 311 of the Constitution of India could also be dispensed with under the exceptions provided in Article 311(2) of the constitution where clause (a) relates to a case where upon a conviction of a person by a criminal court on certain charges he could be dismissed or removed from service or reduced in rank without holding an inquiry. Similarly, under clause (c) an inquiry to be held against the government employee could be dispensed with if it is not possible to hold such an inquiry in the interest of the security of the State. Sub-clause (b) on the other hand provides that such an inquiry could be dispensed with by the concerned authority, after recording reasons, for which it is not practicable to hold an inquiry. The aforesaid power is an absolute power of the disciplinary authority who after following the procedure laid down therein could resort to such extra ordinary power provided it follows the pre-conditions laid down therein meaningfully and effectively.

15. It should also be pointed out at this stage that clause

(b) of the second proviso to Article 311 (2) of the Constitution of India mandates that in case the disciplinary authority feels and decides that it is not reasonably practical to hold an inquiry against the delinquent officer the reasons for such satisfaction must be recorded in writing before an action is taken. Clause (c) of the second proviso to Article 311 (2) on the other hand does not specifically prescribe for recording of such reasons for the satisfaction but at the same time there must be records to indicate that there are sufficient and cogent reasons for dispensing with the enquiry in the interest of the security of the State. Unless and until such satisfaction, based on reasonable and cogent grounds is recorded it would not be possible for the court or the Tribunal, where such legality of an order is challenged, to ascertain as to whether such an order passed in the interest of security of State is based on reasons and is not arbitrary. If and when such an order is challenged in the court of law the competent authority would have to satisfy the court that the competent authority has sufficient materials on record to dispense with the enquiry in the interest of the security of the State.

16. We have analyzed the facts of the present case and on such analysis, we find that even in the first order passed by the Tribunal on 10th December, 2009 itself it was clearly recorded that it could be held from the records, as available, that there essentially was no arbitrariness in the approach of the Government of India while dealing with an officer who had by his conduct showed that he was not reliable for holding sensitive or superior positions and therefore invocation of power under Article 311(2)(c) of the Constitution of India also cannot be faulted because of the sensitive nature of the issues.

17. The aforesaid order passed by the Tribunal in the due course has become final and binding as no challenge was made as against the aforesaid observation by any of the parties before any higher forum. The Tribunal, however, by the aforesaid order issued a direction to the Government to

consider as to whether the penalty could be substituted by issuing a lesser punishment.

18. In terms of the aforesaid order the competent authority reconsidered the matter and maintained the order of punishment awarded to the respondent holding that it is not possible either to substitute the penalty of the respondent from dismissal to reduction in rank or to grant him any pensionary benefit. The said order therefore indicates that the direction of the Tribunal was duly complied with and an effective and conscious decision was taken by the competent authority to maintain the penalty of dismissal.

19. There are credible and substantial materials on record in terms of clause (c) to second proviso to Article 311(2) of the Constitution. The aforesaid action of invoking the extra ordinary provisions like clause (c) to second proviso to Article 311(2) was also found to be justified by the Tribunal in the earlier stage of litigation itself.

20. Despite the said fact the High Court held that the order dated 04.08.2010 passed by the Tribunal not being a speaking order showing application of mind cannot be upheld and consequently the High Court passed the impugned order dated 27.09.2010 thereby setting aside the order passed by the Tribunal with a direction to the appellants herein to pass a fresh speaking order giving reasons for its decision. The said findings of the High Court are being challenged in this appeal contending inter alia that a conscious and informed decision has been taken on the basis of materials on record to dismiss the respondent from the service and the reasons for inability to hold an inquiry in the interest of the security of the State have also been recorded although there is no such mandate to record such reasons. The records indicate that there are sufficient reasons and materials on record as to why the service of the respondent was dispensed with in the interest of the security of the State. We are also satisfied that the reasons contained in the records establish that in the facts of

this case holding of an enquiry was rightly dispensed with in the interest of security of the country. We must hasten to add that the Tribunal had in the earlier round of litigation upheld the action of the appellants in dispensing with the enquiry in the interest of the security of the State. The said order of the Tribunal has also become final and binding. Therefore, challenge in the present round of litigation is whether the appellants are justified in awarding the punishment of dismissal from service on the respondent which also deprives him from getting any pensionary benefit.

21. The original records were placed before us, which we have perused. The allegations against the respondent are very serious which could jeopardize the sovereignty and integrity of India. The records also disclose the highly objectionable activities and conduct of the respondent which is unbecoming of a responsible Government servant. The Inquiry Committee took the decision of not disclosing the grounds for taking action against the delinquent officer under clause (c) of the proviso to Article 311(2) of the Constitution because disclosure of the same or holding of an inquiry has the potential to jeopardize national security and relations with a neighbouring country and such disclosure could lead to gross embarrassment to the Government of India. Intelligence Bureau has already conducted an inquiry and findings of the inquiry officer were based on the written statement of the suspected officer and other officers; analysis of phone records; and recovery of photographs from the laptop of the respondent. In that context and in view of the reasons recorded it was concluded that the allegation had far reaching effects and therefore it was decided to dispense with holding of any inquiry in the matter and also to dismiss him from service.

22. A very high level committee considered the entire record and the allegations against the respondent and on the basis of the materials available on record, the committee prima facie came to the conclusion that action could be taken for his

dismissal under clause (c) to second proviso to Article 311(2) of the Constitution. The aforesaid recommendation is available on record and the High Court could have called for such record and therefrom satisfy itself that there are sufficient and cogent reasons recorded for taking action under Article 311(2) (c) of the Constitution and also for imposing the penalty for dispensation of the service of the respondent by way of dismissal from the service.

23. In our considered opinion, in the present case, charges against the delinquent officer being very serious and also in view of the fact that the respondent was working in a very sensitive post, it cannot be said to be a case of disproportionate punishment to the offence alleged. The reasons recorded in the official file against the person for dismissing him from service need not be incorporated in the impugned order passed.

24. The High Court while passing the impugned order was fully and effectively aware of the reasons as to why the requirement of holding an enquiry in accordance with law was dispensed with. Being so situated, the High Court could have examined and scrutinised the original records to ascertain for itself as to whether the order imposing the penalty of dismissal of service is justified or not in the light of the allegations and the reports of the fact finding enquiry. The power to be exercised under clauses (a), (b) and (c) being special and extraordinary powers conferred by the Constitution, there was no obligation on the part of the disciplinary authority to communicate the reasons for imposing the penalty of dismissal and not any other penalty. For taking action in due discharge of its responsibility for exercising powers under clause (a) or (b) or (c) it is nowhere provided that the disciplinary authority must provide the reasons indicating application of mind for awarding punishment of dismissal. While no reason for arriving at the satisfaction of the President or the Governor, as the case may be, to dispense with the enquiry in the interest of the security of the State is required to be disclosed in the order, we cannot hold that, in

such a situation, the impugned order passed against the respondent should mandatorily disclose the reasons for taking action of dismissal of his service and not any other penalty.

25. If in terms of the mandate of the Constitution, the communication of the charge and holding of an enquiry could be dispensed with, in view of the interest involving security of the State, there is equally for the same reasons no necessity of communicating the reasons for arriving at the satisfaction as to why the extreme penalty of dismissal is imposed on the delinquent officer. The High Court was, therefore, not justified in passing the impugned order.

26. For the aforesaid reasons, we hold that the order and direction passed by the High Court cannot be sustained. Consequently, we set aside the same and restore the order dated 04.08.2010 passed by the Central Administrative Tribunal, Principle Bench at New Delhi in OA No. 2440 of 2010.

27. The present appeal is accordingly allowed to the aforesaid extent leaving the parties to bear their own costs.

B.B.B. Appeal allowed

SHANTA TALWAR & ANR.
v.
UNION OF INDIA & ORS.
(Civil Appeal Nos. 3072-73 of 2004)

APRIL 5, 2011

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

Land Acquisition Act, 1894 – ss.4, 5A, 6, 17(1) and 17(4) – Metro Railways in Delhi – Acquisition of land for purposes of Metro Railways – Applicability of the LA Act – Whether in view of the provisions of the Metro Railways Act, which was applicable to the city of Delhi, the land for the purpose of construction of Metro Railway could and should only be acquired under the provisions of the said Act and not under the provisions of the LA Act – Held: There is no express provision in the Metro Railways Act repealing applicability of the provisions of the LA Act – So long as there is no specific repeal of applicability of the LA Act for the purpose of acquiring land for establishing metro railways it cannot be presumed that there is an implied repeal – The Metro Railways Act was enacted by the legislature, in order to provide additional provisions for construction of Metro Railways or other works connected therewith but it was not made obligatory by the legislature to invoke only the provisions of the said Metro Railways Act in case of acquisition of land for construction of Metro Railways or other works connected therewith – It is left upon to the discretion of the concerned competent authority to take recourse to any of the aforesaid provisions making it clear that if resort is taken to the provisions of LA Act, the said provisions could only be made applicable and no provision of the Metro Railways Act would then be resorted to – Similarly, if provisions of the Metro Railways Act is taken resort to, then only such provisions

would apply and not the provisions of the LA Act – There is no bar or prohibition for the authority to take recourse to the provisions of the LA Act which is also a self-contained Code and also could be taken recourse to for the purpose of acquiring land for public purposes like construction of Metro Railways and works connected therewith – Metro Railways (Construction of Works) Act, 1978 – ss. 17, 40 and 45.

Land acquisition proceedings were initiated for construction of Prem Nagar Station, which is a part of Mass Rapid Transit System [MRTS], a project undertaken by the Delhi Metro Rail Corporation [DMRC]. The land was sought to be acquired by issuing a notification under Section 4 of the Land Acquisition Act, 1894 (LA Act), but by the aforesaid notification, urgency provision under Section 17(1) read with Section 17(4) of the LA Act was also invoked dispensing with the enquiry inviting objections under Section 5-A of the LA Act, which was followed by issuance of Declaration under Section 6 and notice under Section 9.

The appellants-landowners challenged the land acquisition proceedings contending *inter alia* that no acquisition on behalf of the Metro Railways could be made under the general law, i.e., LA Act, as the Metro Railways (Construction of Works) Act, 1978, a special legislation, was enacted by the Parliament with the specific purpose and object of speedy and adequate acquisition of land by the Central Government. The appellants contended that in view of the enactment and aforesaid special Act of 1978, which is a complete and self-contained code providing for acquisition of land solely for the purposes of Metro Railways, applicability of the LA Act for the purpose of Metro Railways should be deemed to be impliedly repealed. The appellants further contended that the Metro Railways Act, which is a specific law on the subject, having specifically

excluded incorporation of any law in the nature of Section 17(1) and 17(4) of the LA Act, which provides for dispensation of the enquiry as envisaged under Section 5-A of the LA Act, the respondents acted illegally and without jurisdiction in taking resort to the said urgency provisions of the LA Act for the purpose of acquisition of land of the appellants, particularly, when there is no such provision in the Metro Railways Act for dispensation of such enquiry.

The Respondents, on the other hand, contended *inter alia* that despite the fact that the Metro Railways Act is in operation, yet the respondents are not denuded of the power of invoking the provisions of the LA Act which empowers the respondents to acquire land for the public purpose, i.e., construction of MRTS projects in the cases at hand.

The question which thus arose for consideration in the instant appeals was whether in view of the provisions of the Metro Railways (Construction of Works) Act, 1978, which is applicable to the city of Delhi, the land for the purpose of construction of Metro Railway could and should only be acquired under the provisions of the said Act and not under the provisions of the LA Act.

Dismissing the appeals, the Court

HELD:1.1. In a situation, where recourse is taken to the provisions of the LA Act for acquiring a property for construction of Metro Railways or other works connected therewith, the provisions mentioned in the LA Act could and would only be made applicable and no provision of Metro Railways Act could be taken resort to or making use of. Similarly when recourse is taken for acquiring land under the Metro Railways Act, no provision of the LA Act would or could be made applicable as both the two Acts contain separate provisions, although they are

similar in some respect. The Metro Railways Act gives the detailed procedure as to how land for construction of Metro Railways or other works connected therewith could be acquired. The Act also lays down the procedure for payment of compensation. Section 17 of the Metro Railways Act specifically states that nothing in the LA Act would apply to an acquisition under the Metro Railways Act. However, in Section 45 a saving clause has been inserted, providing that any proceeding for the acquisition of any land under the LA Act for the purpose of any Metro Railway, pending immediately before the commencement of this Act before any court or other authority shall be continued and be disposed of under that Act as if this Act had not come into force. However, it cannot be said that by inserting the said provision under Section 40 and Section 45 and also in view of the Statements of Object and Reasons of the Metro Railways Act, the applicability of LA Act for the purpose of acquisition of land for construction of Metro Railways or other works connected therewith would stand repealed and could not be taken resort to. There is no express provision in the Metro Railways Act repealing applicability of the provisions of the LA Act. So long as there is no specific repeal of applicability of the LA Act for the purpose of acquiring land for establishing metro railways it cannot be presumed that there is an implied repeal as sought to be submitted by the appellants. It also cannot be construed that the Metro Railways Act is a special Act, of such a nature, that with the enactment of the said Act the general law in LA Act would get obliterated and automatically repealed so far as acquisition of land for the purpose of Metro Railways is concerned. [Paras 16, 17 and 18] [52-E-H; 53-A-F]

1.2. It cannot be said that it was intended by the legislature to do away with the applicability of the LA Act for the purpose of acquisition of land for construction of

Metro Railways or other works connected therewith by enacting the Metro Railways Act. The Metro Railways Act was enacted by the legislature, in order to provide additional provisions for construction of Metro Railways or other works connected therewith but it was not made obligatory by the legislature to invoke only the provisions of the said Metro Railways Act in case of acquisition of land for construction of Metro Railways or other works connected therewith. It was left upon to the discretion of the concerned competent authority to take recourse to any of the aforesaid provisions making it clear that if resort is taken to the provisions of LA Act, the said provisions could only be made applicable and no provision of the Metro Railways Act would then be resorted to. Similarly, if provisions of the Metro Railways Act is taken resort to, then only such provisions would apply and not the provisions of the LA Act. [Para 20] [53-H; 54-A-D]

1.3. Wherever a particular State Act incorporates the provision of the LA Act by way of reference or by way of incorporation by the legislation, the provisions of the LA Act automatically become applicable for the purpose of carrying out the object of the said particular State Act but wherever such power is not given there is no bar for taking recourse to any of the Acts which are available on the subject. There was no bar or prohibition for the authority to take recourse to the provisions of the LA Act which is also a self-contained Code and also could be taken recourse to for the purpose of acquiring land for public purposes like construction of Metro Railways and works connected therewith. In all these cases no other provision except the provisions of the LA Act have been resorted to and, therefore, the appellants cannot have any grievance for taking recourse to the said provision. Besides, the Metro Railways Act gives power to the competent authority to acquire land for the purpose of

construction of Metro Railways and works connected therewith and in the said Act it is also provided that the possession can be taken immediately after issuance of the declaration as envisaged under the Act. The mode of compensation is almost identical with that of Section 23 of the LA Act which lays down the manner for determination of the compensation to be paid. [Paras 22, 23] [55-F-H; 56-A-C]

1.4. The only visible and specific distinction is absence of power of taking immediate possession in case of urgency as provided for under Sections 17(1) and 17(4) of the LA Act. As there was urgency for construction of the Metro Railways in Delhi because of various factors, urgency clause was invoked in the present case and consequent thereupon possession was taken and the construction work of the Metro Railways including construction of the stations is completed. Award has also been passed determining the compensation. Therefore, the appellants suffer no prejudice except for the fact that possession was taken in the instant case on an urgent basis. That plea has also been rendered infructuous in view of the fact that the entire project is complete. [Para 24] [55-D-F]

Rajinder Kishan Gupta and Anr. v. Union of India and Ors. **(2010) 9 SCC 46 = 2010 (10) SCR 172;** *S.S. Darshan v. State of Karnataka and Ors.* **(1996) 7 SCC 302 = 1995 (5) Suppl. SCR 221 and** *Nagpur Improvement Trust v. Vithal Rao and Ors*., **(1973) 1 SCC 500 = 1973 (3) SCR 39 – referred to.**

2.1. There is no reason to quash the notification issued under Section 4 of the LA Act so as to postpone the date of acquisition to a later period thereby allowing the appellants an opportunity of getting higher compensation. Instead, it is felt appropriate that the policy

and guidelines issued by the Government of NCT of Delhi could be best utilized. The aforesaid policy was issued by the Government of NCT of Delhi on 25.10.2006 by way of a Circular, which provides that the persons of all categories, affected due to the implementation of Delhi MRTS projects can be relocated and rehabilitated for which the Government of India has communicated its decision on 28.08.2006 intimating that the DMRC has already relocated the persons affected by Line-III of Metro Phase-I project and that Delhi Development Authority should provide necessary number of units for the rehabilitation of remaining project affected persons. [Para 25] [55-G-H; 56-A-B]

2.2. The counsel appearing for the DMRC stated before this Court that any such project affected person could submit their application in a format prescribed, a copy of which was placed before this Court. This Court has been informed that all the appellants have filed their applications in the appropriate format to the concerned authorities. If the applications have been filed by the appellants in the appropriate format, those are required to be considered by the concerned authorities as expeditiously as possible. If any of the appellants has not filed any such application in the format prescribed, it shall be open to such appellants also to file such applications in appropriate format within three weeks from the date of this order, in which case, their applications shall also be considered along with the applications already filed by the other applicants/appellants and a decision thereon shall be taken within eight weeks from the date of receipt of such applications. In case, any of the appellants is aggrieved by the decisions taken by DMRC or by the other competent authority, such a decision could be challenged by taking recourse to appropriate remedy as provided for under the law. [Para 26] [56-C-F]

2.3. There is no merit in these appeals which are dismissed but giving right to the appellants to take recourse for their rehabilitation in terms of the circular issued by the Government of NCT of Delhi, leaving it open to the competent authority/Government to decide their cases in accordance with law. [Para 27] [56-G]

Case Law Reference:

2010 (10) SCR 172	**referred to**	**Para 9**
1995 (5) Suppl. SCR 221	**referred to**	**Para 9**
1973 (3) SCR 39	**referred to**	**Para 21**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3072-3073 of 2004.

From the Judgment & Order dated 7.4.2004 of the High Court of Delhi at New Delhi in W.P. (Civil) Nos. 2329 & 2786 of 2004.

Ravinder Sethi, P.D. Gupta, Kamal Gupta, Abhishek Gupta, Puneet Sharma, Gagan Gupta, Rachana Joshi Issar, Rajesh Sah, Nidhi Tiwari, Himani Bhatnagar for the Appellants.

Tarun Johri, Ankur Gupta, Rachana Srivastava, Jatinder Kumar Bhaita for the Respondents.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. Since all these appeals involve identical issues, we propose to dispose of all these appeals by this common judgment and order.

2. All these appeals are directed against the judgments and orders passed by the High Court of Delhi, whereby the High Court has dismissed the Writ Petitions filed by the appellants herein. The Writ Petition Nos. WP(C) 8440-43/2003; 2329/04 and 2786/04 filed by Pawan Singh & Ors.; Shanta Talwar and

Diwan Chand, respectively, were dismissed by the Division Bench of the Delhi High Court by its common judgment and order dated 07.04.2004, whereas, the Writ Petition (Civil) No. 716/08 filed by Neera Jain and Writ Petition (Civil) No. 573/08, in which Veena Kapuria was the second Petitioner, were dismissed by a common judgment and order dated 11.04.2008 passed by another Division Bench of the High Court of Delhi.

3. For the sake of brevity and convenience we propose to take the facts of the case in the Writ Petitions filed by Pawan Singh & Ors.; Shanta Talwar and Diwan Chand challenging the acquisition proceedings of their lands for the construction of Prem Nagar Station, which is a part of Mass Rapid Transit System [for short 'MRTS'], which is a project undertaken by the Delhi Metro Rail Corporation [for short 'DMRC']. The aforesaid land was sought to be acquired by issuing a notification under Section 4 of the Land Acquisition Act, 1894 [for short 'the LA Act'] on 16.10.2003, but by the aforesaid notification, urgency provision under Section 17(1) read with Section 17(4) of the LA Act was also invoked dispensing with the enquiry inviting objections under Section 5-A of the LA Act, which was followed by issuance of Declaration under Section 6 and notice under Section 9 on 11.11.2003. There is no dispute with regard to the fact that the possession of the land was also taken by the DMRC on 24.12.2003 and thereafter construction of the metro station was started, which also stand completed as of now. An award was passed in respect of the aforesaid land by the Land Acquisition Collector on 17.09.2004. Smt. Shanta Talwar and other appellants received the compensation as fixed by the Collector.

4. The Parliament of India, in the year 1978 had also enacted another legislation, namely, the Metro Railways (Construction of Works) Act, 1978 [for short 'the Metro Railways Act'] which also contains the provisions for acquisition of land required for specific purpose, namely, for the construction of Metro Railways or other works connected therewith, like: -

(a) make or construct in, upon, across, under or over any lands, buildings, streets, roads, railways or tramways or any rivers, canals, brooks, streams or other waters or any drains, water-pipes, gas-pipes, electric lines or telegraph lines, such temporary or permanent inclined planes, arches, tunnels, culverts, embankments, aqueducts, bridges, ways or passages, as the metro railway administration thinks proper;

(b) alter the course of any rivers, canals, brooks, streams or water-courses for the purpose of constructing tunnels, passages or other works over or under them and divert or alter as well temporarily as permanently, the course of any rivers, cannals, brooks, streams or water-courses or any drains, water-pipes, gas-pipes, electric lines or telegraph lines or raise or sink the level thereof in order the more conveniently to carry them over or under, as the metro railway administration thinks proper;

(c) make drains or conduits into, through or under, any lands adjoining the metro railway for the purpose of conveying water from or to the metro railway;

(d) erect or construct such houses, warehouses, offices and other buildings and such yards, stations, engines, machinery, apparatus and other works and conveniences, as the metro railways administration thinks proper;

(e) alter, repair or discontinue such buildings, works and conveniences as aforesaid or any of them, and substitute others in their stead;

(f) draw, make or conduct such maps, plans, surveys or tests, as the metro railway administration thinks property;

(g) do all other acts necessary for making, maintaining, altering or repairing and using the metro railway;

However, in the said Writ Petitions filed by Pawan Singh & Ors.; Shanta Talwar and Diwan Chand, the lands were acquired by the State Government under the LA Act for the establishment of Prem Nagar MRTS Station at the request of DMRC and not under the Metro Railways Act.

5. Two Civil Appeals are also filed against the dismissal of two other Writ Petitions, viz., the Writ Petition (Civil) No. 716/08 filed by Neera Jain and Writ Petition (Civil) No. 573/08, in which Veena Kapuria was the second Petitioner, which were registered as Civil Appeal Nos. 3200/08 and 3199/08, respectively. The said cases involved lands which were acquired by issuing a notification dated 10.08.2007 under Section 4 of the LA Act. Declaration was also issued in the said cases under Section 6 by issuing a notification on 01.11.2007 followed by the notice under Section 9 issued on 01.11.2007. Not only possession of the said land was taken but also award was passed on 30.10.2010. The records disclose that some of the appellants in the said cases have also received the compensation.

6. Be that as it may, in all these appeals possession of land in question has already been taken and the purpose for which the land was acquired has also been completed/achieved.

7. Contentions raised by all the appellants herein are that in view of the provisions of the Metro Railways Act, which is applicable to the city of Delhi, the land for the purpose of construction of Metro Railway could and should only be acquired under the provisions of the said Act and not under the provisions of the LA Act. Counsel appearing for the appellants reinforced their arguments by contending *inter alia* that no acquisition on behalf of the Metro Railways could be made

under the general law, i.e., LA Act, as a special legislation called the Metro Railways (Construction of Works) Act, 1978 was enacted by the Parliament with the specific purpose and object of speedy and adequate acquisition of land by the Central Government. It was contended that in view of the enactment and aforesaid special Act of 1978, which is a complete and self-contained code providing for acquisition of land solely for the purposes of Metro Railways, applicability of the LA Act for the purpose of Metro Railways should be deemed to be impliedly repealed.

8. It was further contended by the counsel appearing for the appellants that the Metro Railways Act, which is a specific law on the subject, having specifically excluded incorporation of any law in the nature of Section 17(1) and 17(4) of the LA Act, which provides for dispensation of the enquiry as envisaged under Section 5-A of the LA Act, the respondents acted illegally and without jurisdiction in taking resort to the said urgency provisions of the LA Act for the purpose of acquisition of land of the appellants, particularly, when there is no such provision in the Metro Railways Act for dispensation of such enquiry and providing for an opportunity of raising objections by the appellants with regard to very act of acquisiton.

9. The aforesaid submission of the counsel appearing for the appellants were countered by the counsel appearing for the respondents contending *inter alia* that despite the fact that there is an Act called Metro Railways Act in operation, yet the respondents are not denuded of the power of invoking the provisions of the LA Act which empowers the respondents to acquire land for the public purpose, i.e., construction of MRTS projects in the cases at hand. In support of the said contention counsel appearing for the respondents relied upon the decisions of this Court in the case of *Rajinder Kishan Gupta and Anr. V. Union of India and Ors.* reported at (2010) 9 SCC 46 and also on the decision of this Court in *S.S. Darshan v. State of Karnataka and Ors.* reported at (1996) 7 SCC 302.

10. We heard the learned counsel appearing for the parties who have elaborately taken us through the entire records.

11. In view of the ever increasing demand of urban population in Delhi, the existing service transport facilities were found to be inadequate and, therefore, a decision was taken by the Government for having a Mass Rapid Transit System. To undertake the said project DMRC was incorporated as a company under the Indian Companies Act. Thereafter, for the purpose of operation and maintenance of the Metro Railways in Delhi, an Ordinance was promulgated in 2002 by the President of India called 'the Delhi Metro Railway (Operation and Maintenance) Ordinance, 2002' which was replaced by an Act of Parliament, viz., Delhi Metro Railway (Operation and Maintenance) Act, 2002, in the same year. However, the fact remains that despite the enactment of the aforesaid two Acts of 1978 and 2002 whenever any land was required for the purpose of MRTS project, the same was acquired by the Land Acquisition authority from time to time under the Land Acquisition Act and the said acquired land was put at the disposal of the DMRC. In fact, in accordance with the project and planning undertaken for the said purpose, whenever a particular piece of land at a particular place was required by the DMRC, it had send a requisition to the land acquiring authority and on such request being made the land was acquired and put at the disposal of the DMRC. It is admitted fact that every time the machinery under the LA Act was put into motion, the provisions of the Metro Railways Act have never been invoked and the acquisitions in the present cases are no exception.

12. It is not in dispute that in Delhi land can be acquired by the Government, for public purpose, under the provisions of LA Act. The appellants are candid in accepting the importance of the MRTS project for the people of Delhi and also the fact that every time the machinery under the LA Act is put into

motion, the provisions of Metro Railways Act have never been invoked.

13. The Metro Railways (Construction of Works) Act, 1978, was also made applicable to Delhi, which provides for acquisition of land required for specific purpose, namely, for the construction of Metro Railways or other works connected therewith as mentioned above. Our attention was drawn to the Statement of Objects and Reasons of the Metro Railways Act, 1978, which states that the Bill provides a speedy and adequate procedure for the acquisition of land, buildings, streets, roads or passage or the right of user in, or the right in the nature of easement on, such building, land, etc., by the Central Government to the exclusion of the Land Acquisition Act, 1894. The Preamble of the Metro Railways Act also states that the Act provides for the construction of works relating to metro railways in metropolitan cities and for matters connected therewith. Power to acquire land for construction of any metro railways or for any other works connected therewith was vested on the Central Government under Section 6 of the said Metro Railways Act. Section 9 of the Act provided for the procedure for hearing of objections filed by the persons interested in the land, building, street, road or passage. So far as declaration of acquisition of land is concerned, the provision made was Section 10 of the Act and the power to take possession was vested on the competent authority appointed by the Central Government as provided for under Section 11 of the Metro Railways Act. Our specific attention was drawn to Section 45 of the Metro Railways Act which was a provision of saving, providing as follows: -

> "Section 45. Saving - Notwithstanding anything contained in this Act any proceeding, for the acquisition of any land, under the Land Acquisition Act, 1894 for the purpose of any metro railway, pending immediately before the commencement of this Act before any court or other authority shall be continued and be disposed of under that

> Act as if this Act had not come into force."

Section 40 of the Metro Railways Act also provides that the provision of the said Act or any Rule made or any notification issued thereunder would have effect notwithstanding anything inconsistent therewith contained in any enactment other than the said Act or in any instrument having effect by virtue of any enactment other than the said Act.

14. Relying on the Statement of Objects and Reasons, the Preamble and the abovesaid provisions of the Metro Railways Act it was contended by the counsel appearing for the appellants that in view of the incorporation of the said provisions in the said Act, there was an implied repeal of the Land Acquisition Act so far as it concerns construction of Metro Railways or other works connected therewith.

15. Similar contentions were also raised before the High Court and the two Division Benches, who heard the matters in question dismissed the said plea holding that the two Acts are two independent Acts and it is for the authority to decide as to which Act would be made applicable in a given case.

16. However, in a situation, where recourse is taken to the provisions of the LA Act for acquiring a property for construction of Metro Railways or other works connected therewith, the provisions mentioned in the LA Act could and would only be made applicable and no provision of Metro Railways Act could be taken resort to or making use of. Similarly when recourse is taken for acquiring land under the Metro Railways Act, no provision of the LA Act would or could be made applicable as both the two Acts contain separate provisions, although they are similar in some respect.

17. The Metro Railways Act gives the detailed procedure as to how land for construction of Metro Railways or other works connected therewith could be acquired. The Act also lays down the procedure for payment of compensation. Section 17 of the

Metro Railways Act specifically states that nothing in the LA Act would apply to an acquisition under the Metro Railways Act. However, in Section 45 a saving clause has been inserted, providing that any proceeding for the acquisition of any land under the LA Act for the purpose of any Metro Railway, pending immediately before the commencement of this Act before any court or other authority shall be continued and be disposed of under that Act as if this Act had not come into force.

18. However, it cannot be said that by inserting the said provision under Section 40 and Section 45 and also in view of the Statements of Object and Reasons of the Metro Railways Act, the applicability of LA Act for the purpose of acquisition of land for construction of Metro Railways or other works connected therewith would stand repealed and could not be taken resort to. There is no express provision in the Metro Railways Act repealing applicability of the provisions of the LA Act. So long as there is no specific repeal of applicability of the LA Act for the purpose of acquiring land for establishing metro railways it cannot be presumed that there is an implied repeal as sought to be submitted by the counsel appearing for the appellants. It also cannot be construed that the Metro Railways Act is a special Act, of such a nature, that with the enactment of the said Act the general law in LA Act would get obliterated and automatically repealed so far as acquisition of land for the purpose of Metro Railways is concerned.

19. A similar contention was raised before this Court in the case of *Rajinder Kishan Gupta* (supra). The counsel appearing for the appellants, however, submitted that although the said contention raised in the said case was rejected, but, according to them, the said decision needs reconsideration in view of the aforesaid specific provisions of the Metro Railways Act.

20. We are however unable to agree to and accept the aforesaid submission for the learned counsel for the appellants for we do not believe that it was intended by the legislature to

do away with the applicability of the LA Act for the purpose of acquisition of land for construction of Metro Railways or other works connected therewith by enacting the Metro Railways Act. The aforesaid Metro Railways Act was enacted by the legislature, in order to provide additional provisions for construction of Metro Railways or other works connected therewith but it was not made obligatory by the legislature to invoke only the provisions of the said Metro Railways Act in case of acquisition of land for construction of Metro Railways or other works connected therewith. It was left upon to the discretion of the concerned competent authority to take recourse to any of the aforesaid provisions making it clear that if resort is taken to the provisions of LA Act, the said provisions could only be made applicable and no provision of the Metro Railways Act would then be resorted to. Similarly, if provisions of the Metro Railways Act is taken resort to, then only such provisions would apply and not the provisions of the LA Act.

21. One of the contentions of the counsel appearing for the appellants was that the decisions in the case of *Nagpur Improvement Trust v. Vithal Rao and Ors.* reported at (1973) 1 SCC 500 which was relied upon by the High Court, was referred in the context of the particular State Act wherein reference was made to the LA Act and the provisions of the LA Act were made applicable for acquisition of land under that particular State Act also.

22. Wherever a particular State Act incorporates the provision of the LA Act by way of reference or by way of incorporation by the legislation, the provisions of the LA Act automatically become applicable for the purpose of carrying out the object of the said particular State Act but wherever such power is not given there is no bar for taking recourse to any of the Acts which are available on the subject. There was no bar or prohibition for the authority to take recourse to the provisions of the LA Act which is also a self-contained Code and also could be taken recourse to for the purpose of acquiring land

for public purposes like construction of Metro Railways and works connected therewith. In all these cases no other provision except the provisions of the LA Act have been resorted to and, therefore, the appellants cannot have any grievance for taking recourse to the said provision.

23. Besides, the Metro Railways Act gives power to the competent authority to acquire land for the purpose of construction of Metro Railways and works connected therewith and in the said Act it is also provided that the possession can be taken immediately after issuance of the declaration as envisaged under the Act. The mode of compensation is almost identical with that of Section 23 of the LA Act which lays down the manner for determination of the compensation to be paid.

24. The only visible and specific distinction is absence of power of taking immediate possession in case of urgency as provided for under Sections 17(1) and 17(4) of the LA Act. As there was urgency for construction of the Metro Railways in Delhi because of various factors, urgency clause was invoked in the present case and consequent thereupon possession was taken and the construction work of the Metro Railways including construction of the stations is completed. Award has also been passed determining the compensation. Therefore, the appellants herein suffer no prejudice except for the fact that possession was taken in the instant case on an urgent basis. That plea has also been rendered infructuous in view of the fact that the entire project is complete.

25. We see no reason to quash the notification issued under Section 4 of the LA Act so as to postpone the date of acquisition to a later period thereby allowing the appellants an opportunity of getting higher compensation. Instead, we feel it appropriate that the policy and guidelines issued by the Government of NCT of Delhi could be best utilized. The aforesaid policy was issued by the Government of NCT of Delhi on 25.10.2006 by way of a Circular, which provides that the

persons of all categories, affected due to the implementation of Delhi MRTS projects can be relocated and rehabilitated for which the Government of India has communicated its decision on 28.08.2006 intimating that the DMRC has already relocated the persons affected by Line-III of Metro Phase-I project and that Delhi Development Authority should provide necessary number of units for the rehabilitation of remaining project affected persons.

26. Counsel appearing for the DMRC informed us that any such project affected person could submit their application in a format prescribed, a copy of which was placed before us. We are informed that all the appellants herein have filed their applications in the appropriate format to the concerned authorities. If the applications have been filed by the appellants herein in the appropriate format, those are required to be considered by the concerned authorities as expeditiously as possible. If any of the appellants has not filed any such application in the format prescribed, it shall be open to such appellants also to file such applications in appropriate format within three weeks from the date of this order, in which case, their applications shall also be considered along with the applications already filed by the other applicants/appellants and a decision thereon shall be taken within eight weeks from the date of receipt of such applications. Needless to say that in case, any of the appellants is aggrieved by the decisions taken by DMRC or by the other competent authority, such a decision could be challenged by taking recourse to appropriate remedy as provided for under the law.

27. With aforesaid observations and directions we, find no merit in these appeals which are dismissed but giving right to the appellants herein to take recourse for their rehabilitation in terms of the circular issued by the Government of NCT of Delhi, leaving it open to the competent authority / Government to decide their cases in accordance with law.

B.B.B. Appeals dismissed.

STATE OF J & K & ANR.

v.

AJAY DOGRA

(Civil Appeal No.3066 of 2011)

APRIL 07, 2011

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

Service Law – Recruitment – Jammu and Kashmir Police Rules, 1960 – Rule 176 – Direct recruitment of Prosecuting Officers in Jammu & Kashmir Police – Advertisement issued – Essential suitability conditions laid down – One such condition with regard to age/physical qualifications to be possessed by the applicants – Rule 176 of the Jammu & Kashmir Police Rules stated to be applicable to the advertisement – Respondents-applicants disqualified on the ground that they did not possess the necessary physical qualifications – They filed writ petitions seeking for relaxation regarding minimum physical standards/ qualification laid down in the advertisement as also in Rule 176 of the Police Rules – High Court held that Prosecuting Officers are required to exhibit mental ability rather than physical strength and that the candidature of the respondents cannot be rejected merely on the ground that they did not fulfill physical criterion – Consequently, it directed that the cases of all the respondents be considered for appointment – On appeal, held: The only prayer made in the writ petitions filed by the respondents was to grant relaxation to the criteria and standard of physical conditions prescribed for and required to be fulfilled – In the writ petitions, neither the validity of Rule 176 with regard to physical conditions was challenged nor such conditions prescribed in the advertisement were challenged on the ground of validity – High Court went beyond the pleadings in holding that the physical conditions laid down

were bad and arbitrary –The Court was not justified to decide the validity of the aforesaid Rule and the advertisement without there being any challenge to the same – It was not appropriate for the High Court to set aside the said physical conditions which were mandatory in nature – Pleadings.

The appellants issued an advertisement inviting applications for making direct recruitment to the post of Prosecuting Officers in Jammu & Kashmir Police, in the State of Jammu & Kashmir. In the advertisment, various criterion were laid down as essential suitability conditions. One such condition was with regard to age/ physical qualifications to be possessed by the applicants. In the said advertisement, it was mentioned that applications of only such candidates would be considered for selection who conform to the physical standard fixed by the Government with regard to height and with regard to chest. It was further mentioned that Rule 176 of the Jammu & Kashmir Police Rules, 1960 would be applicable to the advertisement.

The respondents submitted their applications pursuant to the aforesaid advertisement. However, during the course of selection it was found that none of the respondents possessed the necessary physical qualifications as they did not fulfil the physical standards fixed by the Government either with regard to height or with regard to chest and they were thus disqualified. Respondents filed writ petitions seeking for relaxation regarding minimum physical standards/qualification laid down in the advertisement as also in Rule 176 of the Police Rules.

The High Court held that the Prosecuting Officers have to appear in the Court and therefore, such officers would be required to exhibit mental ability rather than physical strength and further that the candidature of the

respondents cannot be rejected merely on the ground that they did not fulfill physical criterion since the prescription of physical standard cannot be said to be a criteria which has no nexus with the object sought to be achieved. Consequently, the High Court directed that the cases of all the respondents be considered for their appointment as against the posts advertised and for which they had submitted their applications. Hence the present appeals.

Allowing the appeals, the Court

HELD:1. A perusal of the writ petitions filed by the respondents would prove and establish that the only prayer made in those writ petitions was to grant relaxation to the criteria and standard of physical conditions prescribed for and required to be fulfilled. In aforesaid writ petitions, neither the validity of Rule 176 of the Jammu & Kashmir Police Rules, 1960 with regard to physical conditions were challenged nor such conditions prescribed in the advertisement were challenged on the ground of its validity contending inter alia that there is no nexus of the said conditions with the object sought to be achieved. The physical conditions prescribed in the advertisement are in consonance with Rule 176 of the Police Rules which are statutory Rules. Nowhere in the pleadings, it is stated that such conditions prescribed are illegal or invalid. Constitutional validity of the aforesaid Rule was never challenged in any of the writ petitions. The High Court, however, without there being any pleading in that regard went beyond the pleadings and held that such physical conditions laid down are bad and arbitrary as what has been prescribed have no nexus with the object sought to be achieved. [Paras 14, 15] [64-H; 65-A-D]

1.2. There was no challenge to the constitutional

validity of Rule 176 of the Police Rules so far as it relates to prescribing physical conditions regarding the height and the chest. The stipulations in the advertisement regarding standard of physical condition was also not challenged in the Writ Petition. The High Court was not justified in going into the validity of the aforesaid criterion in absence of any such challenge. The High Court also did not specifically declare the Rule prescribing minimum height standard and chest standard *ultra vires* and, therefore, so long as that Rule exists in the statute book, no such direction as issued by the High Court could be issued. Consequently, the directions issued by the High Court in the present case are required to be set aside. Therefore, the High Court was not justified to decide the validity of the aforesaid Rule and the advertisement without there being any challenge to the same. Also it was not appropriate for the High Court to set aside the said conditions which were mandatory in nature. [Paras 22, 23] [68-E-H; 69-A]

V.K. Majotra v. Union of India & Ors. **(2003) 8 SCC 40: 2003 (3)Suppl. SCR 483;** *Secretary to Government and Anr. v. M. SenthilKumar* **(2005) 3 SCC 451: 2005 (2) SCR 436;** *State of Maharashtra &Ors. v. Jalgaon Municipal Council & Ors.* **(2003) 9 SCC 731: 2003(1) SCR 1112;** *Sanjay Kumar & Ors. v. Narinder Verma and Ors.***(2006) 6 SCC 467: 2006 (2) Suppl. SCR 59 – relied on.**

Case Law Reference:

2003 (3) Suppl. SCR 483	**relied on**	**Para 16**
2005 (2) SCR 436	**relied on**	**Para 17**
2003 (1) SCR 1112	**relied on**	**Para 18**
2006 (2) Suppl. SCR 59	**relied on**	**Para 19**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3066 of 2011.

From the Judgment & Order dated 19.8.2002 of the High Court of Jammu & Kashmir at Jammu IN LPA (SW) No. 184 of 2002 in OWP No. 533 of 2000.

WITH

C.A. Nos. 3067, 3068, 3069, 3070, 3071, 3072, 3073, 3074, 3075, 3076, 3077, 3078, 3079, 3080, 3081, 3083, 3084, 3085, 3087, 3088, 3089, 3090, 3091, 3092 & 3093 of 2011.

Gaurav Pachnanda, AAG, Sunil Fernandes, Renu Gupta for the Appellants

Mohit Chaudhary, Puja Sharma, Nikita Kabre, N.M. Popli, K.B. Hina, Anindita Popli, B. Sunita Rao, Indra Makwana, Dinesh Kumar Garg, B.S. Billowria Tripurai Rai, Vishwa Pal Singh, Surya Kant for the Respondent.

The Judgment of the Court was delivered by

DR. MUKUNDAKAM SHARMA, J. 1. Since, all these appeals involve identical issues both on facts and law, therefore, we have heard all these appeals in one bunch. We also propose to dispose of all these petitions by this common judgment and order, as the issues urged before us are identical.

2. Delay condoned.

3. Leave granted.

4. The appellants herein issued an advertisement inviting applications for making direct recruitment to the post of Prosecuting Officers in Jammu & Kashmir Police, in the State of Jammu & Kashmir. There are altogether two such advertisement/notices, the one issued on 24.3.2000 and the other dated 5.3.2003. In the aforesaid advertisment/notices, various criterion were laid down as essential suitability

conditions. One such condition was with regard to age/physical qualifications to be possessed by the applicants. In the said advertisement, it was clearly mentioned that applications of only such candidates would be considered for selection who conform to the following physical standard fixed by the Government:-

"(i) Height – '5-6"

(ii) Chest

Unexpanded 32 ½",

Expanded 33 ½"

5. In the said advertisement/notices, it was specifically indicated that Rule 176 of the Jammu & Kashmir Police Rules, 1960 (hereinafter referred as "the Police Rules") would be applicable to the advertisement. The aforesaid advertisement/ notices also prescribed amongst other criteria, the age/ physical qualifications that must be possessed by the applicants. It also stated that the applicants must possess certain additional qualifications such as (i) A degree in law from a recognised University and (ii) Minimum 2 years of actual experience at the Bar.

6. Since the aforesaid advertisement refers to and specifically states that the said Rule would be applicable to the advertisement, the relevant part of the said Rules is required to be stated at this stage.

7. The said Rule 176 of Police Rules prescribes amongst other things, the physical and educational qualifications required for direct appointment as Inspectors, sub-Inspectors or Assistant Sub-Inspectors. It reads as follows:-

"176. Qualification for direct appointment as Inspectors, Sub-Inspectors or Assistant Sub-Inspectors

(1)******* ******** ******** ********

(2)******* ******** ******** ********

applications of only such candidates will be considered for selection who conform to the following physical standards fixed by the Government:

(i) Height '5-6"

(ii) Chest

Unexpanded 32 ½"

Expanded 33 ½" "

8. The respondents herein submitted their applications pursuant to the aforesaid advertisement. However, during the course of selection it was found that none of the respondents possesses the necessary physical qualifications as they do not fulfil the physical standards fixed by the Government either with regard to height or with regard to chest. Since the respondents were disqualified on the basis of aforesaid laid down standard on physical qualifications, they filed writ petitions in the High Court seeking for relaxation of the aforesaid Rules regarding minimum physical standards/qualification laid down in the advertisement as also in Rule 176 of the Police Rules.

9. The aforesaid writ petitions filed by the respondents were heard by a Single Judge of the Jammu & Kashmir High Court. The learned Single Judge considered the contentions raised by the respondents. On perusal of the respective contentions, the High Court found that it is only the standard of physical qualification which the respondents are lacking inasmuch as either in the minimum width of the chest they are not fulfilling the criteria or they do not possess the required and the advertised height. It was also observed that Prosecuting Officer has to appear in the Court and therefore, such officer would be required to exhibit mental ability rather than physical

strength and therefore, the physical qualifications are not to stand in the way of such candidates. The High Court further held that neither the height nor the chest or chest expansion, being physical qualifications, could be the reason for rejecting the applications of the respondents. It was also held that the candidature of the respondents cannot be rejected merely on the ground that they do not fulfill physical criterion in view of the fact that the prescription of physical standard cannot be said to be a criteria which has no nexus with the object sought to be achieved. Consequently, it was directed that the cases of all the respondents be considered for their appointment as against the posts advertised and for which they had submitted their applications.

10. Being aggrieved by the aforesaid orders passed by the learned Single Judge, the appellants preferred appeals before the Division Bench of the High Court. The said appeals were registered as Letters Patent Appeals.

11. The Division Bench of the High Court held that the Single Judge has not committed any error in concluding that prescription of physical qualification in regard to width of the chest or with regard to height has no nexus with the object and therefore, no case of interference is made out.

12. Being aggrieved by the aforesaid judgments and orders passed, the present appeals were filed on which we heard the learned counsel appearing for the parties who have taken us through the contents of the advertisement, Rule 176 of the Police Rules, other relevant documents and various decisions which were relied upon during the course of the arguments.

13. In the light of the same, we propose to dispose of all these appeals by giving our reasons.

14. A perusal of the writ petitions would prove and establish that the only prayer made in those writ petitions was

to grant relaxation to the criteria and standard of physical conditions prescribed for and required to be fulfilled. In aforesaid writ petitions, neither the validity of Rule 176 with regard to physical conditions were challenged nor such conditions prescribed in the advertisement were challenged on the ground of its validity contending inter alia that there is no nexus of the said conditions with the object sought to be achieved. We find that the physical conditions prescribed in the advertisement are in consonance with Rule 176 of the Police Rules which are statutory Rules. No where in the pleadings, it is stated that such conditions prescribed are illegal or invalid. Constitutional validity of the aforesaid Rule was never challenged in any of the writ petitions.

15. The High Court, however, without there being any pleading in that regard went beyond the pleadings and held that such physical conditions laid down are bad and arbitrary as what has been prescribed have no nexus with the object sought to be achieved.

16. The aforesaid decision rendered by the High Court is contrary to and inconsistent with the law laid down by this Court in the case of *V.K. Majotra Vs. Union of India & Ors.* reported in (2003) 8 SCC 40**.** In the said decision also what was urged before this Court was neither raised in the pleadings nor it was urged before the High Court by any of the parties to the writ petition. In the said case, the issue was as to whether a person not having judicial experience could be appointed as Vice Chairman of the Central Administrative Tribunal. This Court found that the aforesaid issue was not raised in the writ petition and similarly, vires of the section was also not challenged. This Court in the aforesaid context, held as follows:-

> "8. .....It is also correct that vires of Sections 6(2)(b), (bb) and (c) of the Act were not challenged in the writ petition. The effect of the direction issued by the High Court that henceforth the appointment to the post of Vice-Chairman

> be made only from amongst the sitting or retired High Court judge or an advocate qualified to be appointed as a judge of the High Court would be that Sections 6(2)(b), (bb) and (c) of the Act providing for recruitment to the post of Vice-Chairman from amongst the administrative services have been put to naught/obliterated from the statute-book without striking them down as no appointment from amongst the categories mentioned in clauses (b), (bb) and (c) could now be made. So long as Sections 6(2)(b), (bb) and (c) remain on the statute-book such a direction could not be issued by the High Court....."

In paragraph 9 of the said decision, this Court has discussed the issues in the following terms:-

> "9. We are also in agreement with the submissions made by the counsel for the appellants that the High Court exceeded its jurisdiction in issuing further directions to the Secretary, Law Department, Union of India, the Secretary, Personnel and Appointment Department, Union of India, the Cabinet Secretary of the Union of India and to the Chief Secretary of the U.P. Government as also to the Chairman of CAT and other appropriate authorities that henceforth the appointment to the post of presiding officer of various other Tribunals such as CEGAT, Board of Revenue, Income Tax Appellate Tribunal etc. should be from amongst the judicial members alone. Such a finding could not be recorded without appropriate pleadings and notifying the concerned and affected parties."

17. Similarly, in the case of *Secretary to Government and Anr. Vs. M. Senthil Kumar* reported in (2005) 3 SCC 451, this Court in the context of there being no challenge to the constitutional validity of the policy providing 10 per cent special quota to the children/wards of serving/retired/deceased personnel of Police and like forces held that since there was no challenge to the policy decision contained in the two government orders, it was not proper for the High Court to

uphold the challenge to the policy decision and to hold that the policy decision was unconstitutional and that also overlooking the fact that the applicants were seeking relief under the policy decision.

18. In *State of Maharashtra & Ors. Vs. Jalgaon Municipal Council & Ors.* reported in (2003) 9 SCC 731, this Court has observed that in absence of any challenge, the constitutional validity of the amendment cannot be gone into.

19. We may also appropriately refer to the decision of this Court in *Sanjay Kumar & Ors. Vs. Narinder Verma and Ors.* reported in (2006) 6 SCC 467, wherein also it was contended before this Court that in absence of any challenge to the relevant Rules, it was impermissible for the High Court to depart from such recruitment rules. It was also submitted that it is not open to the High Court to ignore the recruitment rules and to introduce a criterion which is not even contemplated by the applicable rules.

20. This Court while upholding the aforesaid contentions held in paragraph 16 thus:-

> "16. Having heard the learned counsel on both sides for the different contending parties, we are of the view that the impugned judgment of the High Court needs to be interfered with. As already observed, there was no challenge to the Rules in the writ petition. The learned Single Judge was, therefore, justified in applying the Rules and upholding the selection process made by the State authorities. It was wholly unjustified on the part of the Division Bench to have interfered with the selection process on the basis of the criteria which were not laid down in the Rules and that too on an erroneous appreciation of the Rules. The High Court failed to see that the Rules made no distinction, whatsoever, between degree-holders and diploma-holders at the stage of recruitment for the purpose of minimum qualifications. In

> other words, no distinction was made between the two categories at the stage of recruitment, but a greater weightage was given to the degree-holders in the post-recruitment period in the form of a higher starting pay and also lesser number of years of service requirement for qualifying for promotion to the higher post. We agree with the contention expressed by the learned counsel for the appellants that there was sufficient inbuilt balance maintained between the two categories of candidates and the impugned judgment of the High Court completely throws the Rules out of balance. What the executive did not think fit to do by prescription in the Rules, could not have been done by a judicial fiat."

21. The qualifications to be possessed by the applicants have been prescribed in the Rules and also in the advertisement for the reason that some of them are required to be posted at high altitude and therefore they are required to have proper physique so as to be able to be posted to those places.

22. In our considered opinion, the ratio of the aforesaid decisions of this Court are squarely applicable to the facts of the present case. There was no challenge to the constitutional validity of Rule 176 of the Police Rules so far as it relates to prescribing physical conditions regarding the height and the chest. The stipulations in the advertisement regarding standard of physical condition was also not challenged in the Writ Petition. The High Court was not justified in going into the validity of the aforesaid criterion in absence of any such challenge. The High Court also has not specifically declared the Rule prescribing minimum height standard and chest standard *ultra vires* and, therefore, so long as that Rule exists in the statute book, no such direction as issued by the High Court could be issued. Consequently, the directions issued by the High Court in the present case are required to be set aside.

23. We, therefore, hold that the High Court was not justified

to decide the validity of the aforesaid Rule and the advertisement without there being any challenge to the same. We also hold that it was not appropriate for the High Court to set aside the said conditions which are mandatory in nature.

24. Considering the aforesaid facts and circumstances of the case and in the light of the settled principles of law of this Court, we allow these appeals and set aside the judgments and orders passed by the High Court both by the Division Bench and by the Single Judge and dismiss the writ petitions.

B.B.B. Appeals allowed

SRI NAGARAJAPPA

v.

DIVISIONAL MANAGER, ORIENTAL INSURANCE CO. LTD.

(Civil Appeal No.3203 of 2011)

APRIL 11, 2011

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

Motor Vehicles Act, 1988 – s.166 – Compensation – Adequacy of – Due to motor accident, appellant-claimant, who was working as a coolie, suffered from gross deformity of his left upper limb – Doctor assessed permanent residual physical disability of the appellant's upper limb at 68% and his whole body at 22-23% – Tribunal took the income of appellant to be Rs.3,000/- p.m., his disability at 20%, and his age as 55 years (for which it adopted a multiplier of 11) and accordingly calculated loss of future income to be Rs.79,200/- and total compensation to be Rs.1,70,200/- – High Court, however, took the age of the appellant to be 50 years and adopting a multiplier of 13, calculated loss of future income at Rs.93,000/- and enhanced total compensation to Rs.2,22,600/- – Held: Total compensation awarded by the High Court was inadequate considering the nature of injuries suffered by the appellant and the consequent adverse effect it had on the performance of his avocation – Appellant is a manual labourer, for which he requires the use of both his hands but the accident left him with one useless hand – This disability is bound to affect the quality of his work and also his ability to find work – Hence, while computing loss of future income in respect of the appellant, disability should be taken to be 68% and not 20%, as was done by the Tribunal and the High Court – Amount towards loss of future income enhanced to Rs.3,18,240/- – Total compensation raised to Rs.4,77,640/- (rounded off to Rs.4,77,000/-) to be paid at an interest of 6% from the date of claim petition till realization.

The appellant was working as a coolie. He met with a motor accident and sustained multiple injuries. He filed claim petition under Section 166 of the Motor Vehicles Act, 1988 claiming compensation of Rs.5 lacs showing monthly income of Rs.4500/- p.m. The Tribunal found that the appellant had sustained injuries of compound fracture of ulnar styloid process of the left hand and subluxation of the left wrist and that the doctors assessed disability at 23% of the whole body and accordingly awarded Rs.20,000/- for loss of amenities, Rs.30,000/- for pain and suffering, Rs.30,000/- for medical expenses and conveyance and Rs.2,000/- for future medical treatment.

For loss of income during the period of treatment, the Tribunal found that due to the nature of the disability, the appellant was unable to work as a coolie or do other manual work; that since appellant was an indoor patient for 55 days the Tribunal presumed that he was unable to work for 3 months and further, though the appellant claimed to be earning Rs.4,500/- p.m., it was not supported by documentary evidence. Hence, the Tribunal presumed his income to be Rs.3000/- p.m. and awarded Rs.9,000/- for loss of income during the period of treatment. For computation of loss of future income due to disability, the Tribunal took into consideration that disability of the whole body of the appellant had been assessed at 23%, however, his right hand was still free to work and thus, it assessed disability at 20%. Taking the age of the appellant to be around 55 years at the time of the accident, the Tribunal adopted a multiplier of 11. Accordingly, loss of future income was calculated to be Rs.79,200/- (Rs.3000/- X 12 X 11 X 20/100) and the total compensation at Rs.1,70,200/-.

On appeal, the High Court enhanced compensation for pain and suffering, medical expenses, future medical expenses, loss of amenities and loss of future income as

against the amount awarded by the Tribunal. For loss of future income, the High Court took the age of the appellant to be 50 years and adopted a multiplier of 13, income as Rs.3000/- p.m. and disability @ 20%. Accordingly, loss of future income was calculated at Rs. 93,600/-. Compensation was thus enhanced to Rs.2,22,600/-. Still dissatisfied, the appellant filed the instant appeal praying for further enhancement of compensation.

Allowing the appeal, the Court

HELD:1. Rs.2,22,600/- awarded by the High Court is inadequate considering the nature of injuries suffered by the appellant and the consequent adverse effect it has on the performance of his avocation. [Para 7] [77-F]

2.1. Where the claimant suffers a permanent disability as a result of injuries, the assessment of compensation under the head of loss of future earnings, would depend upon the effect and impact of such permanent disability on his earning capacity. What requires to be assessed by the Tribunal is the effect of the permanent disability on the earning capacity of the injured; and after assessing the loss of earning capacity in terms of a percentage of the income, it has to be quantified in terns of money, to arrive at the future loss of earnings (by applying the standard multiplier method used to determine loss of dependency). [Para 8] [78-B-E]

2.2. Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of the permanent disability and what he could not do as a result of the permanent ability (this is also relevant for awarding compensation under the head of loss of amenities of life).

The second step is to ascertain his avocation, profession and nature of work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood. For example, if the left hand of a claimant is amputated, the permanent physical or functional disablement may be assessed around 60%. If the claimant was a driver or a carpenter, the actual loss of earning capacity may virtually be hundred percent, if he is neither able to drive or do carpentry. On the other hand, if the claimant was a clerk in government service, the loss of his left hand may not result in loss of employment and he may still be continued as a clerk as he could perform his clerical functions; and in that event the loss of earning capacity will not be 100% as in the case of a driver or carpenter, nor 60% which is the actual physical disability, but far less. In fact, there may not be any need to award any compensation under the head of "loss of future earnings", if the claimant continues in government service, though he may be awarded compensation under the head of loss of amenities as a consequence of losing his hand. Sometimes the injured claimant may be continued in service, but may not be found suitable for discharging the duties attached to the post or job which he was earlier holding, on account of his disability, and may therefore be shifted to some other suitable but lesser post with lesser emoluments, in which case there should be a limited award under the head of loss of future earning capacity, taking note of the reduced earning capacity. [Para 8] [78-H; 79-A-H; 80-A-B]

Raj Kumar v. Ajay Kumar & Anr. **(2011) 1 SCC 343: 2010(13) SCR 179 – relied on.**

3.1. In the instant case, on perusal of the doctor's evidence with respect to the nature of injuries suffered by the appellant, the appellant was found, inter alia, to be suffering from the following disabilities as a result of the accident- "gross deformity of the left forearm, wrist and hand, wasting and weakness of the muscles of the left upper limb and shortening of the left upper limb by 1 c.m." As a result, the doctor stated that the appellant could not work as a coolie and could not also do any other manual work. The doctor assessed permanent residual physical disability of the upper limb at 68% and 22-23% of the whole body. [Para 10] [80-E-G]

3.2. The appellant is working as a manual labourer, for which he requires the use of both his hands. The fact that the accident has left him with one useless hand will severely affect his ability to perform his work as a coolie or any other manual work, and this has also been certified by the doctor. Thus, while awarding compensation it has to be kept in mind that the appellant is to do manual work for the rest of his life without full use of his left hand, and this is bound to affect the quality of his work and also his ability to find work considering his disability. Hence, while computing loss of future income, disability should be taken to be 68% and not 20%, as was done by the Tribunal and the High Court. The appellant is severely hampered and perhaps forever handicapped from performing his occupation as a coolie. Thus, loss of future income would amount to Rs.3,18,240/- (Rs.3000 X 12 X 13 X 68/100). The amount awarded for loss of amenities is also enhanced to Rs.40,000/-, as against Rs.30,000/- awarded by the High Court. The amount awarded for future medical expenses is enhanced to Rs.30,000/-, as against Rs.10,000/- awarded by the High

Court. The amount awarded under the remaining heads by the High Court are appropriate and are sustained. Accordingly, total compensation payable to the appellant amounts to Rs.4,77,640/-, which is rounded off to Rs.4,77,000/-. The same shall be payable at an interest of 6% from the date of claim petition till realization. [Paras 11, 12, 14, 15] [80-G-H; 81-A-E-H; 82-A-B]

Case Law Reference:

2010(13) SCR 179 relied on Para 8, 11

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3203 of 2011.

From the Judgment & Order dated 16.10.2009 of the High Court of Karnataka at Bangalore in MFA No. 201 of 2007.

V.N. Raghupathy for the Appellant

Neeraj Sachdeva for the Respondent.

The Judgment of the Court was delivered by

GANGULY, J. 1. Leave granted.

2. On 13.08.2004 at about 6 p.m., the appellant was crossing the road carefully when a BMTC bus (bearing registration No.KA-05-B-5245) came in a rash and negligent manner and dashed against the appellant whereupon he was admitted in hospital for treatment as he had sustained multiple injuries.

3. The appellant filed a claim petition under Section 166 of the Motor Vehicles Act, 1988 claiming compensation of Rs.5,00,000/-. The appellant was working as a coolie and claimed that he was earning a monthly income of Rs.4,500/- p.m.

4. The Tribunal concluded that the accident occurred for the rash and negligent driving of the bus driver as a result of which the appellant had sustained injuries in the accident. On perusal of evidence it was found that the appellant had sustained injuries of compound fracture of ulnar styloid process of the left hand and subluxation of the left wrist. The doctor assessed disability at 23% of the whole body. Therefore, it awarded Rs.20,000/- for loss of amenities, Rs.30,000/- for pain and suffering, Rs.30,000/- for medical expenses and conveyance and Rs.2,000/- for future medical treatment. For loss of income during the period of treatment, the Tribunal found that due to the nature of the disability the appellant was unable to work as a coolie or do other manual work. It also added that only the left hand was injured, so the right hand was free to work. The appellant was an indoor patient for 55 days. Thus, the Tribunal presumed that the appellant was unable to work for 3 months. Further, though the appellant claimed to be earning Rs.4,500/- p.m., it was not supported by documentary evidence. Hence, the Tribunal presumed his income to be Rs.3000/- p.m. and awarded Rs.9,000/- for loss of income during the period of treatment. For computation of loss of future income due to disability, the Tribunal took into consideration that disability of the whole body of the appellant had been assessed at 23%, however, his right hand was still free to work. Thus, it assessed disability at 20%. Medical evidence showed that the appellant was around 55 years at the time of the accident, for which a multiplier of 11 was adopted. Accordingly, loss of future income was calculated to be Rs.79,200/- (Rs.3000 X 12 X 11 X 20/ 100). The Tribunal fastened liability on the insurance company. Thus, total compensation was Rs.1,70,200/- payable to the appellant jointly and severally, with interest @ 6% from date of the claim petition till realization.

5. On appeal, the High Court enhanced compensation for pain and suffering, medical expenses, future medical expenses, loss of amenities and loss of future income as against the amount awarded by the Tribunal. For loss of future income, the

High Court concluded that from material on record, the age of the claimant was between 45 to 55 years. Thus, it took 50 years as the safe age and adopted a multiplier of 13, income was taken as Rs.3000/- p.m. and disability @ 20%. Accordingly, loss of future income was calculated at Rs.93,600/- (Rs.3000 X 12 X 13 X 20/100). Compensation was thus enhanced and awarded as follows:

Pain and suffering	-Rs.40,000/-
Medical expenses, nourishment, attendant Charges and other incidental expenses	-Rs.40,000/-
Loss of income during treatment	-Rs.9,000/-
Loss of future income	-Rs.93,600/-
Loss of amenities	-Rs.30,000/-
Future medical expenses	-Rs.10,000/-
TOTAL	-Rs.2,22,600/-

6. Being still aggrieved by the compensation awarded, the appellant approached this Court by filing an Special Leave Petition praying for further enhancement of compensation.

7. Having gone through the records, we are of the opinion that Rs.2,22,600/- awarded by the High Court is inadequate considering the nature of injuries suffered by the appellant and the consequent adverse effect it has on the performance of his avocation.

8. In reaching our decision, we are drawn to, if we may so, a very well-considered judgment of this Court in *Raj Kumar v. Ajay Kumar & Anr.* [(2011) 1 SCC 343], wherein the Bench, comprising of Hon'ble Raveendran and Gokhale, JJ., has propounded the law on compensation in motor accidents claims

cases resulting in disability in a comprehensive manner. The relevant portions of the judgment are extracted below:

> "10. Where the claimant suffers a permanent disability as a result of injuries, the assessment of compensation under the head of loss of future earnings, would depend upon the effect and impact of such permanent disability on his earning capacity. The Tribunal should not mechanically apply the percentage of permanent disability as the percentage of economic loss or loss of earning capacity. In most of the cases, the percentage of economic loss, that is, the percentage of loss of earning capacity, arising from a permanent disability will be different from the percentage of permanent disability. … …"
>
> 11. What requires to be assessed by the Tribunal is the effect of the permanent disability on the earning capacity of the injured; and after assessing the loss of earning capacity in terms of a percentage of the income, it has to be quantified in terns of money, to arrive at the future loss of earnings (by applying the standard multiplier method used to determine loss of dependency). We may however note that in some cases, on appreciation of evidence and assessment, the Tribunal may find that the percentage of loss of earning capacity as a result of the permanent disability, is approximately the same as the percentage of permanent disability in which case, of course, the Tribunal will adopt the said percentage for determination of compensation (See for example, the decisions of this Court in *Arvind Kumar Mishra v. New India Assurance Co. Ltd.* [2010 (10) SCC 254] and *Yadava Kumar v. National Insurance Co. Ltd.* [2010 (10) SCC 341].
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> 12. xxx xxx xxx
>
> 13. Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The

Tribunal has to first ascertain what activities the claimant could carry on in spite of the permanent disability and what he could not do as a result of the permanent ability (this is also relevant for awarding compensation under the head of loss of amenities of life). The second step is to ascertain his avocation, profession and nature of work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood.

14. For example, if the left hand of a claimant is amputated, the permanent physical or functional disablement may be assessed around 60%. If the claimant was a driver or a carpenter, the actual loss of earning capacity may virtually be hundred percent, if he is neither able to drive or do carpentry. On the other hand, if the claimant was a clerk in government service, the loss of his left hand may not result in loss of employment and he may still be continued as a clerk as he could perform his clerical functions; and in that event the loss of earning capacity will not be 100% as in the case of a driver or carpenter, nor 60% which is the actual physical disability, but far less. In fact, there may not be any need to award any compensation under the head of "loss of future earnings", if the claimant continues in government service, though he may be awarded compensation under the head of loss of amenities as a consequence of losing his hand. Sometimes the injured claimant may be continued in service, but may not be found suitable for discharging the duties attached to the post or job which he was earlier holding, on account of his

disability, and may therefore be shifted to some other suitable but lesser post with lesser emoluments, in which case there should be a limited award under the head of loss of future earning capacity, taking note of the reduced earning capacity.

15. xxx xxx xxx

16. … … Sections 168 and 169 of the Act make it evident that the Tribunal does not function as a neutral umpire as in a civil suit, but as an active explorer and seeker of truth who is required to "hold an enquiry into the claim" for determining the "just compensation". The Tribunal should therefore take an active role to ascertain the true and correct position so that it can assess the "just compensation". While dealing with personal injury cases, the Tribunal should preferably equip itself with a Medical Dictionary and a Handbook for evaluation of permanent physical impairment…"

9. We are in complete agreement with the abovementioned judgment.

10. On perusal of the doctor's evidence with respect to the nature of injuries suffered by the appellant, the appellant was found, inter alia, to be suffering from the following disabilities as a result of the accident- "gross deformity of the left forearm, wrist and hand, wasting and weakness of the muscles of the left upper limb and shortening of the left upper limb by 1 c.m." As a result, the doctor stated that the appellant could not work as a coolie and could not also do any other manual work. The doctor assessed permanent residual physical disability of the upper limb at 68% and 22-23% of the whole body.

11. The appellant is working as a manual labourer, for which he requires the use of both his hands. The fact that the accident has left him with one useless hand will severely affect his ability to perform his work as a coolie or any other manual

work, and this has also been certified by the doctor. Thus, while awarding compensation it has to be kept in mind that the appellant is to do manual work for the rest of his life without full use of his left hand, and this is bound to affect the quality of his work and also his ability to find work considering his disability. Hence, while computing loss of future income, disability should be taken to be 68% and not 20%, as was done by the Tribunal and the High Court. Our view is supported from the ratio in *Raj Kumar* (supra) and from the fact that the appellant is severely hampered and perhaps forever handicapped from performing his occupation as a coolie.

12. Thus, loss of future income will amount to Rs.3,18,240/- (Rs.3000 X 12 X 13 X 68/100). We also enhance the amount awarded for loss of amenities to Rs.40,000/-, as against Rs.30,000/- awarded by the High Court. We also enhance the amount awarded for future medical expenses to Rs.30,000/-, as against Rs.10,000/- awarded by the High Court. We are satisfied by the amount awarded under the remaining heads awarded by the High Court and sustain the same.

13. The break-up of compensation is as follows:

Loss of future income	- Rs.3,18,240/-
Loss of amenities	- Rs.40,000/-
Pain and suffering	- Rs.40,000/-
Future medical expenses	- Rs.30,000/-
Medical expenses, nourishment, attendant Charges and other incidental expenses	-Rs.40,000/-
Loss of income during treatment	-Rs.9,000/-
TOTAL	**-Rs.4,77,240/-**

14. Accordingly, total compensation payable to the

appellant amounts to Rs.4,77,640/-, which we round off to Rs.4,77,000/-. The same shall be payable at an interest of 6% from the date of claim petition till realization. We direct the respondent to calculate the amount and deposit the same by way of bank or demand draft in the Motor Accident Claims Tribunal, Bangalore and the Presiding Officer of the Tribunal will deposit the same in the bank account of the appellant. If there is no such bank account one shall be opened in a nationalized bank and the demand draft will be deposited there.

15. Accordingly, the appeal is allowed.

16. No order as to costs.

B.B.B. Appeal allowed.

SUNITA KUMARI KASHYAP
v.
STATE OF BIHAR AND ANR.
(Criminal Appeal No. 917 of 2011)

APRIL 11, 2011

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

Code of Criminal Procedure, 1973 – s.178(c) – Criminal proceedings – Maintainability of – Territorial jurisdiction – Allegation made by wife that husband and in-laws subjected her to ill-treatment and cruelty at her matrimonial home at Ranchi and that she was sent back to her parental home at Gaya by her husband with threat of dire consequences for not fulfilling their demand of dowry – Criminal proceedings initiated by appellant-wife at Gaya against husband and in-laws – Whether the Judicial Magistrate, Gaya had the jurisdiction to entertain the criminal case instituted by the appellant – Held, Yes – The alleged offence was a continuing one having been committed in a number of local areas and one of the local areas being Gaya, the Magistrate at Gaya had the jurisdiction to proceed with the criminal case – The episode at Gaya was only a consequence of continuing offence of harassment and ill-treatment allegedly meted out to the wife – Clause(c) of s.178 was clearly attracted – Penal Code, 1860 – ss. 498A and 406 r/w. s. 34 – Dowry Prohibition Act, 1961 – ss. 3 and 4.

The appellant-wife was married to respondent no.2. She was allegedly forced by the respondents-husband and in-laws to leave the matrimonial home at Ranchi and return to her parental home at Gaya. Subsequently, the appellant lodged FIR at Gaya u/ss. 498A and 406 r/w. s. 34 of IPC and ss. 3 and 4 of the Dowry Prohibition Act, 1961 alleging that the respondents-husband and in-laws were harassing and torturing her for dowry. The Judicial

Magistrate, Gaya took cognizance of the alleged offences. On appeal, the High Court held that the proceedings at Gaya were not maintainable for lack of jurisdiction and quashed the entire proceedings at Gaya with liberty to the appellant to file the same in appropriate Court.

In the instant appeals, the question which arose for consideration was whether the criminal proceedings initiated by the appellant at Gaya against her husband and in-laws were not maintainable for lack of jurisdiction.

Allowing the appeals, the Court

HELD:1.1. Chapter XIII of the Code of Criminal Procedure, 1973 deals with jurisdiction of the criminal courts in inquiries and trials. From Sections 177-179 CrPC, it is clear that the normal rule is that the offence shall ordinarily be inquired into and tried by a court within whose local jurisdiction it was committed. However, when it is uncertain in which of several local areas an offence was committed or where an offence is committed partly in one local area and partly in another or where an offence is a continuing one, and continues to be committed in more than one local area and takes place in different local areas as per Section 178, the Court having jurisdiction over any of such local areas is competent to inquire into and try the offence. Section 179 makes it clear that if anything happened as a consequence of the offence, the same may be inquired into or tried by a Court within whose local jurisdiction such thing has been done or such consequence has ensued. [Paras 6] [88-G-H; 89-F-H; 90-A]

2. In the instant case, in view of the specific assertion by the appellant-wife about the ill-treatment and cruelty at the hands of the husband and his relatives at Ranchi and of the fact that because of their action, she was taken

to her parental home at Gaya by her husband with a threat of dire consequences for not fulfilling their demand of dowry, it is held that in view of Sections 178 and 179 of CrPC, the offence in this case was a continuing one having been committed in more local areas and one of the local areas being Gaya, the Magistrate at Gaya has jurisdiction to proceed with the criminal case instituted therein. In other words, the offence was a continuing one and the episode at Gaya was only a consequence of continuing offence of harassment and ill-treatment meted out to the complainant. Further, from the allegations in the complaint, it appears that it is a continuing offence of ill-treatment and humiliation meted out to the appellant in the hands of all the accused persons and in such continuing offence, on some occasion all had taken part and on other occasion one of the accused, namely, husband had taken part, therefore, undoubtedly clause (c) of Section 178 of CrPC is clearly attracted. [Para 11] [94-H; 95-A-D]

Y. Abraham Ajith and Others vs. Inspector of Police, Chennai and Another **(2004) 8 SCC 100: 2004 (3) Suppl. SCR 604 and** *Bhura Ram and Others vs. State of Rajasthan and Another* **(2008) 11 SCC 103 – distinguished.**

Sujata Mukherjee (Smt) vs. Prashant Kumar Mukherjee **(1997) 5 SCC 30: 1997 (3) SCR 1127 and** *State of M.P. vs. Suresh Kaushal and Another* **(2003) 11 SCC 126 – relied on.**

3. The impugned order of the High Court holding that the proceedings at Gaya are not maintainable due to lack of jurisdiction cannot be sustained. The Judicial Magistrate, Gaya is permitted to proceed with the criminal proceedings in trial and decide the same in accordance with law. [Para 12] [95-E-G]

Case Law Reference:

1997 (3) SCR 1127	**relied on**	**Para 8**

(2003) 11 SCC 126	**relied on**	**Para 8**
(2004) 8 SCC 100	**distinguished**	**Para 9, 10**
(2008) 11 SCC 103	**distinguished**	**Para 10**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 917 of 2011.

From the Judgment & Order dated 29.4.2010 of the High Court of Patna in Criminal Misc. No. 45153 of 2009.

WITH

Crl. A. No. 918 of 2011.

Vivek Singh, Udita Singh, Chandra Prakash, Lakshmi Raman Singh for the Appellant

S.B. Sanyal, Subhro Sanyal, Gopal Singh, Ramita Guha for the Respondents.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. The only issue for consideration in both the appeals is whether criminal proceedings initiated by the appellant herein at Gaya against her husband and his relatives are maintainable or not for lack of jurisdiction?

3. **Brief facts:**

(a) The appellant herein got married to Sanjay Kumar Saini – respondent No.2 herein, on 16.04.2000 as per the Hindu rites and ceremonies at Gaya. According to the appellant, at the time of marriage, her father gifted all the household utensils, Almirah, Double Bed, Dining Table, Fridge, Television and an amount of Rs. 2,50,000/- in cash. In addition to the same, her father spent so much money to solemnize the marriage and for gifts

to other family members of her husband. In spite of the same, immediately after the marriage, she was blamed for bringing less dowry by her in-laws and they started harassing and torturing her. Her husband also used to support his family members to torture her. It is her further grievance that her husband demanded an additional amount of Rs. 4 lakhs from her parents for renovation of their house at Ranchi. When she was pregnant, she was forcibly taken out of her matrimonial home at Ranchi and brought to her parental home at Gaya. After giving birth to a girl child the circumstances became even worse and everyone started blaming her that she had brought an additional burden on them. After some time, her husband came out with a new demand that unless her father gives his house at Gaya to him she will not be taken back to her matrimonial home at Ranchi. Having continuous torture and unbearable nature of treatment by her husband and in-laws for years and years, having no other option, the appellant lodged a First Information Report (in short "FIR") being No. 66 of 2007 under Sections 498A and 406 read with Section 34 of Indian Penal Code (in short "IPC) and Sections 3 and 4 of the Dowry Prohibition Act, 1961 (in short "D.P. Act") at Magadh Medical College Police Station, Gaya.

(b) The Chief Judicial Magistrate, after perusal of the charge-sheet, found a *prima facie* case against the accused persons, accordingly, took cognizance of offences punishable under Sections 498A and 406 read with Section 34 IPC and Sections 3 and 4 of the D.P. Act against all of them and transferred the case to the Court of sub-Divisional Judicial Magistrate, Gaya for trial. Though an objection was raised stating that the Court at Gaya has no jurisdiction, the learned Magistrate, after considering all the relevant materials including the allegations in the complaint, rejected the said objection.

(c) Aggrieved by the said order, the accused persons preferred Criminal Miscellaneous No. 42478 of 2009 before the High Court of Judicature at Patna. By order dated

19.03.2010, the High Court found that the proceedings at Gaya are not maintainable for lack of jurisdiction and quashed the entire proceedings in Magadh Medical College Police Station Case No. 66 of 2007 with liberty to the appellant herein to file the same in appropriate Court. Following the said order, the High Court on 29.04.2010 allowed Criminal Miscellaneous No. 45153 of 2009 filed by Sanjay Kumar Saini – the husband (respondent No.2 herein) and quashed the criminal proceedings lodged against him.

(d) Aggrieved by the impugned orders passed by the High Court on 19.03.2010 in Criminal Misc. Case No. 42478 of 2009 and 29.04.2010 in Criminal Misc. Case No. 45153 of 2009, the appellant-wife has filed the above appeals before this Court by way of special leave petitions.

4. Heard Mr. Vivek Singh, learned counsel for the appellant and Mr. S.B. Sanyal, learned senior counsel for respondent No.2 and Mr. Gopal Singh, learned counsel for respondent No.1 – State.

5. Inasmuch as the issue is confined to territorial jurisdiction about the criminal proceedings initiated by the appellant-wife, there is no need to go into other factual aspects. Since the SDJM has found that the Court at Gaya has jurisdiction to try the accused persons for offences punishable under Sections 498A and 406 read with Section 34 IPC and Sections 3 & 4 of the D.P. Act and the High Court reversed the said decision and found that the proceedings at Gaya are not maintainable for lack of jurisdiction, it is desirable to refer the relevant provisions and the contents of FIR.

6. Chapter XIII of the Code of Criminal Procedure, 1973 (in short "Code") deals with jurisdiction of the criminal courts in inquiries and trials. Sections 177-179 are relevant which are as follows:

> *"177. Ordinary place of inquiry and trial* -. Every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed.
>
> *178. Place of inquiry or trial.* (a) When it is uncertain in which of several local areas an offence was committed, or
>
> (b) where an offence is committed partly in one local area and partly in another, or
>
> (c) where an offence is a continuing one, and continues to be committed in more local areas than one, or
>
> (d) where it consists of several acts done in different local areas,
>
> it may be inquired into or tried by a Court having jurisdiction over any of such local areas.
>
> *179. Offence triable where act is done or consequence ensues.* When an act is an offence by reason of anything which has been done and of a consequence which has ensued, the offence may be inquired into or tried by a Court within whose local jurisdiction such thing has been done or such consequence has ensued."

From the above provisions, it is clear that the normal rule is that the offence shall ordinarily be inquired into and tried by a court within whose local jurisdiction it was committed. However, when it is uncertain in which of several local areas an offence was committed or where an offence is committed partly in one local area and partly in another or where an offence is a continuing one, and continues to be committed in more than one local area and takes place in different local areas as per Section 178, the Court having jurisdiction over any of such local areas is competent to inquire into and try the offence. Section 179 makes it clear that if anything happened as a consequence of the offence, the same may be inquired into or tried by a Court within whose local jurisdiction such thing has been done or such consequence has ensued.

7. Keeping the above provisions in mind, let us consider the allegations made in the complaint. On 17.10.2007, Sunita Kumari Kashyap – the appellant herein made a complaint to the Inspector In-charge, Magadh Medical College Police Station, Gaya. In the complaint, the appellant, after narrating her marriage with Sanjay Kumar Saini, respondent No.2 herein on 16.04.2000 stated that what had happened immediately after marriage at the instance of her husband and his family members' ill-treatment, torture and finally complained that she was taken out of the matrimonial home at Ranchi and sent to her parental Home at Gaya with the threat that unless she gets her father's house in the name of her husband, she has to stay at her parental house forever. In the said complaint, she also asserted that her husband pressurized her to get her father's house in his name and when she denied she was beaten by her husband. It was also asserted that after keeping her entire jewellery and articles, on 24.12.2006, her husband brought her at Gaya and left her there warning that till his demands are met, she has to stay at Gaya and if she tries to come back without meeting those demands she will be killed. It was also stated that from that date till the date of complaint, her in-laws never enquired about her. Even then she called them but they never talked to her. Perusal of the entire complaint, which was registered as an FIR, clearly shows that there was ill-treatment and cruelty at the hands of her husband and his family members at the matrimonial home at Ranchi and because of their actions and threat she was forcibly taken to her parental home at Gaya where she initiated the criminal proceedings against them for offences punishable under Sections 498A and 406/34 IPC and Sections 3 and 4 of the D.P. Act. Among the offences, offence under Section 498A IPC is the main offence relating to cruelty by husband and his relatives. It is useful to extract the same which is as under:

"498A. Husband or relative of husband of a woman subjecting her to cruelty - Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation: For the purpose of this section, "cruelty" means-

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand."

8. Similar allegations as found in the complaint in the case on hand with reference to the offences punishable under Sections 498A, 406/34 IPC were considered by this Court in the following decisions:

(i) In *Sujata Mukherjee (Smt) vs. Prashant Kumar Mukherjee,* (1997) 5 SCC 30, similar issue was considered by this Court and found that clause (c) of Section 178 of the Code is attracted and the Magistrate at wife's parents' place has also jurisdiction to entertain the complaint. In the said decision, wife was the appellant before this Court and the respondents were the husband, parents-in-law and two sisters-in-law of the appellant Sujata Mukherjee. The gist of the allegation of the appellant, Sujata Mukherjee was that on account of dowry demands, she had been maltreated and humiliated not only in the house of her in-laws at Raigarh but as a consequence of such events, the husband of the appellant

had also come to the house of her parents at Raipur and assaulted her. On behalf of the respondents therein, it was contended before the learned Chief Judicial Magistrate, Raipur that the criminal case was not maintainable before the said learned Chief Judicial Magistrate because the cause of action took place only at Raigarh which was outside the territorial jurisdiction of the learned Magistrate at Raipur. A prayer was also made to quash the summons issued by the learned Chief Judicial Magistrate by entertaining the said complaint of Smt Mukherjee. As the Chief Judicial Magistrate was not inclined either to quash the summons or to transfer the criminal case to the competent court at Raigarh, the criminal revision petitions were filed before the High Court, one by all the five respondents and another by four of the respondents excluding the husband presumably because there was specific allegation against the husband that the husband had also gone to Raipur and had assaulted the appellant and as such the husband could not plead want of territorial jurisdiction. Both the said criminal revision cases were disposed of by a common order dated 31.08.1989 by the High Court holding that the case against the husband of the appellant alone is maintainable and in respect of other respondents related to the incidents taking place at Raigarh, hence, the criminal case on the basis of complaint made by the appellant is not maintainable at Raipur. The said order of the High Court was challenged by the appellant-Sujata Mukherjee in this Court. It was submitted that it will be evident from the complaint that the appellant has alleged that she had been subjected to cruel treatment persistently at Raigarh and also at Raipur and incident taking place at Raipur is not an isolated event, but consequential to the series of incidents taking place at Raigarh. Therefore, it was contended that the High Court was wrong in appreciating the scope of the complaint and proceeding on the footing that several isolated events had taken place at Raigarh and one isolated incident had taken place at Raipur. This Court basing reliance on Section 178 of the Code, in particular clauses (b) and (c), found that in view of allegations in the complaint that the offence was

a continuing one having been committed in more local areas and one of the local areas being Raipur, the learned Magistrate at Raipur had jurisdiction to proceed with the criminal case instituted in such court. Ultimately, accepting the stand of the appellant, this Court held as under:

> "We have taken into consideration the complaint filed by the appellant and it appears to us that the complaint reveals a continuing offence of maltreatment and humiliation meted out to the appellant in the hands of all the accused respondents and in such continuing offence, on some occasions all the respondents had taken part and on other occasion, one of the respondents had taken part. Therefore, clause (*c*) of Section 178 of the Code of Criminal Procedure is clearly attracted."

(ii) In *State of M.P. vs. Suresh Kaushal and Another*, (2003) 11 SCC 126, again in a similar circumstance, considering the provisions of Section 179 with reference to the complaint relating to the offences under Section 498A read with Section 34 IPC, this Court held as under:

> "6**.** The above Section contemplates two courts having jurisdiction and the trial is permitted to take place in any one of those two courts. One is the court within whose local jurisdiction the act has been done and the other is the court within whose local jurisdiction the consequence has ensued. When the allegation is that the miscarriage took place at Jabalpur it cannot be contended that the court at Jabalpur could not have acquired jurisdiction as the acts alleged against the accused took place at Indore."

9. Mr. S.B. Sanyal, learned senior counsel appearing for the respondents fairly stated that there is no dispute about the jurisdiction of the Court at Gaya insofar as against the husband, however, in respect of other relatives of the husband in the absence of any act at Gaya, the said Court has no jurisdiction and if at all, the wife has to pursue her remedy only at Ranchi.

In support of his contention, he relied on a decision of this Court in *Y. Abraham Ajith and Others vs. Inspector of Police, Chennai and Another,* (2004) 8 SCC 100 in particular, paragraph 12 of the said decision which reads as under:

> **"12.** The crucial question is whether any part of the cause of action arose within the jurisdiction of the court concerned. In terms of Section 177 of the Code, it is the place where the offence was committed. In essence it is the cause of action for initiation of the proceedings against the accused."

It is true that Section 177 of the Code refers to the local jurisdiction where the offence is committed. Though the expression "cause of action" is not a stranger to criminal cases, in view of Sections 178 and 179 of the Code and in the light of the specific averment in the complaint of the appellant herein, we are of the view that the said decision is not applicable to the case on hand.

10. Mr. Sanyal also relied on a decision of this Court in *Bhura Ram and Others vs. State of Rajasthan and Another,* (2008) 11 SCC 103 wherein following the decision in *Y. Abraham Ajith and Others* (supra), this Court held that "cause of action" having arisen within the jurisdiction of the court where the offence was committed, could not be tried by the court where no part of offence was committed. For the same reasons, as mentioned in the earlier paragraph, while there is no dispute as to the proposition in view of the fact that in the case on hand, the offence was a continuing one and the episode at Gaya was only a consequence at the continuing offence of harassment and ill-treatment meted out to the complainant, clause (c) of Section 178 is attracted. In view of the above reason, both the decisions are not applicable to the facts of this case and we are unable to accept the stand taken by Mr. Sanyal.

11. We have already adverted to the details made by the appellant in the complaint. In view of the specific assertion by

the appellant-wife about the ill-treatment and cruelty at the hands of the husband and his relatives at Ranchi and of the fact that because of their action, she was taken to her parental home at Gaya by her husband with a threat of dire consequences for not fulfilling their demand of dowry, we hold that in view of Sections 178 and 179 of the Code, the offence in this case was a continuing one having been committed in more local areas and one of the local areas being Gaya, the learned Magistrate at Gaya has jurisdiction to proceed with the criminal case instituted therein. In other words, the offence was a continuing one and the episode at Gaya was only a consequence of continuing offence of harassment of ill-treatment meted out to the complainant, clause (c) of Section 178 is attracted. Further, from the allegations in the complaint, it appears to us that it is a continuing offence of ill-treatment and humiliation meted out to the appellant in the hands of all the accused persons and in such continuing offence, on some occasion all had taken part and on other occasion one of the accused, namely, husband had taken part, therefore, undoubtedly clause (c) of Section 178 of the Code is clearly attracted.

12. In view of the above discussion and conclusion, the impugned order of the High Court holding that the proceedings at Gaya are not maintainable due to lack of jurisdiction cannot be sustained. The impugned order of the High Court dated 19.03.2010 in Criminal Misc. No. 42478 of 2009 and another order dated 29.04.2010 in Criminal Misc. Case No. 45153 of 2009 are set aside. In view of the same, the SDJM, Gaya is permitted to proceed with the criminal proceedings in trial Nos. 1551 of 2008 and 1224 of 2009 and decide the same in accordance with law. It is made clear that we have not expressed anything on the merits and claims of both parties and our above conclusion is confined to the territorial jurisdiction of the Court at Gaya. Both the criminal appeals are allowed.

B.B.B. Appeals allowed.

JANAK DULARI DEVI & ANR.
v.
KAPILDEO RAI & ANR.
(Civil Appeal No. 4422 of 2002)

APRIL 15, 2011

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

Transfer of Property Act, 1882 – ss. 8 and 54 – Sale of immovable property – Passing of title – Suit for specific performance by purchaser seeking decree for a direction to vendor to deliver the registration receipt in regard to sale deed by receiving the balance consideration – Vendor alleging that the purchaser did not pay any part of the consideration and as such he cancelled the sale deed and sold the property to the subsequent purchaser – Trial court decreed the suit in favour of the purchaser holding that the purchaser had proved payment of part sale price to vendor and on execution of sale deed by the seller, title passed to the purchaser – First appellate court as also the High Court dismissed the suit – On appeal, held: Intention of the parties was that title would not pass until the consideration was not paid – As the consideration was not paid, the sale in favour of the purchaser did not come into effect and the title remained with the vendor and the sale deed was a dead letter – Thus, the subsequent sale in favour of the subsequent purchaser was valid – Vendor retained the power of repudiating the sale for non-payment of the sale price within a reasonable time and after lawful repudiation, the purchaser was not entitled to claim performance.

Property laws – Practice of exchanging equivalents- 'ta khubzul badlain' – Prevalent in the State of Bihar – Explained.

It was the appellant's case that second respondent-owner of the property executed a sale deed in respect of

the suit property in the appellant's favour for a consideration of Rs.22,000/-; that the appellants paid Rs.17,000/- to the second respondent, at the time of execution and registration of sale deed; and that the second respondent retained the registration receipt of the sale deed, agreeing to deliver it to the appellants against payment of the balance sale consideration. Subsequently, the second respondent avoided receiving the balance of Rs.5000/- and failed to deliver the registration receipt as also denied the receipt of Rs.17,000/-. The appellants filed a suit for specific performance against the second respondent. They sought a decree for a direction to the second respondent to deliver the registration receipt relating to the sale deed by receiving the balance sale consideration of Rs.5000/-. The second respondent contended that as the appellants failed to pay the sale consideration, he cancelled the said sale deed and sold the property to the first respondent for a consideration of Rs.19,000/- and also delivered possession of the property. Thereafter, the first respondent was impleaded as the second defendant in the suit. The trial court decreed the suit holding that the appellants had proved the payment of part sale price of Rs.17000/- to second respondent; that on the execution of the sale deed by the second respondent, title passed to the appellants and the appellants were entitled to declaration of title and recovery of possession. The first respondent filed an appeal. The first appellate court allowed the same holding that the appellants had failed to prove payment of Rs.17,000/- and that as a result thereof, the second respondent was justified in cancelling the sale deed and selling the property to the first respondent. The appellants then filed a second appeal and the same was dismissed. Therefore, the appellants filed the instant appeal.

Dismissing the appeal, the Court

HELD: 1.1 The first appellate court after analyzing the evidence held that the evidence was contrary to the pleadings that a sum of Rs.17,000/- was paid to the defendant at the residence of the first plaintiff, that thereafter, they went to the Sub-Registrar's office and got the sale deed written by the scribe-PW5, and that thereafter, the second respondent executed the sale deed and got it registered; and therefore, liable to be rejected. When what is pleaded is not proved, or what is stated in the evidence is contrary to the pleadings, the dictum that no amount of evidence, contrary to the pleadings, howsoever cogent, can be relied on, would apply. The first appellate court also referred to the recitals in the sale deed and the manner of the execution of the sale deed and concluded that no part of the sale consideration had been paid. This finding of fact recorded by the first appellate court that the appellants had not established the payment of Rs.17000/-, after consideration of the entire evidence, upheld by the High Court in second appeal, does not call for interference, in an appeal under Article 136 of the Constitution in the absence of any valid ground for interference. [Para 7] [107-B-G]

1.2 Where the intention of the parties is that passing of title would depend upon the passing of consideration, evidence is admissible for the purpose of contradicting the recital in the deed acknowledging the receipt of consideration. [Para 8] [107-H; 108-A-B]

Bishundeo Narain Rai vs. Anmol Devi and Ors. **1998 (7) SCC 498: 1998 (1) Suppl. SCR 66;** *Kaliaperumal vs. Rajagopal and Anr*. **2009 (4) SCC 193: 2009 (2) SCR 814 – referred to.**

1.3 Where the sale deed recites that on receipt of the total consideration by the vendor, the property was conveyed and possession was delivered, the clear

intention is that title would pass and possession would be delivered only on payment of the entire sale consideration. Therefore, where the sale deed recited that on receipt of entire consideration, the vendor was conveying the property, but the purchaser admits that he has not paid the entire consideration (or if the vendor proves that the entire sale consideration was not paid to him), title in the property would not pass to the purchaser. [Para 10] [110-C-E]

1.4 As per the practice prevalent in Bihar known as '*ta khubzul badlain*' (that is, title to the property passing to the purchaser only when there is "*exchange of equivalents*"), where a sale deed recites that entire sale consideration has been paid and possession has been delivered, but the Registration Receipt is retained by the vendor and possession of the property is also retained by the vendor, as the agreed consideration (either full or a part) is not received, irrespective of the recitals in the sale deed, the title would not pass to the purchaser, till payment of the entire consideration to the vendor and the Registration Receipt is obtained by the purchaser in exchange. In such cases, on the sale deed being executed and registered, the registration receipt (which is issued by the Sub-Registrar) authorizing the holder thereof to receive the registered sale deed on completion of the registration formalities, is received and retained by the vendor and is not given to the purchaser. The vendor who holds the Registration receipt will either receive the registered document and keep the original sale deed in his custody or may keep the registration receipt without exchanging it for the registered document from the sub-Registrar, till payment of consideration is made. When the purchaser pays the price (that is the whole price or part that is due) on or before the agreed date, he receives in exchange, the registration receipt from the vendor entitling him to receive the original registered sale deed,

as also the possession. If the payment is not made as agreed, the vendor could repudiate the sale and refuse to deliver the registration receipt/registered document, as the case may be, which is in his custody, and proceed to deal with the property as he deems fit, by ignoring the rescinded sale. [Para 11] [110-F-H; 111-A-D]

1.5 The effect of such transactions in Bihar is even though the duly executed and registered sale deed may recite that the sale consideration has been paid, title has been transferred and possession has been delivered to the purchaser, the actual transfer of title and delivery of possession is postponed from the time of execution of the sale deed to the time of exchange of the registration receipt for the consideration, that is *ta khubzul badlain*. [Para 12] [115-C-D]

Bishundeo Narain Rai vs. Anmol Devi and Ors. **1998 (7) SCC 498: 1998 (1) Suppl. SCR 66;** *Sarjug Saran Singh vs. Ramcharitar Singh* **1968 BLJR 74;** *Shiva Narayan Sah vs. Baidya Nath Prasad Tiwary* **AIR 1973 Patna 386;** *Baldeo Singh vs. Dwarika Singh* **AIR 1978 Patna 97;** *Md. Murtaza Hussain vs. Abdul Rahman* **AIR 1949 Pat. 364;** *Motilal Sahu vs. Ugrah Narain Sahu* **AIR 1950 Patna 288;** *Panchoo Sahu v. Janki Mandar* **AIR 1952 Pat. 263 – referred to.**

1.6 The first appellate court recorded a finding of fact that the appellants had not paid the consideration of Rs.22,000/- at the time of execution and registration of the sale deed. This finding of fact (accepted by the High Court in second appeal) has been recorded after exhaustive consideration of the oral evidence and is not open to challenge. The trial court, the first appellate court and the High Court have concurrently found that though the sale deed recited that possession of the property was delivered to the purchasers, the possession was not in fact delivered and continued with the vendor (second

respondent) and he had delivered the actual possession of the property to the first respondent when he subsequently, sold the property to the first respondent. Therefore, the recitals in the sale deed, that the vendor had received the entire price of Rs.22,000/- from the purchasers (that is Rs.17,000/- before execution of the sale deed and Rs.5000/- at the time of exchange of registration receipt) and had transferred all his rights therein and that on such sale the vendor has not retained any title and that the vendor has relinquished and transferred the possession of the property to the purchasers, will not be of any assistance to the appellants to contend that the title has passed to them or part consideration was paid. It is an admitted fact that the registration receipt was retained by the vendor to be exchanged later in consideration of the sale price. It is also admitted that possession was not delivered though the deed recited that possession was delivered. The sale was categorically repudiated by the second respondent on 18.3.1988 by cancelling the sale deed. There is no evidence that the appellants offered the sale price of Rs.22,000/- to the second respondent before the repudiation. The only possible inference is that the intention of the parties was that title would not pass until the consideration was not paid; and as the consideration was not paid, the sale in favour of the appellants did not come into effect and the title remained with the vendor and the sale deed was a dead letter. Consequently, the subsequent sale in favour of the first respondent was valid. [Para 13] [115-E-H; 116-A-E]

1.7 On execution and registration of the sale deed in favour of appellants, title did not pass to the purchaser and possession was not delivered. Therefore, as a consequence the vendor retained the power of repudiating the sale for non-payment of the sale price within a reasonable time. As the finding is that no part of

the sale price was paid, the claim of appellants that they offered to pay Rs.5000/-, even if accepted to be true would mean proving their readiness to pay only a part of the price and not the entire sale price. As the appellants have failed to prove that they tendered the price of Rs.22,000/- before repudiation and cancellation on 18.3.1988, the sale deed in favour of appellants did not convey any title to them and after lawful repudiation, they were not entitled to claim performance. [Para 14] [116-F-H; 117-A]

Case Law Reference:

1998 (1) Suppl. SCR 66	**Referred to.**	**Para 8**
2009 (2) SCR 814	**Referred to.**	**Para 9**
1968 BLJR 74	**Referred to.**	**Para 11**
AIR 1973 Patna 386	**Referred to.**	**Para 11**
AIR 1978 Patna 97	**Referred to.**	**Para 11**
AIR 1949 Pat. 364	**Referred to.**	**Para 11**
AIR 1950 Patna 288	**Referred to.**	**Para 11**
AIR 1952 Pat. 263	**Referred to.**	**Para 11**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4422 of 2002.

From the Judgment & Order dated 3.1.2002 of the High Court of Judicature at Patna in Second Appeal No. 63 of 1998.

K.B. Sinha, Kawaljit Kochar, Kusum Chaudhary for the Appellants.

A. Raghunath, Nikhil Goel (for K.J. John & Co.) for the Respondents.

The Judgment of the Court was delivered by

R.V.RAVEENDRAN, J. 1. Plaintiffs in a suit for specific performance, aggrieved by the judgment and decree of the Patna High Court dated 3.1.2002 dismissing his second appeal against the decision of the first appellate court dated 16.12.1997 dismissing their suit (in reversal of the judgment and decree of the trial court dated 27.8.1990 decreeing the suit) have filed this appeal by special leave.

2. The case of the appellants in brief is as under : The second respondent was the owner of the suit property. The second respondent executed a sale deed dated 22.2.1988 (registered on 7.3.1988) in respect of the suit property in favour of the appellants, for a consideration of Rs.22000/-; that Rs.17,000 was paid by the appellants to the second respondent, at the time of execution and registration of sale deed; that the balance of Rs.5000 was to be paid subsequently, when the vendor requested for the said payment; that the second respondent retained the registration receipt in regard to the sale deed, agreeing to deliver it to the appellants against payment of the balance sale consideration; that on execution of the sale deed, by the second respondent, his right, title and interest in the suit property passed to the appellants and possession of the land sold was also delivered to them; that subsequently the second respondent avoided receiving the balance of Rs.5000 and failed to deliver the registration receipt; that the appellants issued a legal notice calling upon the second respondent to deliver the registration receipt so that they could collect the original registered sale deed, but the second respondent send a reply denying the receipt of Rs.17000 and stating that the entire consideration was due; and that therefore, it became necessary for the appellants to file the suit. The appellants sought a decree for a direction to the second respondent to deliver the registration receipt relating to the sale deed dated 22.2.1988 by receiving the balance sale consideration of Rs.5000 and that in case the second respondent had already obtained the original sale deed from

the office of the Sub-Registrar, then for a direction to deliver the same to the appellant. The said suit was valued at Rs.5000.

3. The second respondent filed his written statement. He alleged that he had agreed to sell the property as he urgently required the money for celebrating the marriage of his daughter; that he executed and registered the sale deed on 22.2.1988; that the appellant did not pay any part of the consideration and the allegation that he had paid Rs.17000 towards the sale price at the time of execution of sale deed was false; that the appellants had played a fraud upon him by stating in the deed that Rs.17000 was already paid towards the sale price and making him to sign the sale deed without reading the deed; that when he demanded the sale price, as the appellants stated that the sale consideration would be paid later, he retained the registration receipt and did not deliver possession; that it was the intention of parties that title in the property should pass to the appellants and possession should be delivered, only on payment of the consideration of Rs.22000 by the appellants; that as the appellants failed to pay the sale consideration, he cancelled the said sale deed dated 22.2.1988 on 18.3.1988 and sold the property to the first respondent on 29.8.1988 for a consideration of Rs.19000 and also delivered possession of the property to the first respondent and ever since then the first respondent is in possession of the suit property. He contended that as the title and possession remained with him even after execution and registration of the sale deed in favour of the appellants, and as the sale price was not paid, he was justified in canceling/rescinding the sale and the appellants were not entitled to any relief.

4. The subsequent purchaser (first respondent herein) was thereafter impleaded as the second defendant in the suit. The court framed appropriate issues as to whether a sale deed executed on 22.2.1988 was for consideration; whether Rs.17000 was paid by the appellants towards the sale price

at the time of execution of the sale deed; whether the appellants had tendered the balance of Rs.5000 to the second respondent; whether the sale deed was cancelled on 18.3.1988; whether the second respondent had any right to execute a sale deed dated 29.8.1988 in favour of the first respondent; whether the appellants were entitled to receive the original sale deed dated 22.2.1988; whether the suit as framed was maintainable and appellants had valid cause of action for the suit; and whether the suit was barred by limitation. The appellant examined seven witnesses and the defendant examined six witnesses. Both sides marked several documents.

5. The trial court by judgment dated 27.8.1990 decreed the suit with costs subject to payment of court fee by the appellants, on Rs.22000. The trial court held that the appellants had proved the payment of part sale price of Rs.17000 to second respondent; that on the execution of the sale deed by the second respondent, title passed to the appellants and the appellants were entitled to declaration of title and recovery of possession. Feeling aggrieved the first respondent filed an appeal. The first appellate court, by judgment and decree dated 16.12.1997, allowed the appeal and dismissed the suit. It held that the plaintiffs/appellants had failed to prove payment of Rs.17000 or of any part of the consideration; that as no part of the sale price was paid and as the Registration Receipt and possession were retained by the second respondent, the intention of parties was that title should not pass to the appellants until payment was made; and that as a consequence of non-payment of the price, the second respondent was justified in cancelling the sale deed and selling the property to the first respondent. The second appeal filed by the appellant, was dismissed by the High Court by the impugned judgment dated 3.1.2002, affirming the finding of facts recorded by the first appellate court. The said judgment is challenged in this appeal by special leave.

6. On the contentions urged, the following questions arise for consideration in this appeal :

(i) Whether the appellants had paid Rs.17000/- towards sale price to second respondent?

(ii) Whether title to the property passed to the appellants on execution of the sale deed?

(iii) Whether the second respondent-vendor was justified in cancelling/ repudiating the sale on the ground that the sale consideration was not paid?

(iv) Whether the appellants are entitled to the relief claimed in the suit?

Re: Question (i)

7. In the plaint, the specific plea of the plaintiffs-appellants in regard to payment of Rs.17000 was that it was initially agreed that the consideration would not be paid at the time of execution and registration of the sale deed, but would be paid later, against exchange with the Registration Receipt; that the appellants paid Rs.17000 to the second respondent at the time of registration of the sale deed; and that though the appellants were ready to pay the balance of Rs.5000, the second respondent stated that he would take the said amount when he needed it in exchange of the registration receipt. But the evidence led by the appellants was contrary to the pleadings. PW3 (the attesting witness to the sale deed), PW4, PW6 (first plaintiff) and PW7 (husband of the first plaintiff) deposed that a sum of Rs.17,000 was paid to the defendant at the residence of the first plaintiff, that thereafter they went to the Sub-Registrar's office at Arrah and got the sale deed written by the scribe - PW5, and that thereafter, the second respondent executed the sale deed and got it registered. The sale deed dated 22.7.1988 also recited that Rs.17000 was received by the vendor prior to the execution of the sale deed and the balance of Rs.5000 was to be paid at the time of transfer of

Registration Receipt. The first appellate court after analyzing the evidence held that the evidence was contrary to the pleadings and therefore liable to be rejected. When what is pleaded is not proved, or what is stated in the evidence is contrary to the pleadings, the dictum that no amount of evidence, contrary to the pleadings, howsoever cogent, can be relied on, would apply. The first appellate court also found that there was no endorsement in the sale deed by the Sub-Registrar about payment of Rs.17000 in his presence, nor any separate receipt existed to show the payment of Rs.17000 prior to the preparation and the execution of the sale deed. The first appellate court believed the evidence of DW1 (attesting witness to the sale deed) and DW4 (the second respondent) that they did not go to the residence of the first appellant on 22.2.1988, but had gone directly to the Sub-Registrar's office; that by then the sale deed had already been got written by the first appellant's husband; that the sale deed was not read over to them; that the second respondent was informed that the sale price would be paid subsequently at the village and that sale could be completed and possession be delivered on payment and exchange of the Registration Receipt. The first appellate court also noted that the appellants alleged that there were two independent witnesses present at the relevant time, namely Dharmanand Pandey and Bindeshwar Pandey, but neither of them was examined. The first appellate court also referred to the recitals in the sale deed and the manner of the execution of the sale deed and concluded that no part of the sale consideration had been paid. This finding of fact recorded by the first appellate court, that the appellants had not established the payment of Rs.17000, after consideration of the entire evidence, affirmed by the High Court in second appeal, does not call for interference, in an appeal under Article 136 of the Constitution in the absence of any valid ground for interference.

Re: Questions (ii) and (iii)

8. Where the intention of the parties is that passing of title

would depend upon the passing of consideration, evidence is admissible for the purpose of contradicting the recital in the deed acknowledging the receipt of consideration. In *Bishundeo Narain Rai vs. Anmol Devi & Ors*. [1998 (7) SCC 498], this Court had occasion to consider the question as to when the ownership and title in a property will pass to the transferee, under a deed of conveyance. This Court observed :

> "Section 8 of the Transfer of Property Act declares that on a transfer of property all the interests which the transferor has or is having at that time, capable of passing in the property and in the legal incidence thereof, pass on such a transfer unless a different intention is expressed or necessarily implied. A combined reading of Section 8 and Section 54 of the Transfer of Property Act suggests that though on execution and registration of a sale deed, the ownership and all interests in the property pass to the transferee, yet that would be on terms and conditions embodied in the deed indicating the intention of the parties. It follows that on execution and registration of a sale deed, the ownership title and all interests in the property pass to the purchaser unless a different intention is either expressed or necessarily implied which has to be proved by the party asserting that title has not passed on registration of the sale deed. Such intention can be gathered by intrinsic evidence, namely, from the averments in the sale deed itself or by other attending circumstances subject, of course, to the provisions of Section 92 of the Evidence Act, 1872."

9. In *Kaliaperumal vs. Rajagopal & Anr*. [2009 (4) SCC 193], this Court again considered the issue and held:

> "It is now well settled that payment of entire price is not a condition precedent for completion of the sale by passing of title, as Section 54 of Transfer of Property Act, 1882 ("the Act", for short) defines 'sale' as a transfer of ownership in exchange for a price paid or promised or part

paid and part promised. If the intention of parties was that title should pass on execution and registration, title would pass to the purchaser even if the sale price or part thereof is not paid. In the event of non-payment of price (or balance price as the case may be) thereafter, the remedy of the vendor is only to sue for the balance price. He cannot avoid the sale. He is, however, entitled to a charge upon the property for the unpaid part of the sale price where the ownership of the property has passed to the buyer before payment of the entire price, under Section 55(4)(b) of the Act.

Normally, ownership and title to the property will pass to the purchaser on registration of the sale deed with effect from the date of execution of the sale deed. But this is not an invariable rule, as the true test of passing of property is the intention of parties. Though registration is prima facie proof of an intention to transfer the property, it is not proof of operative transfer if payment of consideration (price) is a condition precedent for passing of the property.

The answer to the question whether the parties intended that transfer of the ownership should be merely by execution and registration of the deed or whether they intended the transfer of the property to take place, only after receipt of the entire consideration, would depend on the intention of the parties. Such intention is primarily to be gathered and determined from the recitals of the sale deed. When the recitals are insufficient or' ambiguous the surrounding circumstances and conduct of parties can be looked into for ascertaining the intention, subject to the limitations placed by section 92 of Evidence Act. x x x x There is yet another circumstance to show that title was intended to pass only after payment of full price. Though the sale deed recites that the purchaser is entitled to hold, possess and enjoy the scheduled properties from the date of sale, neither the possession of the properties nor the

title deeds were delivered to the purchaser either on the date of sale or thereafter. It is admitted that possession of the suit properties purported to have been sold under the sale deed was never delivered to the appellant and continued to be with the respondents. In fact, the appellant, therefore, sought a decree for possession of the suit properties from the respondents with mesne profits. If really the intention of the parties was that the title to the properties should pass to the appellant on execution of the deed and its registration, the possession of the suit properties would have been delivered to the appellant."

10. Where the sale deed recites that on receipt of the total consideration by the vendor, the property was conveyed and possession was delivered, the clear intention is that title would pass and possession would be delivered only on payment of the entire sale consideration. Therefore, where the sale deed recited that on receipt of entire consideration, the vendor was conveying the property, but the purchaser admits that he has not paid the entire consideration (or if the vendor proves that the entire sale consideration was not paid to him, title in the property would not pass to the purchaser.

11. At this stage, we may refer to the practice prevalent in Bihar known as '*ta khubzul badlain*' (that is, title to the property passing to the purchaser only when there is "*exchange of equivalents*"). As per this practice, where a sale deed recites that entire sale consideration has been paid and possession has been delivered, but the Registration Receipt is retained by the vendor and possession of the property is also retained by the vendor, as the agreed consideration (either full or a part) is not received, irrespective of the recitals in the sale deed, the title would not pass to the purchaser, till payment of the entire consideration to the vendor and the Registration Receipt is obtained by the purchaser in exchange. In such cases, on the sale deed being executed and registered, the registration receipt (which is issued by the Sub-Registrar) authorizing the

holder thereof to receive the registered sale deed on completion of the registration formalities, is received and retained by the vendor and is not given to the purchaser. The vendor who holds the Registration receipt will either receive the registered document and keep the original sale deed in his custody or may keep the registration receipt without exchanging it for the registered document from the sub-Registrar, till payment of consideration is made. When the purchaser pays the price (that is the whole price or part that is due) on or before the agreed date, he receives in exchange, the registration receipt from the vendor entitling him to receive the original registered sale deed, as also the possession. If the payment is not made as agreed, the vendor could repudiate the sale and refuse to deliver the registration receipt/registered document, as the case may be, which is in his custody, and proceed to deal with the property as he deems fit, by ignoring the rescinded sale. The prevalence of this practice in Bihar is noticed and recognized in several reported decisions - the decision of this Court in *Bishundeo Narain Rai* (supra) and the decisions of the Patna High Court in *Sarjug Saran Singh vs. Ramcharitar Singh* (1968 BLJR 74), *Shiva Narayan Sah vs. Baidya Nath Prasad Tiwary* (AIR 1973 Patna 386), *Baldeo Singh vs. Dwarika Singh* (AIR 1978 Patna 97), which explain the practice of *ta khubzul badlain,* after relying upon the principles laid down in the earlier decisions of that court in *Md. Murtaza Hussain vs. Abdul Rahman* (AIR 1949 Pat. 364), *Motilal Sahu vs. Ugrah Narain Sahu* (AIR 1950 Patna 288), and *Panchoo Sahu v. Janki Mandar* (AIR 1952 Pat. 263),

> 11.1) In *Bishundeo Narain Rai* (supra), this Court held :
>
> "It appears that in the State of Bihar a practice is prevalent that when whole or part of sale consideration is due or any other obligation is undertaken by the vendee, then on execution and registration of the sale deed by the vendor, *title to the property, subject matter of sale, does not pass* '*ta Khubzul Badlain*', that is, until there is '*exchange of equivalent*' and in such a case registration receipt is

> retained by the vendor, which on payment of consideration due or on fulfillment of the obligation by the vendee is endorsed in his favour or if the sale deed has already been received by the vendor then the sale deed is delivered to the vendee. Even so, this only shows that such agreement are common in that part of the country but it is essentially a matter of intention of the parties which has to be gathered from the document itself but if the document is ambiguous then from the attending circumstances, subject to the provisions of Section 92 of the Evidence Act."
>
> *(emphasis supplied)*

(11.2) In *Sarjug Saran Singh* (supra) after referring to the recitals in a sale deed that the vendor had delivered possession to the vendee as absolute owner, it was observed :

> "It was admitted by the plaintiffs themselves that the aforesaid recital is incorrect, both as regards the receipt of the consideration money and as regards putting the vendee in possession of the property. The registration receipt remained with the executants, namely, defendants 1 and 2, and the plaintiffs alleged that on a subsequent date, when they offered to pay the consideration money and to take the registration receipt from defendants 1 and 2 (*Ta kalzul badlain* exchange of equivalents), they, under the instigation of the other defendants refused to part with the receipt and sold the property to the other defendants."

The Patna High Court in that decision, upheld the decision of the first appellate court that the intention of the parties was that title should pass only on payment of the consideration and as admittedly the consideration was not paid, the plaintiffs did not obtain title by virtue of the sale deed, on the following reasoning:

> "It is well settled that the intention of the parties should be ascertained on a construction of a document; and where

there is any patent ambiguity in any recital, aid may be taken from evidence of surrounding circumstances and the conduct of the parties. Mr. Rai for the appellants urged that the first sentence in the recital (quoted above) was complete in itself and that sentence indicated the clear intention of the parties that title should pass at the time of the registration when the executants admitted execution before the Sub-registrar. He specially relied on the words "without any right of cancellation and revocation" occurring in that sentence. But it is well known that in construing a document due weight should be given to all the recitals. Hence the subsequent recitals as regards payment of consideration at the time of exchange of equivalents and putting the vendee into possession should also be given equal weight. x x x x x The first appellate court was, therefore, justified in observing that, if the intention was that the title should pass at the time of registration, the vendors would have insisted on payment of the consideration money before the Sub-registrar, or immediately thereafter. *The very fact that the registration receipt was kept in their custody and not handed over to the vendee and possession also admittedly remained with them lead to an inference that there was no intention to convey title until the payment of the consideration.*"

(emphasis supplied)

(11.3) In *Shiva Narayan Sah* (supra), the Patna High Court, following its earlier decisions, held that when the sale deed stipulates payment of balance price during the *exchange of equivalents* (balance sale consideration and registration receipt) and mentions only "putting the buyer in possession" without actually delivering possession, even if the sale deed does not expressly postpone passing of the title till discharge of the consideration due and even if more than three fourth of the total price had been paid to the vendor, the title in the property would not pass to the purchaser on execution and the

registration of the sale deed, but will pass only during the exchange of the equivalents.

(11.4) In *Baldeo Singh* (supra), the sale deed recited that the consideration money had been paid and nothing was due from the vendee to whom possession had also been delivered. But the plaintiffs admitted that neither the consideration money was paid by them nor possession was delivered by them at the time of execution and registration of the sale deed. After referring to the earlier decisions of that Court the High Court held :

"On the basis of the aforesaid decision it can be said that it is almost settled that the question whether title passes on mere execution and registration of a deed or only on payment of consideration depends upon the intention of the parties, to be gathered from the deed. It has also been held that though the sale deed may recite that the consideration has been paid, but there is nothing to prevent the parties from adducing evidence to show that the recital is untrue and that, in fact, the consideration was not paid; this will not be barred by Section 92 of the Evidence Act. In the present case, there is no dispute so far as the second aspect is concerned. The sale deed in question recites that consideration money has been paid and there is nothing due from the vendee to whom the possession has also been delivered. But, the plaintiffs admit that neither the consideration money was paid nor possession delivered to them at the time of the execution and registration of the aforesaid deed. …. In my opinion, the plaintiffs did not acquire title on mere execution and registration of the sale deed.

"In the instant case, the defendant first set has not taken the stand that he had repudiated the contract even before 10-1-1963 when the deed of cancellation was executed. If the amount is tendered by the defaulter after such repudiation, it is of no, consequence. *A vendor cannot be*

expected to wait indefinitely to enable the vendee to perform his part, and he is at liberty in such a situation to sell the property to another person. In my opinion, in cases where the tender or payment of the consideration money is made by the vendee before the vendor repudiates the contract, the vendee will acquire a valid title over the properties covered by the deed in question."

(emphasis supplied)

12. We have referred to several decisions of the Patna High Court in detail to demonstrate the existence of the established practice of *exchanging equivalents* (*ta khubzul badlain*). The effect of such transactions in Bihar is even though the duly executed and registered sale deed may recite that the sale consideration has been paid, title has been transferred and possession has been delivered to the purchaser, the actual transfer of title and delivery of possession is postponed from the time of execution of the sale deed to the time of exchange of the registration receipt for the consideration, that is *ta khubzul badlain*.

13. We may now examine the facts of this case with reference to the said principles. As noticed above the first appellate court has recorded a finding of fact that the appellants had not paid the consideration of Rs.22000 at the time of execution and registration of the sale deed. This finding of fact (accepted by the High Court in second appeal) has been recorded after exhaustive consideration of the oral evidence and is not open to challenge. The trial court, the first appellate court and the High Court have concurrently found that though the sale deed recited that possession of the property was delivered to the purchasers, the possession was not in fact delivered and continued with the vendor (second respondent) and he had delivered the actual possession of the property to the first respondent when he subsequently, sold the property to the first respondent. Therefore, the recitals in the sale deed dated 22.2.1988, that the vendor had received the entire price

of Rs.22000/- from the purchasers (that is Rs.17000 before execution of the sale deed and Rs.5000 at the time of exchange of registration receipt) and had transferred all his rights therein and that on such sale the vendor has not retained any title and that the vendor has relinquished and transferred the possession of the property to the purchasers, will not be of any assistance to the appellants to contend that the title has passed to them or part consideration was paid. It is an admitted fact that the registration receipt was retained by the vendor to be exchanged later in consideration of the sale price. It is also admitted that possession was not delivered though the deed recited that possession was delivered. The sale was categorically repudiated by the second respondent on 18.3.1988 by cancelling the sale deed. There is no evidence that the appellants offered the sale price of Rs.22000/- to the second respondent before the repudiation. The only possible inference is that the intention of the parties was that title would not pass until the consideration was not paid; and as the consideration was not paid, the sale in favour of the appellants did not come into effect and the title remained with the vendor and the sale deed dated 22.2.1988 was a dead letter. Consequently, the subsequent sale in favour of the first respondent was valid.

Re: Question (iv)

14. We are therefore of the view that on execution and registration of the sale deed dated 22.2.1988 in favour of appellants, title did not pass to the purchaser and possession was not delivered. Therefore as a consequence the vendor retained the power of repudiating the sale for non payment of the sale price within a reasonable time. As the finding is that no part of the sale price was paid, the claim of appellants that they offered to pay Rs.5000/-, even if accepted to be true would mean proving their readiness to pay only a part of the price and not the entire sale price. As the appellants have failed to prove that they tendered the price of Rs.22000/- before repudiation and cancellation on 18.3.1988, the sale deed dated 22.2.1988

in favour of appellants did not convey any title to them and after lawful repudiation, they were not entitled to claim performance.

15. We hasten to add that the practice of *ta khubzul badlain* (of title passing on exchange of equivalent) is prevalent only in Bihar. Normally, the recitals in a sale deed about transfer of title, receipt of consideration and delivery of possession will be evidence of such acts and events; and on the execution and registration of the sale deed, the sale would be complete even if the sale price was not paid, and it will not be possible to cancel the sale deed unilaterally. The exception to this rule is stated in *Kaliaperumal* (supra). The practice of '*ta khubzul badlain'* in Bihar recognizes that a duly executed sale deed will not operate as a transfer *in preasenti* but postpones the actual transfer of title, from the time of execution and registration of the deed, to the time of *exchange of equivalents* that is registration receipt and the sale consideration, if the intention of the parties was that title would pass only on payment of entire sale consideration. As a result, until and unless the duly executed and registered sale deed comes to the possession of the purchaser, or until the right to receive the original sale deed is secured by the purchaser by obtaining the registration receipt, the deed of sale merely remains an agreement to be performed and will not be a completed sale. But in States where such a practice is not prevalent, possession of Registration Receipt by the Vendor, may not, in the absence of other clear evidence, lead to an inference that consideration has not been paid or that title has not passed to the purchaser as recited in the duly executed deed of conveyance. Where the purchaser is from an outstation, the vendor being entrusted with the Registration Receipt, to collect the original sale deed and deliver it to the purchaser, is common. Be that as it may.

16. In view of the above, we hold that there is no merit in this appeal and the appeal is dismissed.

N.J. Appeal dismissed.

HITESH BHATNAGAR
v.
DEEPA BHATNAGAR
(Civil Appeal No. 6288 of 2008)

APRIL 18, 2011

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

Hindu Marriage Act, 1955 – s.13B – Petition for divorce by mutual consent – Withdrawal of consent – Whether the consent once given can be subsequently withdrawn by one of the parties after the expiry of 18 months from the date of the filing of the petition in accordance with s.13B(1); and whether the Court can grant a decree of divorce by mutual consent when the consent has been withdrawn by one of the parties, and if so, under what circumstances – Held: The language employed in s.13B(2) is clear – If the second motion is not made within the period of 18 months, then the Court is not bound to pass a decree of divorce by mutual consent – Besides, from the language of the Section, as well as the settled law, it is clear that one of the parties may withdraw consent at any time before the passing of the decree – The most important requirement for a grant of a divorce by mutual consent is free consent of both the parties – Unless there is a complete agreement between husband and wife for the dissolution of the marriage and unless the Court is completely satisfied, it cannot grant a decree for divorce by mutual consent – Otherwise, the expression 'divorce by mutual consent' would be otiose – In the present fact scenario, the second motion was never made by both the parties as mandatorily required under the law, and no Court can pass a decree of divorce in the absence of that – The eighteen month period is specified only to ensure quick disposal of cases of divorce by mutual consent, and not to specify the time period for withdrawal of consent – Non-withdrawal of

consent before expiry of the said eighteen months has no bearing.

Constitution of India, 1950 – Article 142 – Power under – Exercise of – Prayer of appellant-husband before Supreme Court that his marriage with respondent-wife had irretrievably broken down and the Court should dissolve the marriage by exercising its jurisdiction under Article 142 – Held: The power under Article 142 is plenipotentiary – However, it is an extraordinary jurisdiction vested by the Constitution with implicit trust and faith and, therefore, extraordinary care and caution has to be observed while exercising this jurisdiction – This Court uses its extraordinary power to dissolve a marriage as having irretrievably broken down only when it is impossible to save the marriage and all efforts made in that regard would, to the mind of the Court, be counterproductive – Even if the chances are infinitesimal for the marriage to survive, it is not for this Court to use its power under Article 142 to dissolve the marriage as having broken down irretrievably – In the present case, in light of the facts and circumstances, it would be travesty of justice to dissolve the marriage as having broken down – Though there is bitterness amongst the parties and they have not even lived as husband and wife for the past about 11 years, it is hoped that they will give this union another chance, if not for themselves, for the future of their daughter.

The appellant-husband and the respondent-wife had got married according to the Hindu Marriage Act, 1955. The parties filed a petition under Section 13B of the Act for dissolution of the marriage by grant of a decree of divorce by mutual consent. However, before the stage of second motion and passing of the decree of divorce, the respondent withdrew her consent by filing an application. The withdrawal of consent was after a period of eighteen months of filing the petition and in view of this, the petition came to be dismissed by the trial court, though

the appellant insisted for passing of the decree. The appellant, being aggrieved, filed appeal before the High Court, which was dismissed.

In the instant appeal, the questions that arose for consideration were: 1) whether the consent once given in a petition for divorce by mutual consent can be subsequently withdrawn by one of the parties after the expiry of 18 months from the date of the filing of the petition in accordance with Section 13B (1) of the Hindu Marriage Act, 1955; and 2) whether the Court can grant a decree of divorce by mutual consent when the consent has been withdrawn by one of the parties, and if so, under what circumstances.

Dismissing the appeal, the Court

HELD:1.1. The contention raised by the appellant that the trial court was bound to grant divorce if the consent was not withdrawn within a period of 18 months in view of the language employed in Section 13B(2) of the Hindu Marriage Act, 1955, has no merit. The language employed in Section 13B(2) of the Act is clear. The Court is bound to pass a decree of divorce declaring the marriage of the parties before it to be dissolved with effect from the date of the decree, if the following conditions are met: a) A second motion of both the parties is made not before 6 months from the date of filing of the petition as required under sub-section (1) and not later than 18 months; b) After hearing the parties and making such inquiry as it thinks fit, the Court is satisfied that the averments in the petition are true; and c) The petition is not withdrawn by either party at any time before passing the decree. In other words, if the second motion is not made within the period of 18 months, then the Court is not bound to pass a decree of divorce by mutual consent. Besides, from the language of the Section, as well as the settled law, it is

clear that one of the parties may withdraw their consent at any time before the passing of the decree. The most important requirement for a grant of a divorce by mutual consent is free consent of both the parties. In other words, unless there is a complete agreement between husband and wife for the dissolution of the marriage and unless the Court is completely satisfied, it cannot grant a decree for divorce by mutual consent. Otherwise, the expression 'divorce by mutual consent' would be otiose. [Paras 13, 14 and 15] [132-F-H; 133-A-F]

1.2. In the present fact scenario, the second motion was never made by both the parties as is a mandatory requirement of the law, and no Court can pass a decree of divorce in the absence of that. The non-withdrawal of consent before the expiry of the said eighteen months has no bearing. The eighteen month period was specified only to ensure quick disposal of cases of divorce by mutual consent, and not to specify the time period for withdrawal of consent, as canvassed by the appellant. [Para 16] [133-F-G]

Smt. Sureshta Devi v. Om Prakash **(1991) 2 SCC 25: 1991 (1) SCR 274 and** *Smruti Pahariya v. Sanjay Pahariya* **(2009) 13 SCC 338: 2009 (8) SCR 631 – relied on.**

Ashok Hurra v. Rupa Bipin Zaveri **(1997) 4 SCC 226: 1997 (2) SCR 875 – referred to.**

2.1. The appellant further submitted that the marriage had irretrievably broken down and prayed that the Court should dissolve the marriage by exercising its jurisdiction under Article 142 of the Constitution. In support of his request, he placed reliance upon made by this Court in the case of *Anil Kumar Jain*, wherein though the consent was withdrawn by the wife, this Court found the marriage to have been irretrievably broken down and granted a

decree of divorce by invoking its power under Article 142. This Court is not inclined to entertain this submission of the appellant since the facts in that case are not akin to this case. [Para 18] [134-A-C]

2.2. The power under Article 142 of the Constitution is plenipotentiary. However, it is an extraordinary jurisdiction vested by the Constitution with implicit trust and faith and, therefore, extraordinary care and caution has to be observed while exercising this jurisdiction. Irretrievable breakdown of a marriage cannot be the sole ground for the dissolution of a marriage, a view that has withstood the test of time. This Court uses its extraordinary power to dissolve a marriage as having irretrievably broken down only when it is impossible to save the marriage and all efforts made in that regard would, to the mind of the Court, be counterproductive [Paras 21, 22 and 24] [135-E-F; 136-C]

2.3. It is settled law that this Court grants a decree of divorce only in those situations in which the Court is convinced beyond any doubt that there is absolutely no chance of the marriage surviving and it is broken beyond repair. Even if the chances are infinitesimal for the marriage to survive, it is not for this Court to use its power under Article 142 to dissolve the marriage as having broken down irretrievably. [Para 25] [136-D-E]

2.4. In the present case, time and again, the respondent has stated that she wants this marriage to continue, especially in order to secure the future of their minor daughter, though her husband wants it to end. She has stated that from the beginning, she never wanted the marriage to be dissolved. Even now, she states that she is willing to live with her husband putting away all the bitterness that has existed between the parties. In light of these facts and circumstances, it would be travesty of

justice to dissolve this marriage as having broken down. Though there is bitterness amongst the parties and they have not even lived as husband and wife for the past about 11 years, it is hoped that they will give this union another chance, if not for themselves, for the future of their daughter. [Para 26] [136-F-H]

Anil Kumar Jain v. Maya Jain, **(2009) 10 SCC 415: 2009 (14) SCR 90 – distinguished.**

Laxmidas Morarji v. Behrose Darab Madan, **(2009) 10 SCC 425: 2009 (14) SCR 777;** *Manish Goel v. Rohini Goel* **(2010) 4 SCC 393: 2010 (2) SCR 414;** *V. Bhagat v. Mrs. D. Bhagat* **(1994) 1 SCC 337: 1993 (3) Suppl. SCR 796;** *Savitri Pandey v.Prem Chandra Pandey* **(2002) 2 SCC 73: 2002 (1) SCR 50 and** *Samar Ghosh v. Jaya Ghosh* **(2007) 4 SCC 511: 2007 (4) SCR 428 – relied on.**

Case Law Reference:

1991 (1) SCR 274	**relied on**	**Para 8, 9,11, 12,13**
1997 (2) SCR 875	**referred to**	**Para 10, 11**
2009 (8) SCR 631	**relied on**	**Para 12**
2009 (14) SCR 90	**distinguished**	**Para 18**
2009 (14) SCR 777	**relied on**	**Para 19**
2010 (2) SCR 414	**relied on**	**Para 20**
1993 (3) Suppl. SCR 796	**relied on**	**Para 22**
2002 (1) SCR 50	**relied on**	**Para 23**
2007 (4) SCR 428	**relied on**	**Para 24**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6288 of 2008.

From the Judgment & Order dated 8.11.2006 of the High Court of Punjab and Haryana at Chandigarh in FAO No. 193 of 2003.

Hitesh Bhatnagar-in-Person, Devendra Singh for the Appellant

Deepa Bhatnagar-in-Person, Harshvir Pratap Sharma, Sharad Kumar, Vaish, K.S. Rana for the Respondent.

The Judgment of the Court was delivered by

H.L. DATTU, J. 1. Marriages are made in heaven, or so it is said. But we are more often than not made to wonder what happens to them by the time they descend down to earth. Though there is legal machinery in place to deal with such cases, these are perhaps the toughest for the courts to deal with. Such is the case presently before us.

2. The appellant-husband and the respondent-wife got married according to the Hindu Marriage Act, 1955 [hereinafter referred to as 'the Act'] in 1994, and are blessed with a daughter a year thereafter. Some time in the year 2000, due to differences in their temperaments, they began to live separately from each other and have been living thus ever since. Subsequently, in 2001, the parties filed a petition under Section 13B of the Act before the District Court, Gurgaon, for dissolution of the marriage by grant of a decree of divorce by mutual consent. However, before the stage of second motion and passing of the decree of divorce, the respondent withdrew her consent, and in view of this, the petition came to be dismissed by the Ld. Addl. District Judge, Gurgaon, though the appellant insisted for passing of the decree. The appellant, being aggrieved, has filed appeal No. F.A.O. No. 193 of 2003, before the High Court of Punjab and Haryana. The Learned Judge, by his well considered order, dismissed the appeal vide order dt. 08.11.2006. Being aggrieved by the same, the appellant is before us in this appeal.

3. We have heard the learned counsel for the parties and since the parties wanted to ventilate their grievances, we have heard them also.

4. The issues that arise for our consideration and decision are as under:

(a) Whether the consent once given in a petition for divorce by mutual consent can be subsequently withdrawn by one of the parties after the expiry of 18 months from the date of the filing of the petition in accordance with Section 13B (1) of the Act.

(b) Whether the Court can grant a decree of divorce by mutual consent when the consent has been withdrawn by one of the parties, and if so, under what circumstances.

5. In order to answer the issues that we have framed for our consideration and decision, Section 13B of the Act requires to be noticed :-

> 13B. Divorce by mutual consent. – (1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976, (68 of 1976.) on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.
>
> (2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.

6. Admittedly, the parties had filed a petition for divorce by mutual consent expressing their desire to dissolve their marriage due to temperamental incompatibility on 17.08.2001. However, before the stage of second motion, the respondent withdrew her consent by filing an application dated 22.03.2003. The withdrawal of consent was after a period of eighteen months of filing the petition. The respondent, appearing in-person, submits that she was taken by surprise when she was asked by the appellant for divorce, and had given the initial consent under mental stress and duress. She states that she never wanted divorce and is even now willing to live with the appellant as his wife.

7. The appellant, appearing in-person, submits that at the time of filing of the petition, a settlement was reached between the parties, wherein it was agreed that he would pay her '3.5 lakhs, of which he states he has already paid '1.5 lakhs in three installments. He further states in his appeal, as well as before us, that he is willing to take care of the respondent's and their daughter's future interest, by making a substantial financial payment in order to amicably settle the matter. However, despite repeated efforts for a settlement, the respondent is not agreeable to a decree of divorce. She says that she wants to live with the appellant as his wife, especially for the future of their only child, Anamika.

8. The question whether consent once given can be withdrawn in a proceeding for divorce by mutual consent is no more *res integra*. This Court, in the case of Smt. *Sureshta Devi v. Om Prakash*, (1991) 2 SCC 25, has concluded this issue and the view expressed in the said decision as of now holds the field.

9. In the case of *Sureshta Devi* (*supra.*), this Court took the view:

"9**.** The 'living separately' for a period of one year should be immediately preceding the presentation of the petition. It is necessary that immediately preceding the presentation of petition, the parties must have been living separately. The expression 'living separately', connotes to our mind not living like husband and wife. It has no reference to the place of living. The parties may live under the same roof by force of circumstances, and yet they may not be living as husband and wife. The parties may be living in different houses and yet they could live as husband and wife. What seems to be necessary is that they have no desire to perform marital obligations and with that mental attitude they have been living separately for a period of one year immediately preceding the presentation of the petition. The second requirement that they 'have not been able to live together' seems to indicate the concept of broken down marriage and it would not be possible to reconcile themselves. The third requirement is that they have mutually agreed that the marriage should be dissolved.

10**.** Under sub-section (2) the parties are required to make a joint motion not earlier than six months after the date of presentation of the petition and not later than 18 months after the said date. This motion enables the court to proceed with the case in order to satisfy itself about the genuineness of the averments in the petition and also to find out whether the consent was not obtained by force, fraud or undue influence. The court may make such inquiry as it thinks fit including the hearing or examination of the parties for the purpose of satisfying itself whether the averments in the petition are true. If the court is satisfied that the consent of parties was not obtained by force, fraud or undue influence and they have mutually agreed that the

marriage should be dissolved, it must pass a decree of divorce."

On the question of whether one of the parties may withdraw the consent at any time before the actual decree of divorce is passed, this Court held:

"13**.** From the analysis of the section, it will be apparent that the filing of the petition with mutual consent does not authorise the court to make a decree for divorce. There is a period of waiting from 6 to 18 months. This interregnum was obviously intended to give time and opportunity to the parties to reflect on their move and seek advice from relations and friends. In this transitional period one of the parties may have a second thought and change the mind not to proceed with the petition. The spouse may not be a party to the joint motion under sub-section (2). There is nothing in the section which prevents such course. The section does not provide that if there is a change of mind it should not be by one party alone, but by both. The High Courts of Bombay and Delhi have proceeded on the ground that the crucial time for giving mutual consent for divorce is the time of filing the petition and not the time when they subsequently move for divorce decree. This approach appears to be untenable. At the time of the petition by mutual consent, the parties are not unaware that their petition does not by itself snap marital ties. They know that they have to take a further step to snap marital ties. Sub-section (2) of Section 13-B is clear on this point. It provides that "on the motion of both the parties. ... if the petition is not withdrawn in the meantime, the court shall ... pass a decree of divorce ...". What is significant in this provision is that there should also be mutual consent when they move the court with a request to pass a decree of divorce. Secondly, the court shall be satisfied about the bona fides and the consent of the parties. If there is no mutual consent at the time of the enquiry, the court gets

no jurisdiction to make a decree for divorce. If the view is otherwise, the court could make an enquiry and pass a divorce decree even at the instance of one of the parties and against the consent of the other. Such a decree cannot be regarded as decree by mutual consent."

10. In the case of *Ashok Hurra v. Rupa Bipin Zaveri*, (1997) 4 SCC 226, this Court in passing reference, observed:

"16. We are of opinion that in the light of the fact-situation present in this case, the conduct of the parties, the admissions made by the parties in the joint petition filed in Court, and the offer made by appellant's counsel for settlement, which appears to be bona fide, and the conclusion reached by us on an overall view of the matter, it may not be necessary to deal with the rival pleas urged by the parties regarding the scope of Section 13-B of the Act and the correctness or otherwise of the earlier decision of this Court in Sureshta Devi case or the various High Court decisions brought to our notice, in detail. However, with great respect to the learned Judges who rendered the decision in Sureshta Devi case, certain observations therein seem to be very wide and may require reconsideration in an appropriate case. In the said case, the facts were:

The appellant (wife) before this Court married the respondent therein on 21-11-1968. They did not stay together from 9-12-1984 onwards. On 9-1-1985, the husband and wife together moved a petition under Section 13-B of the Act for divorce by mutual consent. The Court recorded statements of the parties. On 15-1-1985, the wife filed an application in the Court stating that her statement dated 9-1-1985 was obtained under pressure and threat. She prayed for withdrawal of her consent for the petition filed under Section 13-B and also prayed for dismissal of the petition. The District Judge dismissed the petition filed under Section 13-B of the Act. In appeal, the High Court

observed that the spouse who has given consent to a petition for divorce cannot unilaterally withdraw the consent and such withdrawal, however, would not take away the jurisdiction of the Court to dissolve the marriage by mutual consent, if the consent was otherwise free. It was found that the appellant (wife) gave her consent to the petition without any force, fraud or undue influence and so she was bound by that consent. The issue that came up for consideration before this Court was, whether a party to a petition for divorce by mutual consent under Section 13-B of the Act, can unilaterally withdraw the consent and whether the consent once given is irrevocable. It was undisputed that the consent was withdrawn within a week from the date of filing of the joint petition under Section 13-B. It was within the time-limit prescribed under Section 13-B(2) of the Act. On the above premises, the crucial question was whether the consent given could be unilaterally withdrawn. The question as to whether a party to a joint application filed under Section 13-B of the Act can withdraw the consent beyond the time-limit provided under Section 13-B(2) of the Act did not arise for consideration. It was not in issue at all. Even so, the Court considered the larger question as to whether it is open to one of the parties at any time till a decree of divorce is passed to withdraw the consent given to the petition. In considering the larger issue, conflicting views of the High Courts were adverted to and finally the Court held that the mutual consent should continue till the divorce decree is passed. In the light of the clear import of the language employed in Section 13-B(2) of the Act, it appears that in a joint petition duly filed under Section 13-B(1) of the Act, motion of both parties should be made six months after the date of filing of the petition and not later than 18 months, if the petition is not withdrawn in the meantime. In other words, the period of interregnum of 6 to 18 months was intended to give time and opportunity to the parties to have a second thought and change the mind. If it is not so done within the outer limit

of 18 months, the petition duly filed under Section 13-B(1) and still pending shall be adjudicated by the Court as provided in Section 13-B(2) of the Act. It appears to us, the observations of this Court to the effect that mutual consent should continue till the divorce decree is passed, even if the petition is not withdrawn by one of the parties within the period of 18 months, appears to be too wide and does not logically accord with Section 13-B(2) of the Act. However, it is unnecessary to decide this vexed issue in this case, since we have reached the conclusion on the fact-situation herein. The decision in Sureshta Devi case may require reconsideration in an appropriate case. We leave it there."

11. These observations of this Court in the case of *Ashok Hurra (supra)* cannot be considered to be ratio decidendi for all purposes, and is limited to the facts of that case. In other words, the ratio laid down by this Court in the case of *Sureshta Devi (supra)* still holds the field.

12. In the case of *Smruti Pahariya v. Sanjay Pahariya*, (2009) 13 SCC 338, a bench of three learned judges of this Court, while approving the ratio laid down in the case of *Sureshta Devi (supra),* has taken the view :-

"40. In the Constitution Bench decision of this Court in Rupa Ashok Hurra this Court did not express any view contrary to the views of this Court in Sureshta Devi. We endorse the views taken by this Court in Sureshta Devi as we find that on a proper construction of the provision in Sections 13-B(1) and 13-B(2), there is no scope of doubting the views taken in Sureshta Devi. In fact the decision which was rendered by the two learned Judges of this Court in Ashok Hurra has to be treated to be one rendered in the facts of that case and it is also clear by the observations of the learned Judges in that case.

41. None of the counsel for the parties argued for

reconsideration of the ratio in Sureshta Devi.

42. We are of the view that it is only on the continued mutual consent of the parties that a decree for divorce under Section 13-B of the said Act can be passed by the court. If petition for divorce is not formally withdrawn and is kept pending then on the date when the court grants the decree, the court has a statutory obligation to hear the parties to ascertain their consent. From the absence of one of the parties for two to three days, the court cannot presume his/her consent as has been done by the learned Family Court Judge in the instant case and especially in its fact situation, discussed above.

43. In our view it is only the mutual consent of the parties which gives the court the jurisdiction to pass a decree for divorce under Section 13-B. So in cases under Section 13-B, mutual consent of the parties is a jurisdictional fact. The court while passing its decree under Section 13-B would be slow and circumspect before it can infer the existence of such jurisdictional fact. The court has to be satisfied about the existence of mutual consent between the parties on some tangible materials which demonstrably disclose such consent."

13. The appellant contends that the Additional District Judge, Gurgaon, was bound to grant divorce if the consent was not withdrawn within a period of 18 months in view of the language employed in Section 13B(2) of the Act. We find no merit in the submission made by the appellant in the light of the law laid down by this Court in Sureshta Devi's case (supra).

14. The language employed in Section 13B(2) of the Act is clear. The Court is bound to pass a decree of divorce declaring the marriage of the parties before it to be dissolved with effect from the date of the decree, if the following conditions are met:

a. A second motion of both the parties is made not before 6 months from the date of filing of the petition as required under sub-section (1) and not later than 18 months;

b. After hearing the parties and making such inquiry as it thinks fit, the Court is satisfied that the averments in the petition are true; and

c. The petition is not withdrawn by either party at any time before passing the decree;

15. In other words, if the second motion is not made within the period of 18 months, then the Court is not bound to pass a decree of divorce by mutual consent. Besides, from the language of the Section, as well as the settled law, it is clear that one of the parties may withdraw their consent at any time before the passing of the decree. The most important requirement for a grant of a divorce by mutual consent is free consent of both the parties. In other words, unless there is a complete agreement between husband and wife for the dissolution of the marriage and unless the Court is completely satisfied, it cannot grant a decree for divorce by mutual consent. Otherwise, in our view, the expression 'divorce by mutual consent' would be otiose.

16. In the present fact scenario, the second motion was never made by both the parties as is a mandatory requirement of the law, and as has been already stated, no Court can pass a decree of divorce in the absence of that. The non-withdrawal of consent before the expiry of the said eighteen months has no bearing. We are of the view that the eighteen month period was specified only to ensure quick disposal of cases of divorce by mutual consent, and not to specify the time period for withdrawal of consent, as canvassed by the appellant.

17. In the light of the settled position of law, we do not find any infirmity with the orders passed by the Ld. Single Judge.

18. As a last resort, the appellant submits that the marriage had irretrievably broken down and prays that the Court should dissolve the marriage by exercising its jurisdiction under Article 142 of the Constitution of India. In support of his request, he invites our attention to the observation made by this Court in the case of *Anil Kumar Jain v. Maya Jain*, (2009) 10 SCC 415, wherein though the consent was withdrawn by the wife, this Court found the marriage to have been irretrievably broken down and granted a decree of divorce by invoking its power under Article 142. We are not inclined to entertain this submission of the appellant since the facts in that case are not akin to those that are before us. In that case, the wife was agreeable to receive payments and property in terms of settlement from her husband, but was neither agreeable for divorce, nor to live with the husband as his wife. It was under these extraordinary circumstances that this Court was compelled to dissolve the marriage as having irretrievably broken down. Hence, this submission of the appellant fails.

19. In the case of *Laxmidas Morarji v. Behrose Darab Madan,* (2009) 10 SCC 425, a Bench of three learned Judges (of which one of us was a party), took the view:

"25. Article 142 being in the nature of a residuary power based on equitable principles, the Courts have thought it advisable to leave the powers under the article undefined. The power under Article 142 of the Constitution is a constitutional power and hence, not restricted by statutory enactments. Though the Supreme Court would not pass any order under Article 142 of the Constitution which would amount to supplanting substantive law applicable or ignoring express statutory provisions dealing with the subject, at the same time these constitutional powers cannot in any way, be controlled by any statutory provisions. However, it is to be made clear that this power cannot be used to supplant the law applicable to the case. This means that acting under Article 142, the Supreme Court

cannot pass an order or grant relief which is totally inconsistent or goes against the substantive or statutory enactments pertaining to the case. The power is to be used sparingly in cases which cannot be effectively and appropriately tackled by the existing provisions of law or when the existing provisions of law cannot bring about complete justice between the parties."

20. Following the above observation, this Court in the case of *Manish Goel v. Rohini Goel*, (2010) 4 SCC 393, while refusing to dissolve the marriage on the ground of irretrievable breakdown of marriage, held:

"19. Therefore, the law in this regard can be summarised to the effect that in exercise of the power under Article 142 of the Constitution, this Court generally does not pass an order in contravention of or ignoring the statutory provisions nor is the power exercised merely on sympathy."

21. In other words, the power under Article 142 of the Constitution is plenipotentiary. However, it is an extraordinary jurisdiction vested by the Constitution with implicit trust and faith and, therefore, extraordinary care and caution has to be observed while exercising this jurisdiction.

22. This Court in the case of *V. Bhagat v. Mrs. D. Bhagat*, (1994) 1 SCC 337 held that irretrievable breakdown of a marriage cannot be the sole ground for the dissolution of a marriage, a view that has withstood the test of time.

23. In the case of *Savitri Pandey v. Prem Chandra Pandey*, (2002) 2 SCC 73, this Court took the view:

"17. The marriage between the parties cannot be dissolved only on the averments made by one of the parties that as the marriage between them has broken down, no useful purpose would be served to keep it alive. The legislature, in its wisdom, despite observation of this

Court has not thought it proper to provide for dissolution of the marriage on such averments. There may be cases where, on facts, it is found that as the marriage has become dead on account of contributory acts of commission and omission of the parties, no useful purpose would be served by keeping such marriage alive. The sanctity of marriage cannot be left at the whims of one of the annoying spouses....."

24. This Court uses its extraordinary power to dissolve a marriage as having irretrievably broken down only when it is impossible to save the marriage and all efforts made in that regard would, to the mind of the Court, be counterproductive [See *Samar Ghosh v. Jaya Ghosh*, (2007) 4 SCC 511].

25. It is settled law that this Court grants a decree of divorce only in those situations in which the Court is convinced beyond any doubt that there is absolutely no chance of the marriage surviving and it is broken beyond repair. Even if the chances are infinitesimal for the marriage to survive, it is not for this Court to use its power under Article 142 to dissolve the marriage as having broken down irretrievably. We may make it clear that we have not finally expressed any opinion on this issue.

26. In the present case, time and again, the respondent has stated that she wants this marriage to continue, especially in order to secure the future of their minor daughter, though her husband wants it to end. She has stated that from the beginning, she never wanted the marriage to be dissolved. Even now, she states that she is willing to live with her husband putting away all the bitterness that has existed between the parties. In light of these facts and circumstances, it would be travesty of justice to dissolve this marriage as having broken down. Though there is bitterness amongst the parties and they have not even lived as husband and wife for the past about 11 years, we hope that they will give this union another chance, if not for themselves, for the future of their daughter. We conclude by quoting the great

poet George Eliot "*What greater thing is there for two human souls than to feel that they are joined for life – to strengthen each other in all labour, to rest on each other in all sorrow, to minister to each other in all pain, to be one with each other in silent, unspeakable memories at the moment of the last parting.*"

27. Before parting with the case, we place on record our appreciation for the efforts made by Shri. Harshvir Pratap Sharma, learned counsel, to bring about an amicable settlement between the parties.

28. In the result, the appeal fails. Accordingly, it is dismissed. No order as to costs.

B.B.B. Appeal dismissed.

SATYAVIR SINGH RATHI
v.
STATE THR. C.B.I.
(Criminal Appeal No. 2231 of 2009)

MAY 2, 2011

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

Penal Code, 1860:

ss. 302/34, 307/34, 193, 201/34 and 203/34 – Police shoot out – Two innocent citizens killed in mistaken identity of a hardcore criminal and third one grievously injured – FIR by father of one of the deceased, against police personnel – Investigation by CBI – Conviction by trial court u/ss 302/120-B and 307/120-B of ten police officials – Two of them further convicted u/ss 193, 201/34 and 203/34 –High Court convicting the accused u/ss 302 and 307 with the aid of s.34 and maintaining the sentence of imprisonment for life – Conviction of two accused u/ss 193, 201/34 and 203/34 also maintained – HELD: It has been established that the police party surrounded the car of the victims and fired indiscriminately at the car due to which two occupants died and the third one grievously injured – The defence that the one of the occupants of the car, when asked to come out, fired at the police party which thereafter opened fire in self-defence has not been supported by the evidence on record – Though the prosecution is bound to prove its case beyond reasonable doubt, obligation on an accused u/s 105 of Evidence Act is to prove it by preponderance of probabilities – The trial court and the High Court have accordingly opined on the basis of the overall assessment that the defence version was a concoction and that the prosecution story that it was the unprovoked firing by the appellants which had led to the death of the two persons and grievous gun shot injuries to the other

had been proved on record – Therefore, High Court rightly convicted the accused u/ss 302/34, 307/34– Evidence Act, 1872 – s.105 – Code of Criminal Procedure, 1973 – ss. 313 and 386(b)(ii).

s.300 – Exception 3 – Death caused by public servants – Police shoot out – Two innocent citizen killed in mistaken identity of a hardcore criminal – HELD: The Exception pre-supposes that a public servant who causes death must do so in good faith and in due discharge of his duty – The accused police officials fired without provocation killing two innocent persons and injuring grievously the third one – Trial court and High Court rightly rejected the defence.

s.34 – Common intention – Police shoot out – A notorious criminal being tracked by police party – A person resembling the criminal, spotted and he along with his two friends in the car followed by police personnel – More police force requisitioned – At the place of incident both the police parties joined together in indiscriminate firing resulting in death of two occupants of the car and grievous injuries to the third one – HELD: The courts below have observed that keeping in mind the background in which the incident happed it was pursuant to the common intention to kill the notorious criminal – The High Court was, therefore, justified in holding that in the light of the facts, it was not necessary to assign a specific role to each individual accused as the firing at the car was undoubtedly with a clear intention to annihilate those in it and was resorted to in furtherance of the common intention of all the accused.

ss.79 and 34 – Police shoot out – Ten police officials prosecuted for two murders – Plea of some of the accused that they acted on the directions of superior officer – HELD: There is absolutely no evidence that the firing had been resorted to by seven accused on the direction of the senior officer, but it was pursuant to the common intention of all the

accused that the incident had happened – s.315 CrPC makes an accused a competent witness in his defence – The accused did not choose to come into the witness box to support their plea – Code of Criminal Procedure, 1973 – s.315.

Code of Criminal Procedure, 1973:

s.386(b)(ii) read with s.220 – Power of appellate court to alter the finding of trial court while maintaining the sentence – Charge framed by trial court u/ss 302/120-B and 307/120-B and alternative charge u/ss 302/34 and 307/34 – Conviction by trial court u/s 302/120-B, 307/120-B, 193/120-B, altered by High Court to s.302/34, 307/34, 193/34, while maintaining the sentence – HELD: Justified –Charges had been framed in the alternative and for cognate offences having similar ingredients as to the main allegation of murder – In the instant case, the relevant provision is s.38(b)(ii), which empowers the High Court to alter the finding while maintaining the sentence – Besides, accused were aware of all the circumstances against them – Penal Code, 1860 – ss.302/34, 307/34, 193/34.

s.313 – Examination of accused – HELD: Prejudice must be shown by an accused before it can be said that he was entitled to acquittal over a defective and perfunctory statement u/s 313 – In the instant case, all the accused police officials filed their written statements but no objection had been raised as to defective 313 statements in the trial court – Penal Code, 1860 – ss.302/34, 307/34, 193/34.

s.197 – Sanction for prosecution of police personnel involved in shoot out – HELD: It has come in evidence that request of CBI for according sanction for prosecution of accused, alongwith the documents, was referred to Law Department, then to Home Department, to Chief Secretary and finally to Lt. Governor, who granted the sanction –

Adequate material for sanction had been made available to the sanctioning authority.

Delhi Police Act, 1978:

s.140 – Prosecution of police officials for causing death of two persons in a police shoot out – Limitation for – HELD: The date of cognizance taken by the Magistrate would be the date for the institution of the criminal proceedings – However, a case of murder would not fall within the expression 'colour of duty' – s.140 would, therefore, have no relevance to the case.

One 'MY', a hardcore criminal, wanted by the Delhi Police and the police of other States in several serious criminal cases, was being tracked by the Inter-State Cell of the Crime Branch of the Delhi Police. A-1, the Assistant Commissioner of Police and In-charge of the Inter-State Cell of the Crime Branch, received information that 'MY' would be visiting the place near Mother Dairy, Patparganj, Delhi at about 1.30 p.m. on 31.3.1997. A-2, the Inspector of the Crime Branch was detailed by A-1 to keep a watch near the said Mother Dairy booth. Two youngmen, namely, 'JS' (deceased-1) and PW-26 had come from Haryana to the area at about the same time to meet their friend 'PG' (deeased-2) who had his office near Mother Dairy. But as 'PG' was not in the office, and would be reaching there within a short time, PW-26 and 'JS' went to Mother Dairy and after buying ice-cream were waiting for 'PG'. A-2 who had a photo of 'MY' with him spotted 'JS' and PW-26 at 1.30 p.m. near Mother Dairy and as 'JS' resembled 'MY', he was mistaken by A-2 as 'MY' and he called for reinforcement from A-1, the ACP, who in turn along with a police party of 12 police personnel armed with service weapons left to assist the police team led by A-2. Meanwhile on PG's arrival the three friends, namely PW 26, 'JS' and 'PG' left for connaught place in blue

Maruti Esteem Car bearing No. UP-14-F-1580 belonging to 'PG'. The police party led by A-2 followed them. Since 'PG' had some work in Dena Bank he went inside the Bank. When he came out, he sat on the front seat and PW 26 sat on the rear seat. 'JS' drove the car towards Barakhamba Road and when they stopped at the red light, both the police parties led by A-2, the Inspector, and A-1, the ACP, surrounded the car and fired from almost all the sides killing 'PG' and 'JS' instantaneously and causing grievous injuries to 'PW 26'. On receiving information of the shoot out, PW-42, the SHO, Connaught Place and other police officials reached the place of incident. He recovered a 7.65 mm pistol loaded with 7 live cartridges, a misfired cartridge in the breach and two spent cartridge cases of 7.65 mm bore inside the car. A-2 handed him over a written complaint stating that after the car had stopped at the red light, he knocked at the driver's window asking the occupants to come out, but 'JS' fired at the police party from inside the car resulting in gun shot injuries to two Constables A-9 and A-8 and that it was thereafter that the police personnels opened fire at the car with a view to immobilizing the occupants and to prevent their escape. Consequently, FIR No. 448/97 for offences punishable u/ss 186/353/307 IPC and 25 of the Arms Act was registered against the occupants of the car.

The following day, the father of deceased 'PG' made a complaint to the Lt. Governor on which another FIR No. 453/97 was registered against the police personnel involved in the shoot out for an offence punishable u/s 302/34 IPC. Later, the investigation was entrusted to CBI. The trial court framed charges against 10 police officials and found all of them guilty of the offences punishable inter alia, u/ss 120-*B, 302/120*-B, 307/120-B IPC and sentenced them to life imprisonment. A-1 and A-2 were

further convicted u/ss 193, 201/34 and 203/34 IPC. On appeal, the High Court held that conviction of appellants u/s 302/120-B IPC could not be sustained and insted convicted all of them, u/ss 302 and 307 with the aid of s.34 IPC and sentenced each of them to imprisonment for life. Conviction of A-1 and A-2 u/ss 193, 201/34 and 203/34 IPC was also maintained. Aggrieved, the accused police officials filed the appeals.

Dismissing the appeals, the Court

HELD: 1. Several facts appear to be admitted on record but are compounded by a tragedy of errors. These relate to the place and time of incident, the presence of the appellants duly armed with most of them having fired into the car with their service weapons, that 'MY' was admittedly a notorious criminal and that 'JS' (deceased) had been mistaken by A-2 for 'MY', and that deceased 'PG' owned a blue Esteem Car with an Uttar Pradesh number plate, and had his office in Patparganj near the Mother Dairy Booth. Further, A-2 and his two associates had followed the car driven by 'PG' to the Dena Bank Branch at Connaught Place and it was after 'PG' and the others had left the Dena Bank premises and were near the Barakhamba Road crossing that the two police parties, one headed by A-2, and the other by A-1, had joined forces and surrounded the car as it stopped at a red light, and had fired into it killing two persons and injuring one. [para 11] [176-F-H; 177-A-B]

2.1. The case of the defence that after the car had been surrounded, A-2 had knocked at the driver's window asking the occupants to come out but instead of doing so 'JS' had fired two shots at the police which had led to a fusillade in self defence, cannot be accepted in view of the evidence on record. [para 11] [177-B-C]

2.2. It is true that it is not always necessary for the accused to plead self- defence and if the prosecution story itself spells it out, it would be open to the court to examine this matter as well. [para 11] [177-C-F]

Mohan Singh & Anr. v*s. State of Punjab 1962 Suppl. SCR* 8**48 = AIR 1963 SC 174; Javed Masood & Anr.** *vs. State of Rajasthan 2010 (3) SCR 236* **= 2010 (3) SCC 538, relied on.**

2.3. It must also be observed that though the prosecution is bound to prove its case beyond reasonable doubt, the obligation on an accused u/s. 105 of the Evidence Act, 1872 is to prove it by a preponderance of probabilities. [para 11] [177-G-H]

2.4. PW 13 and another witness 'AS' did state that a single shot had been followed by multiple shots thereafter. 'AS', however, apparently did not receive a bullet injury as the simple abrasion on him had been apparently caused by a flying splinter from the tarmac but there is extremely independent evidence on this score as well. However, PW-1, the Chief Photographer of the Statesman Newspaper, which has its office adjacent to the red light on Barakhamba Road, deposed that on the 31-03-1997 at about 2 - 2.30 p.m. while he was sitting in his room along with his colleagues, PWs 2 and 67 and another person, they had heard the sound of firing from the Barakhamba Road side and that he along with the other PWs had come out to the crossing along with their camera equipment and saw a blue Esteem Car standing there with two bodies lying alongside and one injured person sitting on the road with a large number of police men, including some in mufti, present. He stated that on his directions PWs 2 and 67 took a large number of photographs of the site and 14 of them were also produced as Exs. P-1 to P-14. He further stated that a

reporter of the Statesman had also been present. PW-2 and PW-67 supported the story given by PW-1. He also proved the photograph marked Ext. 'X' which shows that the driver's window was intact. It has come in the evidence of PW-26 that the car A.C. was on when the firing took place and the windows had been drawn up. [para 12] [178-A-H]

2.5. Likewise, it is also to be seen that had the shots been fired through the driver's window or the windshield some powder residues would have been left around the bullet holes as the shots would have been fired from almost a touching distance. PW-37 from the Central Forensic Science Laboratory, who had examined the car very minutely, detected no such residue and also testified that the appreciable powder distance of a 7.65 mm pistol could be one to two feet but would depend on the sitting posture of the person firing. He also stated that in all at least 29 bullet holes had been detected on the car of 9 mm, 7.62 mm and .380 calibre weapons and that most of the seven exit holes in the car could have been caused by bullets fired from the rear and left side into the car and exiting thereafter, although the possibility of an exit hole being caused by a bullet fired from inside the car could also not be ruled out. He further pointed out that as the bullet fired at Constable A-8 remained embedded in his body and had not been taken out for medical reasons, it was not possible to give an opinion whether it was a bullet of 7.65 mm calibre. [para 12] [178-H; 179-A-D]

2.6. The defence story that Constables A-9 and A-8 had suffered injuries on account of the firing of two shots from inside the car, is further belied by the medical evidence. PW-16, the doctor, who carried out the medico legal examination of Constable A-8 (Ext.PW16/B), found three bullet injuries on his person, which indicated blackening. These injuries could not have been caused

by firing from inside the car as the blackening from a pistol would be, at the most, from a foot or two. Likewise, PW-17 the doctor, who had examined Constable A-8, also found three separate gun shot injuries on his person. He also produced in evidence his treatment record (Exbt. PW17/B). This doctor was not even cross-examined by the prosecution. It needs to be emphasized that all the weapons used in the incident fired single projectiles (i.e. bullets), whereas the distance between the gun shot injuries on the two injured policemen show at least 3 different wounds of entry on each of them. On the contrary, it appears that the injuries suffered by them were caused by the firing amongst the policemen as they had surrounded and fired into the car indiscriminately and without caution ignoring that they could be a danger to themselves on cross-fire on uncontrolled firing. It has, in fact, been pointed out that A-1 had written to his superiors pointing to the ineptitude of his team of officers but he had been told that no other staff was available. [para 12] [179-D-H; 180-A-B]

2.7. In this background, the evidence of PWs 1, 2 to 7 and the two Constables PWs 50 and 51, becomes extremely relevant. The ASI, PW-13, who was the Officer In-Charge of the PCR Gypsy parked near the Fire Station Building adjoining Barakhamba Road, had undoubtedly supported the defence version that a single shot had been followed by a volley. PWs 50 and 51, the two Constables, who were present along with ASI PW-13, categorically stated that they had not heard any single fire and it was only the continuous firing that had brought them rushing to the site and having reached there, they had taken the three victims to the R.M.L. Hospital. Their story is corroborated by the evidence of the three newspaper employees. PW-26 was also categoric that no shot had been fired from inside the car. The story

therefore that 'JS' had fired at the police party when accosted is, therefore, on the face of it, unacceptable. In this overall scenario even if it is assumed that the driver's window had been found broken as contended by the defence, it would still have no effect on the prosecution story. [Para 12] [180-B-F]

2.8. As regards the recovery of the 7.65 mm bore pistol allegedly used by 'JS' first and foremost, it appears that even prior to the arrival of the SHO, PW-42, the Car had already been searched and the site violated, as a cell phone belonging to one of the victims had been picked up by appellant ASI 'A- 3' and handed over to the SHO. The fact that undue interest had been taken by the offending police officials is also clear from Ext. P/10 a photograph showing A-3 looking into the car. More significantly, however, PW-12, the official Photographer of the Delhi Police, took two photographs (Ext. PW12/28 and PW12/29) of the driver's seat from very close range but they show no pistol or empty shells. Even more significantly A-1 submitted a detailed written report (Ext.D.16/8) on 1.4.1997 to his superior officer in which he talks about the firing by 'JS' but makes no mention as to the recovery of a pistol from the car although as per the defence story the weapon had been picked up by the SHO soon after the incident. Likewise, in the report Ext. PW-42/C lodged by the appellant A-2 with the Connaught Place Police immediately after the incident, there is no reference whatsoever to the presence of a 7.65 mm pistol in the car. It is also relevant that the pistol had been sent to the Central Forensic Science Laboratory but PW-46, who examined the weapon, could find no identifiable finger prints thereon. [Para 13] [180-G-H; 181-A-D]

2.9. The cumulative effect of the evidence adduced reveals the starkly patent fact that the defence story projected was a palpably false one and the police officials

involved having realized almost immediately after the incident (perhaps on questioning PW-26 that they had made a horrific mistake, immediately set about creating a false defence. The trial court and the High Court have accordingly opined on the basis of the overall assessment that the defence version was a concoction and that the prosecution story that it was the unprovoked firing by the appellants which had led to the death of the two deceased and grievous gun shot injuries to PW-26, had been proved on record. [Para 14] [181-A-G]

3.1. It can not be said that the accused were entitled to claim the benefit of Exception 3 to s. 300 IPC. This Exception pre-supposes that a public servant who causes death, must do so in good faith and in due discharge of his duty as a public servant and without ill-will towards the person whose death is caused. In the light of the fact that the positive case set up by the defence has been rejected by the trial court, the High Court as well as by this Court, the question of any good faith does not arise. On the contrary, the appellants had fired without provocation at the Esteem Car killing two innocent persons and injuring one. The obligation to prove an exception is on the preponderance of probabilities but it nevertheless lies on the defence. Even on this touchstone the defence cannot succeed. [Para 15] [181-G-H; 182-A-C]

3.2. It is true that the High Court has acquitted the appellants of planting the 7.65 mm bore pistol in the car. However, this acquittal has been rendered only on the ground that it was not possible to pinpoint the culprit who had done so. This can, by no stretch of imagination, be taken to mean that the story that the pistol had been planted in the car has been disbelieved by the High Court. Though, the recovery of the 7.65 mm weapon

appears to be an admitted fact, but with the rider that it had been planted to help the defence. [Para 15] [182-C-F]

Mohan Singh & Anr. v*s. State of Punjab 1962 Suppl. SCR 84***8 = AIR 1963 SC 174; and James Mart*i*n vs. *Sta*te of Kerala 2004 (2) SCC 203; an*d **Javed Masood & *Anr.*** *vs. State of Rajasthan 2010 (3)* SCR 236 **= 2010 (3) SCC 538 – held inapplicable.**

4.1. As regards the plea that CBI conducted a partisan and motivated investigation, it is true that all witnesses have not been examined but in the circumstances this was not necessary. It will also be seen that as per the prosecution story, appellants A-9 and A-8 had been caused injuries by shots fired from the weapons of Head Constable A-5 and the Constable A-10. As per the report of the CFSL Ext.P/37F, the bullet recovered from the person of A-9 had been fired from the .380 revolver of A-5 and as per the evidence of PW-37, the possibility that the metallic bullet which was embedded on the person of A-8 could be the steel core portion of a shattered 7.62 mm bullet of the weapon of A-10. PW-37 stated in his examination-in-Chief that he had received parcel no. 12 and when he opened it, he found one .380 calibre bullet and no other object therein and he resealed the bullet in the parcel. It appears from the evidence of PW-37 that parcel No.12 was again opened in Court and at that stage it was found to contain not only a .380 calibre bullet but also one fired 7.65 mm bullet. The witness, however, stated that when the parcel had been received by him in the Ballistics Department from the Biology Department of the Laboratory, the 7.65 mm bullet had not been in it. In the light of the fact that the trial court and the High Court have already held (and also held by this Court) that no shot had been fired from inside the car from the 7.65 mm pistol, the possibility of a 7.65 mm bullet

being in the parcel becomes suspect. In any case, the creation of some confusion vis-à-vis the bullets, is a matter which would undoubtedly help the defence and a presumption can thus be raised that this had been stage managed by the defence. This aspect too cannot be ignored. [Paras 16, 18 and 19] [183-F-G; 184-A-C; F-H; 185-A]

3.2. So far as the recovery of a bullet from the ashes of deceased 'JS', is concerned, the High Court has rejected the prosecution story by observing that the trial court had ignored the evidence on this score as PW-8, the brother of deceased 'JS' had nowhere stated that he had picked up a bullet from the ashes and handed it over to the Sub-Inspector and more particularly as the two doctors who had X-Rayed the dead body had found no trace of bullet. This Court endorses the finding of the High Court in the light of the uncertain evidence on this score, but to allege that the CBI officials had a hand in planting the bullet is unwarranted. [para 20] [185-C-G]

4.3. It must be seen that the police party comprised 15 personnel. Only 10 who played an active role had been prosecuted. This background points to a fair investigation. Therefore, no fault whatsoever can be found in the investigation made by the CBI. [Para 20] [186-B-C]

5.1. As regards the primary plea of absence of common intention in causing the murders, admittedly, the target was 'MY', concededly a notorious criminal with a bounty on his head, as he had been involved in a large number of very serious criminal matters. The incident happened on account of a mistake as to the identity of 'JS' who could pass off as a Muslim and it is nobody's case that the police party had intended to eliminate 'JS' and his friends. The courts below have been very clear on this score and have observed that keeping in mind

the background in which the incident happened, that it was not the outcome of an act in self-defence but was pursuant to the common intention to kill 'MY'. As to the role of A-1 and A-2, the High Court has found that it was A-1 who was the leader of the police party in his capacity as the A-1 and, therefore, it was not necessary for him to be in the forefront of the attack on the Esteem car and A-2 who had admittedly knocked at the window could be treated likewise as being the next officer in the hierarchy. The site plan indicates that A-1 was sitting in his Gypsy about 15 meters away from the car when the incident happened. It has come in evidence that when A-2 had conveyed the fact of presence of 'JS' and PW-26 at the Mother Dairy Booth at Patparganj, A-1 had got together a police party of heavily armed officers, briefed them, and they had thereafter moved on to Connaught Place. It has been found as a matter of fact that when A-2 had followed the Car to the Dena Bank, 'JS' had been left behind in the car alone for quite some time but A-2 and his two associates had made absolutely no attempt to apprehend him at that stage or to counter check his identity though A-2 had MY's photograph with him. Even more significantly A-2 made no attempt to identify 'PG' or PW-26 whatsoever, although admittedly he was in close wireless contact with A-1. This is the pre-incident conduct which is relevant. [Para 23] [187-A-H; 188-A-B]

5.2. The facts as brought reveal a startling state of affairs during the incident. The case of the defence that the car had been surrounded to immobilize the inmates and to prevent them from escaping and that it was with this intention that A-2 had knocked on the driver's window asking the inmates to get out but he had been answered by firing from inside the car, has already been rejected. Moreover, PW-37 testified that there were no bullet marks on the tyres and they remained intact even after the incident, despite 34 shots being fired at the car,

and 29 bullet holes, most of them of entry, thereon. On the other hand, the appellants presupposed that one of the inmates was 'MY', the wanted criminal and that the firing was so insensitive and indiscriminate that some of the shots had hit A-8 and A-9. [Para 23] [188-B-E]

5.3. The post-facto conduct of the appellants is again relevant. A-2 gave a report on the 01-04-1007 immediately after the incident, which was followed by a report by A-1 the next day giving the counter version. This has been found to be completely untenable. The High Court was, therefore, justified in holding that in the light of the facts, it was not necessary to assign a specific role to each individual appellant as the firing at the Car was undoubtedly with a clear intent to annihilate those in it and was resorted to in furtherance of the common intention of all the appellants. [Para 23] [188-E-G]

5.4. The appellants were, therefore, liable to conviction u/ss 302/34 etc. of the IPC. [Para 24] [189-E-F]

Abdul Sayeed Versus State of M.P. **2010 (10) SCC 259 - relied on.**

6. So far as the argument with regard to the deemed acquittal theory of the appellants for the offence u/ss 302, 307 read with s. 34 IPC by the trial court is concerned, it is pertinent to note that the trial court had framed a charge u/ss. 302 and 307 read with s. 120-B IPC and an alternative charge u/ss. 302 and 307 read with s. 34 IPC but without opining on the alternative charge, convicted the appellants u/ss. 302 and 307 read with s. 120-B IPC. The charges had indeed been framed in the alternative and for cognate offences having similar ingredients as to the main allegation of murder. Section 386 Cr.P.C. refers to the power of the appellate court, and the provision in so far relevant for the purpose of this case, is sub-clause (b) (ii) which empowers the appellate court to alter the

finding while maintaining the sentence. It is significant that s.120-B IPC is an offence and positive evidence on this score has to be produced for a successful prosecution whereas s. 34 does not constitute an offence and is only a rule of evidence and inferences on the evidence can be drawn. Therefore, the question of deemed acquittal in such a case where the substantive charge remains the same and a charge u/s 302/120B and an alternative charge u/s 302/34 IPC had been framed, there was nothing remiss in the High Court in modifying the conviction to one u/ss. 302/307/34 IPC. It is also self-evident that the accused were aware of all the circumstances against them. [Para 25 and 27] [189-F-H; 191-F-H; 192-A-B]

Lachhman Singh & Ors. Vs. The State **1952 SCR 839 = AIR 1952 SC 167; and** *Dalbir Singh vs. State of U.P.* **2004 (5) SCC 334 – relied on**

Sangaraboina Sreenu vs. State of A.P. **1997 (3) SCR 957 = 1997 (5) SCC 348; and** *Lokendra Singh vs. State of M.P.* **1999 SCC (Crl) 371 stood overruled.**

Bimla Devi & Anr. vs. State of J & K **2009 (7) SCR 486 = 2009 (6) SCC 629 - held per incurium**

Lakhan Mahto vs. State of Bihar **1966 (3) SCR 643 – held inapplicable.**

Pradesh vs. Thadi Narayana **1962 (2) SCR 904 – distinguished.**

Kishan Singh vs. Emperor ***AIR 1928 P.C. 254 – referred to.***

7. As regard the plea that the trial court failed to put all relevant questions to the accused while recording their statements u/s 313 Cr.P.C., the latest position in law appears to be that prejudice must be shown by an

accused before it can be held that he was entitled to acquittal over a defective and perfunctory statement u/s 313. In the course of the evidence, the entire prosecution story with regard to the circumstances including those of conspiracy and common intention had been brought out and the witnesses had been subjected to gruelling and detailed cross-examinations. Besides, the incident has been admitted, although the defence has sought to say that it happened in different circumstances. It is also signally important that all the accused had filed their detailed written statements in the matter. All these facts become even more significant in the background that no objection had been raised with regard to the defective 313 statements in the trial court. It must be assumed, therefore, that no prejudice had been felt by the appellants even assuming that some incriminating circumstances in the prosecution story had been left out. [Para 28, 32] [194-D; 195-E-G]

Shivaji Sahebrao Bobde vs. State of Maharashtra **AIR 1973 SC 2622,** *Santosh Kumar Singh vs. State thr. CBI* **2010 (9) SCC 747,** *Shobhit Chamar & Anr. vs. State of Bihar* **1998 (2) SCR 117 =1998 (3) SCC 455, relied on.**

Hate Singh Bhagat Singh vs. State of Madhya Bharat **AIR 1953 SC 468,** *Vikramjit Singh vs. State of Punjab* **2006 (9) Suppl. SCR 375 = 2006 (12) SCC 306) and** *Ranvir Yadav vs. State of Bihar* **2009 (7) SCR 653 = 2009 (6) SCC 595 – referred to.**

8.1. With regard to the plea that the prosecution was barred by s. 140 of the Delhi Police Act, 1978, it is relevant to note that s. 140 of the Delhi Police Act, 1978 postulates that in order to take the shelter of the period of three months referred to therein the act done or the wrong alleged to have been done by the police officer should be done under the colour of duty or authority or in excess of such duty or authority or was of such

character, and in no other case. Though, the facts of the instant case show that the cognizance had been taken by the Magistrate beyond three months from the date of incident, in the light of the decisions of this Court, it cannot, by any stretch of imagination, be claimed by anybody that a case of murder would fall within the expression 'colour of duty'. There is absolutely no connection between the act of the appellants and the allegations against them. Section 140 of the Delhi Police Act would, therefore, have absolutely no relevance in this case. [Para 32, 36-37 and 43] [195-D-G; 196-D-F; 198-D-H; 199-B; 203-B-D]

Prof. Sumer Chand vs. Union of India & Ors. **1993 (2) Suppl. SCR 123 = 1994 (1) SCC 64;** *The State of Andhra Pradesh vs. N.Venugopal & Ors.* **AIR 1964 SC 33** *State of Maharashtra vs. Narhar Rao* **AIR 1966 SC 1783,** *State of Maharashtra vs. Atma Ram* **AIR 1966 SC 1786,** *Bhanuprasad Hariprasad Dave & Anr. vs. The State of Gujarat* **1969 SCR 22 = AIR 1968 SC 1323; and** *Jamuna Singh & Ors. vs. Bhadai Shah* **1964 SCR 37 = AIR 1964 SC 1541 – relied on.**

8.2. As regards the sanction u/s 197 Cr.P.C., PW-48 deposed that a request had been received from the CBI for according sanction for the prosecution of the appellants along with the investigation report and a draft of the sanction order. He further stated that on receipt of the documents the matter had been referred first to the Law Department of the Delhi Administration, then forwarded to the Home Department and thereafter to the Chief Secretary and finally, the entire was file put up before the Lt. Governor who had granted the sanction for the prosecution of the ten officials. It is true that certain other material which was not yet available with the CBI at that stage could not obviously have been forwarded to the Lt. Governor, but from the various documents on

record, it is evident that even on the documents, as laid, adequate material for the sanction was available to the Lt. Governor. The sanction order dated 10-10- 2001 is extremely comprehensive as all the facts and circumstances of the case had been spelt out in the 16 pages that the sanction order runs into. [para 46] [204-B-F]

State of Karnataka vs. Ameerjan **2008 (1) SCC (Crl) 130;** *S.B.Saha & Ors. vs. M.S.Kochar* **1980 (1) SCR 111 = AIR 1979 SC 1841 – referred to.**

9.1. So far as the plea for acquittal of Head Constable A-6 that as he did not fire at the car is concerned, admittedly, as per his own showing, he had used his service weapon and fired one shot therefrom. The prosecution story is that he had fired at the car whereas the defence is that he had fired the shot in the air to keep the crowd away. It appears that the crowd had collected only after the shooting had ceased. There is no evidence whatsoever to show that any crowd had collected while the firing was going on or that a single shot had been fired after the volley of 34 shots. The large number of photographs of the site show that the crowd that had gathered after the shooting, was perfectly disciplined and keeping a reasonable distance away from the Esteem car and the dead bodies lying around it. Admittedly, there is absolutely no evidence with regard to the defence taken by A-6. The story projected by him in his 313 statement is not supported by any evidence whatsoever. His case, therefore, cannot be distinguished from the other seven accused who had admittedly fired at the car. [para 50] [207-B-H]

9.2. It is significant that these seven police officers had admitted to firing into the vehicle but it is their case in their statements u/s 313 of the Cr.P.C. as also their written statements that they had done so only on the

direction of A-1, a superior officer. They have accordingly sought the benefit of s. 79 IPC. However, there is absolutely no evidence that the firing had been resorted to by the seven appellants on the order of A-1 as it has been found that it was pursuant to the common intention of all the accused that the incident had happened. It is also relevant that the statements made by these seven appellants are not admissible in evidence against A-1, being a co-accused. [para 52 and 54] [208-B, G-H; 209-A-B]

Vijendrajit Ayodhya Prasad Goel vs. State of Bombay **AIR 1953 SC 247 and** *S.P.Bhatnagar & Anr. vs. The State of Maharashtra* **AIR 1979 SC 826 – relied on**

9.3. Section 315 Cr.P.C. now makes an accused a competent witness in his defence. The seven appellants did not choose to come into the witness box to support their plea based on the orders of A-1, a superior officer, and, therefore, in the face of no evidence, the story projected by them cannot be believed. [para 54] [209-C-D]

10. On an overall view of the evidence in the case, this Court finds no fault with the judgments of the trial court as well as the High Court. [para 55] [209-E-F]

Ram Nath Madhoprasad & Ors. vs. State of M.P. **AIR 1953 SC 420;** *Lakhjit Singh & Anr. vs. State of Punjab* **1994 Suppl. (1) SCC 173;** *Dinesh Seth vs. State of NCT of Delhi* **2008 (12) SCR 113 = 2008 (14) SCC 94 - cited**

Case Law reference:

2010 (3) SCR 236	**relied on**	**para 5**
AIR 1953 SC 420	**cited**	**para 5**
1997 (3) SCR 957	**stood overruled**	**para 5**

1999 SCC (Crl) 371	**stood overruled**	**para 5**
2009 (7) SCR 486	**held per incurium**	**para 5**
AIR 1928 P.C. 254	**referred to**	**para 5**
1966 (3) SCR 643	**held inapplicable**	**para 5**
1962 (2) SCR 904	**distinguished**	**para 5**
AIR 1953 SC 468	**referred to**	**para 5**
2006 (9) Suppl. SCR 375	**referred to**	**para 5**
2009 (7) SCR 653	**referred to**	**para 5**
1964 SCR 37	**relied on**	**para 5**
1993 (2) Suppl. SCR 123	**relied on**	**para 5**
2008 (1) SCC (Crl) 130	**referred to.**	**Para 5**
1962 Suppl. SCR 848	**relied on**	**para 7**
1994 Suppl. (1) SCC 173	**cited**	**para 9**
2004 (5) SCC 334	**relied on**	**para 9**
2008 (12) SCR 113	**cited**	**para 9**
1998 (2) SCR 117	**relied on**	**para 9**
2010 (9) SCC 747	**relied on**	**para 9**
AIR 1964 SC 33	**relied on**	**para 9**
AIR 1966 SC 1783	**relied on**	**para 9**
AIR 1966 SC 1786	**relied on**	**para 9**
1969 SCR 22	**relied on**	**para 9**
1980 (1) SCR 111	**referred to**	**para 9**
2004 (2) SCC 203	**held inapplicable**	**para 10**
2010 (10) SCC 259	**relied on**	**para 22**

1952 SCR 839	**relied on**	**para 25**
AIR 1973 SC 2622	**relied on**	**para 26**
AIR 1953 SC 247	**relied on**	**para 53**
AIR 1979 SC 826	**relied on**	**para 53**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2231 of 2009.

From the Judgment & Order dated 18.9.2009 of the High Court of Delhi at New Delhi in Crl. Appeal No. 671 of 2007.

WITH

Crl. Appeal Nos. 2476, 2477-2483 & 2484 of 2009.

H.P. Raval, ASG, Amarendra Sharan, R. Balasubramanian, Uday U. Lalit, S. Chandra Shekhar, Manoj Kumar, Sanchit Guru, Suraj Rathi, Somesh Chandra, Ram Raghvendra, S. Sadashiv Reddy, S. Usha Reddy, Vineet Dhanda, J.P. Dhanda, Raj Rani Dhanda, Amrendra Kr. Singh, N.A. Usmani, Manu Sharma, Vinay Arora, Sanjay Jain, P.K. Dey, Padmalakshmi Mridul, Madhurima Mridul, Anirudh Sharma, Harsh N. Parekh, Anando Mukherji, S.K. Saxena, Subash Kaushik, Ranjana Narayana, Arvind Kumar Sharma, Anil Karnwal, Chander Shekhar Ashri for the appearing parties.

The Judgment of the Court was delivered by

HARJIT SINGH BEDI, J. 1. This judgment will dispose of Criminal Appeal Nos.2231 of 2009, 2476 of 2009 and 2477-2484 of 2009. The facts have been taken from Criminal Appeal No. 2231 of 2009 (Satyavir Singh Rathi vs. State thr. C.B.I.).

2. On the 31st March 1997 Jagjit Singh and Tarunpreet Singh PW-11 both hailing from Kurukshetra in the State of Haryana came to Delhi to meet Pradeep Goyal in his office situated near the Mother Dairy Booth in Patparganj, Delhi. They

reached the office premises between 12.00 noon and 1.00 p.m. but found that Pradeep Goyal was not present and the office was locked. Jagjit Singh thereupon contacted Pradeep Goyal on his Mobile Phone and was told by the latter that he would be reaching the office within a short time. Jagjit Singh and Tarunpreet Singh, in the meanwhile, decided to have their lunch and after buying some ice-cream from the Mother Dairy Booth, waited for Pradeep Goyal's arrival. Pradeep Goyal reached his office at about 1.30 p.m. but told Jagjit Singh and Tarunpreet Singh that as he had some work at the Branch of the Dena Bank in Connaught Place, they should accompany him to that place. The three accordingly left for the Bank in the blue Maruti Esteem Car bearing No. UP-14F-1580 belonging to Pradeep Goyal. Mohd. Yaseen, a hardcore criminal, and wanted by the Delhi Police and the police of other States as well, in several serious criminal cases, was being tracked by the Inter-State Cell of the Crime Branch of the Delhi Police and in the process of gathering information of his movements, his telephone calls were being monitored and traced by PW-15 Inspector Ram Mehar. The appellant Satyavir Singh Rathi, Assistant Commissioner of Police and the In-Charge of the Inter-State Cell, received information that Mohd. Yaseen would be visiting a place near the Mother Dairy, Patparganj, Delhi at about 1.30 p.m. on the 31st March 1997. Inspector Anil Kumar (appellant in Criminal Appeal No.2484 of 2009) of the Crime Branch was accordingly detailed by ACP Rathi to keep a watch near the Mother Dairy Booth in Patparganj and he was actually present at that place when Tarunpreet Singh and Jagjit Singh met Pradeep Goyal in his office. Jagjit Singh who was a cut haired Sikh (without a turban though he sported a beard) was mistaken for Mohd. Yaseen by Inspector Anil Kumar. As the Inspector was, at that stage, accompanied only by two police officials, Head Constable Shiv Kumar and Constable Sumer Singh, he called for reinforcements from ACP Rathi who was at that time present in his office in Chanakayapuri. On receiving the call, ACP Rathi briefed the staff in his office and told them that two

young persons had been spotted near the Mother Dairy Booth in Patparganj and that one of them, a bearded young man, resembled Mohd. Yaseen, the wanted criminal. The ACP, along with a police party consisting in all of 12 persons, left the Inter-State Cell office at 1.32 p.m. to assist the police team led by Inspector Anil Kumar. As per the record, barring Head Constable Srikrishna and Constable Om Niwas, all the officials, including ACP Satyavir Singh Rathi were armed with service weapons. The police officials and the weapons they were carrying are given hereunder:

(i) ACP Satyavir Singh Rathi	9 MM Pistol No.0592
(ii) Insp. Anil Kumar	.38 Revolver No.1147
(iii) SI Ashok Rana	.38 Revolver No.1139
(iv) SI A Abbas	.38 Revolver No.1114
(v) ASI Shamsuddin	.38 Revolver No.1112
(vi) HC ShivKumar	.38 Revolver No.1148
(vii) HC Mahavir Singh	.38 Revolver No. 0518
(viii) HC Tej Pal	.38 Revolver No.1137
(ix) Ct.Sunil Kumar	SAF carbine
(x) Ct. Subhash Chand	.38 Revolver No.1891
(xi) Ct. Kothari Ram	AK-47 No.5418
(xii) Ct. Bahadur Singh	AK-47 No. 2299
(xiii) Ct. Sumer Singh	.38 Revolver No.1906

3. In the meanwhile, the Maruti Esteem car, which had been followed by Inspector Anil Kumar and the other two officials with him, stopped at the Dena Bank at 2.00 p.m. Pradeep Goyal then got down from the car, leaving Jagjit Singh

and Tarunpreet Singh behind. Jagjit Singh, however, on the request of Pradeep Goyal, occupied the driver's seat so that the car was not towed away by the police. Pradeep Goyal then went on to the Dena Bank where two of his employees Vikram and Rajiv were waiting for him outside the Bank. The three then went inside the Bank whereafter Vikram returned to the car to pick up a briefcase belonging to Pradeep Goyal. Tarunpreet Singh also accompanied Vikram to the Bank while Jagjit Singh continued to sit alone in the driver's seat. Pradeep Goyal came out from the Bank at about 2.30 p.m. and after giving instructions to his employees, sat in the Esteem car on the front left seat whereas Tarunpreet Singh got into the rear seat. The car driven by Jagjit Singh thereafter moved on towards Barakhamba Road. As the car halted at the red light on Barakhamba Road, the two police parties, one headed by ACP Satyavir Singh Rathi and other by Inspector Anil Kumar, joined forces. The car was immediately surrounded by the police officials who fired from almost all sides killing Pradeep Goyal and Jagjit Singh instantaneously and causing grievous injuries to Tarunpreet Singh. The three occupants were removed to the RML Hospital in a Police Control Room Gypsy, but Pradeep Goyal and Jagjit Singh were declared dead on arrival. On receiving information with regard to the shootout, Inspector Niranjan Singh- PW 42, the SHO of Police Station, Connaught Place, New Delhi, rushed to the place of incident followed by senior police officials, including the DCP. On an inspection of the car, Inspector Niranjan Singh PW recovered a 7.65 mm pistol loaded with 7 live cartridges in the magazine, a misfired cartridge in the breech and two spent cartridge cases of 7.65 mm bore from inside the car. These items were taken into possession. Inspector Anil Kumar also handed over a written complaint with regard to the incident to Inspector Niranjan Singh, who in turn sent the same to the Police Station with his endorsement, and an FIR No. 448/97 dated 31st March 1997 under Sections 186/353/307 of the IPC and Section 25 of the Arms Act was registered against the occupants of the Car. In the complaint, Inspector Anil Kumar recorded that after the Car

had stopped at the red light, it had been surrounded by the police and that he had thereafter knocked at the driver's window asking the occupants to come out but instead of doing so, Jagjit Singh had started firing at the police party from inside the car resulting in gun shot injuries to Constables Sunil Kumar and Subhash Chand and that it was thereafter that the police personnel had opened fire at the car in self defence with a view to immobilizing the occupants and to prevent their escape. The incident, however, sparked a huge public outcry. The very next day Dinesh Chand Gupta, father-in-law of Pradeep Goyal, made a complaint to the Lt. Governor, Delhi on which another FIR No. 453/97 was registered at Police Station Connaught Place, New Delhi against the police personnel involved in the shootout for an offence punishable under Section 302/34 of the IPC. In the complaint, it was alleged that the police officials had surrounded the car and had fired indiscriminately and without cause, at the occupants killing the two and causing grievous injuries to the third. The initial investigation with regard to the incident was carried out by Inspector Niranjan Singh but pursuant to the orders of the Government of India made on the 1st April of 1997 the investigation was handed over to the Central Bureau of Investigation (hereinafter called the CBI) and the two FIRs were amalgamated for the purpose of investigation. The CBI, on investigation, came to the conclusion that the police party headed by ACP Satyavir Singh Rathi and Inspector Anil Kumar had fired on the Maruti Esteem car without provocation and that FIR No. 448/97 dated 31st March 1997, registered on the complaint of Inspector Anil Kumar, was intended to act as a cover-up for the incident and to justify the police action. The CBI accordingly found that no shot had been fired from inside the car by Jagjit Singh, as alleged, and that the claim in this FIR that two police officials, who were a part of the police party, had sustained gun shot injuries as a result of firing from the Car, was false. The investigation also found that the 7.65 MM pistol and cartridges allegedly recovered from inside the car had actually been planted therein by members of the police party with a view to creating a defence and screening themselves

from prosecution. As a result of the investigation made in both the FIRs, a charge sheet was filed before the Chief Metropolitan Magistrate on the 13th June 1997. The said Magistrate took cognizance for the offences punishable under Section 302/307/201/120-B/34 by his order dated 10th July 1997 against 10 members of the police party and in addition, under Section 193 of the IPC against Inspector Anil Kumar for having lodged a false report with regard to the incident. The matter was then committed for trial. The trial court recorded the evidence of 74 witnesses and also took in evidence a large number of documents, including the reports of the Forensic Science Laboratory. In the course of a very comprehensive judgment dated 10th July, 1997 the trial court recorded the conviction and sentence as under:

Name of appellant	Offence for which convicted	Sentence awarded
Satyavir Singh Rathi, ACP, Delhi Police	U/Sections 120B IPC,302 IPC read with 120B IPC,307 IPC read with 120B IPC, 193 IPC read with 120B IPC, 193 IPC, 201/34 IPC and 203/34 IPC	Under Section 120B IPC imprisonment for life & a fine of Rs.100/-. Under Section 302 IPC read with Section 120B IPC – imprisonment for Life and a fine of Rs.100/- Under Section 307 IPC Read with Section 120B IPC – imprisonment for life and a fine of Rs.100/- Under Section 193 IPC read with Section 120B IPC – rigorous imprisonment for 7 years and a fine of Rs.100/- Under Section 201 IPC – rigorous imprisonment for 7 years and a fine of Rs.100/-.

		Under Section 302 IPC – rigorous imprisonment for 2 years.
Anil Kumar, Inspector Of Police, Delhi Police	U/Sections 120B IPC,302 IPC r/w 120B IPC,307IPC r/w 120B IPC 193 IPC r/w 120 B IPC,193 IPC,201/34 IPC And 203/34 IPC	U/Section 120B IPC – imprisonment for life and a fine of Rs.100/- U/S 302 IPC read with Section 120B IPC – imprisonment for life and a fine of Rs.100/- U/S 307 IPC r/w Sec.120B IPC – imprisonment for life and a fine of Rs.100/-. U/S 193 IPC r/w Sec.120B IPC – rigorous imprisonment for 7 years and a fine of Rs.100/-. U/S 201 IPC – rigorous imprisonment for 7 years and a fine of Rs.100/-. U/S 203 IPC – rigorous imprisonment for 2 years.
Ashok Rana, Sub-Inspector of Police, Delhi Police	U/Sections 120B IPC,302IPC r/w 120B IPC,307 IPC r/w 120B IPC, 193 IPC r/w 120B IPC	U/S 120B IPC – imprisonment for life and a fine of Rs.100/- U/S 302 IPC r/w Sec.120B IPC – imprisonment for life and a fine of Rs.100/- U/S 307 IPC r/w Sec.120B IPC – imprisonment for life and a fine of Rs.100/-. U/S 193 IPC r/w Sec.120B

		IPC – rigorous imprisonment for 7 years and a fine of Rs.100/-. U/S 201 IPC – rigorous imprisonment for 7 years and a fine of Rs.100/-. U/S 203 IPC – rigorous imprisonment for 2 years.
Ashok Rana, Sub-Inspector of Police, Delhi Police	U/Sections 120B IPC,302IPC r/w 120B IPC,307 IPC r/w 120B IPC,193 IPC r/w 120B IPC	U/S 120B IPC – imprisonment for life and a fine of Rs.100/- U/s 302 IPC r/w S.120B IPC- imprisonment for life and a fine of Rs.100/-. U/S 307 IPC r/w S.120B IPC – imprisonment for life and a fine of Rs.100/-. U/S 193 IPC r/w S.120B IPC – rigorous imprisonment for 7 years and a fine of Rs.100/-.
Shiv Kumar, Head Constable, Delhi Police	120B IPC,302 IPC r/w 120B IPC 307 IPC r/w 120B IPC,193 IPC r/w 120B IPC	U/S 120B IPC- - imprisonment for life and a fine of Rs.100/- U/S 302 IPC r/w S.120B IPC – imprisonment for life and a fine of Rs.100/-. U/S 307 IPC r/w S.120B IPC – imprisonment for life and a fine of Rs.100/-. U/S 193 IPC r/w S.120B IPC – rigorous imprisonment for 7 years

		and a fine of Rs.100/-
Taj Pal Singh, Head Constable, Delhi Police	120B IPC,302 IPC r/w 120B IPC,307 IPC r/w 120B IPC, 193 IPC r/w 120B IPC	U/S 120B IPC – imprisonment for life and a fine of Rs. 100/-
		U/S 302 IPC r/w S.120B IPC – imprisonment for life and a fine of Rs.100/-
		U/S 307 IPC r/w S.120B IPC – imprisonment for life and a fine of Rs.100/-.
		U/S 193 IPC r/w S.120B IPC-rigorous imprisonment for 7 years and a fine of Rs.100/-
Mahavir Singh, Head Const. Delhi Police	120B IPC,302IPC r/w 120B IPC,307 IPC r/w 120B IPC,193 IPC r/w 120B IPC	U/S 120B IPC – imprisonment for life and a fine of Rs.100/-
		U/S 302 IPC r/w S.120B IPC – imprisonment for life and a fine of Rs.100/-
		U/S 307 IPC r/w S.120B IPC – imprisonment for life and a fine of Rs.100/-.
		U/S 193 IPC r/w S.120B IPC – rigorous imprisonment for 7 years and a fine of Rs.100/-.
Sumer Singh, Const. Delhi Police.	120B IPC,302 IPC r/w 120B IPC 307 IPC r/w 120B IPC, 193 IPC r/w 120B IPC	U/S 120B IPC – imprisonment for life and a fine of Rs.100/-.
		U/S 302 IPC r/w S.120B IPC – imprisonment for life

		and a fine of Rs.100/-.
		U/S 307 IPC r/w S.120B IPC – imprisonment for life and a fine of Rs.100/-
		U/S 193 IPC r/w S.120B IPC – rigorous imprisonment for 7 years and a fine of Rs.100/-.
Subhash Chand, Const. Delhi Police	120B IPC,302 IPC r/w 120B IPC,307 IPC r/w 120B IPC, 193 IPC r/w 120B IPC	U/S 120B IPC – imprisonment for life and a fine of Rs.100/-.
		U/S 302 IPC r/w S.120B IPC – imprisonment for life and a fine of Rs.100/-.
		U/S 307 IPC r/w S.120B IPC – imprisonment for life and a fine of Rs.100/-
		U/S 193 IPC r/w S.120B IPC – rigorous imprisonment for 7 years and a fine of Rs.100/-.
Sunil Kumar, Const. Delhi Police	120B IPC,302 IPC r/w 120B IPC, 307 IPC r/w 120B IPC,193 r/w 120B IPC	U/S 120B IPC – imprisonment for life and a fine of Rs. 100/-.
		U/S 302 IPC r/w S.120B IPC – imprisonment for life and a fine of Rs.100/-.
		U/S 307 IPC r/w S.120B IPC – imprisonment for life and a fine of Rs.100/-.
		U/S 193 IPC r/w S.120B IPC – rigorous imprisonment for 7 years

		and a fine of Rs.100/-.
Kothari Ram, Const. Delhi Police	120B IPC,302 IPC r/w 120B IPC, 307 IPC r/w 120B IPC,193 IPC r/w 120B IPC	U/S 120B IPC – imprisonment for life and a fine of Rs.100/-.
		U/S 302 IPC r/w S.120B IPC – imprisonment for life and a fine of Rs.100/-.
		U/S 307 IPC r/w S.120B IPC – imprisonment for life and a fine of Rs.100/-.
		U/S 193 IPC r/w S.120B IPC – rigorous imprisonment for 7 years and a fine of Rs.100/-.

4. All the substantive sentences were directed to run concurrently. The matter was thereafter taken in appeal to the Delhi High Court which re-examined the entire evidence and concluded that the conviction of the appellants under Section 302/120B of the IPC could not be sustained and they were entitled to acquittal of that charge, but their conviction and sentence under Sections 302 and 307 of the IPC was liable to be maintained with the aid of Section 34 of the IPC instead of Section 120B of the IPC. It was also directed that the conviction and sentence of ACP Rathi and Inspector Anil Kumar under Sections 193, 201/34 and 203/34 of the IPC was liable to be maintained. The appeals were accordingly allowed to this very limited extent. It is in this background that the matter is before us after the grant of Special leave on the 23rd November 2009.

5. We have heard the learned counsel for the parties in extenso in arguments spread over several days. Mr. Amrendra Sharan, the learned senior counsel appearing in the lead case i.e. the appeal of ACP Satyavir Singh Rathi, has raised several arguments in the course of the hearing. He has first pointed out

that the prosecution story and the findings of the trial court as well as of the High Court with regard to the manner of the incident and how it happened were erroneous and the defence version that the appellants had fired at the car in self- defence after Jagjit Singh had first fired a shot through the window injuring two policemen was, in fact, the correct one in the light of the prosecution evidence itself that a 7.65 mm bore pistol, and two fired cartridge cases had been found and recovered from the car itself as deposed to by PW13, PW15, PW35, PW41 and PW57 and as these witnesses had not been declared hostile the prosecution was bound by their statements. In this connection, the learned counsel has placed reliance on Javed Masood & Anr. *vs. State of Rajasthan 2010 (3) SCC 538. It* has also been pleaded that the fact that a single shot had been followed by a volley had been deposed to by PW-26 Avtar Singh who was an injured witness and also by ASI Om Bir-PW who was in a police control room Gypsy stationed closed by. It has further been pointed out that from the evidence of the aforesaid witnesses it was clear that all the window panes of the car had been broken which indicated that a shot had indeed been fired from inside the car. In addition, it has been urged by Mr. Sharan that the investigation made by the CBI was completely partisan and though a large number of independent witnesses had been examined at site, none had been cited as witnesses, and that even Dr. V.Tandon, who had extracted the bullet from the person of Constable Sunil Kumar, had not been produced as a witness. It has been highlighted that no investigation had been made as to the ownership of the 7.65 mm pistol or as to how and who had planted it in the car, as alleged. It has further been submitted that there was no common intention on the part of ACP Rathi along with his co-accused to commit the murders as he was sitting in his Gypsy far away from the place of the shoot out and there was no evidence whatsoever to suggest that he had either encouraged or directed the other police officials to shoot at the car and as such his conviction with the aid of Section 34 of the IPC, could not

be sustained. He has, in this connection, cited Ram Nath Madhoprasad *& Ors. vs. State of M.P. AIR 1953 SC 420. As* a corollary to this argument, the learned counsel has also emphasized that as the trial court had framed a charge under Section 302/120B and in the alternative under Section 302/34 of the IPC but had chosen to record a conviction under the former provision only and had not rendered any opinion on the alternative charge, it amounted to a deemed acquittal of the alternative charge and as the State had not challenged the matter in appeal, the High Court was not justified in an appeal filed by the accused in altering the conviction from one under Section 302/120B of the IPC to one under Section 302/34 of the IPC. In this connection, the learned counsel has placed primary reliance on Sangaraboina Sreenu *vs. State of A.P. 1997 (5) SCC 348 and* Lokendra Singh vs. S*tate of M.P. 1999 SCC (Crl) 371 a*nd Bimla Devi *&* Anr. vs*. State of J & K 2009 (6) SCC 629 and* in addition on Kishan Singh vs. Emp*eror AIR 1928 P.C. 254, T*he State of Andhra *Pradesh vs. Thadi Narayana 1962 (2) SCR 904 and* Lakhan Mahto vs. Sta*te of Bihar 1966 (3) SCR 643. Th*e learned counsel has also urged that it was settled beyond doubt that the provisions of Section 313 of the Code of Criminal Procedure had to be scrupulously observed and it was obligatory on the trial court to put all the incriminating circumstances in the prosecution story to an accused so as to enable him to effectively meet the prosecution case and if some material circumstance was not put to an accused, it could not be taken into account against him and had to be ruled out of consideration in the light of the judgments reported as Hate Singh Bhagat S*ingh vs. State of Madhya Bharat AIR 1953 SC 468, Vik*ramjit Singh vs. *State of Punjab 2006 (12) SCC 306) a*nd Ranvir Yadav vs. Sta*te of Bihar 2009 (6) SCC 595. T*he learned counsel has also furnished a list of 15 circumstances which had not been put to the accused, particularly to ACP Rathi, at the time when his statement had been recorded. It has, in addition, been pleaded that the prosecution was barred as the cognizance in this case had been taken beyond the period of 3 months as envisaged in

Section 140 of the Delhi Police Act, 1978 and on the factual aspect has referred us to various dates relevant in the matter. In this connection, the learned counsel has placed reliance on Jamuna Singh & Ors. *vs. Bhadai Shah AIR 1964 SC 1541 and* Prof. Sumer Chand vs*. Union of India & Ors. 1994 (1) SCC 64. It* has finally been submitted by Mr. Sharan that the sanction under Section 197 of the Code of Criminal Procedure too had been given without application of mind and as the entire record was not before the Lt. Governor, all relevant material had not been considered and for this additional reason also, the prosecution was not justified. In this connection the learned counsel has placed reliance on State of Karnataka v*s. Ameerjan 2008 (1) SCC (Crl) 1*30.

6. Mr. Uday U.Lalit, the learned senior counsel appearing for Head Constable Mahavir Singh, the appellant in Criminal Appeal No. 2476/2009, has pointed out that there were 15 persons in all in the police party and of them only 10 persons had been sent for trial and of the 5 left out, three had not used the firearms which they had been carrying and Head Constable Mahavir Singh (as per the evidence on record) had not fired into the car, his case fell in the category of those who had not been sent up for trial and, as such, he too was entitled to acquittal. It has also been pointed out that after the dead body of Jagjit Singh had been cremated, a bullet had been recovered from his ashes allegedly fired from the weapon of Head Constable Mahavir Singh but as the High Court had disbelieved the evidence of this recovery, there was no evidence against him. He has, in addition, supported Mr. Sharan's arguments on Section 313 of the Cr.P.C. and has contended that the scope and rigour of Section 313 remained unchanged despite the introduction of Section 315 of the Cr.P.C. which now made an accused a competent witness in his defence.

7. Mr. Balasubramaniam, the learned senior counsel for Inspector Anil Kumar in Criminal Appeal No. 2484 of 2009, has also supported the arguments raised by the other counsel with

regard to the common intention of the appellant more particularly as he had not fired at the car though armed. He has also pleaded that even accepting the prosecution story as it was, the only inference that could be drawn was that the police party had fired at the car in self-defence and that such an inference could be drawn from prosecution story had been accepted by this Court in Mohan Singh & Anr. v*s. State of Punjab AIR 1963 SC 174.*

8. Mr. Vineet Dhanda, the learned counsel for the appellants in Criminal Appeal Nos. 2477-2483 of 2009, has pointed out that although the appellants in these matters had admitted that they had fired into the car yet the fact that Mohd. Yaseen was a dreaded criminal with 21 criminal cases against him including 18 of murder, the police party had to be careful and they had fired back only after the first shot by Jagjit Singh. The learned counsel, however, has confined his primary argument to the fact that the appellants were acting on the orders of ACP Rathi, who was their superior officer, and as they had taken an oath at the time of induction to office to follow the orders of superior officers, they were liable for exoneration of any kind of misconduct as per Section 79 of the IPC. He has also pointed out that the appellants had, in their statements recorded under Section 313 of the Cr.P.C., unanimously stated that the orders for the firing had been given by ACP Rathi.

9. Mr. Harin Rawal, the Additional Solicitor General representing the CBI has, however, controverted the submissions made by the counsel for the appellants. It has been pointed out that the investigation had revealed that the incident had happened as the police party was under the impression that Jagjit Singh was in fact Mohd. Yaseen and in their anxiety to get at him, had decided to eliminate him pursuant to their common intention. It has been highlighted that the defence that Jagjit Singh had first resorted to firing from inside the car had been found to be unacceptable by both the courts below and a positive finding had been recorded that the 7.65 mm bore pistol

had been surreptitiously placed in the car to create a defence. He has further pointed out that the prosecution story with regard to the incident had been proved by independent evidence and as the investigation was being handled by the Delhi Police at the initial stage, some attempt had apparently been made to help the appellants in order to create a cover-up story. The argument that the CBI had conducted a partisan investigation has also been controverted. It has been highlighted that all relevant evidence had been produced before the Court and nothing had been withheld and that in any case allegations of a partisan investigation could be made against an individual officer but could not be generalized against an organization as vast as the CBI and no argument had been addressed identifying any officer(s) of the CBI of any misconduct. It has also been submitted that from the evidence of the prosecution witnesses and the conduct of the appellants pre and post-facto the incident indicated that the murders had been committed pursuant to their common intention and this was also supported by the fact that a false story had been put up in defence. It has also been pointed out that deemed acquittal theory projected by Mr. Sharan could not be applied in the present case as the judgment reported in Lokendra Singh's cas*e cited by him ha*d been doubted in Lakhjit Singh & Anr. *vs. State of Punjab 1994 Suppl. (1) SCC* 173 and the matter had thereafter been referred to a larger Bench which in the judgment reported in Dalbir Singh vs. Sta*te of U.P. 2004 (5) SCC 334 had* over-ruled the judgment in Lokendra Singh's cas*e (supra) and tha*t the judgment in Dalbir Singh's case *had subsequentl*y been followed in Dinesh Seth vs. State *of NCT of Delhi 2008 (14) SCC 94. It* has been highlighted that the judgment in Bimla Devi's case (s*upra) relied* upon by Mr. Sharan had not taken note of the last two cited cases. It has, further been contended by Mr. Rawal that though it was a matter of great importance that all incriminating circumstances must be put to an accused, but if some material had been left out it would not ipso-facto mean that it had to be ruled out of consideration as it was for an accused to show that prejudice had been suffered by him

on that account. It has been pointed out that the issue of prejudice ought to have been raised by the appellants at the very initial stage before the trial court and as this had not happened, the prosecution was fully justified in arguing that no prejudice had been caused. The learned ASG has placed reliance on Shobhit Chamar & Anr*. vs. State of Bihar 1998 (3) SCC 455 and* Santosh Kumar Singh *vs. State thr. CBI 2010 (9) SCC 747 for* this submission. The arguments raised by Mr. Sharan with regard to Section 140 of the Delhi Police Act and Section 197 of the Cr.P.C. have also been controverted. It has been submitted that Section 140 of the Delhi Police Act would apply only to offences committed under that Act and not to other offences and that in any case in order to claim the protection under Section 140, the act done by a police officer had to be "under the colour of duty" and as "murder" would not come in that category, no protection thereunder was available. In this connection, the learned ASG has placed reliance on The State of Andhra *Pradesh vs. N.Venugopal & Ors. AIR 1964 SC 33, Stat*e of Maharashtr*a vs. Narhar Rao AIR 1966 SC 1783, St*ate of Maharashtra *vs. Atma Ram AIR 1966 SC 1786 Bha*nuprasad Haripras*ad Dave & Anr. vs. The State of Gujarat AIR 1968 SC 1323, an*d Prof. Sumer Chand's *case (supra) as well*. In so far as the sanction under Section 197 of the Cr.P.C. is concerned, it has been pleaded that the Lt. Governor had all relevant material before him when the order granting sanction had been made and that the material was adequate for him to take a decision and merely because some of the evidence had been received by the CBI after the grant of sanction, would not invalidate the sanction. In this connection, the learned ASG has placed reliance on S.B.Saha & Ors. vs. *M.S.Kochar AIR 1979 SC 1841.*

10. The learned ASG has also controverted Mr. Lalit's arguments with regard to the culpability of appellant Head Constable Mahavir Singh. It has been pointed out that the bullet recovered from the ashes of Jagjit Singh had been found to have been fired from the weapon of Head Constable Mahavir

Singh but the High Court had declined to accept this part of the prosecution story as Didar Singh PW who had produced the bullet before the Haryana Police after picking it up from the funeral ashes, had not deposed in his evidence that he had handed over the bullet to the Police. It has, however, been submitted that Head Constable Mahavir Singh had indeed fired his weapon had been admitted by him and the story that he had fired in the air to disperse a huge and turbulent crowd that had collected, was not borne out by the evidence. Mr. Balasubramaniam's argument with regard to the involvement of Inspector Anil Kumar has also been challenged by the ASG by urging that though he admittedly had not fired his weapon but his case did not fall in the category of those police officials who had not been sent for trial. It has been submitted that the appellant had in fact been the prime mover in the entire story. Dealing with the arguments addressed by Mr. Vineet Dhanda, the learned ASG has highlighted that there was no evidence to suggest that it was on the orders of ACP Rathi that the firing had been resorted to, except for the self-serving statements made by the appellants under Section 313. It has, accordingly, been pointed out that this set of appellants could not claim the benefit of Section 79 of the Indian Penal Code.

11. On hearing the learned counsel for the parties, several facts appear to be admitted on record but are compounded by a tragedy of errors. These relate to the place and time of incident, the presence of the appellants duly armed with most of them having fired into the car with their service weapons, that Mohd. Yaseen was admittedly a notorious criminal and that Jagjit Singh (deceased) had been mistaken by Inspector Anil Kumar for Mohd. Yaseen, and that Pradeep Goyal owned a blue Esteem Car with a Uttar Pradesh number plate, and had his office in Patparganj near the Mother Dairy Booth. It is in this background that the prosecution and the defence versions have to be examined. The prosecution story has already been narrated above and does not require any recapitulation in detail. Suffice it to say that Inspector Anil Kumar and his two

associates had followed the car driven by Pradeep Goyal to the Dena Bank Branch at Connaught Place and it was after Pradeep Goyal and the others had left the Dena Bank premises and were near the Barakhamba Road crossing that the two police parties, one headed by Inspector Anil Kumar, and other by ACP Rathi, had joined forces and surrounded the car as it stopped at a red light, and had fired into it killing two persons and injuring one. It is at this stage that the prosecution and the defence deviate as it is the case of the defence that after the car had been surrounded, Inspector Anil Kumar had knocked at the driver's window asking the occupants to come out but instead of doing so Jagjit Singh had fired two shots at the police which had led to a fusillade in self defence. It is true that Avtar Singh PW, who was an injured witness and ASI Ombir Singh, PW-13 did say that the multiple firing had been preceded by one solitary shot which apparently is in consonance with the defence version. Likewise, PW-13 ASI Ombir Singh, PW15 Inspector Ram Mehar, PW-35 Inspector Rishi Dev, PW41 Constable Samrat Lal, and PW-57 S.I. Sunil Kumar testified that a 7.65 mm bore pistol along with two fired cartridges and 7 live cartridges in the magazine and one misfired cartridge in the breech, had been recovered from the car. This story too appears to support the case of the defence. It is equally true that it is not always necessary for the accused to plead self- defence and if the prosecution story itself spells it out, it would be open to the court to examine this matter as well, as held by this Court in Mohan Singh's case (*Supra) and in* James Martin vs. Sta*te of Kerala 2004 (2) SCC 203. Li*kewise, it is now well settled in the light of the judgment in Javed Masood's case *(supra) that if* a prosecution witness is not declared hostile by the prosecution, the evidence of such a witness has to be accepted by the prosecution. It must also be observed that though the prosecution is bound to prove its case beyond reasonable doubt, the obligation on an accused under Section 105 of the Indian Evidence Act, 1872 is to prove it by a preponderance of probabilities. We have, accordingly, examined the evidence under the above broad principles.

12. As already indicated above, PW's Avtar Singh and Ombir Singh did state that a single shot had been followed by multiple shots thereafter. Avtar Singh, however, apparently did not receive a bullet injury as the simple abrasion on him had been apparently caused by a flying splinter from the tarmac but we have extremely independent evidence on this score as well. PW-1 Geeta Ram Sharma, the Chief Photographer of the Statesman Newspaper, which has its office adjacent to the red light on Barakhamba Road, deposed that on the 31st March 1997 at about 2 – 2.30 p.m. while he was sitting in his room along with his colleagues PWs Sayeed Ahmed and Shah Nawaz, they had heard the sound of firing from the Barakhamba Road side and that he along with the other PWs had come out to the crossing along with their camera equipment and had seen a blue Esteem Car standing there with two bodies lying alongside and one injured person sitting on the road with a large number of police men, including some in mufti, present. He stated that on his directions Shah Nawaz and Sayeed Ahmed had taken a large number of photographs of the site and 14 of them were also produced as Exs. P-1 to P-14. He further stated that Vijay Thakur, one of the Reporters of the Statesman had also been present. Sayeed Ahmed and Shah Nawaz aforementioned appeared as PW-2 and PW-67 and supported the story given by PW-1 Geeta Ram Sharma. He also proved the photograph marked Ex. 'X' which shows that the driver's window was intact. We have perused the photograph ourselves and find that the driver's window was definitely intact. The photograph is in black and white and has been taken through the driver's window and the man wearing white with a dark tie seen in the photograph has two shades of white, the portion through the window having a dull hue and the portion above, far brighter. It has come in the evidence of PW-Tarunpreet that the car A.C. was on when the firing took place and the windows had been drawn up. We can also take notice that in this background, the windows and windshield would be of tinted glass. Likewise, we are also of the opinion that had the shots been fired through the driver's window or the

windshield some powder residues would have been left around the bullet holes as the shots would have been fired from almost a touching distance. PW-37 Roop Singh from the Central Forensic Science Laboratory, who had examined the car very minutely detected no such residue and also testified that the appreciable powder distance of a 7.65 mm pistol could be one to two feet but would depend on the sitting posture of the person firing. He also stated that in all at least 29 bullet holes had been detected on the car of 9 mm, 7.62 mm and .380 calibre weapons and that most of the seven exit holes in the car could have been caused by bullets fired from the rear and left side into the car and exiting thereafter, although the possibility of an exit hole being caused by a bullet fired from inside the car could also not be ruled out. He further pointed out that as the bullet fired at Constable Subhash Chand remained embedded in his body and had not been taken out for medical reasons, it was not possible to give an opinion whether it was a bullet of 7.65 mm calibre. The defence story that Constables Sunil and Subhash had suffered injuries on account of the firing of two shots from inside the car, is further belied by the medical evidence. PW-16-Dr. Harmeet Kapur carried out the medico legal examination of Constable Subhash Chand Ex.PW16/B. He found three bullet injuries on his person, which indicated blackening. These injuries could not have been caused by firing from inside the car as the blackening from a pistol would be, at the most, from a foot or two. Likewise, PW-17 Dr. Neeraj Saxena who had examined Constable Subhash Chand, also found three separate gun shot injuries on his person. He also produced in evidence his treatment record Ex.PW17/B. This doctor was not even cross-examined by the prosecution. It needs to be emphasized that all the weapons used in the incident fired single projectiles (i.e. bullets), whereas the distance between the gun shot injuries on the two injured policemen show at least 3 different wounds of entry on each of them. On the contrary, it appears that the injuries suffered by them were caused by the firing amongst the policemen as they had surrounded and fired into the car indiscriminately and

without caution ignoring that they could be a danger to themselves on cross-fire on uncontrolled firing. It has, in fact, been pointed out by Mr. Sharan that ACP Rathi had written to his superiors pointing to the ineptitude of his team of officers but he had been told that no other staff was available. The present case illustrates and proves the adage that a weapon in the hands of an ill trained individual is often more of a danger to himself than a means of defence. In this background, the evidence of PW's Geeta Ram Sharma, Sayeed Ahmad and Shah Nawaz, PW-50 Constable K.K.Rajan and PW-51 Constable Rajinderan Pilley becomes extremely relevant. PW-13 ASI Ombir Singh who was the Officer In-Charge of the PCR Gypsy parked near the Fire Station Building adjoining Barakhamba Road, had undoubtedly supported the defence version that a single shot had been followed by a volley. Constable Rajan and Constable Pilley, who were present along with ASI Ombir Singh, categorically stated that they had not heard any single fire and it was only the continuous firing that had brought them rushing to the site and having reached there, they had taken the three victims to the R.M.L. Hospital. Their story is corroborated by the evidence of the three newspaper employees. Tarunpreet Singh PW was also categoric that no shot had been fired from inside the car. The story therefore that Jagjit Singh had fired at the police party when accosted is, therefore, on the face of it, unacceptable. In this overall scenario even if it is assumed that the driver's window had been found broken as contended by the defence, it would still have no effect on the prosecution story.

13. We now come to the question as to the recovery of the 7.65 mm bore pistol allegedly used by Jagjit Singh as this fact is intimately connected with the defence version. First and foremost, it appears that even prior to the arrival of PW-42 SHO Niranjan Singh, the Car had already been searched and the site violated as a cell phone belonging to one of the victims had been picked up by appellant ASI Ashok Rana and handed over to the SHO. The fact that undue interest had been taken by the

offending police officials is also clear from Ex. P/10 a photograph showing the ASI looking into the car. More significantly, however, PW-12 Sant Lal, the official Photographer of the Delhi Police, took two photographs Ex. PW12/28 and PW12/29 of the driver's seat from very close range but they show no pistol or empty shells. Even more significantly ACP Rathi submitted a detailed written report Ex.D.16/8 on the 1st of April 1997 to his superior officer in which he talks about the firing by Jagjit Singh but makes no mention as to the recovery of a pistol from the car although as per the defence story the weapon had been picked up by the SHO soon after the incident. Likewise, in the report Ex. PW-42/C lodged by Inspector Anil Kumar appellant with the Connaught Place Police immediately after the incident, there is no reference whatsoever to the presence of a 7.65 mm pistol in the car. It is also relevant that the pistol had been sent to the Central Forensic Science Laboratory but PW-46 S.K.Chadha who examined the weapon, could find no identifiable finger prints thereon.

14. The cumulative effect of the above evidence reveals the starkly patent fact that the defence story projected was a palpably false one and the police officials involved having realized almost immediately after the incident (perhaps on questioning Tarunpreet Singh-PW) that they had made a horrific mistake, immediately set about creating a false defence. The trial court and the High Court have accordingly opined on the basis of the overall assessment that the defence version was a concoction and that the prosecution story that it was the unprovoked firing by the appellants which had led to the death of Jagjit Singh and Pradeep Goyal and grievous gun shot injuries to Tarunpreet Singh, had been proved on record.

15. This finding also completely dislodges Mr. Subramaniam's argument that in case the defence, as laid, was not entirely acceptable, the accused were nevertheless entitled to claim the benefit of Exception 3 to Section 300 of the Indian

Penal Code. This Exception pre-supposes that a public servant who causes death, must do so in good faith and in due discharge of his duty as a public servant and without ill-will towards the person whose death is caused. In the light of the fact that the positive case set up the defence has been rejected by the trial court, the High Court as well as by us, the question of any good faith does not arise. On the contrary, we are of the opinion that the appellants had fired without provocation at the Esteem Car killing two innocent persons and injuring one. As already mentioned above, the obligation to prove an exception is on the preponderance of probabilities but it nevertheless lies on the defence. Even on this touchstone the defence cannot succeed. It is true that the High Court has acquitted the appellants of planting the 7.65 mm bore pistol in the car. However, this acquittal has been rendered only on the ground that it was not possible to pinpoint the culprit who had done so. This can, by no stretch of imagination, be taken to mean that the story that the pistol had been planted in the car has been disbelieved by the High Court. The reliance of the defence on Mohan Singh's case a*nd James Martin*'s Case *(supra) is, the*refore, irrelevant on the facts of this case. It is true that the Prosecution is bound by the evidence of its witnesses as held in Javed Masood's case. In the present matter, however, we see that the recovery of the 7.65 mm weapon appears to be an admitted fact, but with the rider that it had been planted to help the defence.

16. The argument that the CBI had conducted a partisan and motivated investigation, is based largely on three premises; firstly, that all the independent witnesses whose statements had been recorded under Section 161 of the Cr.P.C. at the site, had not been brought in evidence, secondly, that Constables Sunil Kumar and Subhash Chand had suffered gun shot injuries but the CBI had tried to create evidence that these injuries were as a consequence of firing by their co-appellants in that an effort had been made to show that the bullet recovered from the ashes of Jagjit Singh after his cremation had been fired

from the weapon carried by Head Constable Mahavir Singh, thirdly, that Dr. V. Tandon who had extracted the bullet from the hand of Constable Sunil Kumar, had not been even cited as a witness.

17. As against this, the learned ASG has pointed out that it was not necessary to produce every person whose statement had been recorded under Section 161 and as the incident was admitted by the defence, though a counter version had been pleaded, the Court was called upon to decide which of the two versions was correct, and in this background all witnesses who were material had been examined. It has further been pointed out that the bullet which had allegedly been recovered from the ashes of Jagjit Singh, had been handed over to Sub-Inspector Ram Dutt of the Haryana Police who in turn had handed it over to the investigating officer of the CBI and as such, the CBI had nothing to do with that recovery.

18. It is true that all witnesses have not been examined but we find that in the circumstances this was not necessary. It will also be seen that as per the prosecution story, appellants Sunil Kumar and Subhash Chand, had been caused injuries by shots fired from the weapons of Head Constable Tej Pal Singh and Constable Kothari Ram appellants. As per the report of the CFSL Ex.P/37F, the bullet recovered from the person of Constable Sunil Kumar had been fired from the .380 revolver of Head Constable Tej Pal Singh and as per the evidence of PW-37 Roop Singh, the possibility that the metallic bullet which was embedded on the person of Constable Subhash Chand appellant could be the steel core portion of a shattered 7.62 mm bullet of the weapon of Constable Kothari Ram. Much argument has, however, been made by the learned defence counsel on the evidence of PW-37 Roop Singh wherein some doubt has been expressed as to the identity of the bullet allegedly recovered from the hand of Constable Sunil Kumar. He stated in his examination-in-chief that he had received parcel No.12 along with a covering letter dated 7th April, 1997

referring to the bullet recovered from Sunil Kumar's hand. He further stated that he had opened the parcel and had found one .380 calibre bullet and no other object therein and that he had re-sealed the bullet in the parcel. It appears from the evidence of PW-37 that parcel No.12 was again opened in Court and at that stage it was found to contain not only a .380 calibre bullet but also one fired 7.65 mm bullet. The witness, however, stated that when the parcel had been received by him in the Ballistics Department from the Biology Department of the Laboratory, the 7.65 mm bullet had not been in it. A pointed question was thereafter put to him as to how he could explain the presence of the 7.65 mm bullet in parcel No.12. In answer to this question, he stated as under:

> "When this parcel was opened on the earlier hearing and at that time after .380 bullet was exhibited the other bullet i.e. 7.65 mm (Ex.PW37/24) was found lying on the table, and so in these circumstances the said 7.65 mm bullet was exhibited."

19. Taken aback by this unforeseen development, the prosecution filed an application dated 4th December 1999 for clarification. A reply thereto was filed by the defence on the 4th of January 2000. On re-examination, the witness suggested that the 7.65 mm bullet had been mixed up with the .380 bullet by some Advocate when the parcel had been opened in Court on an earlier date during court proceedings. In the light of the fact that the trial court and the High Court have already held (and also held by us) that no shot had been fired from inside the car from the 7.65 mm pistol, the possibility of a 7.65 mm bullet being in the parcel becomes suspect and it appears that some mischief was being played out. We must also notice that we are dealing with appellants who are all police officials and the trial court has clearly hinted that there appeared to be some connivance between the appellants and the investigation. In any case, the creation of some confusion vis-à-vis the bullets, is a matter which would undoubtedly help the defence and a

presumption can thus be raised that this had been stage managed by the defence. This aspect too cannot be ignored. The argument raised by the learned counsel for the appellants, therefore, that the application filed for clarification had been withdrawn as the prosecution was shying away from the truth is not sustainable as this had happened in the light of the clarification given by PW-37 Roop Singh. Nothing ominous or sinister can be read into this.

20. The learned counsel has also challenged the recovery of the bullet from the ashes of Jagjit Singh. This submission is based on the evidence of PW-8 Didar Singh, the elder brother of Jagjit Singh and PW-49 ASI Ram Dutt to whom the bullet had been handed over by Didar Singh and the statements of Dr. G.K.Sharma and PW-24 Yashoda Rani who had X-rayed the dead body and found no image of a bullet therein. It has accordingly been argued that this too was the brainchild of the CBI and a crude attempt to inculpate Constable Mahavir Singh. The trial court had accepted the prosecution story that this spent bullet had been recovered from the ashes of Jagjit Singh. This part of the prosecution story has, however, been rejected by the High Court by observing that the trial court had ignored the evidence on this score as Didar Singh PW-8 had nowhere stated that he had picked up of a bullet from the ashes and handed it over to Sub-Inspector Ram Dutt and more particularly as the two doctors who had X-rayed the dead body had found no trace of a bullet. We endorse this finding of the High Court in the light of the uncertain evidence on this score but to allege that the CBI officials had a hand in planting the bullet, is unwarranted. It will be seen from the evidence of PW-49 Ram Dutt that Jagjit Singh had been cremated on the 2nd of April 1999 and the bullet had been recovered the next day when the ashes were being collected and had been handed over to him the same day and that it had thereafter been sealed and deposited in the Malkhana. The CBI, at this stage, had nothing to do with the recovery of the bullet as PW-72 Inspector Sumit Kumar of the CBI had taken it into possession duly sealed vide

Memo Ex. PW49/A dated 11th April, 1999. It is also relevant that the weapon bearing Butt No.518 carried by Head Constable Mahavir Singh had been seized by the Delhi Police on the 1st April 1997 itself and the CBI did not have access to it which could have enabled it to create any false evidence on this score. We must also recall that the police party comprised 15 personnel. Only 10 who played an active role had been prosecuted. This background points to a fair investigation. We are, therefore, of the opinion that no fault whatsoever can be found in the investigation made by the CBI.

21. The primary argument, however, of the appellants that even assuming the prosecution story to be the correct, there was no common intention on the part of the appellants to commit murder, must now be examined. Highlighting the role attributed to the two appellants ACP Rathi and Inspector Anil Kumar, it has been submitted that ACP Rathi had not fired at the car and was in fact sitting 20 meters away from the firing site. Mr. Lalit, appearing for Inspector Anil Kumar, has also supported this argument and submitted that Inspector Anil Kumar too had not fired at the car and the only role attributed to him was a knock at Jagjit Singh's window calling upon him to step out but instead of doing so he had fired back leading to a nasty shoot out. It has, accordingly, been submitted by the learned counsel that the finding of the High Court that all the appellants were guilty under Section 302/34 etc. was wrong.

22. The learned ASG has, however, submitted that the question as to whether Section 34 of the IPC would apply would depend upon the facts of the case and for this reason, the sequence of events preceding the incident, the actual incident itself, and post facto the incident, would have to be taken into account.

23. We have considered the arguments of the learned counsel very carefully. It bears reiteration that the trial court had convicted all the appellants on the primary charge under Section 302 read with section 120-B of the IPC, but the High Court has

acquitted them under that provision and convicted them under Section 302/34 etc. of the IPC instead. This aspect would have to be examined in the background of the defence story that had been projected and as the entire police operation had been conducted in a secret manner as no outsider had any access to what is going on in the matter relating to Mohd. Yaseen. Admittedly, the target was Mohd. Yaseen, concededly a notorious criminal with a bounty on his head, as he had been involved in a large number of very serious criminal matters. The incident happened on account of a mistake as to the identity of Jagjit Singh who could pass off as a Muslim and it is nobody's case that the police party had intended to eliminate Jagjit Singh and his friends. The courts below have been very clear on this score and have observed that keeping in mind the background in which the incident happened, that it was not the outcome of an act in self defence but was pursuant to the common intention to kill Mohd. Yaseen. The possibility of a hefty cash reward and accelerated promotion acted as a catalyst and spurred the police party to rash and hasty action. As to the role of ACP Rathi and Inspector Anil Kumar, the High Court has found that it was Rathi who was the leader of the police party in his capacity as the ACP and therefore, it was not necessary for him to be in the forefront of the attack on the Esteem car and Inspector Anil Kumar who had admittedly knocked at the window could be treated likewise as being the next officer in the hierarchy. We have seen the site plan and notice that ACP Rathi was sitting in his Gypsy about 15 meters away from the car when the incident happened. It has come in evidence that when Inspector Anil Kumar had conveyed the fact of Jagjit Singh's and Tarunpreet Singh's presence at the Mother Dairy Booth at Patparganj, the ACP had got together a police party of heavily armed officers, briefed them, and they had thereafter moved on to Connaught Place. It has been found as a matter of fact that when Inspector Anil Kumar had followed the Car to the Dena Bank, Jagjit Singh had been left behind in the car alone for quite some time but Inspector Anil Kumar and his two associates had made absolutely no attempt to apprehend him

at that stage or to counter check his identity as the Inspector had Mohd. Yaseen's photograph with him. Even more significantly the Inspector made no attempt to identity Pradeep Goyal or Tarunpreet Singh whatsoever, although admittedly he was in close wireless contact with ACP Rathi. This is the pre-incident conduct which is relevant. The facts as brought reveal a startling state of affairs during the incident. It is the case of the defence that the car had been surrounded to immobilize the inmates and to prevent them from escaping and that it was with this intention that Inspector Anil Kumar had knocked on the driver's window asking the inmates to get out but he had been answered by firing from inside the car. This plea cannot be accepted for the reason that the defence has already been rejected by us. Moreover PW-37 testified that there were no bullet marks on the tyres and they remained intact even after the incident, despite 34 shots being fired at the car, and 29 bullet holes, most of them of entry, thereon. On the other hand, the appellants presupposed that one of the inmates was Mohd. Yaseen, the wanted criminal and that the firing was so insensitive and indiscriminate that some of the shots had hit Constables Subhash Chand and Sunil Kumar. The post-facto conduct of the appellants is again relevant. Inspector Anil Kumar gave a report on the 1st April 1997 immediately after the incident, which was followed by a report by ACP Rathi the next day giving the counter version. This has been found by us to be completely untenable. The High Court was, therefore, justified in holding that in the light of the above facts, it was not necessary to assign a specific role to each individual appellant as the firing at the Car was undoubtedly with a clear intent to annihilate those in it and was resorted to in furtherance of the common intention of all the appellants. In Abdul Sayeed Versus *State of M.P. 2010 (10) SCC 259, i*t has been held as under :

> "49. Section 34 IPC carves out an exception from general law that a person is responsible for his own act, as it provides that a person can also be held vicariously responsible for the act of others if he has the "common

intention" to commit the offence. The phrase "common intention" implies a prearranged plan and acting in concert pursuant to the plan. Thus, the common intention must be there prior to the commission of the offence in point of time. The common intention to bring about a particular result may also well develop on the spot as between a number of persons, with reference to the facts of the case and circumstances existing thereto. The common intention under Section 34 IPC is to be understood in a different sense from the "same intention" or "similar intention" or "common object". The persons having similar intention which is not the result of the prearranged plan cannot be held guilty of the criminal act with the aid of Section 34 IPC. (See Mohan Singh v. State of Punjab.)

50. The establishment of an overt act is not a requirement of law to allow Section 34 to operate inasmuch this section gets attracted when a criminal act is done by several persons in furtherance of the common intention of all. What has, therefore, to be established by the prosecution is that all the persons concerned had shared a common intention. (Vide Krishnan v. State of *Kerala and Harbans Kaur v.* State *of Haryana".)*

24. In conclusion, we must hold that the appellants were liable to conviction under Sections 302/34 etc. of the IPC.

25. We now come to Mr. Sharan's connected argument with regard to the deemed acquittal theory of the appellants for the offence under Sections 302, 307 read with Section 34 of the IPC by the trial court. At this stage, we may recall that the trial court had framed a charge under Section 302/307 read with Section 120-B of the IPC and an alternative charge under Section 302/307 read with Section 34 of the IPC but without opining on the alternative charge, had convicted the appellants for the offence under Section 302/307 read with Section 120-B of the IPC. It has accordingly been contended that as the

appellants had been deemed to have been acquitted of the charge of having the common intention of committing the murders and there was no appeal by the State against the deemed acquittal against under that charge, it was not open to the High Court to alter or modify the conviction. The learned ASG has, however, pointed out that a contrary view had been expressed earlier in Lakhjit Singh's case *(supra) and as* a consequence of this apparent discordance, the matter had been referred to a Bench of three Judges in Dalbir Singh's case *(supra) which h*ad over ruled the judgment in Sangaraboina Sreenu'*s case (supra) and by* implication over-ruled Lokendra Singh's cas*e (supra) as well*. He has further highlighted that the judgment in Dalbir Singh's case *(supra) had bee*n followed in Dinesh Seth's case (*supra) but bot*h these cases had not even been alluded to in Bimla Devi's case (s*upra). He has* accordingly pointed out that the very basis of Mr. Sharan's argument on the theory of deemed acquittal was lacking.

26. We have considered the arguments of the learned counsel very carefully. We must, at the outset, emphasize that the judgments referred to above and cited by Mr. Sharan are largely on the basis that a charge for the offence of which the appellants had ultimately been acquitted, had not been framed and therefore, it was not possible to convict an accused in the absence of a charge. For example, in Sangaraboina Sreenu'*s case (supra) a judgm*ent rendered in two paragraphs, this Court held that only a charge under Section 302 had been framed against the accused, therefore, he could not be convicted under Section 306 of the IPC although the Court noticed that the offence under Section 306 was a comparatively minor offence, within the meaning of Section 220 of the Cr.P.C. It was also noticed that the basic constituent of an offence under Section 302 was homicide whereas the offence under Section 306 was suicidal death and abetment thereof. This judgment was followed in Lokendra Singh's cas*e (supra) wherein* a similar situation existed. It appears, however, that both these judgments had over looked the judgment in Lakhjit Singh's case

*(supra) as in t*his case a Division Bench of this Court had held that a conviction under Section 306 of the IPC could be recorded though a charge under Section 302 had been framed. In arriving at this conclusion, the Bench observed that the accused were on notice as to the allegations which would attract Section 306 of the IPC and as this section was a comparatively minor offence, conviction thereunder could be recorded. On account of this apparent discordance of opinion over the issue involved, the matter was referred to a Bench of three Judges in Dalbir Singh's case *(supra). By thi*s judgment, the opinion rendered in Sangarabonia Sreenu's *case (supra) was ove*r-ruled, as not being correctly decided. Ipso facto, we must assume that the decision in Lokender Singh's cas*e (supra) must al*so be read as not correctly decided. The judgment in Dalbir Singh's (supr*a) has subsequen*tly been followed in Dinesh Seth's case (*supra). We mus*t, therefore, record that the judgment rendered in Bimla Devi's case (s*upra) which d*oes not take into account the last two cited cases, must be held to be per incuriam. Kishan Singh's and L*akhan Mahto's cases (supra) were c*ases where no charge had been framed for the offences under which the accused could be convicted whereas Thadi Narayana's cas*e was on its own* peculiar facts.

27. We find the situation herein to be quite different. We must notice that the charges had indeed been framed in the alternative and for cognate offences having similar ingredients as to the main allegation of murder. Section 386 of the Cr.P.C. refers to the power of the appellate court and the provision in so far relevant for our purpose is sub-clause (b) (ii) which empowers the appellate court to alter the finding while maintaining the sentence. It is significant that Section 120-B of the IPC is an offence and positive evidence on this score has to be produced for a successful prosecution whereas Section 34 does not constitute an offence and is only a rule of evidence and inferences on the evidence can be drawn, as held by this Court in Lachhman Singh & Ors*. vs. The State AIR 1952 SC*

167. We are, therefore, of the opinion that the question of deemed acquittal in such a case where the substantive charge remains the same and a charge under Section 302/120B and an alternative charge under section 302/34 of the IPC had been framed, there was nothing remiss in the High Court in modifying the conviction to one under Section 302/307/34 of the IPC. It is also self evident that the accused were aware of all the circumstances against them. We must, therefore, reject Mr. Sharan's argument with regard to the deemed acquittal in the circumstances of the case.

28. The learned counsel for the appellants have also argued on the failure of the court in putting all relevant questions to them when their statements under Section 313 of the Cr.P.C. had been recorded. Mr. Sharan has also given us a list of 15 questions which ought to have been put to the ACP as they represented the crux of the prosecution story. It has been submitted that on account of this neglect on the part of the court the appellants had suffered deep prejudice in formulating their defence. Reliance has been placed on Hate Singh Bhagat S*ingh, Vikramjit Singh and Ranvir Yadav's c*ases *(supra). It ha*s however been pointed out by the learned ASG that the 15 questions referred to were largely inferences drawn by the courts and relatable to the evidence on record, and the inferences were not required to be put to an accused. He has further submitted even assuming that there had been some omission that by itself would not a fortiori result in the exclusion of evidence from consideration but it had to be shown further by the defence that prejudice had been suffered by the accused on that account inasmuch that they could claim that they did not have notice of the allegations against them. In this connection, the learned ASG has placed reliance on Shivaji Sahebrao Bob*de vs. State of Maharashtra AIR 1973 SC 2622 and* Santosh Kumar Singh *and Shobit Chamar's cases (supra).*

29. Undoubtedly, the importance of a statement under Section 313 of the Cr.P.C. in so far as the accused is

concerned, can hardly be minimized. This statutory provision is based on the rules of natural justice for an accused must be made aware of the circumstances being put against him so that he can give a proper explanation and to meet that case. In Hate Singh's case (s*upra) it was* observed that:

> "the statements of a*n accused person recorded under Ss.208,209 and 342 are among the most important matters to be considered at a trial. It has to be remembered that in this country an accused person is not allowed to enter the box and speak on oath in his own defence. This may operate for the protection of the accused in some cases but experience elsewhere has shown that it can also be a powerful and impressive weapon of defence in the hands of an innocent man. The statements of th*e accused recorded by the Committing Magistrate and the Sessions Judge are intended in Indian to take the place of what in England and in America he would be free to state in his own way in the witness-box. They have to be received in evidence and treated as evidence and be duly considered at the trial.
>
> This means that they must be treated like any other piece of evidence coming from the mouth of a witness and matters in favour of the accused must be viewed with as much deference and given as much weigh as matters which tell against him. Nay more. Because of the presumption of innocence in his favour even when he is not in a position to prove the truth of his story, his version should be accepted if it is reasonable and accords with probabilities unless the prosecution can prove beyond reasonable doubt that it is false. We feel that this fundamental approach has been ignored in this case."

30. It must be highlighted that the judgment in this case was rendered in the background that in the absence of any provision in law to enable an accused to give his part of the

story in court, the statement under Section 342 (now 313) was of the utmost important. The aforesaid observations have now been somewhat whittled down in the light of the fact that Section 315 of the Cr.P.C. now makes an accused a competent witness in his defence. In Vikramjit Singh's c*ase (supra), this* Court again dwelt on the importance of the 313 statement but we see from the judgment that it was primarily based on an overall appreciation of the evidence and the acquittal was not confined only to the fact that the statement of the accused had been defectively recorded. In Ranvir Yadav's case *(supra) this Co*urt has undoubtedly observed that even after the incorporation of Section 315 in the Cr.P.C., the position remains the same, (in so far as the statements under Section 313 are concerned) but we find that the judgment was one of acquittal by the Trial Court and a reversal by the High Court and this was a factor which had weighed with this Court while rendering its judgment. In any case the latest position in law appears to be that prejudice must be shown by an accused before it can be held that he was entitled to acquittal over a defective and perfunctory statement under Section 313. In Shivaji's case (supr*a), a judg*ment rendered by three Hon'ble Judges, it has been observed in paragraph 16 as under :

> "It is trite law, nevertheless fundamental, that the prisoner's attention should be drawn to every inculpatory material so as to enable him to explain it. This is the basic fairness of a criminal trial and failures in this area may gravely imperil the validity of the trial itself, if consequential miscarriage of justice has flowed. However, where such an omission has occurred it does not ipso facto vitiate the proceedings and prejudice occasioned by such defect must be established by the accused. In the event of an evidentiary material not being put to the accused, the court must ordinarily eschew such material from consideration. It is also open to the appellate court to call upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against him but

not put to him and if the accused is unable to offer the appellate court any plausible or reasonable explanation of such circumstances, the court may assume that no acceptable answer exists and that even if the accused had been questioned at the proper time in the trial court he would not have been able to furnish any good ground to get out of the circumstances on which the trial court had relied for its conviction. In such a case, the court proceeds on the footing that though a grave irregularity has occurred as regards compliance with Section 342, Cr.P.C., the omission has not been shown to have caused prejudice to the accused."

31. The judgment in Santosh Kumar Singh's *case (supra) is to t*he same effect and is based on a large number of judgments of this court.

32. It is clear from the record herein that the appellants, all police officers, had been represented by a battery of extremely competent counsel and in the course of the evidence, the entire prosecution story with regard to the circumstances including those of conspiracy and common intention had been brought out and the witnesses had been subjected to gruelling and detailed cross-examinations. It also bears reiteration that the incident has been admitted, although the defence has sought to say that it happened in different circumstances. It is also signally important that all the accused had filed their detailed written statements in the matter. All these facts become even more significant in the background that no objection had been raised with regard to the defective 313 statements in the trial court. In Shobhit Chamar's cas*e (supra) this Co*urt observed:

"We have perused all these reported decisions relied upon by the learned advocates for the parties and we see no hesitation in concluding that the challenge to the conviction based on non-compliance of Section 313 Cr.P.C. first time

in this appeal cannot be entertained unless the appellants demonstrate that the prejudice has been caused to them. In the present case, as indicated earlier, the prosecution strongly relied upon the ocular evidence of the eye witnesses and relevant questions with reference to this evidence were put to the appellants. If the evidence of these witnesses is found acceptable, the conviction can be sustained unless it is shown by the appellants that a prejudice has been caused to them. No such prejudice was demonstrated before us and, therefore, we are unable to accept the contention raised on behalf of the appellants."

These observations proceed on the principle that if an objection as to the 313 statement is taken at the earliest stage, the court can make good the defect and record an additional statement as that would be in the interest of all but if the matter is allowed to linger on and the objections are taken belatedly it would be a difficult situation for the prosecution as well as the accused. In the case before us, as already indicated, the objection as to the defective 313 statements had not been raised in the trial court. We must assume therefore that no prejudice had been felt by the appellants even assuming that some incriminating circumstances in the prosecution story had been left out. We also accept that most of the 15 questions that have been put before us by Mr. Sharan, are inferences drawn by the trial court on the evidence. The challenge on this aspect made by the learned counsel for the appellants, is also repelled.

33. Mr. Sharan has also referred us to Section 140 of the Delhi Police Act, 1978 to contend that as the cognizance in the present matter had been taken more than three months from the date of the incident, the prosecution itself was barred. Elaborating on this aspect, the learned counsel has submitted that the incident had happened on the 31st March 1997 and an incomplete charge-sheet had been filed within three months i.e. on the 13th June 1997 but cognizance in the matter had

admittedly been taken beyond three months i.e. on the 10th July 1997. The learned counsel has, in support of this plea, relied on the judgment in Jamuna Singh and Pro*f. Sumer Chand's case (supra) to argu*e that the provisions of Section 140 of the Delhi Police Act had to be strictly applied, more particularly where the act complained of had been done in the discharge of official duty. The learned ASG has, however, submitted that the provisions of Section 140 of Delhi Police Act would be applicable only to offences referred to in the Act itself and found largely in Section 80 onwards and not to cases where the offence was linked to any other penal provision and that in any case the police official involved had to show that the action taken by him had been taken under colour of duty. The learned counsel has in this connection relied on N. Venugopal, Narhar *Rao, Atma Ram, Bhanuprasad Hariprasad Dave and on Professor S*umer Ch*and's cases (supra).*

*34. B*efore we examine the merits of this submission, we need to see what the High Court has held on this aspect. The High court has observed that an incomplete charge- sheet had been filed within time inasmuch that the statements of the witnesses recorded under Section 161 of the Cr.P.C. had not been appended therewith and we quote :

> "and the prosecuting agency had, therefore, taken adequate care in filing the charge-sheet well within time and could not, thus, have anticipated that the Court of the learned Chief Metropolitan Magistrate would have its own problems in taking immediate cognizance of the offences on the charge-sheet within three months from the date of commission of the crimes, it could not have applied for a sanction for prosecution under Section 140 of the Act as it was not at all required in that situation. If the Court of learned Chief Metropolitan Magistrate had difficulty in taking cognizance of the offences for absence of the copies of statements under Section 161 Cr.P.C., it could have very well posted the case for a shorter date before

> expiry of three months and could have required the CBI to make available the copies of required material for taking cognizance of the offences. We are unable to find from the proceedings recorded by the learned Chief Metropolitan Magistrate the reason as to why instead of requiring the CBI to produce the copies of required material within a day or two, such a longer date was fixed for according consideration for taking cognizance of the offences. Whatever be the reason for delay in taking cognizance of the offences in the facts and circumstances of the case, we are unable to accept the plea that any sanction under Section 140 of the Delhi Police Act was required to sustain the prosecution against the appellants, particularly when the charge-sheet had been filed in the Court well before the expiry of three months' period."

35. We are, however, *not* called upon to go into the correctness or otherwise of the observations of the High Court, as we intend giving our own opinion on this score.

36. Sub-Section (1) of Section 140 is reproduced below:

> "Bar to suits and pr*osecutions.- (1) In any case of a*lleged offence by a police officer or other person, or of a wrong alleged to have been done by such police officer or other person, by any act done under colour of duty or authority or in excess of any such duty or authority, or wherein it shall appear to the court that the offence or wrong if committed or done was of the character aforesaid, the prosecution or suit shall not be entertained and if entertained shall be dismissed if it is instituted, more than three months after the date of the act complained of.
>
> Provided that any such prosecution against a police officer or other person may be entertained by the court, if instituted with the previous sanction of the Administrator, within one year from the date of the offence.

(2)…….

(3)……. ”

37. This Section postulates that in order to take the shelter of the period of three months referred to therein the act done, or the wrong alleged to have been done by the police officer should be done under the colour of duty or authority or in excess of such duty or authority or was of the character aforesaid, and in no other case. It must, therefore, be seen as to whether the act of the appellants could be said to be under the colour of duty and therefore, covered by Section 140 ibidem.

38. At the very outset, it must be made clear from the judgment of this Court in Jamuna Singh’s case *(supra) that th*e date of cognizance taken by a Magistrate would be the date for the institution of the criminal proceedings in a matter. The facts given above show that the cognizance had been taken by the Magistrate beyond three months from the date of incident. The larger question, however, still arises as to whether the shelter of Section 140 of the Delhi Police Act could be claimed, in the facts of this case. We must, at the outset, reject the learned ASG’s argument that Section 140 would be available to police officials only with respect to offences under the Delhi Police Act and not to other penal provisions, in the light of the judgment in Professor Sumer Chan*d’s case (supra) which h*as been rendered after comparing the provisions of the Police Act, 1861 and Section 140 of the Delhi Police Act, 1978 and it has been held that the benefit of the latter provision would be available qua all penal statutes.

The expression ‘colour of duty’ must now be examined in the facts of this case. In Venugopal’s case (su*pra), this C*ourt held as under:

> “It is easy to see that if the act complained of is wholly justified by law, it would not amount to an offence at all in view of the provisions of S.79 of the Indian Penal Code.

> Many cases may however arise wherein acting under the provisions of the Police Act or other law conferring powers on the police the police officer or some other person may go beyond what is strictly justified in law. Though Sec.79 of the Indian Penal Code will have no application to such cases, Sec.53 of the Police Act will apply. But Sec.53 applies to only a limited class of persons. So, it becomes the task of the Court, whenever any question whether this section applies or not arises to bestow particular care on its decision. In doing this it has to ascertain first what act is complained of and then to examine if there is any provision of the Police Act or other law conferring powers on the police under which it may be said to have been done or intended to be done. The Court has to rem*ember in this connection that an act is not “under” a provision of law merely because the point of time at which it is done coincides with the point of time when some act is done in the exercise of the powers granted by the provision or in performance of the duty imposed by it. To be able to say that an act is done “under” a provision of law, one must discover the existence of a reasonable relationship between the provisions and the act. In the absence of such a relation the act cannot be said to be done “under” the particular provision of law.”*

*40. This judgment wa*s followed in Narhar Rao’s case (s*upra). This C*ourt, while dealing with the question as to whether the acceptance of a bribe by a police official with the object of weakening the prosecution case could be said under to be under ‘colour of duty’ or in excess of his duty, observed as under:

> “But unless there is a reasonable connection between the act complained of and the powers and duties of the office, it cannot be said that the act was done by the accused officer under the colour of his office. Applying this test to the present case, we are of the opinion that the alleged

acceptance of bribe by the respondent was not an act which could be said to have been done under the colour of his office or done in excess of his duty or authority within the meaning of S.161(1) of the Bombay Police Act. It follows, therefore, that the High Court was in error in holding that the prosecution of the respondent was barred because of the period of limitation prescribed under Sec.161(1) of the Bombay Police Act. The view that we have expressed is borne out by the decision of this Court in State of Andhra Pradesh vs. N.Venugopal, AIR 1964 SC 33, in which the Court had construed the language of a similar provision of S.53 of the Madras District Police Act (Act 24 of 1859). It was pointed out in that case that the effect of S.53 of that Act was that all prosecutions whether against a police officer or a person other than a police officer (i.e. a member of the Madras Fire Service, above the rank of a fireman acting under S.42 of the Act) must be commenced within three months after the act complained of, if the act is one which has been done or intended to be done under any of the provisions of the Police Act. In that case, the accused police officers were charged under Ss.348 and 331 of the Indian Penal Code for wrongly confining a suspect Arige Ramanua in the course of investigation ad causing him injuries. The accused were convicted by the Sessions Judge under Ss.348 and 331 of the Indian Penal Code but in appeal the Andhra Pradesh High Court held that the bar under S.53 of the Police Act applied and the accused were entitled to an acquittal. It was, however, held by this Court that the prosecution was not barred under S.53 of the Police Act, for it cannot be said that the acts of beating a person suspected of a crime or confining him or sending him away in an injured condition by the police at a time when they were engaged in investigation are acts done or intended to be done under the provisions of the Madras District Police Act or Criminal Procedure Code or any other law conferring powers on the police. The

appeal was accordingly allowed by this Court and the acquittal of the respondent set aside."

4. Both these judgments were followed in Atma Ram's case (sup*ra) where t*he question was as to whether the action of a Police Officer in beating and confining a person suspected of having stolen goods in his possession could be said to be under colour of duty. It was held as under :

> "The provisions of Ss.161 and 163 of the Criminal Procedure Code emphasize the fact that a police officer is prohibited from beating or confining persons with a view to induce them to make statements. In view of the statutory prohibition it cannot, possibly, be said that the acts, complained of, in this case, are acts done by the respondents under the colour of their duty or authority. In our opinion, there is no connection, in this case between the acts complained of and the office of the respondents and the duties and obligations imposed on them by law. On the other hand, the alleged acts fall completely outside the scope of the duties of the respondents and they are not entitled, therefore, to the mantle of protection conferred by S. 161 (1) of the Bombay Police Act."

42. Similar views have been expressed in Bhanuprasad Haripras*ad Dave's case (supra) wherein* the allegations against the police officer was of taking advantage of his position and attempting to coerce a person to give him a bribe. The plea of colour of duty was negatived by this Court and it was observed as under:

> "All that can be said in the present case is that the first appellant a police officer, taking advantage of his position as a police officer and availing himself of the opportunity afforded by the letter Madhukanta handed over to him, coerced Ramanlal to pay illegal gratification to him. This cannot be said to have been done under colour of duty. The charge against the second appellant is that he aided

the first appellant in his illegal activity."

43. These judgments have been considered by this Court in Professor Sumer Chand*'s case (supra) which h*as been relied upon by both sides. In this case, Professor Sumer Chand and several others were brought to trial initiated on a first information report but were acquitted by the trial court. Professor Sumer Chand thereupon filed a suit against the Investigating officer and other police officials for malicious prosecution claiming Rs.3 Lacs as damages. This Court held that the prosecution had been initiated on the basis of a First Information Report and it was the duty of a Police Officer to investigate the matter and to file a charge-sheet, if necessary, and that there was a discernible connection between the act complained of by the appellant and the powers and duties of the Police Officer. This Court endorsed the opinion of the High Court that the act of the Police Officer complained of fell within the description of 'colour of duty'.

44. In the light of the facts that have been found by us above, it cannot, by any stretch of imagination, be claimed by anybody that a case of murder would fall within the expression 'colour of duty'. We find absolutely no connection between the act of the appellants and the allegations against them. Section 140 of the Delhi Police Act would, therefore, have absolutely no relevance in this case and Mr. Sharan's argument based thereon must, therefore, be repelled.

45. The learned Counsel has also raised an argument that the sanction under Section 197 of the Cr.P.C. had been mechanically given and did not indicate any application of mind on the part of the Lt. Governor. It has accordingly been prayed that the entire prosecution was vitiated on this score. Reliance has been placed by Mr. Sharan for this argument on Ameerjan's case (sup*ra). This a*rgument has been controverted by the learned ASG who has pointed out that a bare reading of the sanction order as well as the evidence of PW-48 C.B. Verma, the concerned Deputy Secretary in the Delhi Government who

had forwarded the file to the Lt. Governor, revealed that all material relevant for according the sanction had been given to the Lt. Governor. The learned ASG has placed reliance on S.B.Saha's case (sup*ra) as well* as on Ameerjan's case above-*referred.*

46. We have considered this argument very carefully in the light of the evidence on record. We first go to the evidence of PW-48 C.B. Verma. He deposed that a request had been received from the CBI for according sanction for the prosecution of the appellants along with the investigation report and a draft of the sanction order. He further stated that on receipt of the aforesaid documents the matter had been referred first to the Law Department of the Delhi Administration and then forwarded to the Home Department and then to the Chief Secretary and finally, the entire file had been put up before the Lt. Governor who had granted the sanction for the prosecution of the ten officials. It is true that certain other material which was not yet available with the CBI at that stage could not obviously have been forwarded to the Lt. Governor, but we see from the various documents on record that even on the documents, as laid, adequate material for the sanction was available to the Lt. Governor. We have perused the sanction order dated 10th of October 2001 and we find it to be extremely comprehensive as all the facts and circumstances of the case had been spelt out in the 16 pages that the sanction order runs into. In Ameerjan's case (sup*ra) which w*as a prosecution under the Prevention of Corruption Act (and sanction under Section 19 thereof was called for), this Court observed that though the sanction order could not be construed in a pedantic manner but the purpose for which such an order was required had to be borne in mind and ordinarily the sanctioning authority was the best person to judge as to whether the public servant should receive the protection of Section 19 or not and for that purpose the entire record containing the materials collected against an accused should be placed before the sanctioning authority and in the event that the order of sanction did not indicate a proper

application of mind as to the materials placed before the sanctioning authority, the same could be produced even before the Court. Admittedly, in the present case only the investigation report and the draft sanction order had been put before the Lt. Governor but we find from a reading of the former that it refers to the entire evidence collected in the matter, leaving the Lt. Governor with no option but to grant sanction. In S.B. Saha's case (su*pra), this C*ourt was dealing primarily with the question as to whether sanction under Section 197 of the Cr.P.C. was required where a Customs Officer had misappropriated the goods that he had seized and put them to his own use. While dealing with this submission, it was also observed as under:

> "Thus, the material brought on the record up to the stage when the question of want of sanction was raised by the appellants, contained a clear allegation against the appellants about the commission of an offence under Section 409, Indian Penal Code. To elaborate, it was substantially alleged that the appellants had seized the goods and were holding them in trust in the discharge of their official duty, for being dealt with or disposed of in accordance with l*aw, but in dishonest breach of that trust, they criminally misappropriated or converted those goods. Whether this allegation or charge is true or false, is not to be gone into at this stage. In considering the question whether sanction for prosecution was or was not necessary, these criminal acts attributed to the accused are to be taken as alleged."*

*47. As already indic*ated above, the Lt. Governor had enough relevant material before him when he had accorded sanction on the 10th October 2001.

48. We now come to the other appeals in which some additional arguments have been raised. In Criminal Appeal No. 2476/2009 of Head Constable Mahavir Singh, Mr. Lalit has argued that 15 persons in all had constituted the police party

and 10 persons had been sent up for trial including ACP Rathi and Inspector Anil Kumar and five others, three of them armed who had not fired any shot, and two other who had not been armed, had not been prosecuted and as Head Constable Mahavir Singh had also not fired at the car, his case fell amongst the five and he was, therefore, entitled to be treated in a like manner. In addition, it has been submitted that Head Constable Mahavir Singh did not share the common intention with the other nine accused. Mr. Lalit has also referred us to question No.53 put to the Head Constable by which the circumstances pertaining to the actual incident had been put to him and he had answered as under:

> "I was behind the entire team. Then the team was left with no option but to return fire in self defence and to save members of the public as a large crowd had started gathering suddenly on hearing the faring from inside the car. Some members of our team returned fire. As I was behind and a little away from the car, I held back my fire. But on seeing a crowd gathering and to prevent the members of general public from coming close to the car, I fired one shot in the air. In the meanwhile I heard Constable Subhash Chand scream that he had been hurt. Then the firing was ordered to be stopped. Within moments a PCR Gypsy also arrived. Then the efforts were made to take the injured out and send them to hospital. In the meanwhile press photographers, police of the PS C.P. and Sr. officers also arrived."

49. He has found support for his arguments from the Panchnama Ex. B-67/2 prepared by P.Kailasham, Executive Engineer, CBI on the 11th April, 1997 on the observations of three Shri Ohri, DSP and Sri Sree Deep. It has accordingly been argued by Mr. Lalit that the defence taken by Head Constable Mahavir Singh that he had fired to keep the crowd away was clear from the record and as the incident had happened in a very busy locality i.e. the outer circle of

Connaught Place, a crowd had undoubtedly collected. He has further pointed out that the story that a bullet fired by Head Constable Mahavir Singh from his 7.62 mm AK-47 rifle at Jagjit Singh had been disbelieved by the High Court and the falsity of the prosecution story was, thus, clearly spelt out.

50. We have considered the arguments advanced by the learned counsel. Admittedly, as per his own showing, Head Constable Mahavir Singh had used his service weapon and fired one shot therefrom. The prosecution story is that he had fired at the car whereas the defence is that he had fired the shot in the air to keep the crowd away. This argument is based on a clear misconception and does not take into account the normal tendency of a person at a crime scene, (more particularly where indiscriminate gun fire had been resorted to) would be to run far and away. It appears that the crowd had collected only after the shooting had ceased. There is no evidence whatsoever to show that any crowd had collected while the firing was going on or that a single shot had been fired after the volley of 34 shots. We have also perused the large number of photographs of the site and see that the crowd that had gathered after the shooting, was perfectly disciplined and keeping a reasonable distance away from the Esteem car and the dead bodies lying around it. Admittedly also, there is absolutely no evidence with regard to the defence taken by Constable Mahavir Singh. An effort could have been made by the defence to elicit some information about the behaviour of the crowd from the policemen and the Statesman employees who had appeared as prosecution witnesses. Not a single question was, however, put to them on this aspect. We are therefore of the opinion that the story projected by him in his 313 statement is not supported by any evidence whatsoever. His case, therefore, cannot be distinguished from the other seven accused who had admittedly fired at the car.

51. We have already dealt with Mr. Balasubramaniam's arguments in the case of Inspector Anil Kumar who has filed Criminal Appeal No.2484/2009 while dealing with the question

of common intention and the self-defence claimed by the appellant. No further discussion is, therefore, required in this appeal.

52. We finally take up Criminal Appeal Nos. 2477-2483 of 2009 in which the arguments have been made by Mr. Vineet Dhanda, Advocate. It is significant that these seven police officers had admitted firing into the vehicle but it is their case in their statements under Section 313 of the Cr.P.C. as also their written statements that they had done so only on the direction of ACP Rathi, a superior officer. They have accordingly sought the benefit of Section 79 of the IPC which provided:

> "Act done by a perso*n justified, or by mistake of fact believing himself justified, by law.—-Nothing is an offen*ce which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith, believes himself to be justified by law, in doing it."

53. In the written submissions filed by Mr. Vineet Dhanda long after the judgment had been reserved and beyond the time fixed by us for the filing of the written submissions (which have nevertheless been taken on record) the stand taken is completely different and in accordance with that of Mr. Sharan and Mr. Lalit with regard to the defence claimed by the appellants. Mr. Dhanda has also filed a large number of judgments on this aspect. These judgments had not been cited by the learned counsel at the time of hearing. We have however gone through the judgments and find nothing different therein from the judgments cited by the other learned counsel. We, therefore, deem it unnecessary to advert to them at this stage.

54. We have nevertheless examined the submissions with regard to Sections 76 to 79 of the IPC. We see absolutely no evidence that the firing had been resorted to by the seven appellants on the order of ACP Rathi as we have found that it was pursuant to the common intention of all the accused that

the incident had happened. It is also relevant that the statements made by these seven appellants are not admissible in evidence against ACP Rathi, being a co-accused, in the light of the judgment of this Court reported in Vijendrajit Ayodhya *Prasad Goel vs. State of Bombay AIR 1953 SC 247 and* S.P.Bhatnagar & Anr. *vs. The State of Maharashtra AIR 1979 SC 826. Th*is Court in the former case has observed that a statement under Section 342 of the Cr.P.C. (now Section 313) cannot be regarded as evidence. The observations in the latter case are equally pertinent wherein it has been held that a defence taken by one accused cannot, in law, be treated as evidence against his co-accused. As already observed, Section 315 of the Cr.P.C. now makes an accused a competent witness in his defence. Had the appellants in this set of appeals chosen to come into the witness box to support their plea based on the orders of ACP Rathi, a superior officer, and claimed the benefit of Section 79 of the IPC, something could be said in their behalf but in the face of no evidence the story projected by them cannot be believed.

55. On an overall view of the evidence in the case and in the light of the arguments raised by the learned counsel for the parties, we find no fault with the judgments of the trial court as well as the High Court. We, accordingly, dismiss all these appeals.

R.P. Appeals dismissed.

SHAJI AND ORS.
v.
STATE OF KERALA
(Criminal Appeal No. 1618 of 2005)

MAY 3, 2011

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

Penal Code, 1860:

s.302 r/w s.149 – Murder – Common object – Unlawful assembly armed with deadly weapons – Six accused – A-1 inflicted three cut injuries on head of victim-deceased with a chopper – A-5 and A-6 acquitted – Other four accused (A-1 to A-4) convicted – They filed appeals before Supreme Court – Appeal as regards A-1 dismissed as not pressed – Whether prosecution established the conviction of A-2 to A-4 under s.302 r/w s.149 – Held, No – All the eye-witnesses identified and attributed only A-1 for commission of offence and made no reference to the role of the other accused – Even the Investigation Officer did not mention anything about the role of the other accused except A-1 – Inasmuch as s.149 creates a specific offence and deals with punishment of that offence, in order to convict a person or persons with the aid of s.149, a clear finding regarding common object of the assembly must be available and the evidence discussed must show not only the nature of the common object but also that the object was unlawful – In the case on hand, these ingredients were not fulfilled or established by the prosecution insofar as the accused other than A-1 – Mere fact that they were armed not sufficient to prove common object – Even the Doctor opined that the injury sustained on the head of victim-deceased was sufficient to cause death in the ordinary course of nature – The Head injury was caused by A-1 which is also clear from the evidence of the PWs – In view of the same, the trial Court

and the High Court erred in convicting A-2 to A-4 under s.302 with the aid of s.149 – Their conviction and sentence set aside.

s.149 – Murder – Unlawful assembly – Six accused – Two acquitted – Conviction of the other four accused with aid of s.149 – Scope – Whether in order to bring home a charge under s.149 it is necessary that five or more persons must necessarily be brought before the court and convicted – Held, No – Constitution Bench decision in Mohan Singh's case followed – On facts, prosecution well within its jurisdiction to establish the charge under s.149 even after acquittal of two members of the unlawful assembly.

s.149 – Applicability of – Held: In order to attract s.149, it must be shown that the incriminating act was done to accomplish the common object of unlawful assembly and it must be within the knowledge of other members as one likely to be committed in prosecution of the common object.

According to the prosecution, the accused persons formed themselves into an unlawful assembly and came in a van armed with deadly weapons with the common object of doing away with PW-1's cousin brother; that all the accused persons attacked him and finally, A-1 inflicted three cut injuries on his head with a chopper; that at the time of occurrence, PW-1 and PW-2 were also present there and that PW-1 along with PW-5, who came there, took the victim to the nearest hospital where he was declared brought dead.

The trial court held A-1 to A-4 guilty of the offences punishable under Sections 143, 147, 148, 342, 449 and 302 read with Section 149 of IPC and sentenced them to undergo rigorous imprisonment for six months under Section 143, for one year under Section 148, for another term of six months under Section 342, again for two years under Section 449 and to undergo life imprisonment under Section 302 read with Section 149

IPC and acquitted Accused Nos. 5 & 6. No separate sentence was awarded under Section 147 IPC. Challenging the judgment of the trial court, accused Nos. 1-4 filed criminal appeal before the High Court. The High Court dismissed the appeal and confirmed their conviction and sentence.

Aggrieved, A-1 to A-4 (the appellants) preferred the instant appeal. However, in view of the order of the State Government for pre-mature release of A-1/appellant No.1, the appeal as regards A-1 was not pressed.

The conviction of A-2 to A-4/ appellant nos. 2 to 4 was challenged on the ground that the trial Court and the High Court committed error in convicting them under Section 302 by applying the provision of Section 149 IPC particularly, when there was no material in the evidence of PWs 1, 2 and 5. It was contended that out of six persons charge-sheeted, two were acquitted by the trial Court and the assembly must be deemed to have been composed of only four persons, hence it cannot be regarded as an unlawful assembly in terms of Section 141 IPC.

Disposing the appeal, the Court

HELD:1. The appeal insofar as A-1/appellant No.1 was concerned is dismissed as not pressed in view of the order of premature release by the State Government. [Paras 13, 15] [223-A-B; 224-D-E]

2. As regards the challenge to the conviction of the other accused (A-2 to A-4/ appellant nos. 2 to 4), it is true that out of six named persons, two were acquitted by the trial Court and only four were convicted under Section 302 read with Section 149 IPC. However, in the Constitution Bench decision in *Mohan Singh's* case, it

has been held that if five or more persons are named in the charge as composing an unlawful assembly and evidence adduced by the prosecution proves that charge against all of them, that is a very clear case where Section 149 can be invoked. It is, however, not necessary that five or more persons must be convicted before a charge under Section 149 can be successfully brought home to any members of the unlawful assembly. It may be that less than five persons may be charged and convicted under Section 302/149 if the charge is that the persons before the Court along with others named constituted an unlawful assembly; the other persons so named may not be available for trial along with their companions for the reason, for instance, that they have absconded. In such a case, the fact that less than five persons are before the Court does not make Section 149 inapplicable for the simple reason that both the charge and the evidence seek to prove that the persons before the Court and others number more than five in all and as such, they together constitute an unlawful assembly. Therefore, in order to bring home a charge under Section 149 it is not necessary that five or more persons must necessarily be brought before the court and convicted. In view of the said decision in *Mohan Singh's* case, in the case on hand, even after acquittal of two accused from all the charges leveled against them, if there is any material that they were members of the unlawful assembly, the conviction under Section 302 can be based with the aid of Section 149. [Paras 6, 7, 8] [218-H; 219-A-B; 220-A-H; 221-A]

Mohan Singh & Anr. vs. State of Punjab **AIR 1963 SC 174: 1962 Suppl. SCR 848 – followed.**

3. Though the prosecution is well within its jurisdiction to establish the charge under Section 149 IPC even after acquittal of two members of the unlawful assembly, however, in order to attract Section 149 IPC, it

must be shown that the incriminating act was done to accomplish the common object of unlawful assembly and it must be within the knowledge of other members as one likely to be committed in prosecution of the common object. In the case on hand, admittedly the prosecution rests on the evidence of PWs 1, 2 and 5 who alleged to have witnessed the occurrence. PW-1, in his evidence, though mentioned that he knows all the six accused persons and identified them in the Court, has not attributed to any of the accused other than A-1. In categorical terms, he informed the Court that "A-1 cut the head of the deceased by the chopper (MO1)". He also deposed that the incident had completed within ten minutes. Though he deposed that he told about the incident to one 'A', the owner of the mill, that A-1 and others attacked the deceased, 'A' was not examined. Like PW-1, PW-2 also attributed only against A-1, who was in possession of a chopper. Though she mentioned that A-4 was carrying iron rod, she had not elaborated anything about the role of others except A-1. In the same way, the other eye witness, PW-5 identified and attributed only A-1 for the commission of offence. Absolutely, there is no reference to the role of other accused. Even the Investigation Officer examined as PW-14 had not mentioned anything about the role of other accused except A-1. In fact, in cross-examination, he had admitted that "PW-1 had not given statement specifically that A-2 beat the deceased by Iron rod". None of these witnesses attributed involvement of other accused except A-1. Before convicting accused with the aid of Section 149 IPC, the Court must give clear finding regarding nature of common object and that the object was unlawful. In the absence of such a finding as also any overt act on the part of the accused persons, mere fact that they were armed would not be sufficient to prove common object. Inasmuch as Section 149 creates a specific offence and

deals with punishment of that offence, in order to convict a person or persons with the aid of Section 149 IPC, a clear finding regarding common object of the assembly must be available and the evidence discussed must show not only the nature of the common object but also that the object was unlawful. In the case on hand, these ingredients were not fulfilled or established by the prosecution insofar as the accused other than A-1. [Para 13] [222-E-H; 223-A-H; 224-A-B]

Kuldip Yadav & Ors. vs. State of Bihar **JT 2011 (4) SC 436;** *Bhudeo Mandal & Ors. vs. State of Bihar* **(1981) 2 SCC 755: 1981 (3) SCR 291;** *Ranbir Yadav vs. State of Bihar* **(1995) 4 SCC 392: 1995 (2) SCR 826;** *Allauddin Mian & Ors. Sharif Mian & Anr. vs. State of Bihar* **(1989) 3 SCC 5: 1989 (2) SCR 498;** *Rajendra Shantaram Todankar vs. State of Maharashtra & Ors.* **(2003) 2 SCC 257: 2003 (1) SCR 10 and** *State of Punjab vs. Sanjiv Kumar @ Sanju & Ors.* **(2007) 9 SCC 791: 2007 (7) SCR 1025 – relied on.**

4. Even the Doctor who was examined as PW-7 opined that the injury sustained on the head was sufficient to cause death in the ordinary course of nature. It was not in dispute that the Head injury was caused by A-1 which is also clear from the evidence of PWs. 1, 2 and 5. In view of the same, the trial Court and the High Court committed an error in convicting the appellants Nos. 2-4/ (A-2 to A-4) under Section 302 with the aid of Section 149 IPC. [Para 14] [224-C-D]

Case Law Reference:

1962 Suppl. SCR 848	**followed**	**Para 7**
JT 2011 (4) SC 436	**relied on**	**Para 11**
1981 (3) SCR 291	**relied on**	**Para 11**
1995 (2) SCR 826	**relied on**	**Para 11**
1989 (2) SCR 498	**relied on**	**Para 11**
2003 (1) SCR 10	**relied on**	**Para 11**
2007 (7) SCR 1025	**relied on**	**Para 11**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1618 of 2005.

From the Judgment & Order dated 8.4.2005 of the High Court of Kerala at Ernakulam in Crl. No. 952 of 2004.

T.N. Singh, Vikas K. Singh, Vikram Singh for the Appellants

T.S.R. Venkata Ramana, R. Sathish, S. Geetha for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J.1. This appeal is filed against the final judgment and order dated 08.04.2005 passed by the Division Bench of the High Court of Kerala at Ernakulam in Criminal Appeal No. 952 of 2004 whereby the High Court dismissed the appeal of the appellants herein and confirmed their conviction and sentence under Sections 143, 147, 148, 342, 449 and 302 read with Section 149 of Indian Penal Code (hereinafter referred to as "IPC") passed by the trial Court.

2. **Brief facts:**

(a) The victim, Usman @ Haneefa, aged about 24 years is the brother of Yasin (PW-4) and cousin brother of Mohd. Rafi (PW-1), the first informant. One Nasar (CW-15) was running Kodakassery Oil Mill at Mannambatta during the relevant period. The Oil Mill belonged to Appachan (CW-14) which was taken on rent by Nasar (CW-15). The victim is the brother's son of Nasar and was also a worker and helper in the Oil Mill. There was enmity between Shaji (A-1), first appellant herein and the victim. Devarajan (A-2) and Haridas (A-3) are the brothers of

A-1 and Kannan @ Gopalakrishnan (A-4) is the brother-in-law of A-1.

(b) On 31.12.2000, at about 3 p.m., the accused persons (Shaji, Devarajan, Haridas, Kannan @ Gopalakrishnan, Latheef and Unnikrishnan) formed themselves into an unlawful assembly came in a van armed with deadly weapons such as chopper, iron bars, iron pipe, wooden sticks etc. with the common object of doing away with Usman, who was sitting in the Verandah of the smoke house of the Oil Mill at Mannambatta. All the accused persons attacked him and finally, A-1 inflicted three cut injuries on his head with a chopper. Thereafter, they left the place of occurrence in the Van in which they came. At the time of occurrence, Mohd. Rafi (PW-1) and Geetha (PW-2), a worker in the Oil Mill were also present there. Mohd. Rafi (PW-1) along with Baby (PW-5), who came there, took Usman @ Haneefa to the nearest hospital where he was declared brought dead. At 6.00 p.m., PW-1 furnished his statement before the police and thereafter, the police registered a crime against Shaji and five other unnamed persons. During the investigation, the identities of other accused persons were also revealed. After the completion of investigation, the Circle Inspector of Police, Cherpulassery filed the charge-sheet against all the six accused persons before the Court.

(c) The Additional Sessions Judge, Palakkad, after examining 17 witnesses and other relevant materials passed an order dated 08.06.2004 and held A-1 to A-4 guilty of the offences punishable under Sections 143, 147, 148, 342, 449 and 302 read with Section 149 of IPC and sentenced them to undergo rigorous imprisonment for six months under Section 143, for one year under Section 148, for another term of six months under Section 342, again for two years under Section 449 and to undergo life imprisonment with fine of Rs.10,000/- with a default sentence under Section 302 read with Section 149 IPC and acquitted Accused Nos. 5 & 6. No separate sentence was awarded under Section 147 IPC.

(d) Challenging the judgment of the Additional Sessions Judge, Palakkad, Accused Nos. 1-4 filed Criminal Appeal No. 952 of 2004 before the High Court of Kerala. The Division Bench of the High Court, by impugned order dated 08.04.2005, dismissed the appeal and confirmed their conviction and sentence passed by the trial Court. Aggrieved by the said judgment, the appellants preferred this appeal by way of special leave before this Court.

3. Heard Mr. T.N. Singh, learned counsel for the appellants and Mr. T.S.R. Venkata Ramana, learned counsel for the respondent-State.

4. Mr. T.N. Singh, learned counsel appearing for the appellants, at the outset, submitted that in view of the order of the State Government releasing Shaji (A-1), Appellant No.1 herein, by G.O. [MS] No. 47/2011/Home dated 18.02.2011 before the date of expiry of his life imprisonment by executing a bond on the conditions specified therein, he is not pressing the appeal insofar as A-1 is concerned. The same has been taken on record.

5. Now in the present appeal, we are concerned with other three accused, namely, Appellant Nos. 2 to 4. Mr. T.N. Singh submitted that the trial Court and the High Court committed an error in convicting these appellants under Section 302 by applying the provision of Section 149 IPC particularly, when there was no material in the evidence of PWs 1, 2 and 5. He further submitted that out of six persons charge-sheeted, two were acquitted by the trial Court and the assembly must be deemed to have been composed of only four persons, hence it cannot be regarded as an unlawful assembly in terms of Section 141 IPC.

6. Insofar as the second submission of the learned counsel for the appellants is concerned, it is true that out of six named persons, two were acquitted by the trial Court and only four were convicted under Section 302 read with Section 149 IPC.

7. On the other hand, Mr. T.S.R. Venkata Ramana, learned counsel appearing for the respondent-State, by drawing our attention to the judgment of the Constitution Bench in *Mohan Singh & Anr. Vs. State of Punjab*, AIR 1963 SC 174, submitted that even after acquittal of two accused, in order to bring home the charge under Section 149 IPC, it is not necessary that five or more persons must necessarily be brought before the Court and convicted. The following principles laid down by the Constitution Bench are relevant for our consideration:

> **"8.** The true legal position in regard to the essential ingredients of an offence specified by Section 149 are not in doubt. Section 149 prescribes for vicarious or constructive criminal liability for all members of an unlawful assembly where an offence is committed by any member of such an unlawful assembly in prosecution of the common object of that assembly or such as the members of that assembly knew to be likely to be committed in prosecution of that object. It would thus be noticed that one of the essential ingredients of Section 149 is that the offence must have been committed by any member of an unlawful assembly, and Section 141 makes it clear that it is only where five or more persons constituted an assembly that an unlawful assembly is born, provided, of course, the other requirements of the said section as to the common object of the persons composing that assembly are satisfied. In other words, it is an essential condition of an unlawful assembly that its membership must be five or more. The argument, therefore, is that as soon as the two Piara Singhs were acquitted, the membership of the assembly was reduced from five to three and that made Section 141 inapplicable which inevitably leads to the result that Section 149 cannot be invoked against the appellants. In our opinion, on the facts of this case, this argument has to be upheld. We have already observed that the point raised by the appellants has to be dealt with on the assumption that only five persons were named in the charge as

> persons composing the unlawful assembly and evidence led in the course of the trial is confined only to the said five persons. If that be so, as soon as two of the five named persons are acquitted, the assembly must be deemed to have been composed of only three persons and that clearly cannot be regarded as an unlawful assembly.
>
> **9.** In dealing with the question as to the applicability of Section 149 in such cases, it is necessary to bear in mind the several categories of cases which come before the criminal courts for their decision. If five or more persons are named in the charge as composing an unlawful assembly and evidence adduced by the prosecution proves that charge against all of them, that is a very clear case where Section 149 can be invoked. It is, however, not necessary that five or more persons must be convicted before a charge under Section 149 can be successfully brought home to any members of the unlawful assembly. It may be that less than five persons may be charged and convicted under Section 302/149 if the charge is that the persons before the Court along with others named constituted an unlawful assembly; the other persons so named may not be available for trial along with their companions for the reason, for instance, that they have absconded. In such a case, the fact that less than five persons are before the Court does not make Section 149 inapplicable for the simple reason that both the charge and the evidence seek to prove that the persons before the Court and others number more than five in all and as such, they together constitute an unlawful assembly. Therefore, in order to bring home a charge under Section 149 it is not necessary that five or more persons must necessarily be brought before the court and convicted……."

8. In view of the decision of the Constitution Bench, in the case on hand, even after acquittal of two accused from all the charges leveled against them, if there is any material that they

were members of the unlawful assembly, the conviction under Section 302 can be based with the aid of Section 149.

9. Now let us consider whether the prosecution has established the conviction of the remaining accused-appellants under Sections 302/149 IPC?

10. In order to understand the rival claims, it is useful to refer Section 149 IPC which reads as under:

> *"149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.*—If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

11. While considering the applicability of necessary ingredients of Section 149 IPC, we had an occasion to consider the same in *Kuldip Yadav & Ors. vs. State of Bihar,* JT 2011 (4) SC 436. After analyzing the conditions therein, it was held in paragraph 26 of the judgment as under:

> "26 The above provision makes it clear that before convicting accused with the aid of Section 149 IPC, the Court must give clear finding regarding nature of common object and that the object was unlawful. In the absence of such finding as also any overt act on the part of the accused persons, mere fact that they were armed would not be sufficient to prove common object. Section 149 creates a specific offence and deals with punishment of that offence. Whenever the court convicts any person or persons of an offence with the aid of Section 149, a clear finding regarding the common object of the assembly must

> be given and the evidence discussed must show not only the nature of the common object but also that the object was unlawful. Before recording a conviction under Section 149 IPC, essential ingredients of Section 141 IPC must be established. ……."

The above principles have been reiterated in *Bhudeo Mandal & Ors. vs. State of Bihar* (1981) 2 SCC 755, *Ranbir Yadav vs. State of Bihar* (1995) 4 SCC 392, *Allauddin Mian & Ors. Sharif Mian & Anr. Vs. State of Bihar,* (1989) 3 SCC 5, *Rajendra Shantaram Todankar vs. State of Maharashtra & Ors.* (2003) 2 SCC 257 and State of Punjab vs. Sanjiv Kumar @ Sanju & Ors. (2007) 9 SCC 791.

12. The following conclusion in *Kuldip Yadav* (supra) is also relevant which reads as under:

> "It is not the intention of the legislature in enacting Section 149 to render every member of unlawful assembly liable to punishment for every offence committed by one or more of its members. In order to attract Section 149, it must be shown that the incriminating act was done to accomplish the common object of unlawful assembly and it must be within the knowledge of other members as one likely to be committed in prosecution of the common object. If the members of the assembly knew or were aware of the likelihood of a particular offence being committed in prosecution of the common object, they would be liable for the same under Section 149 IPC"

13. Though as per the decision of the Constitution Bench, the prosecution is well within its jurisdiction to establish the charge under Section 149 IPC even after the acquittal of two members of the unlawful assembly, however, in order to attract Section 149 IPC, it must be shown that the incriminating act was done to accomplish the common object of unlawful assembly and it must be within the knowledge of other members as one likely to be committed in prosecution of the

common object. In the case on hand, admittedly the prosecution rests on the evidence of PWs 1, 2 and 5 who alleged to have witnessed the occurrence. We have already mentioned that we are not concerned with A-1 (Appellant No.1 herein) in the present appeal in view of the order of premature release by the State Government. PW-1, in his evidence, though mentioned that he knows all the six accused persons and identified them in the Court, has not attributed to any of the accused other than A-1. In categorical terms, he informed the Court that "A-1 (Shaji) cut the head of Usman by the chopper (MO1)". He also deposed that the incident had completed within ten minutes. Though he deposed that he told about the incident to one Appachan, the owner of the mill, that Shaji and others attacked Usman, the said Appachan was not examined. Like PW-1, PW-2 also attributed only against A-1, who was in possession of a chopper. Though she mentioned that A-4 was carrying iron rod, she had not elaborated anything about the role of others except A-1. In the same way, the other eye witness, PW-5 identified and attributed only A-1 for the commission of offence. Absolutely, there is no reference to the role of other accused. Even the Investigation Officer examined as PW-14 had not mentioned any thing about the role of other accused except A-1. In fact, in cross-examination, he had admitted that "PW-1 had not given statement specifically that A-2 beat Usman by Iron rod". In view of the claim of the learned counsel for the appellants about the evidence of PWs 1, 2 and 5, we have carefully analysed the same. As rightly submitted by Mr. T.N. Singh, none of these witnesses attributed involvement of other accused except A-1. As observed in ***Kuldip Yadav*** (supra), before convicting accused with the aid of Section 149 IPC, the Court must give clear finding regarding nature of common object and that the object was unlawful. In the absence of such a finding as also any overt act on the part of the accused persons, mere fact that they were armed would not be sufficient to prove common object. Inasmuch as Section 149 creates a specific offence and deals with punishment of that offence, in order to

convict a person or persons with the aid of Section 149 IPC, a clear finding regarding common object of the assembly must be available and the evidence discussed must show not only the nature of the common object but also that the object was unlawful. In the case on hand, we are satisfied that the above-mentioned ingredients have not been fulfilled or established by the prosecution insofar as the accused other than A-1.

14. Even the Doctor who was examined as PW-7 opined that the injury sustained on the head is sufficient to cause death in the ordinary course of nature. It is not in dispute that the Head injury was caused by A-1 which is also clear from the evidence of PWs. 1, 2 and 5. In view of the same, we are satisfied that the trial Court and the High Court committed an error in convicting the present appellants (A-2 to A-4) under Section 302 with the aid of Section 149 IPC.

15. In view of the above discussion, the appeal insofar as Appellant No.1 (A-1) is concerned, is dismissed as not pressed. Insofar as Appellant Nos. 2-4 (A-2 to A-4) are concerned, the conviction and sentence under Sections 302/149 IPC are set aside. Inasmuch as Appellant Nos. 2-4 were enlarged on bail by this Court vide order dated 02.11.2007, their bail bonds shall stand discharged. The appeal is allowed on the above terms.

B.B.B. Appeal disposed of.

S. THILAGAVATHY
v.
STATE OF TAMIL NADU AND ORS.
(Civil Appeal No. 3991 of 2011)

MAY 6, 2011

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

Appeal: Appeal against consent order/non-speaking order – Maintainability of – Appellant working as Instructor in grade I in respondent-Board – The Board passed order transferring the appellant – Writ petition by appellant challenging her transfer order – Appellant thereafter not reporting for duty – Order of discharge – Appellant filing writ petition, but withdrawing the same on assurance of reinstatement – Restored back on grade II instead of grade I – Appellant filing writ petition after three years seeking reinstatement on grade I – Single judge of High Court dismissing writ petitions by combined order – Writ appeal dismissed by Division Bench on the ground that since the appellant had agreed to join at the transferred place and given an assurance to that effect to the Single Judge, the appeal was not maintainable – On appeal, held: Division Bench was right in holding that the appellant could not prefer a writ appeal against the order which was passed with her consent as she had given up her challenge before the Single Judge against the order of her transfer – No reason to interfere with that part of the order of the Single Judge – However, Division Bench did not deal with the issue concerning reinstatement on grade II post – In the said circumstance, the appellant ought to have taken steps by way of review petition before the Division Bench and pointed out the error that her appeal arising out of writ petition seeking reinstatement on grade I was not dealt with at all by the Division Bench – It is left open to the appellant to approach Division Bench by way of review.

The appellant was an Organiser-cum-Tailoring Instructor in Grade-I in the Labour Welfare Board. The Board passed the order transferring the appellant. The appellant filed a suit challenging the transfer order. The District Munsif granted interim injunction in favour of the appellant. The suit was finally dismissed by the District Munsif on the ground that the civil court had no jurisdiction in the said matter. The appellant filed another writ petition no.9110/1997 challenging the transfer order. Meanwhile, in an enquiry against the appellant, the Board found that the appellant had abandoned the service as she had failed to report for duty and had also not filed any application for grant of leave. The Board passed the order of discharge. The appellant filed another writ petition but subsequently withdrew the same as accordingly to her, an assurance was given to her by the respondent that she would be restored back to the service as Grade I Officer on which she was appointed. After withdrawal of the said writ petition, the appellant was reinstated but on Grade II post. After about 3 years, she filed another writ petition no.4318/1997 before the High Court.

The two writ petitions no.9110/97 and 4318/97 were clubbed together. By a common order, the Single judge of the High Court dismissed writ petition no.9110/97 holding that the transfer order was not illegal or vitiated in any manner. Writ petition no.4318/97 was also dismissed by the Single Judge on the ground that there was no evidence to show that there was any assurance by the respondent-Board. The Single Judge also took notice of the fact that after her reinstatement on Grade II post, the appellant had remained silent for well over a period of three years and only after a lapse of three years in the year 1997, she filed a writ petition alleging that there was an assurance from the respondent-Board to

reinstate her on Grade I post. The Single Judge inferred that this plea of the appellant was purely an afterthought with no factual basis. She preferred a writ appeal before the Division Bench which was also dismissed. The instant appeal was filed challenging the order of the Division Bench of the High Court.

Disposing of the appeal, the Court

HELD: 1.1. A perusal of the impugned order passed by the Division Bench showed that the Division Bench although dismissed the writ appeal by common order, however, it dealt only with the facts of the case arising out of writ petition No.9110/97 which was filed by the appellant before the Single Judge challenging the order of her transfer and upheld the order passed by the Single Judge by which the writ petition was dismissed since the appellant had failed to establish before the Single Judge that the order of transfer required interference. The Division Bench observed that when the appellant had agreed to join at the transferred place and given an assurance to that effect to the Single Judge, the appeal against the consent order cannot be held maintainable. The Division Bench was right in holding that the appellant could not have been allowed to prefer a writ appeal against the order which was passed with her consent as she had given up her challenge before the Single Judge against the order of her transfer. There is no reason to interfere with this part of the order of the Single Judge passed in the appeal arising out of writ petition No. 9110/97. [Paras 10, 11] [231-H; 232-A-F]

1.2. In so far as appeal arising out of writ petition No 4318/97 was concerned, the Division Bench had not dealt with the case of the appellant wherein she had challenged her reinstatement on Grade II post and had preferred the appeal clearly contending that she should have been

reinstated on Grade I post on which she initially claimed to have been appointed in the year 1986. But this plea was not dealt with by the Division Bench at all, which amounts to non-consideration of the appeal directed against the order passed in writ petition No. 4318/97. But, in the said circumstance, the appellant ought to have taken steps by way of a review petition before the Division Bench wherein it was open to the appellant to point out the error that her appeal arising out of writ petition No.4318/97 was not dealt with at all one way or the other by the Division Bench and this was a factual error on the part of the Division Bench. Although it is quite possible to infer under the circumstance, that the Division Bench has impliedly dismissed the writ appeal arising out of writ petition No. 4318/97 by a non-speaking order, yet it was necessary for the Division Bench to expressly state whether the appeal arising out of writ petition No.4318/97 was rejected. It is left open to the appellant to approach the Division Bench by way of a review petition pointing out the error apparent on the face of the record to the effect that her appeal directed against the order in writ petition No.4318/97 was not dealt with at all and has been dismissed without indicating any reason whatsoever. If a review petition to that effect is filed, the same shall be dealt with in accordance with law. [Paras 12-14] [232-G-H; 233-A-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3991 of 2011.

From the Judgment & Order dated 14.3.2007 of the High Court of Judicature at Madras in Writ Appeal No. 621 of 1998.

Pankaj Kumar, Malini Poduval for the Appellant

T. Harish Kumar, R. Nedumaran for the Respondents.

The Judgment of the Court was delivered by

GYAN SUDHA MISRA, J. 1. Leave granted.

2. Heard learned counsel for the contesting parties.

3. This appeal by grant of special leave is directed against the judgment and order dated 14.3.2007 passed by the Division Bench of the High Court of Judicature at Madras in Writ Appeal No.621 of 1998 whereby the learned Judges were pleased to dismiss the writ appeal and upheld the common order dated 19.1.1998 of the learned single Judge given out in two Writ Petitions bearing Nos. 9110 & 4318/97.

4. In order to explain the controversy with clarity, it may be essential to state that the appellant Smt. S. Thilagavathy who had joined as an Orgnizer -cum-Tailoring Instructor in Grade I on 27.1.1986 in the Labour Welfare Board, Government of Tamil Nadu, challenged her transfer order from Trichy to Kovilpatti dated 16.6.1993, by filing a suit bearing O.S.No. 1460/93 before the District Munsif, Trichy. The learned District Munsif was pleased to grant interim injunction in favour of the appellant against the transfer order. However, the suit was finally dismissed, by the District Munsif vide judgment and order dated 21.9.1993 on the ground that the civil court had no jurisdiction in the said matter.

5. Subsequent development in the matter also took place thereafter, as the Secretary, Tamil Nadu Welfare Board , Chennai vide Order dated 29.9.1993 discharged the appellant from service referring to certain omissions and commissions on the part of the appellant after an enquiry was conducted against the appellant, which lasted for over three years. The order of discharge indicated that the appellant had abandoned the service as she had failed to report for duty ever since 24.6.1993 and had also not filed any application for grant of leave. It also stated that the interim injunction granted in favour of the appellant by the District Munsif against the transfer order

of the appellant, would not enure any benefit in her favour as it was not obtained within three days of the order of transfer dated 16.6.1993.

6. The appellant herein feeling aggrieved with the order of discharge issued by the respondent No.2 herein, filed another writ petition bearing No.18550/93 in the High Court of Judicature at Madras on several grounds but the appellant withdrew the said writ petition as according to her case, an assurance was given to her by the respondent that she would be restored back to the service as Grade I officer on which she has been appointed. It is the specific case of the appellant that she had withdrawn her writ petition in the High Court, in view of the this assurance.

7. After withdrawal of this writ petition, the appellant no doubt was reinstated, but it is her case that she was reinstated not on grade I post to which she was appointed and was holding prior to her discharge but on grade II post although she was entitled to be restored to her original post of grade I on which she had been appointed, and she could not have been reinstated on a lower grade II post. It is her further case that in view of the dire necessity or pressing need of her livelihood, she was compelled to join on a lower grade II post although she should have been reinstated on grade I post. But she continued making representations which did not meet with any response from the authorities concerned. She, therefore, filed another writ petition No.4318/97 in the High Court of Madras in March 1997.

8. The two writ petitions filed by the appellant challenging her transfer order bearing writ petition No.9110/97 and her writ petition No. 4318/97 assailing her reinstatement on grade II post of Organizer –cum-Tailoring Instructress and not on grade I post of Organizer-cum-Tailoring Instructor, were both clubbed together along with two more writ petitions which the appellant had filed before the High Court but with which we are not concerned, as the writ appeal filed by the appellant before the

Division Bench was only against the common order passed in writ petition Nos. 4318 and 9110/97, which the learned single Judge was pleased to dismiss by a common order as it was held that the order of transfer was not fit to be interfered with since the same was not illegal or vitiated in any other manner. In the result, writ petition No.9110/97 had been dismissed due to which the appellant had sought a week's time from the court, to report for duty at the place to which she had been transferred.

9. The learned single Judge was also pleased to dismiss the writ petition No.4318/97 as the learned single Judge noticed that the appellant had joined the service of the second respondent on 27.1.1986 and after discharge of service, she was reinstated on 17.3.1994 as Organizer –cum- Tailoring Instructress grade II in the scale of Rs. 905-1500/-. The learned single Judge however dismissed her writ petition refusing to hold that she was entitled to be reinstated on grade I post on the ground that the appellant was unable to produce any record containing such assurance although the respondent-Board by its affidavit filed through its Secretary had denied having given any assurance or promise to the appellant. The learned single Judge also took notice of the fact that after her reinstatement on grade II post, the appellant had remained silent for well over a period of three years and only after a lapse of three years in the year 1997, she filed a writ petition alleging that there was an assurance from the respondent-Board to reinstate her on grade I post. The learned single Judge inferred that this plea of the appellant was purely an afterthought with no factual basis and hence the writ petition was dismissed. Thus the two writ petitions filed by the appellant which included the challenge to her transfer order as also her reinstatement on grade II post instead of grade I post, were dismissed by the learned single Judge by a common order on 19.1.1998 against which she preferred a writ appeal before the Division Bench which was also dismissed.

10. However, on perusal of the impugned order passed by the Division Bench, it is quite apparent that the learned

Judges of the Division Bench although were pleased to dismiss the writ appeal by its common order dated 14.3.2007, it dealt only with the facts of the case arising out of writ petition No.9110/97 which had been filed by the appellant before the learned single Judge challenging the order of her transfer and upheld the order passed by the learned single Judge by which the writ petition was dismissed since the appellant had failed to establish before the learned single Judge that the order of transfer required interference. The Division Bench was pleased to observe that when the appellant had agreed to join at the transferred place and given an assurance to that effect to the learned single Judge, the appeal against the consent order cannot be held maintainable and hence the appeal against the same was dismissed by the Division Bench vide the impugned order under challenge in this appeal.

11. But having heard the learned counsel for the appellant, we do not find any ground to interfere with the aforesaid reason assigned by the learned single Judge as the appellant had already given up her contest before the learned single Judge against the order of her transfer and hence it had rightly not been allowed to be challenged by the Division Bench. As we agree with the view of the Division Bench that the appellant could not have been allowed to prefer a writ appeal against the order which was passed with her consent as she had given up her challenge before the single Judge against the order of her transfer, we see no reason to interfere with this part of the order of the learned single Judge passed in the appeal arising out of writ petition No. 9110/97.

12. However, we have noticed that the learned Judges of the Division Bench have not dealt with the case of the appellant in so far as her appeal arising out of writ petition No 4318/97 is concerned, wherein the appellant had challenged her reinstatement on grade II post and had preferred the appeal clearly contending that she should have been reinstated on grade I post on which she initially claimed to have been appointed in the year 1986. But it appears that this plea has

not been dealt with by the Division Bench at all, which amounts to non-consideration of the appeal directed against the order passed in writ petition No. 4318/97.

13. But, in the aforesaid circumstance, the appellant in our considered view ought to have taken steps in the High Court by way of a review petition before the Division Bench wherein it was open to the appellant to point out the error that her appeal arising out of writ petition No.4318/97 has not been dealt with at all one way or the other by the Division Bench and this was a factual error on the part of the Division Bench. Although it is quite possible to infer under the circumstance, that the Division Bench has impliedly dismissed the writ appeal arising out of writ petition No. 4318/97 by a non-speaking order, in view of the observation of the single Judge that the plea of the appellant on this count was an afterthought on the part of the appellant claiming reinstatement on grade I post, since she had discharged duties on grade II post for a long period of three years and thereafter by way of an afterthought, filed a writ petition challenging that her reinstatement on grade II post was illegal and arbitrary, yet it was necessary for the Division Bench to expressly state whether the appeal arising out of writ petition No.4318/97 was rejected.

14. However, since the learned Judges of the Division Bench have not passed any order in the writ appeal dealing with this plea of the appellant arising out of writ petition No. 4318/97, we leave it open to the appellant to approach the Division Bench by way of a review petition pointing out the error apparent on the face of the record to the effect that her appeal directed against the order in writ petition No.4318/97 has not been dealt with at all and has been dismissed without indicating any reason whatsoever. If a review petition to that effect is filed, the same shall be dealt with in accordance with law. Subject to this liberty, we dismiss this appeal but in the circumstance without any order as to costs.

D.G. Appeal disposed of.

SMT. RASILA S. MEHTA

v.

CUSTODIAN, NARIMAN BHAVAN, MUMBAI

(Civil Appeal No. 2924 of 2008)

MAY 6, 2011

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

Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992:

ss. 3(2) and 4(2) and 9-A – Notification of persons involved in Securities Scam – Notification dated 4.1.2007 notifying two more family members of the entities initially notified – HELD: When the earlier entities were notified, complete details of their transactions were not known and the appellants were not notified because their involvement and diversion of funds to them was not clear – On the complaint of Canbank Financial Services Ltd., the Custodian rightly notified the appellants and the Special Court was justified in dismissing the petition of appellants for their de-notification u/s 4(2) – Securities Scam.

ss.3(2), 3(3), 3(4) and 9-A – Proceedings against persons not involved in offences in transactions in securities – HELD: With the amendment carried out in the Act on 25.1.1994, by virtue of s.9-A,civil jurisdiction has been conferred on Special Court – The object of the Act is not merely to bring the offender to book but also to recover the public funds – Even if there is a nexus between third party, an offender and/or property of the third party can also be notified – The word "involved" in s.3(2) has to be interpreted in such a manner as to achieve the purpose of the Act – Interpretation of Statutes – Purposive construction – Rule of construction, 'noscitur a sociis' – Applicability of – Maxim 'ut res magis valeat quam pereat'

ss. 3(2), 3(3), 3(4), 9-A and 11 – Notified persons – Attachment of properties – HELD: From the date of notification u/s 3(2) all movable/immovable properties whether acquired by tainted fund of otherwise, belonging to notified persons shall stand attached simultaneously with the issue of the Notification and are available for distribution u/s 11.

ss. 3(2), 3(4) and 11 – Notification u/s 3(2) – Attachment of property – Opportunity of hearing – HELD: s.3(2) does not give any right of personal hearing to the person being notified, as a pre-decisonal hearing would frustrate the entire purpose of the Act – Attachment of property is natural consequence of notification and not sale of property – Power to order sale of property lies with Special Court which is presided over by a High Court Judge – Notified person can file a petition u/s 4(2) within 30 days of the issuance of notification – This amounts to post-decisional hearing satisfying the principles of natural justice.

ss. 3(2), 3(3), 3(4), 9-A and 11 – Notified persons – Property attached – Claim for maintenance, repair charges, interest and penalty for belated payment – HELD: The attached properties continue to remain with the Custodian – For their upkeep maintenance, repair etc., Custodian is liable to pay to the Housing Societies, and as such his claim as approved by the Special Court is sustained, except that he is not permitted to collect interest and penalty charges on the arrears of maintenance and repair charges.

Special court (Trial of Offences relating to Transactions in Securities) Rules, 1992:

r.2(b) read with s.11(2) – "Financial institution" – Complaint by and claim of Canbank Financial Services Ltd. (Canfina) – HELD: For the purpose of the Special Court Act and the Rules, Confina is a 'financial institution' – Its claim falls u/s 11(2)(b) of the Act and complaint falls under r.2(b) –

Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 – s.11(2).

Interpretation of Statutes:

Purposive construction – Object and reasons of a statute – Significance of – HELD: It is incumbent on courts to strive and interpret the statute as to protect and advance its object and purpose and to keep the legislative policy in mind while applying the provisions of the Act to the facts of the case – When rule of purposive construction is gaining momentum, courts should be very reluctant to ignore the legislative intent when the language is tolerably plain what it seeks to achieve.

Harmonious construction – HELD: In the event of any conflict, a harmonious construction should be given.

Words and Phrases:

Expression "involved in the offence" and "accused of the offence" in the context of s.3(2) of Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 – Connotation of.

On 8.6.1992, the Custodian, under the provisions of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992, notified late 'HSM' and 28 entities of 'HSM' group including his family members, except the appellants in Civil Appeal Nos. 2924 and 2915 of 2008, namely, Smt. 'RSM', mother of 'HSM and Smt. 'RM', the sister-in-law of 'HSM'. The appellants were active investors and had built up a portfolio by investment which appreciated in the value during the last three years. They owned flats at Madhuli Co-operative Housing Society Ltd., which are merged and amalgamated with other flats under the occupation of the Joint family. The Bank account of shareholdings of these appellants was held jointly where the appellants were the

first holders and their family members were joint/second holders. Due to the fact that joint/second holders were notified entities, the assets of the appellants were treated as attached on and from 8.6.1992 and the same were managed by the Custodian for the last 15 years. On 21.7.2006 the Custodian preferred a common miscellaneous Petition No. 20/2006 against the appellants seeking relief of a declaration that the said appellants were benamies and friends of late 'HSM' and other notified entities, and, therefore, their assets should be utilized in discharge of their liabilities. The appellants also filed M.A. No. 291 of 2006 on 11.9.1997, seeking relief of a declaration that all the assets belonged to them and they were the first holders and their bank accounts and fixed deposits of the shareholdings may be declared as free from attachment. On 4.1.2007, on the basis of the complaint made by Canbank Financial Services Ltd. (Canfina), the Custodian notified both the appellants u/s 3(2) of the 1992 Act, for which a public notice was published in the newspaper on 6.1.2007. On 19.1.2007, Smt. 'RSM', filed Miscellaneous Petition No. 1/2007 and on 18.6.2007, Smt. 'RM' filed Miscellaneous Petition No. 2/2007 for de-notification u/s 4(2) of the Act. The Special Court by its order dated 26.2.2008 dismissed both the petitions. It also approved Report No. 19/2008 filed by the Custodian in respect of outstanding dues towards flats No. 32-A, 32-B, 33, 34A, 34-B, 44-A, 44-B and 45 in Madhuli Co-operative Housing Society Ltd. belonging to 'HSM' as well as other related notified entities of 'HSM' group and Report No. 23/2009 of the Custodian on outstanding dues towards flats No. 31 in Madhuli Co-operative Housing Society Ltd. Aggrieved, Smt. 'RSM' filed Civil Appeal No. 2294/2008 and Smt. 'RM' filed Civil Appeal No. 2915/2008 against the final order dated 26.2.2008. Smt. 'RSM' also filed Civil Appeal No. 4764 of 2010 challenging the order dated 7.5.2010 passed by the Special Court approving report No. 23/2009 of the Custodian. Smt. 'JSM' and six

other family members of 'HSM' filed Civil Appeal No. 3377/2009 against the order of the Special Court approving of Report No. 19/2008 filed by the Custodian.

Disposing of the appeals, the Court

HELD: 1.1. It is settled law that the objects and reasons of an the Act are to be taken into consideration in interpreting its provisions. It is incumbent on the court to strive and interpret the statute as to protect and advance its object and purpose. Any narrow or technical interpretation of the provisions would defeat the legislative policy. The court must, therefore, keep the legislative policy in mind while applying the provisions of the Act to the facts of the case. [para 12] [256-C-D]

1.2. It is a cardinal principle of construction of statute or the statutory rule that efforts should be made in construing the different provisions, so that each provision may have effective meaning and implementation and in the event of any conflict a harmonious construction should be given. [para 12] [256-D-E]

1.3. The Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 provides for stringent measures. It was enacted for dealing with an extraordinary situation in the sense that any person who was involved in any offence relating to transaction of any security could be notified, whereupon all his properties stood attached. The provision contained in the Act being stringent in nature, the purport and intent thereof must be ascertained having regard to the purpose and object it seeks to achieve. [para 18] [261-D-F]

Harshad Shantilal Mehta vs. *Custodian and Ors.* **(1998) 3 SCR 389=(1998) 5 SCC 1;** *Hitesh S. Mehta vs. Union of India & Anr.,* **1992 (3) Bomb. C.R. 716;** *L.S. Synthetics Ltd.*

vs. Fairgrowth Financial Services Ltd. & Anr. **2004 (4) Suppl. SCR 109 = (2004) 11 SCC 456; *J*yoti Harshad Mehta & Ors. Vs. Custodian & Ors. 2009 (12) SCR 1229 = (2009) 10 SCC 564;** *Ashwin S. Mehta vs. Custodian & Ors.* **2006 (1) SCR 56 = (2006) 2 SCC 385 – relied on**

2. <u>Provisions with regard to Attachment:</u>

2.1. Sub-s. (3) of s. 3 of the Special Court Act contains a non-obstante clause providing that on and from the date of notification under sub-s.(2), any property, movable or immovable, or both, belonging to any person notified under that sub-section shall stand attached simultaneously with the issue of the notification and sub-s. (4) of s. 3 makes it clear that such attached property shall be dealt with by the Custodian in such manner as the Special Court may direct. There is nothing in the Act which suggests that only such properties which belong to the notified party and which have been acquired by the use of tainted funds alone can be attached for the purposes of distribution u/s 11 of the Act. Attachment of all the properties in terms of s. 3(3) of the Act is automatic. The said section does not provide any qualification that the properties which are liable to be attached should relate to the illegal transactions in securities in respect of which the Act was brought in force. [para 17 and 25] [260-F-H; 267-A-C]

2.2. A reading of s. 11 of the Act further provides that all the properties which stand attached to the Special Court u/s. 3(3) are available for distribution u/s 11 of the Act. There is again nothing which suggests that the distribution must be restricted only to sale of such properties which have been acquired by use of tainted funds. The statutory period is irrelevant for the attachment of properties and sale of the same. All properties which are attached would be liable to be sold

for redemption of liabilities till the date of notification u/s 11 of the Act. [para 25] [266-H; 267-A-C]

3. <u>Whether there are sufficient provisions for pre and post decisional hearing thereby ensuring Rules of Natural Justice?</u>

3.1. Section 3(2) of the Special Court Act confers power on Custodian to notify a person in the Official Gazette on being satisfied on information received that such person was involved in any offence relating to transactions in securities during the statutory period 1.4.1991 to 6.6.1992. Section 3(2) does not give any right of personal hearing to the person being notified. In the absence of any such right there is no pre-decisional hearing The provisions of the Act do not provide for a pre-decisional hearing before notification but contain an impeccable milieu for a fair and just post decisional hearing. The fact that it does not provide for a pre-decisional hearing is not contrary to the rules of natural justice because the decision of the Custodian to notify does not ipso facto take away any right of the person thus notified nor does it impose any duty on him. Also a pre-decisional hearing would frustrate the entire purpose of the Act. If there is time given to show cause why a person should not be notified, that time could practically be utilized to further divert the funds, if any, so that it becomes even more difficult to trace it. [para 30-31] [269-F-G; 270-A-C; 271-F-G]

Swadeshi Cotton Mills v. Union of India, **1981 (2) SCR 533 = (1981) 1 SCC 664 – relied on**

3.2. Attachment of property is a natural consequence of notification and not sale of the property. The power to order a sale of the property lies only with the Special Court u/s. 11 and at this instance where notified person can be adversely affected, sub-s. (2) of s. 4, provides for

a hearing as regards correctness or otherwise of the notification notifying a person in this behalf, in the event an appropriate application, therefor, is filed within 30 days of the issuance of such notification. The Special Court is presided over by a sitting Judge of the High Court. All material before the Custodian is placed before the Special Court which independently analyses all the material while deciding the application filed by the notified party challenging the notification. This amounts to post decisional hearing satisfying the principles of natural justice. [para 18 and 31] [260-B-D; 271-D-F]

4. <u>Notification of the appellants:</u>

4.1. When 'HSM' and 28 members of his group including his family members/entities were notified under the Ordinance, the complete details of his transactions were not known. At that time the appellants were not notified because their involvement and diversion of funds to them was not clear. The Reserve Bank of India constituted the Janakiraman Committee to look into the diversion of funds. Inasmuch as the scam relates to accounts and money transactions by way of transfer of shares through nationalized banks and financial institutions, various committees were appointed by the Union of India which collected relevant materials and unearthed the persons involved, therefore, the Custodian and the Special Court are fully justified in relying on those reports in order to ascertain the correctness or otherwise of the transactions. [para 32 and 34] [272-B-D; 276-D-F]

Childline India Foundation & Anr. Vs. Allan John Waters & Ors., **JT 2011(3) SC 750 – relied on**

4.2. The accounts of the notified parties where significant diversion of funds had taken place were not completed due to non-cooperation of members of 'HSM' Group. The important aspect is that the appellants have

not explained the source of their income either to the Custodian or to the Income Tax authorities. The outstanding Income Tax from the appellants for the assessment year 1991-92 is Rs.2,65,38,345; for the assessment year 1992-93 it is Rs.11,55,28,951 and for the assessment year 1993-94, it is Rs.4,46,40,586. On a complaint, filed by Canbank Financial Services Ltd. (Canfina), the Custodian notified the appellants on 04.01.2007. The appellants filed petitions u/s.4 (2) of the Act challenging the notification. The Special Court looked into all the materials including the Audit Report and came to a conclusion that the appellants are only fronts of late 'HSM'. It further concluded that the appellants are only housewives, having no independent source of income, and were given loan by the brokerage firms for purchase of shares. The Special Court, therefore, rightly held that the money and assets were diverted to the appellants by the brokerage firms who were notified parties. The order of the Special Court does not suffer from any infirmity and there was sufficient material before the Custodian to arrive at a satisfaction that monies had been diverted by late 'HSM' to the appellants. [para 37,38,44 and 46] [278-A-B; D-G; 286-C-D; 291-F-G; 292-B-C]

5. <u>Whether the appellants being not involved in offences in transactions in securities could have been proceeded against in terms of the provisions of the Act?</u>

5.1. On 25.1.1994, an amendment was carried out in the Act, wherein, s.9-A was inserted to confer civil jurisdiction on the Special Court. The appellants were active investors and had built up a portfolio of investments which has appreciated in value over the years, more particularly, during the last three years. It cannot be said that since the appellant have not been charged for any offence, they cannot be notified under the Act. The plea that the phrase "involved in the offence"

could only mean "accused of the offence" and since the appellants are not charged with any offence they could not be notified, cannot be accepted. In construing these words which are used in association with each other, the rule of construction *noscitur a sociis* may be applied. It is a legitimate rule of construction to construe words in an Act of Parliament with reference to words found in immediate connection with them. The actual order of these words in juxtaposition indicates that meaning of one takes colour from the other. The rule is explained differently: that meaning of doubtful words may be ascertained by reference to the meaning of words associated with it. [para 5(e) and 47] [250-H; 251-A-B; 292-D-G]

Ahmedabad Teachers' Association vs. Administrative Officer, **AIR 2004 SC 1426 – relied on.**

5.3. In the instant case the nature of *"offence",* in which the appellants are allegedly involved, is to be taken into consideration. The Act does not create an offence for which a particular person has to be charged or held guilty. Thus the phrase "involved in the offence" would not mean "accused of the offence". Also, the appellants could have been reasonably suspected to have been involved in the offence after consideration of the various reports of the Janakiraman Committee, Joint Parliamentary Committee and the Inter Disciplinary Group (IDG); and also the fact that 28 members of M/S 'HSM' group including his family members/entities were notified under the Special Act Ordinance itself. The said factual matrix was sufficient for the satisfaction of the Custodian to notify the appellants. [para 48] [292-G-H; 293-A-C]

5.4. The object of the Act is not merely to bring the offender to book but also to recover what are ultimately public funds. Even if there is a nexus between a third party, an offender and/or property of the third party can

also be notified. The word "involved" in s. 3(2) of the Special Court Act has to be interpreted in such a manner so as to achieve the purpose of the Act. [para 48] [293-C-D]

Ashwin S. Mehta vs. *Custodian & Ors.,* **(2006) 2 SCC 386; and** *Jyoti H Mehta & Ors.* vs. *Custodian & Ors.,* **(2009) 10 SCC 564 – referred to.**

5.5. In construing the statute of this nature the court should not always adhere to a literal meaning but should construe the same, keeping in view the larger public interest. For the said purpose, the court may also take recourse to the basic rules of interpretation, namely, *ut res magis valeat quam pereat* to see that a machinery must be so construed as to effectuate the liability imposed by the charging section and to make the machinery workable. The statutes must be construed in a manner which will suppress the mischief and advance the object the legislature had in view. A narrow construction which tends to stultify the law must not be taken. Contextual reading is a well-known proposition of interpretation of statutes. The courts, when rule of purposive construction is gaining momentum, should be very reluctant to hold that Parliament has achieved nothing by the language it used when it is tolerably plain what it seeks to achieve. [para 49] [293-H; 294-A-C, F]

6. <u>Whether Canfina is a Financial Institution and whether the complaint filed by Canfina is invalid?</u>

6.1. The complaint has been received from Canfina which is a 100% subsidiary of Canara Bank, a nationalized bank. The term 'financial institution' has not been defined under the Act. It became necessary to enact the Special Court Act because of the large scale irregularities which came to light as a result of the investigations by the Reserve Bank of India into the

affairs of various banks and financial institutions whose monies were siphoned out. It has come to light that there were large scale siphoning out of monies from Canfina also as held by the Special Court in its order dated 25.06.1997. [para 50] [294-G-H; 295-A-D]

6.2. The term "financial institution" for the purposes of the Special Court Act should be interpreted in accordance with the Statement of Objects and Reasons of the Act. Thus, at the very inception of this Act are the investigations by the Reserve Bank of India and these investigations were carried on by the Janakiraman Committee. The Act was intended to be applied to the workings of the banks and financial institutions (though not covered by the strict definition of the term but involved in the securities scam of 1992) into whose affairs the Janakiraman Committee had investigated. Canfina, was one such non-banking financial institution that Janakiraman Committee had investigated and thus it was meant to be covered under the Act. The sources of information illustrated in r. 2 of the Special Court (Trial of Offences Relating to Transactions in Securities) Rules, 1992 also indicates Canfina as a financial institution. Thus, the claim of Canfina falls u/s 11(2)(b) of the Act and their complaint falls under r. (2)(b). The power to deal with the property ultimately lies with the Special Court. This Court is entirely in agreement with the conclusion arrived at by the Special Court. [para 51-55] [295-F-H; 296-A-C, H; 297-A-D]

7. <u>Claim for maintenance, repair charges, interest and penalty for belated payment (CA Nos. 3377 of 2009 and 4764 of 2010)</u>

7.1. The appellants in C.A.No. 3377 of 2009 were notified under the Act. Upon enforcement of the Act, all the properties of late 'HSM' and his family members, including the appellants apart from other corporate

entities stood attached by the Custodian. Consequently, all eight residential properties/flats of the appellants, namely, residential flat Nos. of 32A, 32B, 33, 34A, 34B, 44A, 44B and 45 in the Madhuli Cooperative Housing Society Ltd. at Dr. Anne Besant Road, Worli, Mumbai continue to remain attached under the Act with the Custodian. Their upkeep/repair is essential so that their market value does not get depreciated. Further, all the owners of the residential properties/flats, as the members of the Housing Society, are liable to pay such amount as may be determined by the Society towards the upkeep, maintenance and repairs of the flats as well as common areas and amenities in the housing complex, and the Cooperative Housing Societies are entitled to recover all the arrears and charges from the members who have not paid the society in time. The appellants have failed to pay to the Madhuli Cooperative Housing Society Ltd. their contribution towards the maintenance charges, interest thereon and the charges incurred towards the repair of the attached property by the Housing Society. The total dues demanded by said Housing Society by its letter dated 12.03.2009 relating to the eight attached properties in question is Rs.1,87,97,011/-. In the same way, in Civil Appeal No. 4764 of 2010, the appellant, namely, 'RSM' a notified party who is the owner of the attached property failed to pay to the Housing Society her contribution towards maintenance charges, interest thereon and also the charges incurred by the Housing Society towards repair of the attached property. The total dues demanded by the Housing Society, by its letter dated 21.06.2010 qua the attached property is Rs.21,06,230/-. The attached properties are to be properly maintained and as per the scheme, the repair and upkeep of the attached properties are to be followed by the Custodian and on the orders of the Special Court. [para 56-58, 60 and 61] [297-F; 298-B-H; 299-A-B, F-H; 300-B]

7.2. It is also brought to the notice of the Court that during the course of hearing, either before the Special Court or in this Court, certain amounts have been paid/ deposited by the appellants. Considering the fact that the appellants are agitating the matter at the hands of the Custodian, the Special Court and before this Court, the appellants need not be burdened with interest and penal charges for non-payment of maintenance and repair charges to the society. Accordingly, while sustaining the claim of the Custodian as approved by the Special Court, it is clarified that the Custodian is not permitted to collect interest and penalty charges on the arrears of maintenance and repair charges. The Custodian is free to adjust the amounts deposited by the appellants on the orders of this Court or the Special Court. The impugned order in both the appeals is accordingly modified. [para 62] [300-C-F]

Case Law Reference:

(1998) 3 SCR 389	**relied on**	**para 8**
1992 (3) Bomb. C.R. 716	**relied on**	**para 19**
2004 (4) Suppl. SCR 109	**relied on**	**para 20**
2009 (12) SCR 1229	**relied on**	**para 21**
2006 (1) SCR 56	**relied on**	**para 22**
1981 (2) SCR 533	**relied on**	**para 33**
JT 2011(3) SC 750	**relied on**	**para 34**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2924 of 2008.

From the Judgment & Order dated 26.2.2008 of the Special Court (Trial of offences relating to transactions in securities) at Bombay in Misc. Petition No. 2 of 2007.

WITH

C.A.Nos. 2915 of 2008, 3377of 2009 & 4764 of 2010.

K.K. Venugopal, I.H. Syed, Varinder Kumar Sharma, Kamini Jaiswal, Sham Mohan, B. Vijayalakshmi Menon, Tushad Cooper, Sangeeta Mandal, Kayesh Begg, Taruna A. Prasad (for Fox Mandal & Co.), Arvind Kumar Tewari, Subramonium Prasad, S. Majumdar, Shyam Nanda for the appearing parties.

The Judgment of the Court was deliverd by

P. SATHASIVAM, J.1. Civil Appeal No. 2924 of 2008 has been filed by Smt. Rasila S. Mehta, mother of late Harshad S. Mehta and Civil Appeal No. 2915 of 2008 has been filed by Smt. Rina S. Mehta, sister-in-law of late Harshad S. Mehta against the final judgment and order dated 26.02.2008 passed by the Special Court under the provisions of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 (hereinafter referred to as "the Act") at Bombay in Misc. Petition Nos. 2 and 1 of 2007 respectively whereby the Special Court dismissed their petitions challenging the notification dated 04.01.2007 issued by the Custodian exercising powers under Section 3(2) of the Act notifying the appellants.

2. Civil Appeal No. 3377 of 2009 has been filed by Smt. Jyothi H. Mehta, widow of late Shri Harshad S. Mehta and six others against the judgment and order dated 13.03.2009 passed by the Special Court in approving Report No. 19 of 2008 filed by the Custodian in respect of outstanding dues towards Flat Nos. 32A, 32B, 33, 34A, and 34B on the Third Floor and 44A, 44B and 45 on the Fourth Floor together with terrace area on the Third Floor and eight car parking space in Madhuli Cooperative Housing Society Limited, Worli belonging to late Harshad S. Mehta as well as other related notified entities of the Harshad Mehta Group.

3. Civil Appeal No. 4764 of 2010 has been filed by Smt.

Rasila S. Mehta challenging the order dated 07.05.2010 passed by the Special Court in approving Report No. 23 of 2009 of the Custodian on outstanding dues of Madhuli Cooperative Housing Society Limited, Worli as on 31.03.2009 towards Flat No. 31 on the Third Floor belonging to her being a notified party.

4. Since all the parties in the above appeals are family members of late Harshad S. Mehta and the orders challenged were of the Special Court, the same are being disposed of by the following common judgment.

5. **Brief Facts:**

(a) Sometime in 1992, it was noticed that frauds and irregularities involving colossal amounts of money were committed by certain stock brokers and other persons as also by certain banks and financial institutions. The amounts involved in the said frauds and/or irregularities were estimated to run into several thousand crores. The Central Government, therefore, formed an opinion that it was necessary to take immediate steps to try offences relating to such transactions in securities and for matters connected therewith or incidental thereto. The President of India thereupon promulgated an Ordinance on 6th June 1992 known as the Special Court (Trial of Offences Relating to Transactions in Securities) Ordinance 1992 and the said Ordinance came into force on the same day. The said Ordinance with certain modifications became the Act when the assent of the President was given thereto on 18th August 1992 and the said Act was deemed to have come into force on 6th June 1992, namely, the date on which the said Ordinance had been promulgated.

(b) On 6th June, 1992 the Central Government had also framed certain rules under the provisions of Section 14 of the said Ordinance known as the Special Court (Trial of Offences Relating to Transactions in Securities) Rules, 1992 (hereinafter referred to as 'the Rules'). The said rules came into force on

the 6th June 1992 and continue in force after the enactment of the Act under section 15(2) of the Act and/or Section 24 of the General Clauses Act, 1897.

(c) The object of the Act, as apparent from the provisions thereof, is to ensure that offences relating to securities were expeditiously tried and it, therefore, provides for the establishment of a Special Court. The Act also provides that an appeal lies from the judgment, sentence or order, not being interlocutory order, of the said Special Court to the Supreme Court of India both on facts and on law. An important object of the said Act is to ensure speedy recovery of the huge amounts involved, to punish the guilty in such irregularities or fraud, to restore confidence in and maintain the basic integrity and credibility of the banks and financial institutions.

(d) On 13.05.1992, the Central Bureau of Investigation (in short "the CBI") issued freeze orders under Section 102 of the Code of Criminal Procedure (in short 'the Code) on all the bank accounts of Smt. Rasila S. Mehta and Smt. Rina S. Mehta on the ground that the appellants are recipients of monies diverted by M/s Harshad S. Mehta from banks and financial institutions. This was a preventive measure taken by the CBI which powers are normally invoked pending investigation to bring within their fold, any property which is the subject-matter of an offence. Since then, all the charge-sheets came to be filed by the CBI after thorough investigation and trial has been completed in several cases. Based on the provisions of the Act, on 08.06.1992, the Custodian notified 29 entities except the appellants (Smt. Rasila S. Mehta and Smt. Rina S. Mehta) in the Mehta family comprising four brothers, the wives of three brothers, their three HUFs, a partnership firm, three brokerage firms in the family and 15 corporate entities promoted by them. These persons were notified on the basis of information/ complaint received from the Ministry of Finance in which the Janakiraman Committee report was cited and relied upon.

(e) On 25.01.1994, an amendment was carried out in the

Act, wherein, Section 9-A was inserted to confer civil jurisdiction to the Special Court. Smt. Rasila S. Mehta and Smt. Rina S. Mehta were active investors and had built up a portfolio of investments which has appreciated in value over the years, more particularly, during the last three years. They own one each of the nine flats at Madhuli Cooperative Housing Society Limited which are merged/amalgamated with other flats under the occupation of the joint family. The bank accounts and shareholdings of these appellants are held jointly where the appellants are the first holders and their family members are joint/second holders. Due to the fact that joint/second holders are notified entities, the assets of the appellants have been treated as attached on and from 08.06.1992 and the same are being managed by the Custodian for the last 15 years. On 21.07.2006, the Custodian preferred a common Misc. petition No. 20 of 2006 against Smt. Rasila S. Mehta and Smt. Rina S. Mehta seeking relief of a declaration that the said appellants are benamis and fronts of late Harshad S. Mehta and other notified entities and, therefore, their assets should be utilized in discharge of their liabilities. The appellants also filed M.A. No. 291/2006 on 11.09.2007 seeking relief of a declaration that all the assets belonged to them and they were the first holders, namely, bank accounts and fixed deposits and the shareholdings may be declared as free from attachment.

(f) On 04.01.2007, the Custodian issued a notification notifying both the appellants under Section 3(2) of the Act for which a public notice was published in the newspapers on 06.01.2007.

(g) On 19.01.2007, Smt. Rina S. Mehta filed Misc. Petition No. 1 of 2007 and on 18.06.2007, Smt. Rasila S. Mehta filed Misc. Petition No. 2 of 2007 for the relief of de-notification under Section 4(2) of the Act. It transpired that the appellants were notified on the basis of the alleged complaint by Canbank Financial Services Ltd. (in short "Canfina"). On considering the materials, the Special Court, by impugned order dated

26.02.2008, dismissed the petitions filed by the appellants – Smt. Rasila S. Mehta and Smt. Rina S. Mehta.

(h) Inasmuch as the other two appeals relate to the orders passed on the report submitted by the Custodian, there is no need to traverse all the details as stated therein.

6. Heard Mr. I.H. Syed, learned counsel for the appellants, Mr. Subramonium Prasad, learned counsel for the Custodian, Mr. K.K. Venugopal, learned senior counsel for intervenor/ Standard Chartered Bank and Mr. Tushad Cooper, learned counsel for intervenor/State Bank of India.

7. Mr. Syed, learned counsel for the appellants after taking us through the relevant provisions of the Act, Rules and the materials available with the Custodian as well as the reasonings of the Special Court raised the following contentions:

(i) The impugned notification is non-reasoned and non-speaking. The validity of a statutory order must be judged by a court of law by the reasons mentioned in the order itself and a statutory order cannot be explained and supplemented by fresh reasons in the shape of affidavit or otherwise whereas in the present case the Special Court accepted the same which is contrary to settled law.

(ii) Delay of 15 years in passing the order of notification is unreasonable. The explanation offered for delay is also unacceptable.

(iii) Material relied upon in passing the order of notification i.e. Canfina's letter dated 28.12.2006 is not supported by an affidavit which could not have been relied upon as it is contrary to proviso to Rule 2 of the Rules.

(iv) Reliance on the reports of Joint Parliamentary Committee, Jankiraman Committee, IDG and Chartered Accountants' by the Custodian is unacceptable.

(v) Pre-decisional hearing by the Custodian was required to be given and in the case on hand such opportunity was not afforded.

(vi) No effective post-decisional hearing as the materials relied upon was not supplied in time.

(vii) The Special Court erroneously held the transaction to be benami in general on the basis of Chartered Accountants' reports without examining individual transactions.

(viii) The onus to establish the validity, correctness, legality, propriety of the notification order is on the Custodian but wrongly shifted on the appellants.

(ix) Satisfaction of Custodian while passing an order of notification should be objective and based on materials as provided in the Rules.

(x) The Special Court erroneously held that the meaning of the phrase "involved an offence" has attained finality by this Court, though the said question was left open. In any event, the case of the Custodian was that a sum of Rs. 50 crores was diverted by M/s Harshad S. Mehta to the appellants during the period 01.04.1990 to 06.06.1992. In such event, monies transferred/diverted from the banks/financial institutions can only be recovered from the appellants and nothing more.

(xi) The jurisdiction of the Special Court is limited to the statutory period only, i.e. 01.04.1991 to 06.06.1992.

(xii) No interest can be levied on the notified parties as per the judgment of this Court in *Harshad Shantilal Mehta* vs. *Custodian and Ors*. (1998) 5 SCC 1.

8. On the other hand, Mr. Subramonium Prasad, learned counsel for the Custodian heavily relying on the circumstances for passing the Act, the statement of Objects and Reasons and the relevant provisions submitted that:

(i) The impugned order of the Special Court is valid and the appellants have not made out any case for interference by this Court.

(ii) As per Section 4(2) of the Act, it is for the appellants to show to the Special Court that they are not involved in any offence in securities between 01.04.1991 to 06.06.1992.

(iii) A perusal of various reports like the Auditor's report, Janakiraman Committee's report, report of Inter Disciplinary Group (IDG), report of Vinod K. Aggarwal and Company coupled with materials placed and discussed, the impugned decision of the Special Court cannot be faulted with.

(iv) From the materials placed, it is clear that the appellants are nothing but front benamidars of Harshad S. Mehta and there is no acceptable material to show that the appellants were having sufficient funds in their hands due to the purchase and sale of shares by placing acceptable materials such as income-tax returns etc. Inasmuch as the Special Court is manned by or presided over by a sitting Judge of High Court, sufficient safeguards are provided in the Act and, in any event, the appellants have no way prejudiced.

(v) As per the provisions of the Act and interpreted by this Court on various occasions, it is for the appellants to make out a case before the Special Court that they are not involved in any offence or that they have no nexus.

9. Mr. K.K. Venugopal, learned senior counsel for intervenor/Standard Chartered Bank and Mr. Tushad Cooper, learned counsel for intervenor/State Bank of India assisted the Court by highlighting the object and salient features of the Act as well as huge financial implications on the banks due to the act of Harshad S. Mehta in the sale and purchase of shares. They also highlighted that crores of public monies were lost due to the conduct of Harshad S. Mehta and his family members which resulted in huge financial loss to the banks.

10. Before going into the rival submissions, it is necessary to trace the history of enactment of the Act. The Special Courts Act, 1992 (27 of 1992) was legislated to meet the necessity of establishing Special Courts for trial of offences committed in relation to Transactions in Securities Act, 1992. Reserve Bank of India found that large scale irregularities and malpractices were found in Government and other securities through brokers in collusion with Bank employees. This legislation was enacted to meet this situation. It is a short Act containing only 15 sections. It deals with establishment of Courts, defines jurisdiction and powers of Special Court. It also defines civil jurisdiction of such Special Courts. Provision of arbitration was reserved and appeal could also be preferred under the Act. Much protection was given for acts done in good faith and punishment for contempt was also provided so that the provisions of the Act would be more strictly implemented.

11. **Objects & Reasons:**

The Statement of Objects and Reasons is as follows:-

"(1) In the course of the investigations by the Reserve Bank of India, large scale irregularities and malpractices were noticed in transactions in both the Government and other securities, indulged in by some brokers in collusion with the employees of various banks and financial institutions. The said irregularities and malpractices led to the diversion of funds from banks and financial institutions to the individual accounts of certain brokers.

(2) To deal with the situation and in particular to ensure speedy recovery of the huge amount involved, to punish the guilty and restore confidence in and maintain the basic integrity and credibility of the banks and financial institutions the Special Court (Trial of Offences Relating to Transactions in Securities) Ordinance, 1992, was promulgated on

the 6th June, 1992. The Ordinance provides for the establishment of a Special Court with a sitting Judge of a High Court for speedy trial of offences relating to transactions in securities and disposal of properties attached. It also provides for appointment of one or more custodians for attaching the property of the offenders with a view to prevent diversion of such properties by the offenders."

12. It is settled law that the objects and reasons of the Act are to be taken into consideration in interpreting the provisions of the statute. It is incumbent on the court to strive and interpret the statute as to protect and advance the object and purpose of the enactment. Any narrow or technical interpretation of the provisions would defeat the legislative policy. The Court must, therefore, keep the legislative policy in mind while applying the provisions of the Act to the facts of the case. It is a cardinal principle of construction of statute or the statutory rule that efforts should be made in construing the different provisions, so that each provision may have effective meaning and implementation and in the event of any conflict a harmonious construction should be given. It is also settled law that literal meaning of the statute must be adhered to when there is no absurdity in ascertaining the legislative intendment and for that purpose the broad features of the Act can be looked into. The main function of the Court is to merely interpret the section and in doing so it cannot re-write or re-design the section. Keeping all these principles in mind, let us consider the relevant provisions.

13. **Relevant Provisions:**

As per Section 2(b), 'Custodian' means "the Custodian appointed under sub-section (1) of Section 3." Section 2(c) 'securities' includes.—

"(i) shares, scrips, stocks, bonds, debentures, debenture stock, units of the Unit Trust of India or

any other mutual fund or other marketable securities of a like nature in or of any incorporated company or other body corporate;

(ii) Government securities; and

(iii) Rights or interests in securities;"

and as per Section 2(d) 'Special Court' means "the Special Court established under sub-section (1) of Section 5." Among all the provisions Sections 3 and 4 are relevant which read as follows:

"3. Appointment and functions of Custodian.—-(1) The Central Government may appoint one or more Custodian as it may deem fit for the purposes of this Act.

(2) The Custodian may, on being satisfied on information received that any person has been involved in any offence relating to transactions in securities after the 1st day of April, 1991 and on and before 6th June, 1992, notify the name of such person in the Official Gazette.

(3) Notwithstanding anything contained in the Code and any other law for the time being in force, on and from the date of notification under sub-section (2), any property, movable or immovable, or both, belonging to any person notified under that sub-section shall stand attached simultaneously with the issue of the notification.

(4) The property attached under sub-section (3) shall be dealt with by the Custodian in such manner as the Special Court may direct.

(5) The Custodian may take assistance of any person while exercising his powers or for discharging his duties under this section and section 4.

4. Contracts entered into fraudulently may be

cancelled.—(1) If the Custodian is satisfied, after such inquiry as he may think fit, that any contract or agreement entered into at any time after the 1st day of April, 1991 and on and before the 6th June, 1992 in relation to any property of the person notified under sub-section (2) of section 3 has been entered into fraudulently or to defeat the provisions of this Act, he may cancel such contract or agreement and on such cancellation such property shall stand attached under this Act:

Provided that no contract or agreement shall be cancelled except after giving to the parties to the contract or agreement a reasonable opportunity of being heard.

(2) Any person aggrieved by a notification issued under sub-section (2) of section 3 or any cancellation made under sub-section (1) of section 4 or any other order made by the Custodian in exercise of the powers conferred on him under section 3 or 4 may file a petition objecting to the same within thirty days of the assent to the Special Court (Trial of Offences Relating to Transactions in Securities) Bill, 1992 by the President before the Special Court where such notification, cancellation or order has been issued before the date of assent to the Special Court (Trial of Offences Relating to Transactions in Securities) Bill, 1992 by the President and where such notification, cancellation or order has been issued on or after that date, within thirty days of the issuance of such notification, cancellation or order, as the case may be; and the Special Court after hearing the parties, may make such order as it deems fit."

Section 9 speaks about procedure and powers of Special Court and by way of an amendment with effect from 25th January, 1994, Section 9-A was inserted to confer jurisdiction, powers, authority and procedure of Special Court in respect of civil matters. As per Section 10, against any judgment, sentence or order, not being interlocutory in nature of the Special Court, an appeal shall lie to the Supreme Court both

on facts and on law. Like Sections 3 and 4, another important section is Section 11 which reads as under:

"11. *Discharge of liabilities.*- (1) Notwithstanding anything contained in the Code and any other law for the time being in force, the Special Court may make such order as it may deem fit directing the Custodian for the disposal of the property under attachment.

(2) The following liabilities shall be paid or discharged in full, as far as may be, in the order as under :-

(a) all revenues, taxes, cesses and rates due from the persons notified by the Custodian under sub-section(2) of Sec. 3 to the Central Government or any State Government or any local authority.

(b) all amounts due from the person so notified by the Custodian to any bank or financial institution or mutual fund ; and

(c) any other liability as may be specified by the Special Court from time to time."

Section 13 makes it clear that the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law, other than this Act, or in any decree or order of any Court, Tribunal or other authority. Section 14 empowers the Central Government to make rules for carrying out the provisions of the Act.

14. Based on the above statutory provisions, let us consider the claim of the appellants, stand taken by the Custodian and the reasonings of the Special Court in passing the impugned orders.

15. *Discussion:*

The objects of the Act are two fold:

(a) to punish the guilty, and

(b) to ensure speedy recovery of the huge amount involved.

"Amount involved" means the amount of the banks and financial institutions alleged to have been diverted to the accounts of the offenders during the statutory period from 01.04.1991 to 06.06.1992.

16. The attached properties can be dealt with by the Special Court under sub-Sections (3) and (4) of Section 3, sub-Section (2) of Section 4, Sections 9-A and 11 of the Act. Section 3(3) of the Act provides for an automatic attachment of all properties as a consequence of Notification. The object provides the attachment of all properties of the offender with a view to prevent diversion of such properties. The said provision is a preventive provision.

17. Section 11 provides for disposal and sale of attached properties extinguishing the rights and title of a notified party, which is a punitive provision. Section 3 of the Act provides for appointment and functions of the Custodian. Sub-section (2) of Section 3 postulates that the Custodian may, on being satisfied on information received that any person has been involved in any offence relating to transactions in securities after the 1st day of April, 1991 and on and before 06.06.1992 (the statutory period), notify the name of such person in the Official Gazette. Sub-section (3) of Section 3 contains a non obstante clause providing that on and from the date of notification under sub-section (2), any property, movable or immovable, or both, belonging to any person notified under that sub-section shall stand attached simultaneously with the issue of the notification and sub-section (4) of Section 3 makes it clear that such attached property shall be dealt with by the Custodian in such manner as the Special Court may direct.

18. In the Ordinance which preceded the Act, there was no provision for giving post facto hearing to a notified person for cancellation of notification, but such a provision has been made in the Act, as would appear from Section 4(2) thereof. Sub-section (2) of Section 4, however, provides for a hearing as regards correctness or otherwise of the notification notifying a person in this behalf, in the event an appropriate application therefor is filed within 30 days of the issuance of such notification. Section 5 provides for establishment of the Special Court. Section 7 confers exclusive jurisdiction of Special Court. A perusal of the Act makes it clear that any prosecution in respect of any offence referred to in sub-section (2) of Section 3 pending in any court is required to be transferred to the Special Court. Section 9 provides for the procedure and powers of the Special Court. Section 9-A, which was inserted by Act 24 of 1994 with effect from 25.01.1994, confers all such jurisdiction, powers and authority as were exercisable, immediately before such commencement by any civil court in relation to the matter specified therein. The Act provides for stringent measures. It was enacted for dealing with an extraordinary situation in the sense that any person who was involved in any offence relating to transaction of any security could be notified, whereupon all his properties stood attached. The provision contained in the Act being stringent in nature, the purport and intent thereof must be ascertained having regard to the purpose and object it seeks to achieve.

Provisions with regard to Attachment

19. The *vires* of Sections 3(2), 3(3) and 3(4) of the Ordinance was challenged before the High Court of Bombay in Writ Petition No. 1547 of 1992 *Hitesh S. Mehta vs. Union of India & Anr.,* 1992 (3) Bomb. C.R. 716. It was argued before the Bombay High Court that there is no provision for hearing at the stage of notification i.e. Section 3(2) and also at the stage of attachment of all properties i.e., Section 3(3). Therefore, the provisions are contrary to the principles of natural justice and

be struck down. The Division Bench of the High Court in paragraph 8 of the said judgment observed as follows:

> "Had the provision been confined to Section 3, sub-sections (2) and (3), the argument which is advanced before us would have had considerable force. It is undoubtedly true that neither in sub-Section (2) nor in (3) is there any provision for any hearing being given to the person who may be notified; nor is there any provision for any reasoned order being passed by the Custodian at the time when he notifies such a person. There is, however, a further sub-Section, namely, sub-Section (4) of Section 3 which provides as follows:
>
> Section 3 (4) : The property attached under sub-Section (3) shall be dealt with by the Custodian in such manner as the Special Court may direct.
>
> This sub-section clearly contemplates that the power of the Custodian to deal with the property of a person who has been notified is subject to the orders and directions of the Special Court. Now, in the first place, the Special Court under the Ordinance is a Court presided over by a sitting Judge of a High Court. This itself is a check on any arbitrary exercise of powers by the Custodian. Secondly, the power of the Special Court to give directions to the Custodian in respect of any attached property must necessarily bring within its ambit, the power to order the release of such property or any part of its from attachment. If the person who is aggrieved by his name being notified under sub-section (2) approaches the Special Court and makes out, for example, a case that the property which is attached or a portion of its has no nexus of any sort with the illegal dealings in securities belonging to banks and financial institutions during the relevant period and/or that there are no claims or liabilities which have to be satisfied by attachment and sale of such property, in our view, the Special Court would have the power to direct the custodian

to release such property from attachment. In the same way, if ultimately, the Special Court, after looking at all the relevant circumstances, comes to the conclusion that the entire property should be released from attachment, we do not see any reason why such a direction also cannot be given by the Special Court under Section 3, sub-section (4). In such a situation, if the entire property is required to be released from attachment, the Special Court, in our view, can also direct the Custodian that the name of the notified person should be de-notified. This would be a necessary consequence of the power of the Special Court to give proper directions in connection with the property which the Custodian seeks to attach. If sub-section (4) is read in this light, the grievance of the petitioner relating to the validity of powers granted to the Custodian under Section 3 would not survive.

The above-said paragraph of *Hitesh S. Mehta's* judgment was relied upon by this Court in *Harshad S. Mehta vs. Custodian* (supra).

20. This Court in *L.S. Synthetics Ltd. vs. Fairgrowth Financial Services Ltd. & Anr.* (2004) 11 SCC 456 considered the judgment of *Harshad S. Mehta* (supra) and in paragraphs 27 to 29 observed as under:

> **"27.** This Court in para 14 was merely recording the submissions of one of the notified parties. Even a question as to whether all properties of notified persons would be subject to the statutory attachment under sub-section (3) of Section 3 of the said Act or not did not arise for consideration therein.
>
> **28.** Therein indisputably this Court was referring to a judgment of the Bombay High Court but did not pronounce finally on the correctness or otherwise thereof.
>
> **29.** In *Hitesh Shantilal Mehta* the Bombay High Court

> appears to have merely held that in appropriate cases the Special Court would have the power to direct the Custodian to release such property from attachment, in the event, it is found that the property which is attached has no nexus with the illegal dealings in securities belonging to banks and financial institutions during the relevant period and/or there are no claims or liabilities which have to be satisfied by attachment and sale of such property. Once it is held that a debt can be the subject-matter of attachment, the provisions of sub-section (3) of Section 3 of the said Act would squarely be applicable in view of the fact that the same was the property belonging to a notified person. This position in law is not disputed. Such attached property, thus, if necessary, for the purpose of discharging the claims and liabilities of the notified person indisputably would stand attached and can be applied for discharge of his liabilities in terms of Section 11 of the said Act."

21. In paragraphs 45, 46 and 47 of *Jyoti Harshad Mehta & Ors. vs. Custodian & Ors.* (2009) 10 SCC 564 this Court held as under:

> **"**45**.** It is contended by the learned counsel for the appellants Mr Syed that if any of the properties or assets of the notified parties have no nexus with the illegal securities transactions, the same can be released from attachment or at least need not be sold.
>
> 46**.** It has further been argued that no evidence has been adduced that loans given by M/s Harshad S. Mehta to his family members or monies used by Shri Harshad Mehta for purchase of his flat were acquired from the tainted funds. It is submitted by the appellants that unless it can be shown that the properties in question were acquired from the tainted funds they would be liable to be released from attachment. It is argued that the fact that the properties had been purchased much before the securities scam

would go on to show that they had no nexus with the funds diverted therefrom.

47. In our opinion the arguments advanced on behalf of the appellants need to be rejected at the outset because a plain reading of the sections of the Special Act would clearly point otherwise. In our opinion the attachment of all the properties in terms of sub-section (3) of Section 3 of the Special Act is automatic. The attachment restricts sale of the properties which have been acquired from illegal securities transaction. The sub-section specifically mentions that on and from the date of the notification, "any property, movable or immovable, or both", belonging to any person notified under the Act shall stand attached. ……."

22. In *Ashwin S. Mehta vs. Custodian & Ors.* (2006) 2 SCC 385 in paragraph 15, this Court observed as under:

"15. The Act provides for stringent measures. It was enacted for dealing with an extraordinary situation in the sense that any person who was involved in any offence relating to transaction of any security may be notified, whereupon all his properties stand attached. The provision contained in the Act being stringent in nature, the purport and intent thereof must be ascertained having regard to the purpose and object it seeks to achieve. The right of a person notified to file an application or to raise a defence that he is not liable in terms of the provisions of the Act or, in any event, the properties attached should not be sold in discharge of the liabilities can be taken at the initial stage by filing an application in terms of sub-section (2) of Section 4 of the Act. But, at the stage when liabilities are required to be discharged, the notified persons may raise a contention *inter alia* for the purpose of establishing that the properties held and possessed by them are sufficient to meet their liabilities. In terms of the provisions

of the Act, the Special Court had been conferred a very wide power."

23. Section 9-A was inserted by an amendment dated 25.01.1994 conferring jurisdiction, powers, authority and procedure of Special Court in civil matters. In view of this amendment, this Court in paragraph 41 of *Harshad Mehta's* case (supra) observed as under:

"41. ..... If, according to any of the banks or financial institutions, any of the properties attached belongs to the bank or financial institution concerned, it is open to that bank or financial institution to file a claim before the Special Court in that connection and establish its right to the property attached or any part thereof in accordance with law. Obviously, until such a claim is determined, the property attached cannot be sold or distributed under Section 11……."

24. This Court in *Ashwin S. Mehta's* case (supra), in paragraphs 51 and 52 observed as under:

"51. ……..It was, thus, necessary for the learned Special Court to arrive at a firm conclusion as regards the involvement of the individuals with Harshad Mehta, if any, and the extent of his liability as such.

52. Furthermore, the question as regards liability of the parties should have been determined at the stage of Section 9-A of the Act. …… It does not appear that claims inter se between the entities within the so-called group had ever been taken into consideration. The Custodian does not appear to have preferred claims before the Special Court on behalf of the largest lender on the so-called group against those he had to recover loans. Such claims may also be preferred."

25. As regards Section 11, the properties which stand attached by the Custodian are used to discharge the liabilities

in full as far as may be in the order prescribed under Section 11(2) of the Special Court Act. There is nothing in the Act which suggests that only such properties which belong to the notified party and which have been acquired by the use of tainted funds alone can be attached for the purposes of distribution under Section 11 of the Act. Section 3(3) postulates that on and from the date of notification all properties movable, immovable or both, belonging to the notified party on and from the date of the notification stand attached. Attachment of all the properties in terms of Section 3(3) of the Act is automatic. The said section does not provide any qualification that the properties which are liable to be attached should relate to the illegal transactions in securities in respect of which the Act was brought in force. Had the Parliament intended otherwise it would have specifically provided for the same as was done under the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976. A reading of Section 11 of the Act further provides that all the properties which stand attached to the Special Court under Section 3(3) are available for distribution under Section 11 of the Act. There is again nothing which suggests that the distribution must be restricted only to sale of such properties which have been acquired by use of tainted funds. The statutory period is irrelevant for the attachment of properties and sale of the same. All properties which are attached would be liable to be sold for redemption of liabilities till the date of notification under Section 11 of the Act.

26. The Custodian filed Misc. Petition No. 20 of 2006 on 21.07.2006 against the appellants for the recovery of the money alleged to have been advanced by the three brokerage firms i.e., M/s Harshad S. Mehta, M/s Ashwin Mehta and M/s J.H. Mehta to the appellants and prayed that the appellants be declared benami/front of late Harshad S. Mehta and/or his group, and the assets be utilized for discharging the liabilities of late Harsahd S. Mehta and/or his group. On 04.01.2007, the Custodian notified the appellants and subsequently on 23.01.2007 withdrew the said M.P. No. 20 of 2006 after the notification.

27. The appellants filed Misc. Petition Nos. 1 & 2 of 2007 challenging the validity of the Notification dated 04.01.2007 before the Special Court. The Special Court dismissed the said petitions and granted the prayer in Misc. Petition No.20 of 2006 filed by the Custodian.

28. This Court in *L.S. Synthetics* (supra) in paragraphs 35, 36 and 42 held as under:

> **"35.** S.N. Variava, J. in *A.K. Menon, Custodian* whereupon the learned Special Court has placed reliance, observed:
>
> "*19*. It is thus that the said Act lays down a responsibility on the Court to recover the properties. So far as monies are concerned, undoubtedly the particular coin or particular currency note given to a debtor would no longer be available. That however does not mean that the lender does not have any right to monies. What is payable is the loan i.e. the amount which has been lent. The right which the creditor has is not a 'right to recover' the money. The creditor has the title/right in the money itself. An equivalent amount is recoverable by him and the title in any equivalent amount remains with the lender. Thus the property which a notified party would have is not the right to recover but the 'title in the money itself'. Thus under Section 3(3) what would stand attached would be the title/right in the money itself. Of course what would be recoverable would be an equivalent of that money. Once the money stands attached then no application is required to be made by any parties for recovery of that money. It is then the duty of the court to recover the money. No period of limitation can apply to any act to be done by a court. Therefore in all such applications the only question which remains is whether on the date of the notification the right in the property existed. If the right in the property existed then irrespective of the fact that the right to recover may be barred by limitation there would be a statutory attachment of that property.

Once there is a statutory attachment of that property the court is duty-bound to recover it for the purposes of distribution. There can be no period of limitation for acts which a court is bound to perform. In this case since the court is compulsorily bound to recover the money there can be no limitation to such recovery proceedings. To be remembered that Section 3(3) as well as Section 13 provide that provisions of the said Act would prevail over any other law. This would include the Limitation Act.

36**.** We respectfully agree with the said view.

42**.** Only in the event, all the claims as provided for under Section 11 of the said Act are fully satisfied, the amount belonging to the notified person can be directed to be released in his favour or in favour of any other person."

29. The same position is reiterated in para 56 of the judgment in *Jyoti Harshad Mehta's* case (supra) wherein this Court held that,

"……It is true that to such an extent all properties would be liable to be sold which are needed for redemption and not beyond the same. What should be kept uppermost in the mind of the Court is to see that the liabilities are discharged and not beyond the same. It is with that end in view that the powers of the Special Court contained in Sections 9A and 11 must be construed."

30. *Whether there are sufficient provisions for pre and post decisional hearing thereby ensuring Rules of Natural Justice?*

Section 3(2) of the Special Courts Act confer power to Custodian to notify a person in the Official Gazette on being satisfied on information received that such person was involved in any offence relating to transactions in securities during the statutory period 01.04.1991 to 06.06.1992. Though Mr. Syed

contended that the appellants are entitled to hearing even at the stage of Section 3(2), we are unable to accept his claim. Section 3(2) does not give any right of personal hearing to the person being notified. In the absence of any such right there is no pre-decisional hearing The provisions of the Act do not provide for a pre-decisional hearing before notification but contains an impeccable milieu for a fair and just post decisional hearing. The fact that it does not provide for a pre-decisional hearing is not contrary to the rules of Natural Justice because the decision of the Custodian to notify does not ipso facto takes away any right of the person thus notified or imposes any duty on him. This also has to be read in the light of the judgment of *Swadeshi Cotton Mills v. Union of India,* (1981) 1 SCC 664 which reads as under:

"Rules of natural justice are not embodied rules. Being means to an end and not an end in themselves, it is not possible to make an exhaustive catalogue of such rules. But there are two fundamental maxims of natural justice viz. (i) *audi alteram partem* and (ii) *nemo judex in re sua*. The *audi alteram partem* rule has many facets, two of them being (a) notice of the case to be met; and (b) opportunity to explain. This rule cannot be sacrificed at the altar of administrative convenience or celerity. The general principle—as distinguished from an absolute rule of uniform application—seems to be that where a statute does not, in terms, exclude this rule of prior hearing but contemplates a post-decisional hearing amounting to a full review of the original order on merits, then such a statute would be construed as excluding the audi alteram partem rule at the pre-decisional stage. Conversely *if the statute conferring the power is silent with regard to the giving of a pre-decisional hearing to the person affected and the administrative decision taken by the authority involves civil consequences of a grave nature, and no full review or appeal on merits against that decision is provided, courts will be extremely reluctant to construe such a*

statute as excluding the duty of affording even a minimal hearing, shorn of all its formal trappings and dilatory features at the pre-decisional stage, unless, viewed pragmatically, it would paralyse the administrative process or frustrate the need for utmost promptitude. In short, this rule of fair play must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands. The court must make every effort to salvage this cardinal rule to the maximum extent possible, with situational modifications. *But, the core of it must, however, remain, namely, that the person affected must have reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise."*

(Emphasis supplied)

31. Attachment of property is a natural consequence of notification and not sale of the property. The power to order a sale of the property lies only with the Special Court under Section 11 and at this instance where the notified person can be adversely affected, Section 4(2) provides that any person aggrieved by the notification can file a petition objecting the same within 30 days of the date of the issuance of the notification. The Special Court is presided over by a sitting Judge of the High Court. All material before the Custodian is placed before the Special Court which independently analyses all the material while deciding the application filed by the notified party challenging the notification. This amounts to post decisional hearing satisfying the principles of natural justice. Also a pre-decisional hearing would frustrate the entire purpose of the Act. If there is time given to Show Cause why a person should not be notified, that time could practically be utilized to further divert the funds, if any, so that it becomes even more difficult to trace it.

32. **Notification of the appellants:**

As stated earlier that some time in 1992, it was noticed that frauds and irregularities involving huge amounts of money running into several thousand crores were commited by certain financial brokers and financial institutions. The Central Government, to combat with the situation, promulgated an ordinance on 6.6.1992 known as the Special Court (Trial of Offences relating to Transactions in Securities) Ordinance, 1992. On 08.06.1992 Mr. Harshad S. Mehta (since deceased) and 28 members of his group including his family members/ entities were notified under the Ordinance. It is pertinent to mention here that the complete details of the transactions of Harshad Mehta were not known. At that time the appellants - Mrs. Rasila Mehta (mother of Harshad Mehta) and Mrs. Rina Mehta (sister-in law of Harshad Mehta and wife of Sudhir Mehta) were not notified because their involvement and diversion of funds to them was not clear. The Reserve Bank of India constituted the Janakiraman Committee to look into the diversion of funds. The Janakiraman Committee in March 1993 brought out the 4th Interim Report. Para 2.3 of the said report reads as under:

"2.3 In the names of HSM and his family members, the bank's Adayar branch, Madras granted 19 individual overdrafts against shares. Significantly, all the current accounts, which were opened between April and June, 1991 were introduced by the same person viz. Branch Manager Shri Bakshi Varunkumar, Adayar branch, Madras and a cheque book was issued only in the name of one account holder, Smt. Jyoti H. Mehta. All the overdrafts limits were sanctioned between 20 April, 1991 and 24th July, 1991 and on the very day of sanction, the overdrafts amounts were transferred to Smt. Jyoti H. Mehta's current account for operational convenience. This facility also appears to have been extended, as HSM was a 'significant customer'."

Similarly, the Joint Parliamentary Committee established to enquire into the irregularities in securities and bank

transactions also found out the involvement of the family members of Harshad Mehta. Para 17.21 of the Report reads as under:

> "17.21 In January, 1992 Smt. Rasila Mehta, mother of HSM and Shri Hitesh Mehta, brother of HSM received US $ 5 lakhs each from Popular Espanol Las Palmas, Spain on the advice of Giorgia Pvt. Ltd., New York under the Immunity Scheme, 1991. Smt. Rasila Mehta also received US $ 96, 331 as per advice of Morgan Guaranty Trust Co. New York also under the Immunity Scheme, 1991. As Shri Niranjan J Shah had narcotic and hawala business links, it was suspected that the said remittances were arranged through him."

In accordance with the recommendations of the Joint Parliamentary Committee a group known as Inter Disciplinary Group (IDG) for tracing the end use of funds was set up by the Reserve Bank of India. The findings of the IDG read as under:

> "3.5.2 On the basis of reliable and specific information, action under Section 132 of the Income Tax Act was taken on 23.07.1993, during which shares valued at Rs. 22.69 crores were seized. Records of Income Tax investigations indicated that investment in these shares had been made in the names of dummy companies and individuals at the behest of the HMG. About 30 defunct Private Limited Companies appear to have been 'purchased' and the shares transferred in their names. Further enquiries led to identification of further 50 dummy companies and over 40 individuals. Enquiries have revealed that they were apparently fronts, since they were located in chawls, shops, etc. and prima facie could not have been made such huge investments. Considerable assistance was made available by CBI in identifying employees and associates of HMG.
>
> 3.5.3 Action under Section 132 was thereafter conducted

> on 27.08.1993 at more than 30 premises. The search confirmed that the shares had been transferred in the names of these companies and individuals by the HMG. Documents seized indicated the possibility of investments of market value of over Rs. 50 crores in the names of Smt. Rasila Mehta, mother of Harshad Mehta and Smt. Reena Mehta, wife of Sudhir Mehta. Statements recorded of various persons confirmed that they had merely allowed their names as benamidars of HMG. In addition, persons found in premises given as addresses of various companies stated that they had allowed their premises to be used as mailing addresses, and no companies existed there. They also stated that the shares received at these addresses were handed over mainly to one Shri Vinod Mehta, an uncle of HSM, who died in February, 1993. Subsequent to his death, these were handed over to his wife, Smt. Vanita Mehta who confirmed that her husband was receiving these shares, and that after his death she had, on instructions from HSM, handed them over to his representative. The involvement of the HMG in the matter of transfer of shares in benami names was corroborated by recorded statements of HSM and Sudhir Mehta. The total shareholding of HMG in benami shares identified so far comes to 81.65 lakh shares in 131 companies of market value (as in June, 1995) of Rs. 453 crores.
>
> 4.7 Problems in tracing:
>
> 4.7.1. The identification of end use of funds was a laborious process involving examination and correlation of every investment transaction of the brokers and banks. The following were among the more important constraints:
>
> - Entries in the books of one counterparty bank did not correspond with that of the other counterparty.
>
> - There was mismatch between seller and

payee or buyer and payer.

- The investment records did not depict the true character of the deals. Actual recipient and issuer of cheque were not known.

- Often, and more particularly in the case of HMG, entries in broker's current account at SBI, Bombay only revealed the net effect of all bankers cheques received and issued on his behalf on a particular day. On days when the value of cheques issued equaled the value of cheques received there was no entry in his current account.

- Transactions with banks/financial institutions whose investment account was maintained by the same routing bank was difficult to analyze as the payments and receipts were netted and only the net effect reflected in the bank accounts. One to one correspondence between security transactions and payments was difficult to establish as entries did not reflect true details of the transactions.

- Accounts of the brokers had not been prepared."

33. Mr. Syed heavily contended that the Custodian and the Special Court ought not to have based reliance on these reports since the appellants were not afforded opportunity to go through the contents of the same. This objection is liable to be rejected. First of all, there is no criminal prosecution against these appellants and in the event of prosecution, all documents relied on by them could be furnished. These are all materials from various bodies constituted by the Reserve Bank of India/ Government of India about the scam created at the instance of Harshad Mehta. These bodies consist of experts in various

fields, particularly, from the financial side. The Special Court is fully justified in relying on these Reports.

34. This Court in *Childline India Foundation & Anr. Vs. Allan John Waters & Ors.*, JT 2011(3) SC 750, while considering the plight of street children in Bombay, heavily relied on the evidence of PW-2 & PW-3, who were the members of NGOs, who highlighted the plight of street children in a shelter home at Bombay. Similar objection was raised in that case about the admissibility and reliability of those witnesses. Rejecting the said objection, this Court held that though based on the statements of PWs 2 & 3, members of NGOs the accused persons cannot be convicted but taking into account their initiation, work done, interview with the children, interaction with the children at the shelter homes which laid the foundation for the investigation and to that extent their statements and actions are reliable and acceptable. By applying the same analogy, inasmuch as the scam relates to accounts and money transactions by way of transfer of shares through nationalized banks and financial institutions, various committees were appointed by the Union of India which collected relevant materials and unearthed the persons involved, hence the Custodian and the Special Court are justified in relying on those reports in order to ascertain the correctness or otherwise of the transactions. Accordingly, we reject the objection of the counsel for the appellants relating to the report of various Committees mentioned above.

35. The Special Court, vide its order dated 03.08.1993 allowed the application of the Custodian for appointing Auditor. The Minutes of the Order read as under:

"1. Order in terms of prayer (a)

2. Order in terms of prayer (b) & (c), Respondents 2 and 3 to furnish the information within 6 weeks.

3. To enable the 1st Respondent to furnish the said

information one or more of the following persons, viz., Mr. Harshad Mehta, Mr. Ashwin Mehta, Mr. Pankaj Shah and Mr. Atul Parekh and a computer specialist will be entitled to attend the offices of the 1st Respondent between 10 a.m. to 6 p.m. A representative of the Custodian and the C.B.I. will be present for which prior intimation will be given. The said persons will be entitled to operate the computers in the presence of the officers of Respondent Nos. 2 and 3 and if necessary hire a personal computer to compile the requisite information.

4. The Custodian will appoint one or more auditors to prepare and audit the accounts of the 1st Respondent from 1st April, 1990. The auditors will be entitled to obtain all requisite information and documents from the Respondents or any other person in possession of the same. They will be entitled to use the computers of Respondent no.1 and the requisite hard discs and floppy discs will be made available to the auditors by Respondents No. 2 and/or 3. The remuneration of the auditors will be determined by the Custodian. The persons named in Clause 2 will assist the auditors. The auditors will complete the work and submit a report to court as expeditiously as possible and preferably within 3 months. The auditors will be entitled to furnish reports from time to time as the work is completed.

5. The remuneration payable to the auditor to be released from the bank account of the Respondent No.1.

6. Liberty to apply."

36. The Special Court vide its order dated 03.02.1994 appointed M/s Kalyaniwalla & Mistry, M/s Kapadia Damania & Co. and M/s Natwarlal Vepari & Co., Chartered Accountants firms for the purposes of preparing Statements of Accounts and liabilities of the notified parties i.e. the Harshad Mehta Group for the period 01.04.1990 to 08.06.1992.

37. It was the grievance of the Custodian that the notified parties were not at all cooperating in the process of auditing. The accounts of the notified parties where significant diversion of funds had taken place were not completed due to non-cooperation of members of M/s Harshad Mehta Group. When their non-cooperation was brought to the notice of the Special Court, the members of the Harshad Mehta Group had given an undertaking to fully cooperate with the Auditors. Rasila S. Mehta, the appellant herein had filed an application being M.A. No. 467/1999 for lifting the attachment over assets which she was owning jointly with the other members of the family. In the said application, the Custodian filed a reply highlighting the complete non-cooperation of the group in completing the accounts.

38. The important aspect is that the appellants have not explained the source of their income. The outstanding Income tax from the appellants for the Assessment Years 1988-89 to 1993-94 is as under:

1988-89	Rs.2,005
1989-90	Rs. 0
1990-91	Rs.2,54,595
1991-92	Rs.2,65,38,345
1992-93	Rs.11,55,28,951
1993-94	Rs.4,46,40,586

The appellants are house-wives having no independent source of income. It is impossible for such persons to have such huge amounts of money unless they were the beneficiaries of monies diverted by late Harshad Mehta and his other family members who were notified and firms belonging to the Harshad Mehta Group. The appellants have not been able to reveal their source of income either to the Custodian or to the Income Tax

authorities.

39. It is relevant to point out that in a letter dated 22.03.1996 addressed to the Assistant Commissioner of Income Tax the appellant – Rasila P. Mehta has stated as under:

"3) Please be informed that as far as my source of funds is concerned for making investments or taking trading positions to the extent the funds are required the same are from the following:

(a) Capital plus profits

(b) Borrowings

(c) Proceeds from sale of shares and debentures.

4. As far as borrowings are concerned, the same is resorted in two ways. I have obtained loans from my family members, particularly, Shri Harshad S. Mehta which is as and by way of monies advanced to me through cheques or payments made on my behalf. The other way of borrowing is through enjoying a running current account with the brokerage firms in my family of M/s Harshad S. Mehta, M/s Ashwin S. Mehta and M/s Jyoti Mehta which are partly paid-unpaid. Under this arrangement for transactions undertaken by me at these respective brokerage firms my account is debited and credited for each and every transaction, i.e. for every purchase made by me my account gets debited and for every sale effected by me my account with these brokerage firms gets credited. I state that barring a few exceptions payments for these transactions have not been exchanged on a transaction to transaction basis and the account is in the nature of a running account. I state that for the borrowings effected under both the methods. I have agreed to pay interest to the lender. I state that the same is computed on the basis of deliveries performed for purchase and sale

of shares. I state that in cases where I have purchased the shares for delivery and the delivery has not been tendered to me, for the purposes of computation of interest the debit will not be reckoned. I say that thus on the net outstanding balance after giving credit to each party on account of non-delivery of share the amount payable at the end of month is arrived at which is mentioned for the computation of interest (not on compounded basis). I state that as such interest is payable on the amounts borrowed by me and the same constitutes my expense. I humbly submit that this expense is allowable as a deduction from my taxable income. In support of my above and other related contentions I am also pleased to enclose confirmation letters of the three brokerage firms of M/s Harshad S. Mehta, M/s Ashwin S. Mehta and M/s J.H. Mehta. I further submit that due to course of events and multiple raids and our groups accounting system having gone haywire and the delivery status of all the transactions remaining unascertained we have not been able to precisely compute my interest liability for the earlier as well as the present year.

5. I state that I follow an accrual method of accounting for all my income as well as expenses which system of accounting is being followed by me for a number of years. I state that pending finalization of my payable figure for which effort is being made to arrive at the figure and on the basis of the minimum amount due by me I have made the provision of interest payable by me in my books of accounts and the extract of my account in this regard is being forwarded separately to your kindself. I submit that since my books of accounts are in the process of being drawn I am not in a position to make a provision of the precise figures of interest amount much as I would like to do. I submit that in this regard the respective brokerage firms have to assist and furnish substantial particulars. I further state that the provision made by me is in fact on a

conservative basis though the interest payable by me would be higher that the provision. I humbly request your kindself to take note of above and grant me a deduction of the same from the income that your kindself is arriving for the present year. In case your kindself is not inclined to accept my submissions or allow me the deduction of above expenses then kindly give me an opportunity to make further representation in this regard more so as it vitally affects determination of my taxable income".

40. A perusal of the above letter shows that there was no proper maintenance of accounts and there was no cooperation at all. Even, late Harshad Mehta in his letter and declarations to the Income Tax Authorities in which the appellant Rasila Mehta is a signatory had admitted that the family is a joint Hindu family where all are living together and that the business is such that it requires very close control at the operational level.

41. It is relevant to note that in a letter dated 21.01.1991 late Harshad S. Mehta informed the following particulars about source of payments for acquisition of flats in Madhuli, Worli by the entities of his family to the Deputy Director of Income Tax (Investigation), Mumbai.

"My transactions in the Capital and Money markets, especially the latter, result in a continuous stream of funds and securities moving in and out. These transactions result in large but transient positive balances in my bank accounts on any given day. Running up of such current liabilities constitutes payables to my clients/constituents which include, *inter alia*, corporates and banks. Such funds, though transient in nature, tend to acquire semi-permanency in view of the daily operations in the Money Market and result in a pool of funds float. This float of funds has been utilized for acquisition of flats as well as for making investments in shares, pending accrual of income, in future, when such liabilities are automatically washed off. In point of fact, deferred and future incomes have been

financed in advance by the float. I now enclose, on behalf of my family and myself details of payments made to M/s Crest Hotels Pvt. Ltd. the owners of the 9 (nine) flats, at "Madhuli", Worli in the firsthalf of 1990 and extracts of the relevant Bank Accounts of the concerned members of my family, reflecting the payments and corresponding receipts in the bank. Details of transactions which resulted in credit balances in my accounts on those particular dates on which the payments for these flats were effected are also enclosed. You will appreciate that all my family members have been financed through my business operations."

42. Another important aspect relates to final declaration made by Harshad S. Mehta and all his family members including Rasila S. Mehta under Section 132(4) of the Income Tax Act, 1961. The following material from his statement dated 24.01.1991 is relevant:

"First of all, I would like to put on record a few things about my family members. I take justifiable pride in asserting that it is the combination of the efforts of all the members of my family that has been responsible for our expansion and growth in terms of volume since 1988. Each and every member of the family is taking charge of some or the other vital functions in the organization creating controls and checks which are so very essential for generating, maintaining and reaping the fruits of any business activity. Almost all of them are very well attained and qualified and do business in their individual capacities and possess a sound and thorough knowledge of Investments, Finance and are authorized agents of the Unit Trust of India or members of the recognized Stock Exchange in Bombay. All of them take active interest in Investments in the Stock Market. Ours is an investor family committed to growth through capital appreciation and holds a mix of both short term and long term portfolio of shares. In brief, we owe our success to our coordinated endeavours and investment

philosophy. The sharp growth in income in the last two years from 1988 is only after entering the Money Market. …. ……

Our family is run as a Joint Hindu Family. We, all live together. Our joint effort is one of the most important factors that has contributed to the growth of our business. Our business is such that it requires very close control at the operational level. The different members of the family have taken charge of various areas of crucial importance in our business e.g. Research, On-the-floor, trading, dealing in Money Market, Share Handling, Accounts, Finance, etc. My wife Mrs. Jyoti Mehta and Ashwin's wife Mrs. Deepika Mehta while handling other functions in the office, also work as authorized clerks and hold the necessary badge for entry into the trading floor of the Stock Exchange, Bombay. ….. …… "

43. It is also useful to refer the letter of Smt. Rasila S. Mehta dated 25.06.2007 addressed to Mukund M. Chitale & Co., Chartered Accountants, Mumbai wherein she admitted that during the relevant period i.e. in 1990s she and all her family members actively associating in the brokerage firms and companies promoted by them jointly. She also admitted that she had a running account with brokerage firms of M/s Harshad S. Mehta, M/s Ashwin Mehta and M/s J.H. Mehta.

44. All the above details clearly show their association with brokerage firms being handled by Harshad S. Mehta and also their interest and entitlement in the transactions of their joint family business.

45. The firms of M/s Kalyaniwalla & Mistry, M/s Kapadia Damania & Co. and M/s Natwarlal Vepari & Co. did not complete the audit and as permitted by the Special Court, vide Order dated 16.10.2003, the Custodian was permitted to appoint another Auditor. The Custodian, vide its Order dated 05.11.2003, appointed M/s Vyas & Vyas Chartered

Accountants to audit the accounts and also to investigate fraudulent and illegal transactions entered into by M/s Harshad S. Mehta Group and his notified entities as referred to in Janakiraman Committee Report, IDG Report and reports based on the audit of the banks conducted by the RBI and the charge-sheet filed in the Special Court. M/s Vyas & Vyas submitted their report in respect of Harshad S. Mehta Group. Even in the said report, Vyas & Vyas pointed out the complete non-cooperation on the part of the appellants and the group while auditing the accounts. In the report, on review of un-audited accounts of M/s Harshad S. Mehta regarding the diversion of funds it was observed as under:

"12 Diversion of funds

12.1 HSM diverted his funds to his family members as and when he received funds generated form PSU banks and financial institutions. We have drawn a statement of funds diverted to family members and his associate companies in Annexure No. 7. We have also checked these figures from the audited reports of his family members and associate companies and comparative chart is enclosed in Annexure No. 6A.

12.2 Further we studied the end use of funds diverted to family members and associate companies of HSM group and found that either funds were used for purchase of immovable properties or for purchase of shares and securities. HSM has not charged interest from his family members and his associate companies. The details of end use (broadly) by HSM group are also enclosed.

12.3 It is a case of one man show i.e. Mr. H.S. Mehta, who generated funds from PSU banks and financial institutions and diverted funds to his group entities. There is no ban on payment/receipt of funds from one family member to another member of the family. But then all prudential norms should have been followed. In this case no interest was

charged/paid and there are huge differences in the balances of both the books.

12.4 The concept of corporate entity was evolved to encourage and promote trade and commerce but not to commit illegalities or to defraud people where therefore the corporate character is employed for the purpose of committing illegality or for defrauding other the corporate character should be ignored and will look at the reality behind the corporate veil.

12.5 We have found that these corporate bodies are merely cloaks behind which lurks HSM and/or member of his family are involved and the device of incorporation was really a ploy adopted for committing illegalities and/or to defraud revenue and other people. Finally to get protection by law, in case HSM gets exposed the property belonging to his family members may be protected.

12.6 Further we have studied the accounts of Smt. Rasila Mehta and Reena Mehta who is not notified parties and their accounts were not subject to audit. The total balances outstanding in the books of M/s HSM of both the entities are as under as on 8/6/92:

Smt. Rasila Mehta 10,82,65,860.74 Dr

Smt. Reena Mehta 6,33,35,834.69

We are enclosing the copies of accounts of Smt. Rasila Mehta and Reena Mehta appearing in the books of M/s HSM. From the accounts we observed that M/s HSM paid a sum of Rs. 30 Lacs on 16th April 1990 and a sum of Rs. 1259000/- on 18th April 1990 to Rasila Mehta. These are the dates when other members of the family purchased flat in 'Madhuli'. Therefore in our opinion these funds were diverted by M/s HSM to Smt. Rasila Mehta (mother) for purchase of flat in 'Madhuli'. Further we have also observed that M/s HSM debited the account of Smt. Rasila on

account of purchases of shares in different companies. Similarly in case of Smt. Reena Mehta huge quantity of share were purchased by her, which were funded by M/s HSM. Copy of accounts of Mrs Rasila & Mrs Reena Mehta is enclosed in annexure No.5E

12.7 The above funds diverted by HSM to his family members were certainly for purchase of immovable properties and shares. Therefore all assets so called belonging to above persons should go back to HSM only."

46. On a complaint, filed by Canbank Financial Services Ltd. (wholly owned subsidiary of Canara Bank), the Custodian notified the Appellants on 04.01.2007. The appellants filed petitions challenging the order of notification under Section 4(2) of the Act. The Special Court looked into all the materials including the Audit Report submitted by M/s Vyas & Vyas. A summary of the accounts produced by M/s Vyas & Vyas is as under:

Ledger Account of Mrs. Rasila S. Mehta for the period 1.4.1991 to 8.6.1992 in the books of accounts of various entities of Harshad Mehta Group.

SUMMARY

M/s Harshad S. Mehta

Opening Balance as on 01.04.1990		
ADD:		3227047.30
(i) Shares purchased		275393709.50
(ii) Funds transferred		110184616.44
Total debits		**388805373.24**
LESS CREDITS:		
1990-91	71135919.00	

1991-92	195090538.50	
8TH June 1992	16948055.00	283174512.50
Debit balance as on 08.06.1992		**105630860.74**
ADD:		
Loans & Advances due to M/s Harshad S. Mehta as per Balance Sheet as on 08.06.1992.		2635000.00
Total Debits		**108265860.74**

Mr. Harshad S. Mehta

Opening Balance as on 01.04.1991		NIL
ADD:		
(i) Shares purchased		NIL
(ii) Funds transferred		5000000.00
Debit balance as on 08.06.1992		**5000000.00**
LESS CREDITS:		
1991-92	NIL	
8TH June 1992	NIL	
Total Debits		**5000000.00**

M/s Jyoti H. Mehta

Opening Balance as on 08.06.1992 As per client control – AR summary		117899544.00
ADD:		
(i) Interest receivable (as per Annexure E of Balance Sheet)		2500000.00
Total Debits		**120399544.00**

Mrs. Jyoti H. Mehta

Opening Balance as on 01.04.1990		**179550.00**
ADD:		
(i) Shares purchased		NIL
(ii) Funds transferred		18000.00
Total Debits		197550.00
LESS CREDIT:		
Debit balance as on 31st March 1991. The balance is as per Trial balance as on 8th June, 1992.		NIL 197550.00

M/s Ashwin S. Mehta

Opening Balance as on 01.04.1990		117756.00
ADD:		
(i) Shares purchased		149166082.25
(ii) Funds transferred		300.00
Total debits		**149048626.25**
LESS CREDITS:		
1990-91	88034149.00	
1991-92	47414656.84	
8TH June 1992	649373.00	136098178.84

Debit balance as on 08.06.1992 12950447.41

Mr. Ashwin S. Mehta

Opening Balance as on 01.04.1991 NIL

ADD:

(i)	Shares purchased	204085.50
(ii)	Funds transferred	NIL
	Total Debits	204085.50
	Less Credits	NIL
	Total Debits	204085.50

Mrs. Deepika A. Mehta

Opening Balance as on 08.06.1992 20500.00

(As per Trial Balance of Mrs. Deepika A. Mehta)

Ledger Account of Mrs. Rina S. Mehta for the period from 1st April, 1990 to 8th June, 1992 in the books of accounts of various entities of Harshad Mehta Group:

SUMMARY:

M/s Harshad S. Mehta

Opening balance as on 01.04.1990 NIL

ADD:

(i)	Shares purchased	72918112.75
(ii)	Funds transferred	32239980.94
	Total Debits	105158093.69

LESS CREDITS:

1990-91	NIL	
1991-92	41822259.00	41822259.00

Debit Balance as on 08.06.1992.

The balance is the same as on 31.03.1992 (as per the copy of client control accounts as on 08.06.1992.) 63335834.69

Mr. Harshad S Mehta

Opening balance as on 01.04.1991 NIL

ADD:

(i)	Shares purchased	NIL
(ii)	Funds transferred	3500000.00
	Total Debits	3500000.00

LESS CREDITS:

NIL

Total Debits 3500000.00

Balance as on 08.06.1992 is the same as on 31.03.1992 (As per trial balance as on 08.06.1992)

M/s Jyoti H. Mehta

Opening balance as on 08.06.1992 50757937.00

As per client control – AR Summary (extracts of report of M/s Jyoti H. Mehta)

Add: Interest receivable	3000000.00
Total Debits	53757937.00

Mrs. Jyoti H. Mehta

Opening balance as on 08.06.1992 (as pretrial balance as on 8th June 1992)		131000.00
M/s Ashwin S. Mehta		
Opening balance as on 01.04.1990		NIL
ADD:		
(i)	Shares purchased	102293155.00
(ii)	Funds transferred	4929687.50
	Total Debits	107222842.50
LESS CREDITS:		
1990-91		NIL
1991-92		50936485.00
Total Debits		56286357.50
Mrs. Deepika A. Mehta		
Opening Balance as on 08.06.1992 (As per Trial Balance of Mrs. Deepika A. Mehta)		8300.00

After perusing the Report of M/s Vyas & Vyas, the Special Court came to a conclusion that the appellants are only fronts of late Harshad S. Mehta. It further concluded that the appellants are only housewives and were given loan by the brokerage firms for purchase of shares. The Special Court, therefore, rightly held that the money and assets were diverted to the appellants by the brokerage firms who were notified parties. Mr. Syed objected to the order of the Special Court for fully relying on the Auditor's report. We reject his objection for the following reasons. First of all, the issue relates to accounting of several persons. Several volumes of accounts relating to various members of late Harshad Mehta's family have to be scrutinized.

The Court and members of the bar are not conversant with the accounting procedures and in such event assistance from an established Chartered Accountant Firm is needed. In fact, even during the course of arguments in respect of questions by the Court, Mr. Syed himself sought the assistance of persons who are conversant with accountancy. In view of complicity in the matter, there is nothing wrong on the part of the Special Court getting report from M/s Vyas and Vyas who are recognized Chartered Accountants. The order of the Special Court does not suffer from any infirmity and there was sufficient material before the Custodian to arrive at a satisfaction that monies had been diverted by late Harshad S. Mehta to the appellants.

47. **Whether the appellants being not involved in offences in transactions in securities could have been proceeded against in terms of the provisions of the Act?**

The contention of the appellants that since they have not been charged for any offence, they cannot be notified under the Act. According to the appellants, the phrase "involved in the offence" could only mean "accused of the offence" and since they are not charged with any offence they can not be notified. In construing the above mentioned words which are used in association with each other, the rule of construction *noscitur a sociis* may be applied. It is a legitimate rule of construction to construe words in an Act of Parliament with reference to words found in immediate connection with them. The actual order of these three words in juxtaposition indicates that meaning of one takes colour from the other. The rule is explained differently: 'that meaning of doubtful words may be ascertained by reference to the meaning of words associated with it. (vide *Ahmedabad Teachers' Association vs. Administrative Officer*, AIR 2004 SC 1426).

48. Therefore, in the present case the nature of *"offence",* in which the appellants are allegedly involved, is to be taken into consideration. The Act does not create an offence for which a particular person has to be charged or held guilty. Thus the

phrase "involved in the offence" would not mean "accused of the offence". Also, the appellants could have been reasonably suspected to have been involved in the offence after consideration of the various reports of the Janakiraman Committee, Joint Parliamentary Committee and the Inter Disciplinary Group (IDG); and also the fact that 28 members of the M/s Harshad S. Mehta group including his family members/entities were notified under the Special Act Ordinance itself. The above factual matrix was sufficient for the satisfaction of the Custodian to notify the Appellants. The object of the Act is not merely to bring the offender to book but also to recover what are ultimately public funds. Even if there is a nexus between a third party, an offender and/or property the third party can also be notified. The word "involved" in Section 3(2) of the Special Court Act has to be interpreted in such a manner so as to achieve the purpose of the Act. This Court in *Ashwin S. Mehta* vs. *Custodian & Ors.,* (2006) 2 SCC 386 has observed as under:

> "Although, we do not intend to enter into the correctness or otherwise of the said contention of the appellants at this stage, however, there cannot be any doubt whatsoever that they being notified persons, all their properties would be deemed to be automatically attached as a consequence thereto. For the said purpose, *it is not necessary that they should be accused of commission of an offence as such."*

49. In *Jyoti H Mehta & Ors.* vs. *Custodian & Ors.,* (2009) 10 SCC 564, this Court from para 33 to 38 has held that the Special Court Act is a special statute and is a complete code in itself. The purpose and object for which it was created was to punish the persons who were involved in the act for criminal misconduct in respect of defrauding banks and financial institutions and its object was to see that the properties of those who were involved shall be appropriated for the discharge of liabilities of not only banks and financial institutions but also other governmental agencies. In construing the statute of this nature the court should not always adhere to a literal meaning

but should construe the same, keeping in view in the larger public interest. For the said purpose, the court may also take recourse to the basic rules of interpretation, namely, *ut res magis valeat quam pereat* to see that a machinery must be so construed as to effectuate the liability imposed by the charging section and to make the machinery workable. The statutes must be construed in a manner which will suppress the mischief and advance the object the legislature had in view. A narrow construction which tends to stultify the law must not be taken. Contextual reading is a well-known proposition of interpretation of statute. The clauses of a statute should be construed with reference to the context vis-à-vis the other provisions so as to make a consistent enactment of the whole statute relating to the subject-matter. Furthermore, even in relation to a penal statute any narrow and pedantic, literal and lexical construction may not always be given effect to. The law would have to be interpreted having regard to the subject-matter of the offence and the object of the law it seeks to achieve. The purpose of the law is not to allow the offender to sneak out the meshes of law. The courts will reject the construction which will defeat the plain intention of the legislature even though there may be some inexactitude in the language used. Reducing the legislation futility shall be avoided and in a case where the intention of the legislature cannot be given effect to, the courts would accept the bolder construction for the purpose of bringing about an effective result. The courts, when rule of purposive construction is gaining momentum, should be very reluctant to hold that Parliament has achieved nothing by the language it used when it is tolerably plain what it seeks to achieve.

50. **Whether Canfina is a Financial Institution and whether the complaint filed by Canfina is invalid?**

The complaint has been received from Canfina which is a 100% subsidiary of Canara Bank, a nationalized bank. The term financial institution has not been defined under the Act. It became necessary to enact the Special Court Act because of

the large scale irregularities which came to light as a result of the investigations by the Reserve Bank of India into the affairs of various banks and financial institutions whose monies were siphoned out. Thus the Statement of Objects and Reasons makes it clear that the purpose and the object of the Act was to recover and return monies to those banks and financial institutions from whom the monies were siphoned out. It is thus clear that the bodies which were sought to be covered were the banks and financial institutions whose affairs were investigated into by the Reserve Bank of India. The investigation was conducted by the Reserve Bank of India through Janakiraman Committee; the Joint Parliamentary Committee, and the Inter Disciplinary Group. The affairs of Canfina were also investigated by the various committees as a financial institution. It has come to light that there were large scale siphoning out of monies from Canfina also as held by the Special Court in its order dated 25.06.1997 in the matter of *Fairgrowth Financial Services* Vs. *Andhra Bank* in Misc. Petition No. 222 of 1996.

51. It is the argument of learned counsel for the appellants that Canfina should not be treated as a Financial Institution after the rejection of the Reserve Bank of India to consider Canfina as a Financial Institution. But this straight jacket definition should be applied to the provisions of other Acts like the Debt Recovery Act, the Companies Act, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 etc. The term "Financial Institution" for the purposes of this Act should be interpreted in accordance with the Statement of Objects and Reasons of the Act.

52. Thus, at the very inception of this Act are the investigations by the Reserve Bank of India and these investigations were carried on by the Janakiraman Committee. The Act was intended to be applied to the workings of the banks and financial institutions (though not covered by the strict definition of the term but involved in the securities scam of 1992) into whose affairs the Janakiraman Committee had

investigated. Canfina, was one such non-banking financial institution that Janakiraman Committee had investigated and thus it was meant to be covered under the Act.

53. These sources of information have been illustrated in Rule 2 of the Rules, which reads as under:

"*2. Sources of information:* The Custodian appointed under sub-section (1) of section 3 of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 (hereinafter referred to as the Act) may entertain for consideration any information or complaint in writing submitted personally or sent by post to him by ——

(a) the Reserve Bank of India;

(b) any bank or financial institution

(c) any enforcement or investigating agency or department of the Government;

(d) any officer or authority of the Government;

(e) any person who is engaged in transactions of securities as a dealer, agent or broker;

(f) any other person whose rights or interests in securities are affected:

(g) any other source including reports and proceedings before the Special Court established under the Act or any Court or Tribunal for the time being in force as the Custodian may deem fit at any point of time.

Provided that the information or complaint sent by any person referred to in clauses (e) and (f) shall not be entertained by the Custodian if it is not accompanied by an affidavit signed by that person and duly verified by a Magistrate or a Notary Public."

Thus the claim of Canfina falls under Section 11(2)(b) of the

Act and their complaint falls under Rule (2)(b). Thus the fact that it was not accompanied by an affidavit signed by that person and duly verified by a Magistrate or a Notary Public, does not make it an inappropriate complaint for consideration by the Custodian.

54. Further, Rule 3 illustrates situations whereby the Custodian may reject a certain complaint which is not accompanied by copies of documents referred to in the information or complaint, or is vague or does not contain the name and address of the sender. This rule also does not make it mandatory on the Custodian to reject a complaint if it does not accompany the above details. If the material information or the documents received by the Custodian are sufficient in his opinion, to reveal that a person is involved in an offence referred to in sub-section (2) of section 3 of the Act, he may proceed to notify the name of the person under that sub-section. Thus the satisfaction of the Custodian is of a subjective nature and is not violative of Natural Justice. The power to deal with the property ultimately lies with the Special Court.

55. In view of the same, we are in entire agreement with the conclusion arrived at by the Special Court and unable to accept any of the contentions raised by counsel for the appellants.

56. **Claims for maintenance, repair charges, interest and penalty for belated payment** (Civil Appeal Nos. 3377 of 2009 and 4764 of 2010)

With regard to the above appeals filed against the orders of the Special Court approving their report of the Custodian for realization of certain amounts payable to the Society towards repairs and maintenance charges, interest and penalty for belated payment, learned counsel for the appellants again raised various objections, inasmuch as the claim of the Custodian depends upon the outcome of the other appeals i.e. Civil Appeal Nos. 2924 of 2008 and 2915 of 2008 and in view

of our conclusion on these appeals, we are not inclined to go into all those details once again. Since we agree with the claim of the Custodian and various steps taken by him and the ultimate order of the Special Court in the normal circumstance, present appeals are also to be dismissed. We have already noted that Smt. Jyoti H. Mehta and six other family members of late Harshad S. Mehta were notified under the Act. Upon enforcement of the aforesaid Act, all the properties of late Harshad S. Mehta and his family members, including the six appellants in Civil Appeal No. 3377 of 2009 apart from other corporate entities stood attached by the Custodian. As a consequence thereof, all eight residential properties/flats of the appellants, namely, residential flat Nos. of 32A, 32B, 33, 34A, 34B, 44A, 44B and 45 in the Madhuli Cooperative Housing Society Limited at Dr. Anne Besant Road, Worli, Mumbai continue to remain attached under the Act by the Custodian. Since the aforesaid eight residential properties remain attached with the Custodian their upkeep/repair is essential so that the market value of the said attached properties does not get depreciated and that they may fetch best market value as and when the same are permitted to be sold by the Special Court so as to pay the liabilities of the Government, Banks, Financial Institutions as well as other decree holders under the provisions of Section 11(2) of the Act.

57. It was highlighted by the Custodian that as per the rules and bye-laws of the Cooperative Housing Societies in Mumbai, which are incorporated under the provisions of the Maharashtra Cooperative Societies Act, all the owners of the residential properties/flats, as the members of the Housing Society are liable to pay such amount as may be determined by the Society towards the upkeep, maintenance and repairs of the flats as well as common areas and amenities in the housing complex. In view of the same, the Cooperative Housing Societies are entitled to recover all the arrears and charges from the members who have not paid the society in time.

58. The appellants herein are notified parties who are the

owners of the attached properties and have failed to pay to the Madhuli Cooperative Housing Society Limited their contribution towards the maintenance charges, interest thereon and the charges incurred towards the repair of the attached property by the Society. The total dues demanded by Madhuli Cooperative Housing Society Limited vide its letter dated 12.03.2009 relating to the eight attached properties in question is Rs.1,87,97,011/-. The Custodian has furnished break-up of the same as follows:

"i.	Maintenance Charges & Rs. Interest thereon.	Rs. 1,62,80,811-00
ii.	Repairs of Flats.	Rs. 25,16,200-00"

59. Learned counsel for the Custodian submitted that as per the scheme of the repair and upkeep of the attached properties, the maintenance charges including the interest for the delayed payment is to be borne by the notified parties/ entities occupying the attached property, whereas the charges incurred by the society towards the repair of the attached properties is to be paid by the Custodian from the attached account of the notified parties. Regarding payment of maintenance and repair charges, there cannot be any doubt that the Custodian is liable to pay the same to the society. However, the Custodian has claimed interest for arrears of maintenance charges as claimed by the Housing Society.

60. In the same way, in Civil Appeal No. 4764 of 2010, the appellant, namely, Rasila S. Mehta, a notified party who is the owner of the attached property failed to pay to the Madhuli Cooperative Housing Society Limited her contribution towards maintenance charges, interest thereon and also the charges incurred by the Society towards repair of the attached property. The total dues demanded by the Madhuli Cooperative Housing Society Limited, vide its letter dated 21.06.2010 qua the attached property is Rs.21,06,230/- and breakup of the same is as follows:

"i.	Maintenance Charges	Rs. 2,59,759-00
ii.	Repairs	Rs. 9,57,501-00
iii.	Interest	Rs. 8,88,970-00"

61. As discussed earlier, unless the attached properties are properly maintained and as per the scheme, the repair and upkeep of the attached properties are to be followed by the Custodian and on the orders of the Special Court.

62. It is also brought to our notice that during the course of hearing, either before the Special Court or in this Court, certain amounts have been paid/deposited by the appellant. Considering the fact that the appellants are agitating the matter at the hands of the Custodian, the Special Court and before this Court, we feel that the appellants need not be burdened with interest and penal charges for non-payment of maintenance and repair charges to the society. Accordingly, while sustaining the claim of the Custodian as approved by the Special Court in view of the reasons mentioned above, we clarify that the Custodian is not permitted to collect interest and penalty charges from the arrears of maintenance and repair charges. This position is also clear from the decision of this Court in *Harshad Shantilal Mehta* vs. *Custodian & Ors*, (1998) 5 SCC 1. The Custodian is free to adjust the amounts deposited by the appellants on the orders of this Court or the Special Court. With the above direction, the impugned order in both the appeals is modified to the limited extent.

63. In the light of the above discussion, we do not find any merit in Civil Appeal Nos. 2924 of 2008 and 2915 of 2008 and accordingly they are dismissed. Civil Appeal Nos. 3377 of 2009 and 4764 of 2010 are disposed of granting the relief to the extent mentioned in para 62. No order as to costs in all the appeals.

R.P. Appeals disposed of.

prosecution as she resiled from her earlier statement to the police. However, the evidence of a hostile witness