KANWARJIT SINGH KAKKAR
v.
STATE OF PUNJAB AND ANR.
(Criminal Appeal No. 1041 of 2011)

APRIL 28, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Code of Criminal Procedure, 1973: s.482

Quashing of proceedings – Allegation against the government doctors that they indulged in private practice in the evening at their residence and charged consultation fee from patients which was contrary to the government rules – FIR lodged under the Prevention of Corruption Act and under IPC – High Court declined to quash the FIR – On appeal, held: The demand/receipt of fee by a medical professional for extending medical help by itself cannot be held to be an illegal gratification as the amount so charged is towards professional remuneration – If, however, it is alleged that medical professional as a Government doctor indulged in malpractice in any manner, the same would be a clear case to be registered under the IPC as also under the Prevention of Corruption Act – Case of unlawful engagement in trade by public servants can also be held to be made out u/s.168, IPC if the facts of a particular case indicate that besides professional discharge of duty by the doctor, he is indulging in trading activities of innumerable nature which is not expected of a medical professional – In the instant case, no presumption could be drawn that the alleged fee was accepted as motive or reward for doing or forbearing to do any official act so as to treat the receipt of professional fee as gratification much less illegal gratification – Also, offence u/s.168, IPC cannot be said to have been made out as the treatment of patients by a doctor cannot by itself be held to be engagement in a trade – However, the said act may fall within the ambit of

misconduct to be dealt with under the Service Rules – Thus, no prima facie case either u/s.168, IPC or s.13(1)(d) r/w s.13(2) of the Prevention of Corruption Act was made out in the facts and circumstances of the case – FIR registered under IPC or Prevention of Corruption Act not sustainable and is quashed – Prevention of Corruption Act, 1988 – s.13(1)(d) r.w. s.13(2), s.7 – Penal Code, 1860 – s.168 – Punjab Civil Medical (State Service Class I) Rules, 1972 – r.15.

Words and phrases: Corruption – Meaning of – In the context of Prevention of Corruption Act, 1988.

The appellants were medical officers/doctors working with the Punjab Government. An FIR was registered under Section 13(1)(d) r.w. Section 13(2) of the Prevention of Corruption Act and under Section 168 IPC against the appellants alleging that both the government doctors were doing private practice in the evening at their residence and charging Rs. 100 in cash per patient as prescription fee. The complainant stated in his FIR that as per the government instructions, the government doctors could not charge any fee from the patients for checking them. A raid was conducted at the residence of both the appellants, where they were allegedly nabbed doing private practice as they were trapped receiving Rs. 100 as consultation charges from the complainant.

The appellants filed petitions for quashing the FIR. The plea of appellants was that there was no law prohibiting government doctor from any act on humanitarian ground and the appellants could be alleged to have indulged in private practice only if they have deviated from the rules laid down by the State Government and even if there was deviation from these rules prohibiting private practice by government doctors contrary to the government instructions, it could warrant

initiation of departmental proceedings and the punishment under the Punjab Civil Services (Punishment and Appeal) Rules and not under IPC or Prevention of Corruption Act. The High Court dismissed the petitions. The instant appeals were filed challenging the order of the High Court.

Allowing the appeals, the Court

HELD: 1.1. In the light of the definition of 'corruption' defined under the Prevention of Corruption Act in its Preamble and under Section 7 of the Act, it would clearly emerge that 'corruption' is acceptance or demand of illegal gratification for doing an official act. The demand/ receipt of fee while doing private practice by itself cannot be held to be an illegal gratification as the same obviously is the amount charged towards professional remuneration. It would be preposterous to hold that if a doctor charges fee for extending medical help and is doing that by way of his professional duty, the same would amount to illegal gratification as that would be even against the plain common sense. If however, it is alleged that the doctor while doing private practice as Government doctor indulged in malpractice in any manner as for instance took money by way of illegal gratification for admitting the patients in the government hospital or any other offence of criminal nature like prescribing unnecessary surgery for the purpose of extracting money by way of professional fee and a host of other circumstances, the same obviously would be a clear case to be registered under the IPC as also under the Prevention of Corruption Act which was not the case in the instant matter. The FIR sought to be quashed, merely alleged that the appellants were indulging in private practice while holding the post of government doctor which restrained private practice, and charged

professional fee after examining the patients. [Para 11] [906-F-H; 907-A-C]

1.2. Before a public servant can be booked under the Prevention of Corruption Act, the ingredients of the offence will have to be deduced from the facts and circumstances obtained in the particular case. Judging the case of the appellants on this anvil, the amount that was alleged to have been accepted even as per the allegation of the complainant/informant was not by way of gratification for doing any favour to the accused, but admittedly by way of professional fee for examining and treating the patients. However, no presumption can be drawn that it was accepted as motive or reward for doing or forbearing any official act so as to treat the receipt of professional fee as gratification much less illegal gratification. Even as per the case of the complainant/ informant, the act on the part of the appellants was contrary to the government circular and the circular itself had a rider in it which stated that the government doctor could do private practice also, provided he sought permission from the government in this regard. Thus, the conduct of the appellants who were alleged to have indulged in private practice while holding the office of government doctor and hence public servant at the most, could be proceeded with for departmental proceeding under the Service Rules but in so far as making out of an offence either under the Prevention of Corruption Act or under the IPC, would be difficult to sustain as examination of patients by doctor and thereby charging professional fee, by itself, would not be an offence. Thus, the appellants even as per the FIR as it stands, can be held to have violated only the government instructions which itself has not termed private practice as 'corruption' under the Prevention of Corruption Act merely on account of charging fee as the same in any event was a professional fee. Thus, if a particular

professional discharges the duty of a doctor, that by itself is not an offence but becomes an offence by virtue of the fact that it contravenes a bar imposed by a circular or instruction of the government. In that event, the said act clearly would fall within the ambit of misconduct to be dealt with under the Service Rules but would not constitute criminal offence under the Prevention of Corruption Act. [Para 15] [909-G; 910-A-H; 911-A]

State of Gujarat vs. Maheshkumar Dheerajlal Thakkar **AIR 1980 SC 1167;** *Raj Rajendra Singh Seth alias R.R.S. Seth vs. State of Jharkhand And Anr*. **(2008) 11 SCC 681;** *B. Noha vs. State of Kerala* **(2008) 11 SCC 681;** *Madhukar Bhaskarrao Joshi vs. State of Maharashtra* **(2000) 8 SCC 571;** *M. Narsinga Rao vs. State of A.P* **(2001) 1 SCC 691 – referred to.**

1.3. The offence under Section 168, IPC cannot be held to have been made out against the appellants even under this Section as the treatment of patients by a doctor cannot by itself be held to be engagement in a trade as the doctors' duty to treat patients is in the discharge of his professional duty which cannot be held to be a 'trade' so as to make out or constitute an offence under Section 168, IPC. There may be cases of doctors indulging in cases of medical negligence, demand or accept amount in order to incur favour on the patients which would amount to illegal gratification and hence 'corruption', and in such cases offence can most certainly be held to have been made out under the Prevention of Corruption Act also. Cases of unlawful engagement in trade by public servants can also be held to be made out under Section 168 of the IPC if the facts of a particular case indicate that besides professional discharge of duty by the doctor, he is indulging in trading activities of innumerable nature which is not expected of a medical professional. But if the

medical professional has acted in a manner which is contrary only to the government instructions *dehors* any criminal activity or criminal negligence, the same would not constitute an offence either under the IPC or a case of corruption under the Prevention of Corruption Act. The allegation even as per the FIR as it stands in the instant case, do not constitute an offence either under the Prevention of Corruption Act or under Section 168 of the IPC. [Para 16] [911-B-H; 912-A]

1.4. No prima facie case either under Section 168, IPC or Section 13 (1)(d) read with 13(2) of the Prevention of Corruption Act is made out under the prevailing facts and circumstances of the case and hence proceeding in the FIR registered against the appellants would ultimately result into abuse of the process of the Court as also huge wastage of time and energy of the Court. Hence, the respondent – State, although may be justified if it proceeds under the Punjab Civil Services (Punishment and Appeal) Rules against the appellants initiating action for misconduct, FIR registered against them under IPC or Prevention of Corruption Act is not fit to be sustained. [Para 17] [912-B-D]

Case Law Reference:

AIR 1980 SC 1167	**referred to**	**Para 10**
(2008) 11 SCC 681	**referred to**	**Para 12**
(2008) 11 SCC 681	**referred to**	**Para 13**
(2000) 8 SCC 571	**referred to**	**Para 14**
(2001) 1 SCC 691	**referred to**	**Para 14**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1041 of 2011.

From the Judgment & Order dated 2.4.2009 of the High Court of Punjab & Haryana at Chandigarh in Crl. Misc. No. 15695-M of 2007.

WITH

Crl. A.No. 1042 of 2011.

Jigyasa Tanwar, Rohit Tanwar (for Dr. Kailash Chand) for the Appellant.

Niraj Jha (for Kuldip Singh) for the Respondents.

The Judgment of the Court was delivered by

GYAN SUDHA MISRA, J. 1. Leave granted.

2. These appeals by special leave had been filed against the order dated 2.4.2009 passed by the High Court of Punjab and Haryana at Chandigarh in two Criminal Miscellaneous Petitions Nos. M-15695/2007 and 23037-M of 2007 for quashing FIR No.13 dated 9.4.2003 which was registered for offences punishable under Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 and under Section 168 of the Indian Penal Code, at Police Station, Vigilance Bureau, Ludhiana but were dismissed as the learned single Judge declined to quash the proceedings against the appellants.

3. Relevant facts of the case under which the two cases were registered against the appellants disclose that the appellants are Medical Officers working with the State Government of Punjab against whom first information report was registered on the statement of informant/Raman Kumar alleging that he knew the appellants Dr. Rajinder Singh Chawla who was posted as Government Doctor at Dhanasu and Dr. Kanwarjit Singh Kakkar who also was serving as Government Doctor in Koom Kalan in District Ludhiana. It was alleged that both the doctors were doing private practice in the evening at

Metro Road, Jamalpur and charged Rs.100/- in cash per patient as prescription fee. While Dr. Rajinder Singh Chawla checked the blood pressure of the patients Dr. Kanwarjit Singh issued prescription slips and medicines to the patients after checking them properly and charged Rs.100/- from each patient. The complainant Raman Kumar got medicines from the two doctors regarding his ailment and the doctor had charged Rs.100/- as professional fee from him. The informant further stated in his FIR that as per the government instructions, the government doctors are not supposed to charge any fee from the patients for checking them as the same was contrary to the government instructions. In view of this allegation, a raid was conducted at the premises of both these doctors and it was alleged that they could be nabbed doing private practice as they were trapped receiving Rs.100/- as consultation charges from the complainant. On the basis of this, the FIR was registered against the appellants under Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act and under Section 168, IPC which has registered at Police Station Vigilance Bureau, Ludhiana.

4. As already stated, the appellants felt aggrieved with the case registered against them and hence filed two Criminal Miscellaneous Petitions for quashing FIR No.13 dated April 9, 2003 before the High Court of Punjab and Haryana at Chandigarh wherein counsel for the appellants contended that no offence is made out from the allegations in the FIR even as it stands. Substantiating the arguments, it was submitted that neither any medical instrument was recovered nor any apparatus or blood pressure checking machine or even thermometer was recovered from the residence of the appellants. It was explained that the complainant had come to the house of Dr. Kanwarjit Singh Kakkar which was under renovation and requested for treatment. It was added that on humanitarian grounds, the appellant just scribbled down the prescription on a plain paper which does not even bear the signature of the appellant.

5. It was also contended by learned counsel for the appellants that there is no law prohibiting government doctor from doing any act on humanitarian ground and the appellants could be alleged to have indulged in private practice only if they have deviated from the rules laid down by the State Government in this regard. In the alternative, it was contended that even if there is a deviation from these rules prohibiting private practice by government doctors contrary to the government instructions, it could warrant initiation of departmental proceeding and the punishment under the Punjab Civil Services (Punishment and Appeal) Rules and not under IPC much less under the Prevention of Corruption Act.

6. The learned single Judge, however, was pleased to dismiss the Criminal Miscellaneous Applications refusing to quash the FIR relying on Rule 15 of the Punjab Civil Medical (State Service Class I) Rules, 1972. As per Rule 15 of the said Rules, the Government may by general or special order permit any member of the Service to engage in private service on such terms and conditions and subject to such restrictions and limitations as may be specified in the order provided that such practice does not in any way interfere with the discharge of his or their official duties. Rule 15 of the aforesaid Rules states as follows:

> **"15. Private Practice:** (1) The Government may, by general or special order, permit any member of the Service to engage in private practice on such terms and conditions and subject to such restrictions and limitations as may be specified in the order, provided that such practice does not in any way interfere with the discharge of his or their official duties.
>
> (2) Nothing contained herein shall be construed to limit or abridge the power of the Government at any time to withdraw such permission or to modify the terms on which it is granted without assigning any cause and without payment of compensation."

7. The relevant question which requires determination in these appeals is whether a government doctor alleged to be doing practice can be booked within the ambit and purview of the Prevention of Corruption Act or under Indian Penal Code, or the same would amount to misconduct under the Punjab Civil Medical(State Service Class I) Rules, 1972 under Rule 15 which has been extracted above.

8. Learned counsel for the appellants submitted that the FIR was fit to be quashed as the case against the appellants who admittedly are government doctors could not have been registered under IPC or the Prevention of Corruption Act as Section 7 of the Prevention of Corruption Act explains 'corruption' as acceptance or 'demand' illegal gratification for doing any official act'. It was submitted that the demand/receipt of 'fee' while doing private practice is not an illegal gratification for official duties. It was further submitted that even Section 13(1)(d) of the Prevention of Corruption Act does not apply since the main ingredients of this Section are:

(a) the accused must be a public servant at the time of the offence;

(b) he must have used corrupt or illegal means and obtain for himself or for any other person any valuable or pecuniary advantage; or

(c) he must have abused his position as a public servant and have obtained for himself and for any other person any valuable thing or pecuniary advantage; or

(d) while holding such office he must have obtained for any other person any valuable thing or pecuniary advantage without any motive.

9. Learned counsel for the respondents however repelled the arguments advanced in support of the plea of the appellants

and it was contended that the provisions of Prevention of Corruption Act clearly apply as the government doctors in the State of Punjab have been specifically prohibited to carry private practice under the departmental rules and as such the act of the appellants were illegal.

10. By way of a rejoinder, it was again submitted by the counsel for the appellants that it is the 'departmental rules' which bar private practice by a government doctor, hence action if any, is liable to be initiated/taken under the departmental rules which in the present case are the Punjab Civil Services (Punishment and Appeal) Rules. Rule 15 of the Punjab Civil Medical (State Service Class I) Rules, 1972 states that a government doctor may engage in practice with prior permission from the government. It was still further submitted that the FIR against the appellant has also been registered under Section 168 of the Indian Penal Code which states as follows:

> **"168. Public servant unlawfully engaging in trade.**— Whoever, being a public servant and being legally bound as such public servant not to engage in trade, engages in trade, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both."

It was submitted that this Section makes it amply clear that 'private practice' cannot be termed as 'trade', as accepting of 'fee', does not involve profit making which is an essential ingredient of the term 'trade' as held in *State of Gujarat vs. Maheshkumar Dheerajlal Thakkar*[1]. The counsel further took assistance from the Punjab Government Vigilance Department (Vigilance -3 Branch) which vide Memo No. 53/168/02-54/ 20094dated 23.12.2004 (T) instructed the Chief Director, Vigilance Bureau, Punjab, Chandigarh on 19.1.2005, that the cases pending against the government teachers for holding

1. AIR 1980 SC 1167..

tuition classes should be withdrawn as these cases do not come within the purview of the Prevention of Corruption Act as fees demanded/accepted by a teacher in view of teaching private tuition classes can neither be termed as a corruption nor can it be said to be a demand for remuneration for some official act. It was submitted that this principle needs to be applied on all professionals on the basis of the principle of equity. The counsel also submitted on the merit of the case given out in the FIR, by urging that the appellants although wrote down the prescription on a plain paper for the complainant who had approached him for medical assistance at about 8.30 p.m. on 9.4.2003, he obliged him merely on humanitarian grounds and the raid which was conducted on the appellant's premises, no recovery of medical instruments or medical apparatus was made. It was, therefore, contended that the impugned order of the High Court refusing to quash the FIR against the appellants is liable to be set aside and the FIR against the appellants should be quashed as the FIR alleging private practice by the government doctors/appellants herein is not criminal in nature but at the most would amount to a deviation from the departmental rules and hence at the most, it could be dealt with under the Punjab Civil Services (Punishment and Appeal) Rules only.

11. On a critical analysis of the arguments advanced in the light of the definition of 'corruption' defined under the Prevention of Corruption Act in its Preamble and under Section 7 of the Act, it clearly emerges that 'corruption' is acceptance or demand of illegal gratification for doing an official act. We find no difficulty in accepting the submission and endorsing the view that the demand/receipt of fee while doing private practice by itself cannot be held to be an illegal gratification as the same obviously is the amount charged towards professional remuneration. It would be preposterous in our view to hold that if a doctor charges fee for extending medical help and is doing that by way of his professional duty, the same would amount to illegal gratification as that would be even against the plain

common sense. If however, for the sake of assumption, it were alleged that the doctor while doing private practice as Government doctor indulged in malpractice in any manner as for instance took money by way of illegal gratification for admitting the patients in the government hospital or any other offence of criminal nature like prescribing unnecessary surgery for the purpose of extracting money by way of professional fee and a host of other circumstances, the same obviously would be a clear case to be registered under the IPC as also under the Prevention of Corruption Act which is not the case in the instant matter. The FIR sought to be quashed, merely alleges that the appellants were indulging in private practice while holding the post of government doctor which restrained private practice, and charged professional fee after examining the patients.

12. We however, came across a case of *Raj Rajendra Singh Seth alias R.R.S. Seth vs. State of Jharkhand And Anr.*[2], wherein a doctor who had demanded Rs.500/- for giving proper medical treatment to the complainant's father resulted in conviction of the doctor as it was held in the circumstances of the said case that all the requisites for proving demand and acceptance of bribe were clearly established and the appellant therein was held to have been rightly convicted. However, the prosecution version in the said case disclosed that a written complaint was made to SP., CBI, Dhanbad that on 1.9.1985 one Raju Hadi, a Safai Mazdoor of the Pathological Laboratory Area -9, BCCL, Dhanbad, alleged therein that he had visited Chamodih Dispensary in connection with the treatment of his father who was examined by Dr. L.B. Sah who referred him to Central Hospital, Dhanbad. The complainant's father was admitted in the Central Hospital and the complainant visited his ailing father who complained of lack of proper treatment and he requested him to meet the doctor concerned. The complainant met Dr. R.R.S. Seth who was treating the complainant's father. It was alleged by the complainant therein

2. (2008) 11 SCC 681..

that Dr. R.R.S. Seth demanded a sum of Rs. 500/- from the complainant for giving proper medical treatment to his father and also insisted that the amount be paid to the doctor on 1.9.1985. The doctor also told the complainant Raju Hadi that in case he was not available in the hospital, he should pay the amount to his ward boy Nag Narain who would pass the amount to him. Since the complainant Raju Hadi was not willing to make the payment of bribe amount to the doctor and ward boy, he lodged a complaint to the SP, CBI, Dhanbad for taking necessary action.

13. On the basis of this complaint, which was finally tried and resulted into conviction, came up to this Court (Supreme Court) challenging the conviction. This conviction was upheld by this Court as it was held therein that there is no case of the accused that the said amount was received by him as the amount which he was legally entitled to receive or collect from the complainant. It was, therefore, held that when the amount is found to have been passed to the public servant, the burden is on public servant to establish that it was not by way of illegal gratification. This Court held that the said burden was not discharged by the accused and hence it was held that all the requisites for proving the demand and acceptance of bribe had been established and hence interference with the conviction and sentence was refused. The learned Judges in this matter had placed reliance on the case of *B. Noha vs. State of Kerala*[3], wherein this Court took notice of the observations made in the said case at paras 10 and 11 wherein it was observed as follows:

> "……When it is proved that there was voluntary and conscious acceptance of the money, there is no further burden cast on the prosecution to prove by direct evidence, the demand or motive. It has only to be deduced from the facts and circumstances obtained in the particular case."

3. (2006) 12 SCC 277.

14. The learned Judges also took notice of the observations made by this Court in *Madhukar Bhaskarrao Joshi vs. State of Maharashtra,*[4] (2000) 8 SCC 571 at 577, para 12 wherein it was observed that

> "The premise to be established on the facts for drawing the presumption is that there was payment or acceptance of gratification. Once the said premise is established, the inference to be drawn is that the said gratification was accepted "as motive or reward" for doing or forbearing to do any official act. So the word "gratification" need not be stretched to mean reward because reward is the outcome of the presumption which the court has to draw on the factual premise that there was payment of gratification. ……..If acceptance of any valuable thing can help to draw the presumption that it was accepted as motive or reward for doing or forbearing to do official act, the word "gratification" must be treated in the context to mean any payment for giving satisfaction to the public servant who received it."

This decision was followed by this Court in *M. Narsinga Rao vs. State of A.P*[5]..

Thus in all the cases referred to hereinabove, the amount received was held to be by way of gratification as there could be no escape from the conclusion that it would amount to corruption within the meaning of Prevention of Corruption Act as also the offence under the IPC.

15. But the most important and vital check before a public servant can be booked under the Prevention of Corruption Act, the ingredients of the offence will have to be deduced from the facts and circumstances obtained in the particular case. Judging the case of the appellants on this anvil, it is not difficult to notice that in the case at hand, the amount that is alleged to

4. (2000) 8 SCC 571.

5. (2001) 1 SCC 691.

have been accepted even as per the allegation of the complainant/informant was not by way of gratification for doing any favour to the accused, but admittedly by way of professional fee for examining and treating the patients. However, no presumption can be drawn that it was accepted as motive or reward for doing or forbearing any official act so as to treat the receipt of professional fee as gratification much less illegal gratification. The professional fee even as per the case of the complainant/informant was that this act on the part of the accused appellants was, contrary to the government circular and the circular itself had a rider in it which stated that the government doctor could do private practice also, provided he sought permission from the government in this regard. Thus the conduct of the appellants who are alleged to have indulged in private practice while holding the office of government doctor and hence public servant at the most, could be proceeded with for departmental proceeding under the Service Rules but in so far as making out of an offence either under the Prevention of Corruption Act or under the IPC, would be difficult to sustain as we have already observed that examination of patients by doctor and thereby charging professional fee, by itself, would not be an offence but as per the complaint, since the same was contrary to the government circular which instructed that private practice may be conducted by the government doctors in the State of Punjab provided permission was sought from the Government in this regard, the appellants were fit to be prosecuted. Thus, the appellants even as per the FIR as it stands, can be held to have violated only the government instructions which itself has not termed private practice as 'corruption' under the Prevention of Corruption Act merely on account of charging fee as the same in any event was a professional fee which could not have been charged since the same was contrary to the government instructions. Thus, if a particular professional discharges the duty of a doctor, that by itself is not an offence but becomes an offence by virtue of the fact that it contravenes a bar imposed by a circular or instruction of the government. In that event, the said act clearly would fall

within the ambit of misconduct to be dealt with under the Service Rules but would not constitute criminal offence under the Prevention of Corruption Act.

16. However, the question still remains whether the indulgence in private practice would amount to indulgence in 'trade' while holding the post of a government doctor and hence an offence under Section 168 of the IPC, so as to hold that it constitutes a criminal offence in which case that FIR could be held to have made out a prima facie case against the appellants under Section 168 of the IPC on the ground that the appellants who are public servants unlawfully engaged in trade. In our view, offence under Section 168 of the IPC cannot be held to have been made out against the appellants even under this Section as the treatment of patients by a doctor cannot by itself be held to be engagement in a trade as the doctors' duty to treat patients is in the discharge of his professional duty which cannot be held to be a 'trade' so as to make out or constitute an offence under Section 168 of the IPC. As already stated, there may be cases of doctors indulging in cases of medical negligence, demand or accept amount in order to incur favour on the patients which would amount to illegal gratification and hence 'corruption', and in such cases offence can most certainly be held to have been made out under the Prevention of Corruption Act also. Cases of unlawful engagement in trade by public servants can also be held to be made out under Section 168 of the IPC if the facts of a particular case indicate that besides professional discharge of duty by the doctor, he is indulging in trading activities of innumerable nature which is not expected of a medical professional as was the fact in the case referred to herein before. But if the medical professional has acted in a manner which is contrary only to the government instructions dehors any criminal activity or criminal negligence, the same would not constitute an offence either under the IPC or a case of corruption under the Prevention of Corruption Act. In our considered view, the allegation even as per the FIR as it stands in the instant case, do not constitute an offence either

under the Prevention of Corruption Act or under Section 168 of the IPC.

17. For the reasons discussed hereinbefore, we are pleased to set aside the impugned orders passed by the High Court and quash the FIR No.13 dated 9.4.2003 registered against the appellants as we hold that no prima facie case either under Section 168 of the IPC or Section 13 (1)(d) read with 13(2) of the Prevention of Corruption Act is made out under the prevailing facts and circumstances of the case and hence proceeding in the FIR registered against the appellants would ultimately result into abuse of the process of the Court as also huge wastage of time and energy of the Court. Hence, the respondent – State, although may be justified if it proceeds under the Punjab Civil Services (Punishment and Appeal) Rules against the appellants initiating action for misconduct, FIR registered against them under IPC or Prevention of Corruption Act is not fit to be sustained. Consequently, both the appeals are allowed.

D.G. Appeals allowed.

PURSHOTTAM VISHANDAS RAHEJA AND ANOTHER
v.
SHRICHAND VISHANDAS RAHEJA (D) THROUGH LRS. AND OTHERS
(Civil Appeal No. 4005 of 2011)

MAY 6, 2011

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

Interim Order:

Suit for mandatory injunction – Interim relief – Extent of – Suit property being developed and flats for sale being constructed on it – Dispute between brothers as regards the suit property – Single Judge of High Court granting limited interim orders so that the construction can go on and flats can be purchased – Division Bench making the notice of motion absolute and granting full interim relief – HELD: The instant case was not the one where mandatory interim injunction as sought by the plaintiff was justified – The Single Judge passed limited interim relief in the interest of both the parties as well as flat purchasers – The Single Judge had passed a reasoned order, and it could not be said that he had exercised discretion in an arbitrary, capricious or perverse manner – There was no reason for the appellate Bench to interfere and set aside that order – The order passed by the Division Bench of the High Court is set aside and that of the Single Judge restored.

A dispute arose between two brothers, namely, appellant No.1 and respondent No.1, as regards the suit property, which was being developed by raising constructions thereon. Respondent No.1 had executed three Power of Attorneys in favour of appellant No.1, which the latter stated were executed for valid consideration. Respondent No.1 filed a suit arraying

appellant No.1 as defendant No.1, and his son as defendant No.2 and the Indian Bank, HSBC Bank and the State Bank of India as defendant Nos. 3 to 5 respectively. The principal prayers in the suit were for permanent injunction restraining defendant Nos. 1 and 2 from in any manner directly or indirectly acting or holding themselves out as attorneys or agents of the plaintiff or dealing with any of the properties or business of the plaintiff including the suit property or any premises or constructions thereon; and restraining defendants no. 1 and 2 from in any manner entering upon the suit property or any premises or construction thereon. It was also prayed that defendant Nos. 1 and 2 be ordered and decreed to deliver to the plaintiff the documents listed in Ext. 4 and all other documents, correspondences and records belonging to the plaintiff, in the possession or power of defendant Nos. 1 and 2. The notice of motion was taken out in the suit with the prayers similar to those made in the plaint and with further prayer seeking to restrain defendant Nos. 3 to 5 from honoring any cheques signed by defendant No.1 relating to the accounts mentioned therein. The Single Judge of the High Court considered the stand of defendant Nos. 1 and 2 and in the circumstances, observed that development and construction work had progressed to a substantial extent as only some finishing works were remaining and 23 flats were already sold; and, therefore, directed that the development and construction works can be completed at the site and flats can be sold and the sale proceeds must be deposited in the joint bank account alone, and the account would be operated only to the extent paying off the liabilities towards the suit property and its development. However, on appeal, the Division Bench held that a strong prima facie case was made out and by the impugned order, the notice of motion taken up by the plaintiff was made absolute thereby granting full interim relief to respondent no. 1.

In the instant appeal filed by defendant Nos. 1 and 2, it was contended for the appellants that the Single Judge had exercised his discretion appropriately and there was no reason for the Division Bench of the High Court to interfere therein. It was also contended that the prayers of the notice of motion were principal prayers in the plaint and, therefore, the order of the Division Bench of the High Court amounted to granting a decree at the interlocutory stage which was not justified.

Allowing the appeal, the Court

Held: 1.1. The test to be applied to assess the correctness of the order of the Single Judge would be whether the order is so arbitrary, capricious or perverse that it should be interfered at an interlocutory stage in an intra-court appeal. [Para 22] [932-E-F]

Wander Ltd. and another vs. Antox India P.Ltd. **1990 (Supp) SCC 727;** *Dorab Cawasji Warden v. Coomi Warden* **1990 (1) SCR 332 (1990) 2 SCC 117;** *Metro Marins and another v. Bonus Watch Co. (P) Ltd. and Others* **(2004) 7 SCC 478; and** *Kishore Kumar Khaitan and another vs. Praveen Kumar Singh* **2006 (2) SCR 176 =(2006) 3 SCC 312, relied on.**

Films Rover International Ltd. v. Cannon Film Sales Ltd. **(1986) 3 All ER 87 – referred to.**

1.2. The Single Judge has passed a detailed order explaining as to why he was constrained to grant only the limited interim relief. It was in the interest of both the parties as well as the flat purchasers. The order passed by the Single Judge is also on the basis that anything beyond the limited protection given at that stage would deny the opportunity to the appellants to establish their case at the trial when it is not in dispute that appellant

No.1 contributed ninety percent of the purchase money to the property and he took steps all throughout to develop the property. [Para 16] [928-F-H; 929-A]

1.3. The Single Judge has considered all the relevant aspects of the matter and thereafter passed the limited interim order whereby documents for sale of the flats will continue to be signed by the respondents, though, the monies coming into the bank account thereafter will be utilized only for the purposes that are necessary. The appellants have not been directed to be removed from the property inasmuch as they were the people on the spot carrying on the development prior to filing of the suit. The order sought by the respondents, if granted, would mean granting all the reliefs and a sort of pre-trial decree without the opportunity to the appellants to have their plea examined with respect to the family arrangement, which plea is supported by their sisters. [Para 21] [932-C-E]

1.4. The present case is not the one where mandatory interim injunction, as sought by the respondents was justified. The Single Judge had passed a reasoned order, and, in no way, it could be said that he had exercised the discretion in an arbitrary, capricious or perverse manner, or had ignored the settled principles of law regarding grant or refusal of interlocutory injunction. There was no reason for the appellate Bench to interfere and set aside that order. The order passed by the Division Bench of the High Court is set aside and that of the Single Judge restored. [Para 23 and 24] [934-D-G]

Case Law Reference:

1990 (1) SCR 332	**relied on**	**Para 17**
(1986) 3 All ER 87	**referred to**	**Para 18**
(2004) 7 SCC 478	**relied on**	**Para 19**

2006 (2) SCR 176	**relied on**	**Para 20**
(1990) (Supp) SCC 727	**relied on**	**para 22**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4005 of 2011.

From the Judgment & Order dated 12.8.2010 of the High Court of Judicature at Bombay in Appeal No. 550 of 2009 in Notice of Motion No. 1787 of 2009 in Suit No. 1266 of 2009.

Mukul Rohatgi, L. Nageswara Rao, Prateek Jalan, M.L. Ranjeet, Ashish Kamat, R. Karanjawala, Manik Karanjawala, Ruby Singh Ahuja, Deepti Sarin, Pragya Ohri, Karanjawala & Co., for the Appellants.

K.K. Venugopal, R.F. Nariman, Jonathan Solomon, Vikas Mehta, Rohit Bhat, Narhari Singh for the Respondents.

The Judgment of the Court was delivered by

GOKHALE J. 1. Leave granted.

2. This appeal by special leave by original Defendants Nos. 1 and 2 seeks to challenge the Judgment and Order dated 12.8.2010 passed by a Division Bench of the Bombay High Court allowing the Appeal No. 550/2009 against the order of a Single Judge dated 9.9.2009 in Notice of Motion No. 1787/2009 in Suit No. 1266/2009 filed by Respondent No. 1 (since deceased). The learned Single Judge had granted a limited relief to Respondent No. 1 (original plaintiff) whereas by the Order passed by the Division Bench the Notice of Motion taken up by the original Plaintiff had been made absolute in terms of prayers (a), (b) and (c), and thereby granting full interim relief which was sought by Respondent No. 1 herein.

3. In view of the demise of Respondent No. 1, the heirs of Respondent No. 1 have come on record of the appeal. Their case is that the interim relief as was sought, though in the nature

of mandatory relief, was necessary in the facts and circumstances of the case. As against that, the submission on behalf of the Appellants is that the learned Single Judge had exercised his discretion appropriately and there was no reason for the Division Bench to interfere therein. The Appellants also contend that the prayers in the Notice of Motion are the principal prayers in the plaint and, therefore, it amounts to granting a decree at the interlocutory stage which was not justified in the present case.

4. The question for determination, therefore, is as to whether, in the facts and circumstances of the case, the mandatory order as passed by the Division Bench was justified, or whether the learned Single Judge having exercised his discretion appropriately, the Division Bench erred in interfering therein?

5. *The facts leading to this appeal are as follows:*

Respondent No.1 (the original Plaintiff) is the elder brother of Petitioner No.1 (Defendant No.1 in the Suit). Petitioner No.2 is the son of Petitioner No.1. The dispute between them is about the rights to a property which is being developed and is situated at Cadastral Survey No. 764, Mazgaon Division in Mumbai. The case of Respondent No.1 is that he is the exclusive owner of that property whereas the Appellants very much dispute the same. It is the case of Respondent No.1 that by Conveyance Deed dated 27.3.1981 as rectified by Rectification Deed dated 11.9.1986, he had purchased the property from the original owners and necessary property entries are in his name. It is his case that he has taken steps to develop that property under the Development Control Rules by removing one old bungalow and several chawls situated thereon. Two buildings have already been put up on that property and the third one now named as 'Siddhagiri' is under construction.

6. It is his further case that since 1999, he has not been

keeping well, and therefore, he executed three Powers of Attorney from time to time. The first one was executed on 8.8.2000 in favour of his wife and Appellant No.1 which was for performing various acts and deeds on his behalf as his Constituted Attorneys in furtherance of this project. He executed second Power of Attorney on 21.9.2005 again in favour of his wife and Appellant No.1 as well as Appellant No.2 which is also in the similar fashion as the first one. The third Power of Attorney was executed on 24.10.2000 which is a specific power in favour of Appellant No.1 for giving evidence on behalf of the Respondent No.1. It was his further case that though there was one Joint Account with Appellant No.1 in Indian Bank since 1993, one more Joint Account was opened on 10.10.2001, this time in HSBC Bank which was particularly for carrying the transactions relating to the property and developments thereon. It was his case that all amounts deposited in that account belong to him. He opened one more Joint Account on 1.2.2008 in the State Bank of India with the Appellant which was stated to be opened for payment of taxes etc. relating to the property.

7. It is the case of Respondent No.1 that from time to time Appellant No. 1 surreptitiously withdrew amounts that were lying with the HSBC bank totalling to One Crore Forty Lakhs and invested in Birla Sun Life Mutual Funds. The Appellant No. 1 had suggested this investment to him which he had declined, and thereafter unilaterally this account was shifted. On Respondent No.1's protest, the investments in mutual funds were redeemed and substantial amount came back into the account. However, an amount of about Rs. 6.9 lakhs was lost as it could not be redeemed. In view of this development, he lost confidence in his brother and therefore served a notice dated on 2.3.2009 on the Appellants, revoking all the three Powers of Attorney. He called upon both the Appellants to desist from acting on the basis of these Powers of Attorney. He called upon them further to return the title deeds of the property, and render the accounts, and informed them that he had appointed one Yogesh Jadhav as the Project Manager and

asked the Appellants to acquaint him with various contractors as also the position of work and balance of payment to be made. He lastly called upon the Appellants not to operate the account with Indian Bank as well as with the HSBC bank and return all the bank papers.

8. Appellant No.1 thereafter wrote to the Manager of the Indian Bank on 24.4.2009 pointing out that the account with their bank was initially in the joint names of his father and himself and subsequently on the demise of his father; the first Respondent had been joined into that account. According to the first Appellant, he alone was entitled to operate the account and removal of an amount of Rs. 65,500/- from that account by the first Respondent was illegal. He asked the bankers to ignore first Respondent's earlier letter dated 9.3.2009 addressed to the bank. This was followed by a detailed reply by the first Appellant to the first Respondent dated 12.5.2009 wherein it was specifically pleaded that the Powers of Attorney were executed for valid consideration and the same were coupled with interest in the concerned property. Thereafter, he pointed out that although the property stood in the name of first Respondent, as per the family settlement which took place on 30.1.1992, two flats on the 15th floor of "Arihant Tower" (first building developed) together with terrace, one shop, one room and six chawls together with land appurtenant thereto and interest therein were allotted to him and his father. He specifically pleaded that the Powers of Attorney were executed to enable him and his son to develop those properties. He pointed out that Respondent No.1 was the legal heir to the extent of only one fifth share of his father's fifty percent (50%) share at the time of his demise, i.e. ten percent (10%) only.

9. Thereafter, it was specifically pleaded that after the demise of their father in the year 1994, the first Appellant started work on the property to get the No-Objection Certificate from the government authorities, spent good amount and time on the construction, provided initially temporary

accommodation, and thereafter permanent accommodation to the occupants of the shops and chawls, developed the property by spending crores of rupees. He, inter alia, coordinated with the architects, took steps to obtain permissions and No-Objection Certificates (NOCs) from the Housing Board and the Municipal authorities and attended court matters. He further pointed out that since Respondent No.1 had failed to effect the necessary transfers of various properties, discussions took place with the assistance of lawyers for an understanding, and in spite of that he was making a dishonest claim on the property knowing fully well what had come to his share, viz. only ten percent (10%) of the property. He further pointed out that he had a larger counter-claim running into crores of rupees against Respondent No.1, and that the entire property was in his exclusive possession for several years and there was no question of appointing anyone else as Project Manager. With respect to the bank account, he specifically pointed out that the bank account was being operated by him in his own independent right and the Respondent could not order him to refrain from operating the said account.

10. This led to the first Respondent to file the above mentioned suit against the appellants. The Indian Bank, Hong Kong & Shanghai Banking Corporation (HSBC Bank) and the State Bank of India were joined as defendants No.3 to 5 respectively. The three principal prayers in the suit were as follows:

> "[a] Defendant Nos. 1 and 2 and their servants and agents be restrained by a permanent order and injunction of this Hon'ble Court from in any manner directly or indirectly acting or holding themselves out as Attorneys or Agents of the Plaintiff or dealing with any of the properties or businesses of the Plaintiff, including property bearing Cadastral Survey No.764 of Mazgaon Division situate at 119, Chinchpokali Cross Lane, Byculla, Mumbai 400 027 described in Exhibit – A-3 hereto or any premises thereon or under construction thereon or any part thereof;
>
> [b] Defendant Nos. 1 and 2 and their servants and agents be restrained by a permanent order and injunction of this Hon'ble Court from in any manner directly or indirectly entering upon property bearing Cadastral Survey No.764 of Mazgaon Division situate at 119, Chinchpokali Cross Lane, Byculla, Mumbai 400 027 described in Exhibit – A-3 hereto or any premises thereon or under construction thereon or any part thereof;
>
> [c] Defendant Nos. 1 and 2 and their servants and agents be ordered and decreed to deliver to the Plaintiff documents listed in Exhibit – U hereto and all other documents, correspondence and records belonging to the Plaintiff in the possession or power of Defendant No.1 or Defendant No.2."

The Notice of Motion taken out in the Suit had the following prayers:

> "(a) that pending the hearing and final disposal of the Suit, Defendant Nos. 1and 2 and their servants and agents be restrained by interim orders and injunctions of this Hon'ble Court from in any manner, directly or indirectly.
>
> (i) Acting or holding themselves out as Attorneys or Agents of the Appellant or dealing with any of the properties or businesses of the Plaintiff, including property bearing Cadastral Survey No.764 of Mazgaon Division situate at 119, Chinchpokali Cross Lane, Byculla, Mumbai 400 027 described in Exhibit "A-3" to the Plaint or any premises thereon or under construction thereon or any part thereof;
>
> (ii) entering upon property bearing Cadastral Survey

No.764 of Mazgaon Division situate at 119, Chinchpokali Cross Lane, Byculla, Mumbai 400 027 described in Exhibit "A-3" to the Plaint or any premises thereon or under construction thereon or any part thereof;

(iii) operating or signing any Cheques on or giving any instructions relating to or withdrawing any amounts form Account No. 417627508 in the joint names of the Plaintiff and Defendant No.1 with Defendant No. 3.

(iv) operating or signing any Cheques on or giving any instructions relating to or withdrawing any amounts from Account No. 002-236586-006 in the joint names of the Plaintiff and Defendant No.1 with Defendant No. 4.

(v) operating or signing any Cheques on or giving any instructions relating to or withdrawing any amounts from Account No. 20006421901 in the joint names of the Plaintiff and Defendant No.1 with Defendant No. 5.

(b) that pending the hearing and final disposal of the Suit, Defendant Nos.1 and 2 and their servants and agents be directed by an interim order and injunction of this Hon'ble Court to deliver to the Plaintiff documents listed in Exhibit "U" to the Plaint and all other documents, correspondence and records belonging to the Plaintiff in the possession or power of Defendant No.1 or Defendant No.2

(c) that pending admission, hearing and final disposal of the Suit;

(i) Defendant No.3 and their servants and agents be restrained by an order and injunction of this Hon'ble Court from honouring any Cheques signed by Defendant No.1 on or acting on any instructions given by Defendant No.1

relating to Account No.417627508 with Respondent No. 3 permitting any withdrawal of amounts by Defendant No.1 from Account No.417627508 with Defendant No. 3;

(ii) Defendant No.4 and their servants and agents be restrained by an order and injunction of this Hon'ble Court from honouring any Cheques signed by Defendant No.1 on or acting on any instructions given by Defendant No.1 relating to Account No.002-236586-006 with Defendant No. 4 permitting any withdrawal of amounts by Defendant No.1 from Account No. 002-236586-006 with Defendant No. 4;

(iii) Defendant No.5 and their servants and agents be restrained by an order and injunction of this Hon'ble Court from honouring any Cheques signed by Defendant No.1 on or acting on any instructions given by Defendant No.1 relating to Account No.20006421901 with Defendant No. 5 permitting any withdrawal of amounts by Respondent No.1 from Account No. 20006421901 with Defendant No. 5;"

11. Respondent No.1 filed affidavit in support containing the same submissions as above whereas the Appellant filed a reply based on the letters which have been pointed out above. Thereafter, further affidavits from both the parties were filed. Two sisters of the two brothers have filed their joint affidavit in this Motion supporting the contention raised by Appellants herein that there was a family settlement on 30.01.1992 and as per the terms of the settlement, the Byculla property came to Appellant No.1 and their father, and some other properties were given to Respondent No.1. They also supported the submission of the Appellants that only on the demise of their father, the Respondent No.1 can claim ten percent (10%) share in that property and nothing more.

12. In view of these pleadings when this matter was heard before the learned Single Judge, he formed an opinion that it

was not possible to hold at that stage whether the documents of powers of attorney were merely powers simpliciter given by the owner of the property, or whether they contained agency coupled with interest as contended by the Appellants herein. The Appellants had pointed out that although the property was purchased in the name of Respondent No.1, almost ninety percent of the amount for the purchase was contributed by Appellant No. 1. Besides this, the joint account in Indian Bank was opened way back in the year 1993 and the amount realized from the sale of the flats was being deposited therein. He was the person on the spot dealing with that property and only on the basis of the fact that the document of title stood in the name of the first Respondent the interim order as sought could not have been granted. The plea of the Appellants had to be examined particularly when their sisters were supporting the Appellants with respect to family settlement which was allegedly arrived at when their father was alive. Granting of the interim order as prayed would have meant that the Appellants will be required to withdraw themselves from the concerned property. They will be restrained from entering into that property or holding out as the attorneys of Respondent No.1 concerning that property. The Order by the learned Single Judge also records that with respect to the stage of the construction it was the counsel for the Appellants who placed the facts before the Court on instructions that the construction was nearly complete, payments to various agencies had been made by the first Appellant and at this belated stage if any interim order was passed it would not only be inconvenient to Appellants, but also to the purchasers of the flats and other third parties.

13. The grant of interim order would mean discontinuance of the scenario on the spot as it existed at that point of time. Hence, the prayers restraining the Appellants as attorneys or agents of first Respondent or restraining them from entering into the property could not be granted. As far as the prayer for the return of the documents in possession of the Appellants was concerned, the learned Judge noted that it was not possible to

issue final orders with regard to them. He, however, recorded that appellants had agreed to forward photocopies of those documents to Respondent No.1. The learned judge held that no prima facie case for a mandatory injunction was made out, yet in paragraph 22 of his order, he granted a limited interim order which reads as follows:

> *"22.* For the aforesaid reasons, it is held that no prima facie case is made out by the plaintiff and considering that the development and construction work has progressed to a substantial extent and only some finishing works are remaining so also 23 flats have been already sold, interest of justice would be sub-served if it is directed that the development and construction work can be completed at site. The flats can be sold on the basis of the documents executed but all sale proceeds must be deposited in the concerned joint bank account alone. The joint bank account would be allowed to be operated only to the extent of paying off the liabilities insofar as the suit property and its development, which shall include payment to contractors and other agents. However, such payment shall be made only on production of necessary proof and it is only thereafter the first defendant can release the sums from this joint account in favour of the contractors/agents/ third parties. Needless to state that the payment for the works which have been carried out through any contractors, sub-contractors, agents would be made only upon the Architect of the project certifying the said works and issuing the necessary and relevant certificates to certify the completion thereof. Apart from paying off these monies, the bank account shall not be utilized by the first defendant for any other purposes. The monies received from the sale of 23 flats are stated to be deposited in the said joint account by the Plaintiff.
>
> The documents are signed in favour of third parties by either the plaintiff or plaintiff's daughter. As far as

balance 27 flats are concerned, it would be open to both sides to negotiate with prospective buyers with necessary intimation to each of them. It would also be open for the first defendant to forward the offers for consideration to the plaintiff and vice versa. All documents in favour of such purchasers shall be signed by the plaintiff and/or his daughters Laxmi and Sangita. However, this entire arrangement is without prejudice to the rights and contentions of both sides. The plaintiff should furnish details of all the offers received and agreements which are entered into by him to the first defendant so as to enable first defendant to verify the particulars thereof. It is only after the offers are intimated in writing that the plaintiff can conclude the transactions and not otherwise."

14. Being aggrieved by that limited order and seeking full interim relief, Respondent No. 1 filed an appeal to the Division Bench. The learned Judges of the Division Bench were impressed by the fact that the conveyance of the property was in the name of the Respondent and the flats were being sold in his name. Though the learned Judges noted that the explanation given by the Respondent No.1 about opening of the joint account in the year 1993 was not satisfactory, they emphasized the fact that in the Powers of Attorney there was no reference to the family arrangement. They also posed the question that if the Appellants had developed the property why there was no reference to those dealings in their tax returns. They, however, noted the fact that Respondent No.1 had not enough money to purchase the property in the year 1991 (though he contends that he had taken the money as loan from Appellant No.1). In view of these factors, they were persuaded by the fact that the Powers of Attorney had been revoked and in fact two flats which were supposed to be given to Appellant No. 1 were sold by the first Respondent in the year 1993. The Division Bench, therefore, was of the view that a strong prima facie case was made out and an interim order will have to be

granted. Being aggrieved by this order, the present appeal has been filed.

15. The submission on behalf of the Appellant is that the totality of circumstances have got to be seen and the factum of family settlement along with the contribution to the purchase of the property by Appellant No.1 has to be given due weightage. It was also submitted on their behalf that the Appellants are the persons on the spot and they are developing the property and none of the Respondents are available there. The flats are undoubtedly sold in the name of the first Respondent because the property stands in his name. In any case, it is submitted that the nature of powers under documents have got to be examined on evidence with respect to the family settlement and the Appellants cannot be non-suited at the Motion stage when it was a family dispute and particularly when the sisters who were parties to the family settlement were supporting the submission of the Appellant. The Respondent, on the other hand, submitted that this was a fit case to grant the interim mandatory order as was granted by the Division Bench. The property belonged to the Respondent and it is only because he was not well that the Appellants carried out the development thereon. Now, they are taking advantage of the situation.

16. We have noted the submissions of both parties. The question which comes up for our consideration is whether the learned Single Judge exercised his discretion in such an arbitrary or perverse manner that the Appellate Court ought to have interfered with it? The Learned Single Judge has passed a detailed order explaining as to why he was constrained to grant only the limited interim relief. It was in the interest of both the parties as well as the flat purchasers. The Order passed by the learned Single Judge is also on the basis that anything beyond the limited protection given at that stage would deny the opportunity to the Appellants to establish their case at the trial when it is not in dispute that Appellant No.1 contributed

ninety percent of the purchase money to the property and he took steps all throughout to develop the property. Undoubtedly, there are many inconsistencies in the stories that are put up by both the parties, and an interlocutory stage is not the one where one can reach at a definite conclusion one way or the other, particularly where the fact situation is as above and it would result into non-suiting one party.

17. As stated above, the question comes up as to whether the order passed by the Division Bench was necessary. Mr. Nariman, learned counsel appearing for the Respondents, relied upon the Judgment of this Court in *Dorab Cawasji Warden v. Coomi Warden* [(1990) 2 SCC 117] in support.

18. As far as this judgment is concerned, it must be noted that it was a suit by one joint owner of an undivided family house to restrain the other joint owners/their heirs from transferring their share of the house and from parting with possession to a third party/purchaser and restraining the purchaser from entering into and or remaining into possession of the suit property. This was on the basis of the mandate of Section 44 of the Transfer of Property Act and particularly its proviso. This Court went into the question as to whether interlocutory injunction of a mandatory character as against the prohibitory injunction could be granted? The counsel for the Respondents pointed out that the mandatory injunctions were essential to avoid greater risk of injustice being caused as held in *Films Rover International Ltd. v. Cannon Film Sales Ltd.* [(1986) 3 All ER 87]. There is no difficulty in accepting that this Court did accept that test. It, however, laid down the law in that behalf in paragraphs 16 and 17 as follows:

> "16. The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which

> was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are:
>
> (1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.
>
> (2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.
>
> (3) The balance of convenience is in favour of the one seeking such relief.
>
> **17.** Being essentially an equitably relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the court to be exercised in the light of the facts and circumstances in each case. Though the above guidelines are neither exhaustive nor complete or absolute rules, and there may be exceptional circumstances needing action, applying them as prerequisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion."

19. In *Metro Marins and another v. Bonus Watch Co. (P) Ltd. and others* [reported in (2004) 7 SCC 478], the Respondent had filed a suit for possession contending that the license of the Appellant to the suit property had expired. The Respondent had prayed for a judgment on admission and alternatively an injunction directing the Appellant to immediately hand over vacant and peaceful possession of the suit property.

The learned Single Judge of the Calcutta High Court who heard the interlocutory application, came to the conclusion that he did not find any reason to pass such an order in view of the fact that the suit was still pending and granting of such relief would tantamount to a decree before trial. The Appellate Bench, however, re-examined the facts and observed that the litigation to be a luxury litigation directed the Receiver to put the Respondent/Plaintiff in possession. In the appeal to this Court, the learned counsel for the Appellants pointed out that the Appellants were very much in possession of the premises and the order passed by the Division Bench was contrary to the law laid down in Dorab Cawasji Warden (Supra). The counsel for the Respondents, on the other hand, defended the order of the Division Bench by contending that the period of license having come to an end, mandatory injunction passed by the Division Bench was justified. A Bench of Three Judges of this Court allowed the appeal and explained the proposition in *Dorab Cawasji Warden* (Supra) as follows in paragraph 9:

> "**9.** Having considered the arguments of the learned counsel for the parties and having perused the documents produced, we are satisfied that the impugned order of the appellate court cannot be sustained either on facts or in law. As noticed by this Court, in the case of Dorab Cawasji Warden v. Coomi Sorab Warden it has held that an interim mandatory injunction can be granted only in exceptional cases coming within the exceptions noticed in the said judgment. In our opinion, the case of the respondent herein does not come under any one of those exceptions and even on facts it is not such a case which calls for the issuance of an interim mandatory injunction directing the possession being handed over to the respondent."

20. In *Kishore Kumar Khaitan and another vs. Praveen Kumar Singh* [reported in (2006) 3 SCC 312], this Court once again reiterated the principles with respect to the interim mandatory injunction in paragraph 6 in the following words:

> "6. An interim mandatory injunction is not a remedy that is easily granted. It is an order that is passed only in circumstances which are clear and the prima facie materials clearly justify a finding that the status quo has been altered by one of the parties to the litigation and the interests of justice demanded that the status quo ante be restored by way of an interim mandatory injunction."

21. In our view, the learned Single Judge has considered all the relevant aspects of the matter and thereafter passed the limited interim order whereby documents for sale of the flats will continue to be signed by the Respondents, though, the monies coming into the bank account thereafter will be utilized only for the purposes that are necessary, as stated in paragraph 22 extracted above. The appellants have not been directed to be removed from the property inasmuch as they were the people on the spot carrying on the development prior to filing of the suit. The order sought by the respondents, if granted, would mean granting all the reliefs and a sort of pre-trial decree without the opportunity to the Appellants to have their plea examined with respect to the family arrangement, which plea is supported by their sisters.

22. The test to be applied to assess the correctness of the order of the learned Single Judge would be whether the order is so arbitrary, capricious or perverse that it should be interfered at an interlocutory stage in an intra-Court appeal. In *Wander Ltd. and another vs. Antox India P.Ltd.* [reported in 1990 (Supp) SCC 727], a bench of Three Judges of this Court has laid down the law in this respect which has been consistently followed. In that matter, Appellant No.1 being the registered proprietor of a Trade Mark had entered into an agreement with the Respondent permitting it to manufacture certain pharmaceutical product. On the basis of that arrangement, the respondent applied for the requisite license from the authorities concerned. In view the dispute between the parties, the Appellant called upon the Respondent to stop manufacturing the particular product, and entered into an

arrangement with another company. The Respondent filed a suit and sought a temporary injunction to restrain the Appellant and its new nominee-company from manufacturing the products concerned. This was on the basis of continued user in respect of the Trade Mark of the product by the Respondent. It was contended that user was in his own right. A learned Single Judge of the High Court declined to grant the interim injunction which was granted in appeal by the Appellate Bench of Madras High Court. This Court, in its judgment, held that the Appellate Bench had erred firstly, in misdirecting with respect to the nature of its powers in appeal and secondly, in basing its judgment on the alleged user of the Trade Mark. A bench of Three Judge of this Court laid down the law in this behalf in paragraph 14 of the judgment which is as follows:

> "**14.** The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these

> principles Gajendragadkar, J. in *Printers (Mysore) Private Ltd. v. Pothan Joseph.* (1960) 3 SCR 713
>
> ….These principles are well established, but as has been observed by Viscount Simon in *Charles Osenton & Co. v. Jhanaton*'… the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case'.
>
> The appellate judgment does not seem to defer to this principle."

It is to be noted that the proposition laid down has been consistently followed thereafter.

23. For the reasons stated above, in our view, the present case, is not one where mandatory interim injunction, as sought by the Respondents was justified. The learned Single Judge had passed a reasoned order, and, in no way, it could be said that he had exercised the discretion in an arbitrary, capricious or perverse manner, or had ignored the settled principles of law regarding grant or refusal of interlocutory injunction. There was no reason for the Appellate Bench to interfere and set aside that order.

24. This appeal is, therefore, allowed. The order passed by the Division Bench is set aside and that of the learned Single Judge is restored. We make it clear that we have not made any observations on the merits of the rival claims of the Appellants as well as the Respondents. We have confined ourselves only with respect to the question as to what should be the interlocutory arrangement in the facts and circumstances of the present case. In our view, the order passed by the learned Single Judge was well reasoned and justified in that context.

In the facts of the case, the parties will bear their own costs.

R.P. Appeal allowed.

M/S. ATMA RAM BUILDERS P. LTD.

v.

A.K. TULI & OTHERS

Contempt Petition (C) Nos. 140 – 144 of 2011

IN

SLP (C) Nos. 27755-27759 of 2010

MAY 10, 2011

[MARKANDEY KATJU AND GYAN SUDHA MISRA, JJ.]

Contempt of Court – Eviction decree upheld by the High Court – Supreme Court dismissed SLP, however, granted six months' time to the tenant to vacate the premises on furnishing usual undertaking – Tenant neither furnished undertaking nor vacated the premises – Alleged sub-tenant raised frivolous objections in the execution proceedings which was rejected – In an appeal filed thereagainst, Additional District Judge by a detailed order stayed the warrant of possession – Contempt petitions filed by the landlord – Held: Additional District Judge-Contemnor by staying the warrants of possession, practically superseded and overruled order passed by Supreme Court – The order of Supreme Court directing the tenant to vacate premises in six months, was totally flouted – Order passed by the Additional District Judge quashed – Chief Justice of the High Court directed to take disciplinary action against the Additional District Judge.

Judiciary – Subordinate judiciary – Certain section of the subordinate judiciary passing orders on extraneous considerations – Held: Such kind of malpractices have to be totally weeded out.

CIVIL ORIGINAL JURISDICTION : Contempt Petition (Civil) No. 140-141 of 2011.

In SLP (C) No. 27755-27759 of 2010.

Dushyant Dave, G.L. Rawal, Dr. A.M. Singhvi, Mukul Rohtagi, Jayant Bhushan, Pramod Swarup, Bina Madhuan, Krishna Kumar Singh, Amit, Vinita Sasidharan (for Lawyer's Knit & Co.), Ashwani Kumar, Kuljeet Rawal, Radhika Gautam, Rishi Agrawala (for E.C. Agrawala), Garima Prashad, Ninad Laud, Pareena Swarup, Sushma Verma, Shekhar Kumar, Asha G. Nair, Anil Katiyar for the appearing parties.

The following Order of the Court was delivered

O R D E R

Heard learned counsel for the parties.

Special Leave Petitions were filed in this Court against the judgment of the Delhi High Court dated 14th September, 2010 by which the Delhi High Court had rejected the second appeal filed by the tenant against the decree of eviction.

By our order dated 06th October, 2010, we dismissed the special leave petitions by the following order:

"Taken on Board.

Heard.

We find no merit in the special leave petitions and they are dismissed accordingly. However, we grant six months' time from today to the petitioner to vacate the premises in question on furnishing usual undertaking before this Court within six weeks from today."

From a perusal of the above order, it is evident that the tenant had to vacate the premises in question within six months' from the date of dismissal of the special leave petitions and to furnish usual undertaking within six weeks from that date. It is extremely unfortunate that neither an undertaking was furnished nor did the tenant vacate the premises in question on the expiry of six months, i.e., 06th April, 2011. Instead, frivolous objections were filed in the execution proceedings, and our order was flouted. Hence, these contempt petitions have been filed by the landlord.

It is deeply regrettable that in our country often litigations between the landlord and tenant are fought up to the stage of the Supreme Court and when the tenant loses in this Court then he starts a second innings through someone claiming to be a co-tenant or as a sub-tenant or in some other capacity and in the second round of litigation the matter remains pending for years and the landlord cannot get possession despite the order of this Court The time has come that this malpractice must now be stopped effectively.

After our order dated 06th October, 2010, the counsel of the tenant should have advised the tenant to vacate the premises in question like a gentleman before or on the expiry of six months from 06.10.2010 but unfortunately they advised the tenant to put up some other person claiming independent right against the landlord as a sub-tenant and start a fresh round of litigation to remain in possession.

In this manner, our order dated 06th October, 2010 was totally frustrated.

In these contempt proceedings, we had passed the following order on 27th April, 2011:

> "Very serious allegations have been made in these contempt petitions. By our Order dated 06.10.2010 we had dismissed the Special Leave Petitions of M/s Udham Singh Jain Charitable Trust-the tenant by giving it six months time from that date to vacate the premises in question on furnishing usual undertaking before this Court within six weeks from that date. Despite that Order, the petitioner in the original Special Leave Petitions Nos. 27755-27759 of 2010 has not vacated the premises in question nor did it file any undertaking before this Court. Instead, to frustrate the Order of this Court dated 06.10.2010 it got some persons to file frivolous objections before the executing court. One objector is none else than the son of one of the trustees of the tenant-trust, another objector is one of the trustees claiming to be the sub-

> tenant.
>
> In our opinion, such conduct is contemptuous and is simply unacceptable. It prima facie seems to us that the alleged contemnors are only creating frivolous objections to start a second round of litigation, and frustrate the Order of this Court dated 06.10.2010. We have noted that the tenancy was for 10 years effective from 01.11.1982. Hence, the respondents in these contempt petitions (petitioner in the original Special Leave Petitions Nos. 27755-27759 of 2010 and the objectors) should have handed over peaceful, vacant possession on 01.11.1992, but they have not done so till now.
>
> Issue notice.
>
> Dasti in addition.
>
> List on 10th May, 2011 by which time counter affidavit may be filed. It is made clear that the case will not be adjourned on that day. There are very serious allegations of flouting the Order dated 06.10.2010 passed by this Court. We may be constrained to pass harsher orders on that date if cause shown is not sufficient according to us.
>
> The alleged contemnors shall remain present in the Court on 10th May, 2011.
>
> The petitioner in these contempt petitions is allowed to implead Archna Sinha, Additional District Judge Central, Delhi. Issue notice to her also. She is directed to remain present in the Court on 10th May, 2011 to explain to this Court how and why she had passed the order dated 23.04.2011 in total defiance of the Order passed by this Court on 06.10.2010. She is also directed to file a personal affidavit before the next date of hearing. She shall also show cause why contempt proceedings be not taken against her and a recommendation be made by this Court for her immediate suspension.

Notice may be served dasti to Mr. Ashwani Kumar, Advocate-on-Record for the petitioner in the original Special Leave Petitions Nos. 27755-27759 of 2010.

Copy of this Order shall be given to the alleged contemnors and Archna Sinha, Additional District Judge Central, Delhi, forthwith. "

Today, when the case was taken up for hearing at 11.25 a.m., senior counsels appeared on behalf of the alleged sub-tenants and stated that their clients will vacate the premises. Hence, we directed that possession be handed over to the landlord by 12.30 p.m. today and we directed this case to be put up again before us at 12.30 p.m. today.

In this case, the order of this Court dated 06th October, 2010 has been totally flouted. It appears that the alleged sub-tenant in the execution proceedings raised an objection which was rejected on 01st April, 2011 against which an appeal was filed to the Additional District Judge Archana Sinha who by a detailed order dated 23rd April, 2011, has granted stay of the warrant of possession.

It seems to us that in this country certain members of the Subordinate Courts do not even care for orders of this Court. When this Court passed an order dated 06th October, 2010 granting six months' time to vacate, the contemnor Archana Sinha, Additional District Judge had no business to pass the order dated 23rd April, 2011 but instead she has stayed the warrants of possession, meaning thereby that she has practically superseded our order and overruled us.

We are constrained to say that a certain section of the subordinate judiciary in this country is bringing the whole judiciary of India into disrepute by passing orders on extraneous considerations. We do not wish to comment on the various allegations which are often made to us about what certain members of the subordinate judiciary are doing, but we do want to say that these kind of malpractices have to be totally

weeded out. Such subordinate judiciary Judges are bringing a bad name to the whole institution and must be thrown out of the judiciary.

In this case, the contemnor Archana Sinha had no business to pass the order dated 23rd April, 2011 and it is hereby quashed as totally void.

We further direct the Hon'ble Chief Justice of the Delhi High Court to enquire into the matter and take such disciplinary action against Archana Sinha, Additional District Judge, as the High Court deems fit. Let a copy of this order be sent forthwith to Hon'ble the Chief Justice of the Delhi High Court for appropriate orders on the administrative side against Archana Sinha.

We are informed at 12.30 p.m. today that the possession of the property in dispute has now been delivered to the landlord.

In view of this, the contempt notice against the contemnors is discharged.

Mr. Dushyant Dave, learned counsel for the landlord/ petitioner stated that the tenant has not paid electricity and other dues which the tenant was liable to pay. For this separate proceedings may be filed by the landlord, which will be decided by the competent court expeditiously.

Let a copy of this order be sent to the Registrar Generals/ Registrars of all the High Courts to be placed before their respective Hon'ble the Chief Justices for information and appropriate orders.

The Contempt Petitions are disposed of.

N.J. Contempt petitions disposed of.

GURU DEV SINGH
v.
STATE OF M.P.
(Criminal Appeal No. 1125 of 2011)

MAY 10, 2011

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

Penal Code, 1860:

ss. 302/34 and 323/34 – Three accused attacking the victims with deadly weapons – One of the victims found dead in the following morning – One of the accused died pending trial – Conviction of two by trial court u/ss 302/34 and 307/34 – High Court maintaining conviction u/s 302/34, but setting aside conviction u/s 307/34 and instead convicting the accused u/s 323/34 – Appeal by one accused – HELD: There is categorical evidence of the injured eye-witness that the accused persons caused serious injuries on the head and other parts of body of the deceased with 'kirpan', 'lohangi and lathi' – The other eye-witness stated that the accused after causing injuries to the deceased threw him in the 'nala' – Medical evidence, the statement of eye-witnesses, the statement of accused leading to recovery of crime weapons, clearly establish that the deceased received serious injuries from the weapons used by the accused, due to which he died – Appellant is guilty of offences punishable u/ss 302/34 and 323/34 IPC and the order of conviction and sentence passed by High Court against him is upheld.

s.300 – Exceptions I to IV – Three accused attacking two victims with deadly weapons resulting in death of one of the victims – Plea of accused that there was provocation from the side of the victims and the incident happened due to sudden fight – HELD: The defence is not corroborated by evidence

on record – From the evidence it is found that provocation came from the side of accused and not from the victims – It was also not a sudden fight as it has been proved that accused were armed with deadly weapons like 'kirpan', 'lohangi' and lathi and they surrounded the victims and gave blows to vital parts of deceased with intention to kill him – Thus, none of Exceptions to s.300 is attracted.

FIR

Delay in lodging the FIR – Victim attacked at about 8 P.M. in the night and found dead on the following morning and FIR recorded thereafter – HELD: There is proper and reasonable explanation that as the victim was not found at the place of incident, he was searched throughout the night and only after tracing him in the 'nala' on the following morning and finding him dead, FIR was lodged immediately thereafter.

The appellant-accused No.2 (A-2) along with A-1 and 'B' was prosecuted for the murder of one 'BS', the brother of the complainant (PW-3). The prosecution case was that on 17.11.1986, 'BS' along with one 'SS' had gone to purchase seeds of 'chana' and at about 8.00 p.m. when they reached near the place of incident, A-1 armed with 'Kirpan' (sword) accused 'B' armed with lathi and A-2 armed with 'Lohangi' met them; that accused 'B' had enmity with 'BS' as the latter wanted the sister of 'B' to marry one 'LS' but 'B' was opposed to it. All the three accused with their respective weapons attacked 'BS' and PW-1. 'BS' fell down due to serious injuries; PW-1 managed to run away and told the incident to PW-3. Thereupon, PW-3 along with PW-1 and others reached the place of incident but they could not find 'BS' there. On the following morning the dead body of 'BS' was found in the 'nala' and the FIR was lodged. Accused 'B' died pending trial. The trial court convicted A-1 and A-2 u/ss.302/34 and 307/34 IPC and sentenced them to imprisonment for life and RI for 7 years, respectively, for

the two counts. On appeal, the High Court maintained the conviction and sentence u/s 302/34 IPC but set aside the conviction and sentence u/s. 307/34 IPC and instead convicted the accused u/s 323/34 IPC.

In the instant appeal filed by A-2 it was contended for the appellant that there were vital discrepancies in the evidence as alleged by the eye-witnesses namely, PW-1 and PW-2 and, therefore, their evidence could not be relied upon and further PW-1 was an interested witness as there was a mutual fight between the parties in which PW-1 was a party; that the accused also received injuries and the prosecution furnished no explanation therefor; that there was delay in lodging the FIR; and that, in any case, the appellant was protected under Exceptions to s.300 IPC for there was provocation from the complainant side and the incident occurred due to sudden fight between the parties.

Dismissing the appeal, the Court

HELD: 1.1. PW-1 is an injured witness and, therefore, an eye-witness to the occurrence. He has given vivid description as to how the incident has taken place. He has clearly stated that there was no provocation on the part of complainant party, and that the provocation, in fact, came from the side of the accused persons. There is a categorical statement of PW-1 that the appellant and other accused persons caused serious injuries on the head and body of the deceased by '*lohangi', 'kirpan'* and *lathi*. PW-1 also stated that, the appellant, and another accused gave him (PW-1) lathi blows and realizing that the accused would kill him, he ran away from the place of occurrence and reported the matter to his father who came along with him and other persons to the place of occurrence but they could not find the deceased after searching throughout the night. They could find the body of the deceased only on the morning of 18.11.1986 in a

'*nala'* whereupon the report was lodged. [para 13-14] [950-E-H; 951-A-E]

1.2. PW-2, who is also an eye-witness to the occurrence, has clearly stated that all the three accused persons hit the deceased on his head, hands and legs and also hit PW-1 when he tried to rescue the deceased whereupon PW-1 ran away from the spot. He also stated that the accused lifted the deceased and took him towards the *nala*. This eye-witness has further stated that he followed them stealthily by remaining 8-10 steps behind them. The accused persons threw the deceased in the *nala* and went away. Thereafter PW-2 returned back to his village and on the following day went and narrated the facts to the complainant. [para 15] [951-F-H; 952-A-B]

1.3. The statement of the two eye-witnesses, viz., PWs 1 and 2, are also supported by the proved medical evidence of PW-7 who conducted the post mortem of the dead body on 18.11.1986. PW-7 has stated in his evidence that he found 21 injuries on the body of the deceased and that in his opinion 8 injuries were on the head of the deceased. He clearly stated in his evidence that the deceased died due to the head injuries and that the said injuries were sufficient to cause death in normal course of nature. The injuries were caused by sharp cutting, hard and blunt weapons. [para 16, 19-20] [952-C-E; 953-B-C]

1.4. PW-4, who is a witness to the recovery of *lathi*, *lohangi* and *kirpan* has clearly stated that on the basis of the statements made by the accused persons the weapons were recovered from the places shown by them. Therefore, his evidence also proves the allegation made against the accused persons including the appellant. [para 21] [953-D-E]

1.5. When the medical evidence of PW-7 is read along with post mortem report and the statements of PWs 1 and

2 as also the statements of the accused persons leading to the discovery, it is clearly established that the deceased received serious injuries on account of the blows of the sword, *lathi* and *lohangi* **used by the accused persons due to which he died. [para 18] [952-G-H; 953-A]**

2. The defence of accused that his case is covered under one of Exceptions I to IV to s. 300 IPC is not corroborated by the evidence on record. On going through the evidence on record it is found that the provocation came from the side of the accused and not from the deceased or PW-1. It was also not a sudden attack as it was proved that the accused persons were armed with deadly weapons like, '*lohangi*' and '*kirpan*' at the time of occurrence and in fact they surrounded the deceased and the injured eye-witness, (PW-1), and started giving blows of '*sword*', *lathi* and '*lohangi*' on the vital parts of the body with the intention of killing the deceased. Therefore, it cannot be said that any of the Exceptions I to IV to s. 300 IPC is attracted in the instant case. [para 27] [956-G-H; 957-A-B]

Kulesh Mondal v. The State of West Bengal **2007 (9) SCR 799 = (2007) 8 SCC 578** *K. M. Nanavati v. State of Maharashtra* **1962 Suppl. SCR 567 = AIR 1962 SC 605, and** *Babulal Bhagwan Khandare & Anr. v. State of Maharashtra* **2004 (6) Suppl. SCR 633 = (2005) 10 SCC 404 referred to.**

3. So far the submission with regard to delay in filing the first information report is concerned, there is proper explanation given by the informant that as the deceased was not found at the place of occurrence, the informant with PW1 was trying to locate the deceased throughout the night and only after tracing him out in the '*nala*' and being sure of his death filed the information immediately

thereafter. The explanation appeals to be reasonable. [para 28] [957-B-C]

4. Considering the entire evidence on record, it is held that the appellant is guilty of the offences punishable u/s. 302/34 IPC as also u/s. 323 /34 IPC and, therefore, the order of conviction and sentence passed by the High Court against him is upheld. [para 29] [957-D-E]

Case Law Reference:

1962 Suppl. SCR 567	**referred to.**	**Para 24**
2007 (9) SCR 799	**referred to.**	**para 25**
2004 (6) Suppl. SCR 633	**referred to**	**para 26**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1125 of 2011.

From the Judgment & Order dated 3.8.2007 of the High Court of Madhya Pradesh, Jabalpur Bench at Gwalior in Criminal Appeal No. 426 of 1999.

Shankar Divate (SCLSC) for the Appellant.

S.K. Dubey, Vikas Bansal, Kusumanjali Sharma and C.D. Singh for the Respondent.

The Judgment of the Court was delivered by

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

2. The present appeal is directed against the judgment and order passed by the Madhya Pradesh High Court convicting the appellant herein under Section 302 read with Section 34 of the Indian Penal Code [for short "IPC"] as also under Section 323 read with Section 34 of IPC sentencing the appellant to undergo imprisonment for life under Section 302/34 for committing murder with a fine of Rs. 5,000/- and in default of

payment of fine further to undergo one year additional rigorous imprisonment.

3. Brief facts leading to the filing of First Information Report and the present case/appeal are that on 18.11.1986 the complainant-Hardev Singh lodged a written complaint which was exhibited in the trial as Exhibit P.1 in the Police Station-Pichhore contending inter alia that his brother Bhola Singh alias Kamal who was residing in Village Sarnagat had gone to Janakpur via Village Badera to purchase seeds of chana on 17.11.1986 along with Sukhdev Singh and that at about 8.00 p.m. when they reached near the tapra of Dilip Singh, Raju, son of Dilip Singh, armed with kirpan [sword]; Baldev armed with lathi and Chhidda alias Gurudev armed with lohangi met them. It was also stated therein that accused Baldev and Bhola Singh had enmity towards each other as Bhola Singh wanted the sister of Baldev to marry Lakkha Singh but Baldev did not want the same and because of that the accused persons attacked Bhola Singh and Suveg Singh whereupon both of them were injured. It was alleged that Bhola Singh fell down due to the serious injuries sustained by him whereas Suveg Singh after being injured ran away to save himself and told this fact to Hardev Singh. Thereupon Hardev Singh alongwith his brother Billa, Bhiru and Suveg Singh returned back to the place of occurrence to save Bhola Singh alias Kamal but they could not find him at the place of occurrence and that only in the morning they could find the dead body of Bhola Singh in the nala near the tapra of Dilip Singh. The dead body of the decease was then taken out whereupon it was found that the deceased was injured by sharp edged and hard and blunt objects. Consequently, the First Information Report was lodged by Hardev Singh on the basis of which a criminal case was registered being Crime No. 193/1986. The police after investigation filed challan against the accused persons, viz., Baldev Singh, Chhidda alias Gurudev Singh and Raju for the commission of offence under Section 302 read with Section 34 and under Section 307 read with Section 34 of the IPC.

4. It transpires from the records that the accused persons also lodged a complaint with the police regarding the incident contending inter alia that Bhola Singh and Suveg Singh attacked the accused persons and injured them. However, the medical report submitted in support of the said contention indicates that the injuries suffered by the accused persons in the present case were simple in nature.

5. On the basis of the charge sheet filed as against the appellant and also two other accused persons the case was committed to the Sessions Court. Evidence was adduced by the prosecution, on completion of which, the statement of the accused under Section 313 Cr.P.C. was also recorded.

6. The learned Sessions Judge after perusing the evidence on record passed an order of conviction against the accused for commission of offence under Section 302/34 and Section 307/34 of the IPC and passed an order of sentence to undergo life imprisonment for the offence under Section 302/34 IPC and also imposed fine of Rs. 5,000/- and in default of payment of fine, to further undergo one year additional rigorous imprisonment. The Sessions Court also passed an order of sentence under Section 307/34 of the IPC ordering the accused to undergo rigorous imprisonment for seven years and also imposed fine of Rs. 2,000/- and in default in payment of fine, to further undergo six months' additional rigorous imprisonment.

7. Being aggrieved by the aforesaid judgment and order of conviction passed by the Sessions Judge, Raju and the present appellant filed appeals before the High Court of Madhya Pradesh. We are informed that one of the accused, viz., Baldev Singh had died in the meantime. The High Court took up the appeals filed by Raju and the present appellant for consideration and by a judgment and order dated 03.08.2007 maintained the order of conviction of the accused persons, including the appellant herein, under Section 302/34 IPC and also maintained the sentence of imprisonment passed against them. The High Court, however, set aside the conviction under

Section 307/34 IPC and instead the accused persons were convicted under Section 323/34 IPC, for which, no separate sentence was passed as they were already convicted for life under Section 302/34 IPC.

8. As against the aforesaid judgment and order the present appeal is filed only by Gurudev Singh. We are informed at the Bar that accused Raju has not filed any appeal as against his order of conviction and sentence. Therefore, in the present appeal we are concerned only with the order of conviction and sentence passed by the Sessions Judge and confirmed by the High Court under Section 302/34 of the IPC as against the present appellant, Sri Guru Dev Singh.

9. Counsel appearing for the appellant submitted that the evidence/statements of Suveg Singh [PW-1] and Lakkha Singh [PW-2], who were stated to be eye-witnesses to the said incident, cannot be relied upon as there are vital discrepancies in their evidence. It was also submitted that PW-1 is an interested witness for he was also a party to the fight wherein there was a mutual maarpit/fight between the parties in which even the accused persons received injuries for which no explanation has been submitted by the prosecution and, therefore, the order of conviction and sentence passed against the appellant is liable to be set aside. He also submitted that even if the evidence adduced by the prosecution is to be believed, the accused is protected under Exceptions provided under Section 300 IPC for there was provocation from the side of the complainant party and that due to such provocation, the incident occurred due to sudden fight between the parties.

10. The aforesaid contentions of the counsel appearing for the appellant were refuted by the counsel appearing for the State who contended inter alia that the injuries received by the accused were very simple in nature whereas the injuries inflicted on the deceased were very serious in nature and were inflicted on the vital parts of the body of the deceased and, therefore, there was a clear intention on the part of the accused

persons to kill and murder the deceased and that even the injuries received by PW-1 were also serious in nature but he could save himself from the vital blows by fleeing away from the place of occurrence.

11. There was also a contention on behalf of the appellant regarding the delay in filing the First Information Report. The said contention was also refuted by the counsel appearing for the respondent contending inter alia that the deceased was not traceable and, therefore, the complainant and his relations were busy throughout the night trying to locate Bhola Singh alias Kamal and that the First Information Report was lodged only after the dead body of the deceased was found in the morning of 18.11.1986 from the nala near the tapra of Dilip Singh. Therefore, it was submitted that there was sufficient explanation for the delay in filing the aforesaid First Information Report.

12. We have considered the aforesaid submissions put forward by the counsel appearing for the parties in the light of the documents placed on records.

13. Suveg Singh [PW-1] is an injured witness and, therefore, an eye-witness to the occurrence. He has given vivid description as to how the incident has taken place. He has clearly stated that there was no provocation on the part of complainant party, and that the provocation in fact came from the side of the accused persons. He clearly stated that when he along with Bhola Singh alias Kamal was returning back from the shop where they had gone to purchase seed of chana and when they reached near the tapara of Dilip Singh at about 8.00 p.m. they found accused Baldev Singh armed with lathi, Chhidda alias Gurudev armed with lohangi and Raju armed with kirpan. It was also stated by him that all the three accused persons surrounded him and Bhola Singh alias Kamal and Baldev Singh told that his sister was engaged in Village-Salaiya and Bhola Singh was mediator in the said engagement. He has also stated in his evidence that all the accused persons were opposing the proposed engagement and so they asked

Bhola Singh alias Kamal to cancel the marriage which Bhola Singh refused, whereupon Chhidda alias Gurudev, Raju and Baldev Singh attacked both Bhola Singh and him and caused vital injuries on different parts of the body of the deceased as also on his body.

14. There is a categorical statement of PW-1, the eye-witness, that the present appellant-Chhidda alias Gurudev Singh and other accused persons caused serious injuries on the head and body of the deceased by inflicting injuries by weapons like lohangi, kirpan and lathi which they were carrying with them. It was also stated by him that Chhidda alias Gurudev Singh, the present appellant, gave PW 1 a blow of lathi on his hand while Baldev gave him a blow of lathi on his waist/back and the third blow was given by Chidda on his back, after being so hit and on the realizing that the accused persons would kill him he ran away from the place of occurrence and reported the matter to his father Pyarasingh who came along with him and other persons to the place of occurrence but they could not find Bhola Singh after searching throughout the night. They could find the dead body of Bhola Singh only on the morning of 18.11.1986 in a nala near the tapra of Dilip Singh whereupon they returned back to Janakpur and lodged the report.

15. Lakkha Singh [PW-2], who is also an eye-witness to the said occurrence, has clearly stated that all the three accused persons hit Bhola on his head, hands and legs and also hit Suveg Singh [PW-1] when he tried to rescue Bhola Singh whereupon Suveg Singh ran away from the spot. He also stated that Baldev Singh, Gurdev Singh and Raju lifted Bhola Singh and took him towards the nala. This eye-witness has further stated that he further followed them stealthily by remaining 8-10 steps behind them and then the accused persons threw Bhola Singh in the nala and at that time also Bhola Singh was crying and pleading with the accused persons but Baldev Singh again beat Bhola Singh there with lathis and accused Chidda alias Gurdip Singh beat Bhola Singh with lohangi. Thereafter

accused Raju said that Bhola Singh is dead now and thereupon all the accused persons left the body of Bhola Singh there and went away towards their tapras. Thereafter he [PW-2] returned back to his Village-Sarnagat and on the next day he went to the Village-Janakpur and narrated the facts to Hardev Singh.

16. The aforesaid statement of the two eye-witnesses, viz., PWs 1 & 2, are also supported by the proved medical evidence of Dr. B.D. Sharma [PW-7] in the present case. The post mortem report of the dead body was conducted by Dr. B.D. Sharma on 18.11.1986 which indicates that there were as many as 21 injuries on the deceased which are in the nature of lacerated wounds as well as contusion on the skull and other parts of the body. The injuries caused on the skull which are in the nature of lacerated wound and also contusion over skull are all very deep. Other injuries were also found to be very serious in nature and were caused by sharp cutting hard and blunt weapon. It is thus established from the aforesaid post mortem report that the deceased would have received injuries from sword as also from lathi and lohangi. The nature of the injuries caused to the deceased would prove and establish that the aforesaid injuries were caused with the intention of killing the deceased.

17. It was also established from the records that the sword as also the lohangi and lathi, the weapons used during the incident, have been recovered at the instance of the accused persons and on the basis of the statements made by the accused persons leading to their discovery which are cogent and admissible evidence in the present case.

18. When the aforesaid medical evidence of PW-7 is read along with post mortem report and the statements of PWs 1 & 2, who were stated to be eye-witnesses, as also the statements of the accused persons leading to the discovery, which are admissible in evidence, it is clearly established that the deceased received serious injuries on account of the blows of

the sword, lathi and lohangi used by the accused persons due to which Bhola Singh died.

19. Dr. B.D. Sharma [PW-7] has stated in his evidence that he found 21 injuries on the body of the deceased and that in his opinion 8 injuries were on the head of the deceased, which resulted in Subdurel Hemotoma and Coma. He clearly stated in his evidence that the deceased died due to the head injuries and that the said injuries were sufficient to cause death in normal course of nature.

20. So, all the aforesaid injuries proved through the medical evidence are also supported by the oral testimony of two eye-witnesses, viz., PWs 1 & 2.

21. Gurmej Singh [PW-4], who is a witness to the recovery of lathi, lohangi and kirpan has clearly stated that on the basis of the statements made by the accused persons the aforesaid weapons were recovered from the places shown by the accused persons. Therefore, the aforesaid evidence also proves the allegation made against the accused persons including the present appellant.

22. The defence that was also raised by the counsel appearing for the appellant was that the aforesaid incident had taken place as a result of provocation on the part of deceased and PW-1 because of which a sudden fight had developed and thus the appellant is protected under one of the exceptions provided under Section 300 of the IPC.

23. With regard to this plea of the accused it seems that Exceptions I and IV to Section 300 of the IPC are sought to be taken advantage of by the accused in this case. For dealing with such plea raised on behalf of the accused person we may extract the said exceptions to Section 300 IPC, which are as under: -

"Exception 1: When culpable homicide is not murder. Culpable homicide is not murder if the offender, whilst

deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.

Exception 4: Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner."

24. With regard to law dealing with Exception I to Section 300 we may refer to the case of *K. M. Nanavati v. State of Maharashtra* reported in AIR 1962 SC 605 in which this Court held that following conditions must be complied with for the application of Exception I to Section 300 of the IPC: - (1) the deceased must have given provocation to the accused, (2) the provocation must be grave, (3) the provocation must be sudden, (4) the offender, by reason of the said provocation, shall have been deprived of his power of self-control, (5) he should have killed the deceased during the continuance of the deprivation of the power of self-control and (6) the offender must have caused the death of the person who gave the provocation or that of any other person by mistake or accident.

25. With regard to Exception IV to Section 300 we may refer to the case of *Kulesh Mondal v. The State of West Bengal* reported in (2007) 8 SCC 578 in which this Court

"12. The residuary plea relates to the applicability of Exception 4 of Section 300 IPC, as it is contended that the incident took place in course of a sudden quarrel.

13. For bringing it in operation it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in a cruel or unusual manner."

26. In the case of *Babulal Bhagwan Khandare & Anr. v. State of Maharashtra* reported in (2005) 10 SCC 404 this Court detailed the law relating to Exception I and IV to Section 300 IPC in following terms: -

> "17. The fourth exception of Section 300 IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution (sic provocation) not covered by the first exception, after which its place would have been more appropriate. The exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A "sudden fight" implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the exception more appropriately applicable would be Exception 1.
>
> 18. The help of Exception 4 can be invoked if death is caused (a) without premeditation; (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4, all the ingredients mentioned in it must be found. It is to be noted that the "fight" occurring in Exception 4 to Section 300 IPC is not defined in IPC. It takes two to

> make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties had worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in a cruel or unusual manner. The expression "undue advantage" as used in the provision means "unfair advantage".
>
> 19. Where the offender takes undue advantage or has acted in a cruel or unusual manner, the benefit of Exception 4 cannot be given to him. If the weapon used or the manner of attack by the assailant is out of all proportion, that circumstance must be taken into consideration to decide whether undue advantage has been taken. In Kikar Singh v. State of Rajasthan it was held that if the accused used deadly weapons against the unarmed man and struck a blow on the head it must be held that by using the blows with the knowledge that they were likely to cause death he had taken undue advantage. ....."

27. The defence of accused that his case is covered under one of the above Exceptions to Section 300 is not corroborated by the evidence on record. On going through the evidence on record we find that the provocation came from the side of the accused and not from the deceased or PW-1. It was also not a sudden attack as it was proved that the accused persons were armed with deadly weapons like, lohangi and kirpan at the time of occurrence and in fact they surrounded the deceased and the injured eye-witness, PW-1, and started

giving blows of sword, lathi and lohangi on the vital parts of the body with the intention of killing Bhola Singh. Therefore, the argument that one of the above Exceptions to Section 300 of the IPC is attracted in the instant case cannot be accepted on the face of the evidence on record.

28. So far the submission with regard to delay in filing the first information report is concerned, we are satisfied that there is proper explanation given by the informant for the delay in filing such report. As the deceased was not found at the place of occurrence, the informant with PW1 was trying to locate the deceased throughout the night and only after tracing him out in the nala and being sure of his death filed the information immediately thereafter. The aforesaid explanation appeals to us as reasonable.

29. Considering the entire evidence on record, we are satisfied that the appellant is guilty of the offence committed under Section 302/34 of the IPC as also under Section 323 / 34 of the IPC and, therefore, the order of conviction and sentence passed by the High Court of Madhya Pradesh against him is found to be justified. We, therefore, find no merit in this appeal which is dismissed.

R.P. Appeal dismissed.

YOMESHBHAI PRANSHANKAR BHATT
v.
STATE OF GUJARAT
(Criminal Appeal No. 2109 of 2009)

MAY 19, 2011

[ASOK KUMAR GANGULY AND DEEPAK VERMA, JJ.]

Constitution of India, 1950:

Article 136 and 142 – Limited notice issued in special leave petition – Power of Court to consider all issues while hearing the matter finally – HELD: In view of the inherent powers of the Court under the Rules and having regard to Article 142, the Supreme Court at the time of final hearing is not precluded from considering the controversy in its entire perspective and in doing so, the Court is not inhibited by any observation in an order made at the time of issuing the notice – Supreme Court Rules, 1966 – Or.47, rr. 1 and 6 – Inherent powers of Supreme Court.

Penal Code, 1860:

s.304 (part II) – During an altercation accused pouring kerosene on victim and setting her on fire resulting in her death – HELD: There being no eye-witness, the case is based on circumstantial evidence and statements of deceased in the dying declarations – Accused had no pre-mediation to kill the deceased or cause any bodily injury to her – The incident happened on the spur of the moment – The case falls u/s 304(part II) – The sentence of 11 years and 2 months already undergone by the accused is more than sufficient – Circumstantial evidence.

The appellant was prosecuted for committing an offence punishable u/s 302 IPC. The prosecution case

was that on the day of incident, the woman working as a maid in the house of the appellant did not turn up. He, accompanied by one 'AP', went to her house, which was nearby. An altercation took between the maid and the appellant. The appellant gagged the mouth of the maid, and emptied a can of kerosene on her and lit the matchstick. PW-2, the elder sister-in-law of the victim, reached there after hearing shouts and made arrangements for taking the victim for treatment. The victim made three dying declarations. The first one was recorded when PW-2 took the deceased to the hospital wherein the victim had informed the doctor that the appellant had sprinkled kerosene on her and set her on fire. The second and the third ones recorded by the PS1 and the Executive Magistrate, respectively were to the same effect. Thereafter, the victim lost her consciousness and died six days later in an unconscious stage. The trial court convicted the accused u/s 302 IPC and sentenced him to imprisonment for life. The High Court upheld the conviction and the sentence.

In the special leave petition filed by the appellant, though the notice was confined only to the question as to whether the appellant was guilty of an offence under any of the parts of s.304 IPC and not u/s 302, during the course of hearing it was contended for the appellant that the Court at the time of final hearing was not bound with the directions given while issuing notice, and the appellant was entitled to urge all questions including his right to plead for his acquittal.

Partly allowing the appeal, the Court

HELD: 1.1. Under Article 142 of the Constitution, this Court in exercise of its jurisdiction may pass such decrees and may make such orders as is necessary for doing complete justice in any case or matter pending

before it. It is, therefore, clear that the Court while hearing the matter finally, may pass such orders which the justice of the case demands and in doing so, no fetter is imposed on the Court's jurisdiction except, of course, any express provision of the law to the contrary. Any observations which are made by the Court at the time of entertaining a petition by way of issuing notice are tentative observations. [para 9-10] [966-C-F]

1.2. It is also clear from O. 47, r. 6 of the Supreme Court Rules, 1966 that the inherent powers of the Court are saved under the Rules. In view of the inherent powers of the Court under the Rules and having regard to the constitutional provision under Article 142, the Supreme Court at the time of final hearing is not precluded from considering the controversy in its entire perspective and in doing so, this Court is not inhibited by any observation in an order made at the time of issuing the notice. This Court is, therefore, entitled to consider the plea of the appellant for acquittal despite the fact that at the time of issuing notice, it was limited in terms of the order dated 27.7.2009. However, it is made clear that this cannot be a universal practice in all cases. The question whether the Court will enlarge the scope of its inquiry at the time of final hearing depends on the facts and circumstances of the case. In the facts of the instant case, this Court finds that the appellant should be heard on all points. [para 11,13,17 and 18] [966-G; 967-C-D; 969-A-C]

State of Uttaranchal vs. Alok Sharma and others **2009 (7) SCR 1 = 2009(7) SCC 647 – relied on.**

2.1. As regards the merits of the case, it is nobody's case that the appellant went to the house of the deceased, being armed with any weapon or he was carrying any inflammable substance. Therefore, any pre-meditation on the part of the appellant in causing any bodily harm or injury to the deceased is admittedly ruled out.

Surprisingly, 'AP', who had accompanied the appellant to the house of the deceased, had run away before the incident of burning took place and he was not examined by the prosecution at all. The only two other witnesses in the case are the husband of the deceased (PW-1) and her elder sister-in-law (PW-2). PW 1, in his evidence abmitted that the deceased had suicidal tendencies in the past. [para 19-20] [969-D-E; 970-B-D]

2.2. There is no eye-witness. The case is, therefore, entirely based on circumstantial evidence and the statements of the deceased in more than one dying declarations. Virtually, there is no inconsistency between the dying declarations of the deceased recorded at the interval of few hours on the day of the incident. The evidence of PW 1 is that he was informed of the incident and he came to see the deceased on the date of the incident and found her unconscious. [para 19 and 21] [969-D; 970-E-H]

State of U.P. vs. Chetram and others, **AIR 1989 SC 1543; and** *Khujji alias Surendra Tiwari vs. State of Madhya Pradesh* **AIR 1991 SC 1853– referred to.**

2.3. The statement of the appellant u/s 313 was accompanied by written document. There the appellant had taken a defence plea that he wanted to save the deceased and in the process got his right hand burnt. However, neither the trial court nor the High Court had considered this aspect of the case. [para 24-25] [971-F-H]

2.4. In a case relating to circumstantial evidence, the Court should see the circumstances very carefully before arriving at a finding of guilt of the person concerned and yet if there is any doubt which is inconsistent with the innocence of the accused, the benefit should go to the accused. [para 29] [972-F]

2.5. In the instant case, it is clear that the appellant had no pre-meditation to kill the deceased or cause any bodily harm or injury to her. Everything has happened on the spur of the moment. The appellant must have lost self-control on some provocative utterances of the deceased. These possibilities cannot be ruled out, having regard to the evidence of PW.1. However, the fact that kerosene was sprinkled on the deceased by the appellant possibly cannot be disputed, in view of concurrent finding by both the courts and having regard to the materials on record. But the case falling u/s 300, thirdly of IPC, is very doubtful. [para 30-31] [972-G-H; 973-A-B]

2.6. Having regard to the facts and circumstances of the case and in the light of defence of the accused, this Court holds that the case falls u/s 304 (Part II). The appellant has already suffered imprisonment for 11 years and 2 months. In that view of the matter, this Court holds that the sentence which has already been undergone by the appellant is more than sufficient u/s 304 (Part II). However, the sentence of fine is set aside. [para 31] [973-B-C]

Rodemadan India Ltd., v. International Trade Expo Centre Ltd., **(2006) 11 SCC 651; and** *Prem Chand Garg and another v. Excise Commissioner, U.P. and others*, **1963 Suppl. SCR 885 = AIR 1963 SC 996 – cited.**

Case Law Reference:

(2006) 11 SCC 651	**cited**	**para 5**
1963 Suppl. SCR 885	**cited**	**para 5**
2009 (7) SCR 1	**relied on**	**para 14**
AIR 1989 SC 1543	**referred to**	**para 22**
AIR 1991 SC 1853	**referred to**	**para 23**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2109 of 2009.

From the Judgment & Order dated 17.3.2009 of the High Court of Gujarat at Ahmedabad in Criminal Appeal No. 815 of 2001.

D.N. Ray, Lokesh K. Choudhary, Sumita Ray for the Appellant.

Hemantika Wahi, Jesal Wahi, Suveni Banerjee for the Respondent.

The Judgment of the Court was delivered by

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

2. Some important questions have come up for consideration in this case.

3. This appeal is against the concurrent finding of both the courts convicting the appellant under Section 302 IPC and sentencing him to suffer imprisonment for life. The judgment of the Trial Court was rendered by the Additional Sessions Judge at Vadodara in Sessions Case No. 275 of 2001 by judgment and order dated 16.8.2001. The High Court by judgment and order dated 17.3.2009 in Criminal Appeal No. 815 of 2001 affirmed the same.

4. At the stage of SLP, this Court by an order dated 27.7.2009 issued notice only confined to the question as to whether the petitioner is guilty for commission of an offence under any of the parts of Section 304 of the Indian Penal Code and not under Section 302 thereof.

5. Learned counsel for the appellant urged that though at the time of issuing notice, this Court limited its rights to raise points only within the confines of Section 304 of Indian Penal Code, the Court is not bound at the time of final hearing with

that direction given while issuing notice and the appellant is entitled to urge all questions including his right to urge that he should have been acquitted in the facts and circumstances of the case. Before examining the correctness of the aforesaid submission, we are inclined to look into the rules of this Court. The Supreme Court Rules, 1966 (hereinafter referred to as "the rules") which have been framed under Article 145 of the Constitution are relevant in connection with this inquiry. It has been held by this Court that the power of Supreme Court to make Rules to regulate its own procedure is only subject to two limitations:

(i) These rules are subject to laws made by Parliament. [See *Rodemadan India Ltd., v. International Trade Expo Centre Ltd.,* (2006) 11 SCC 651.]

(ii) These rules, being in the nature of subordinate legislation, cannot override the Constitutional provision. [See *Prem Chand Garg and another v. Excise Commissioner, U.P. and others,* AIR 1963 SC 996]

6. However, these rules are intended to govern the practice and procedure of this Court.

7. Article 145 of the Constitution provides that subject to the provisions of any law made by Parliament, the Supreme Court, may from time to time, with the approval of the President, make rules for regulating the general practice and procedures of the court including the matters which are enumerated as follows:-

(a) rules as to the persons practising before the Court;

(b) rules as to the procedure for hearing appeals and other matters pertaining to appeals including the time within which appeals to the Court are to be entered;

(c) rules as to the proceedings in the Court for the enforcement of any of the rights conferred by Part III;

(cc) [rules as to the proceedings in the Court under [article 139A];

(d) rules as to the entertainment of appeals under sub-clause (c) of clause (1) of article 134;

(e) rules as to the conditions subject to which any judgment pronounced or order made by the Court may be reviewed and the procedure for such review including the time within which applications to the Court for such review are to be entered;

(f) rules as to the costs of and incidental to any proceedings in the Court and as to the fees to be charged in respect of proceedings therein;

(g) rules as to the granting of bail;

(h) rules as to stay of proceedings;

(i) rules providing for the summary determination of any appeal which appears to the Court to be frivolous or vexatious or brought for the purpose of delay;

8. We are not concerned here with other sub-articles of Article 145. The rules which have been thus framed by this Court under the constitutional provision must be read in understanding the scope of its power under Article 142 of the Constitution. Article 142 of the Constitution provides as follows:-

142. Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc. (1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made,

in such manner as the President may by order prescribed.

2. Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself.

9. The provision of Article 142 of the Constitution have been construed by this Court in several judgments. However, one thing is clear that under Article 142 of the Constitution, this Court in exercise of its jurisdiction may pass such decrees and may make such orders as is necessary for doing complete justice in any case or matters pending before it. It is, therefore, clear that the court while hearing the matter finally and considering the justice of the case may pass such orders which the justice of the case demands and in doing so, no fetter is imposed on the court's jurisdiction except of course any express provision of the law to the contrary, and normally this Court cannot ignore the same while exercising its power under Article 142.

10. An order which was passed by the court at the time of admitting a petition does not have the status of an express provision of law. Any observation which is made by the court at the time of entertaining a petition by way of issuing notice are tentative observations. Those observations or orders cannot limit this court's jurisdiction under Article 142.

11. If we look at the rules, it is also clear from the Order XLVII Rule 6, that the inherent powers of the Court are saved under the Rules. The provision of Order XLVII Rule 6 are set out to demonstrate the same.

"Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make

such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

12. Order XLVII Rule 1 is almost to the same effect and is set out below:-

"The Court may, for sufficient cause shown, excuse the parties from compliance with any of the requirements of these rules, and may give such directions in matters of practice and procedure as it may consider just and expedient."

13. In view of this position under the rules and having regard to the constitutional provision under Article 142, we do not think that this Court at the time of final hearing is precluded from considering the controversy in its entire perspective and in doing so, this Court is not inhibited by any observation in an order made at the time of issuing the notice.

14. Observation to that effect has been made in a judgment of this Court in the case of *State of Uttaranchal vs. Alok Sharma and others* reported in 2009(7) SCC 647. In paragraph 31 at page 658, this Court, after making an express provision to Article 142 held as follows:-

"So far as civil appeal arising out of SLP(C) No. 6451 of 2005 and civil appeal arising out of SLP(C) no. 8239 of 2005 are concerned, although limited notice having been issued confining the case to back wages, but keeping in view the order passed in the other cases, we are of the opinion that the said order shall be recalled and leave on all points should be granted. The respondents being placed similarly should not, in our opinion, be treated differently. This order is being passed in exercise of our jurisdiction under Article 142 of the Constitution of India. However, we make it clear that if any amount has been paid to the said respondents, the same should not be recovered. The appeals are allowed with the

aforementioned directions. No costs."

15. By way of analogy we may refer to the provision of Section 100 of Civil Procedure Code. Section 100 runs as follows:-

100. Second Appeal. (1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from an appellate decree passed ex-parte.

(3) In an appeal under this Section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.

16. Proviso to Section 100 of the Code makes it clear that the powers of High Court cannot be fettered to hear a second appeal on a question which was not formulated by it at the time of admitting a second appeal, if the case involves any other

question. So far as the High Court is concerned, the same has been statutorily recognised under Section 100 in the case of Second Appeal. In the case of this Court, the same has been constitutionally provided in Article 142.

17. We are, therefore, entitled to consider the plea of the appellant for acquittal despite the fact that at the time of issuing notice, it was limited in terms of the order dated 27.7.2009.

18. We, however, make it clear that this cannot be a universal practice in all cases. The question whether the Court will enlarge the scope of its inquiry at the time of final hearing depends on the facts and circumstances of the case. Since in the facts of this case, we find that the appellant should be heard on all points, we have come to the aforesaid conclusion.

19. Now, coming to the facts of the case, we find that broadly in the case against the appellant, there is no eye-witness. The facts are that the deceased was working in the house of the appellant as a maid. She was absent from her duties and the appellant went to her house, which is at a nearby area from the house of the appellant, to call her to join her duties as a maid. It is nobody's case that the appellant went to the house of the deceased, being armed with any weapon or he was carrying any inflammable substance. Therefore, any pre-meditation on the part of the appellant in causing any bodily harm or injury to the deceased is admittedly ruled out.

20. The appellant went to the house of the deceased being accompanied by one Alpesh. In the house of the deceased, an altercation ensued between the appellant and the deceased as the deceased was refusing to come and join her work as a maid presumably on the ground that the amount of Rs. 375/- per month which was paid by the appellant to the deceased by way of remuneration was very low. The appellant had stated by way of defence that the deceased had taken a loan of Rs. 10,000 from the appellant and the appellant wanted the deceased to return the same. However, this defence has not

been accepted either by the trial court or the High Court. Admittedly, an altercation followed and it is alleged that the appellant on the spur of the moment, went to the deceased and gagged her mouth. The further prosecution case is that the deceased was cooking at the time when the appellant went to her house. A can of kerosene was lying nearby and the appellant almost emptied the can of kerosene on the deceased and lit the match stick. Surprisingly, Alpesh who accompanied the appellant to the house of the deceased ran away before the incident of burning had taken place and he was not examined by the prosecution at all. The only two other witnesses in this case are PW 1 husband of the deceased and PW 2 the elder sister-in-law of the deceased. PW 2 came to the place of occurrence after hearing the shouts of the deceased and made arrangements for taking the deceased to the doctor for treatment. Both PW 1 husband of the deceased and PW 2 Kanta Ben, who made arrangements for taking the deceased for medical treatment were declared hostile. PW 1, the husband of the deceased, in his evidence submitted that the deceased had suicidal tendencies in the past.

21. The case is, therefore, entirely based on circumstantial evidence and the statement of the deceased in more than one dying declarations. The first dying declaration appears to have been recorded when PW 2 Kanta Ben took the deceased to hospital at 0330 hours wherein the doctor said that the deceased was fully conscious and had informed the doctor that the appellant had sprinkled kerosene on her at 0200 hours at her residence when she was doing her work and set her on fire with a match stick. The second was recorded by PSI which is Exh. 27 and the third one was by the Executive Magistrate (Exh. 31). Virtually, there is no inconsistency between these dying declarations of the deceased recorded at the interval of few hours on the day of the incident. The prosecution evidence is that the deceased survived for six days after the date of the incident and lost her consciousness and did not regain her consciousness till she was alive. The evidence of PW 1 is that

he was informed of the incident and he came to see the deceased on the date of the incident and found her unconscious. The learned counsel for the appellant further submitted the doctor had not given his written opinion that the deceased was fit enough to give her statement. Though orally, the doctor said so. Relying on this part of the evidence especially the evidence of the husband of the deceased, the learned counsel for the appellant submitted that even though the husband may have been declared hostile, the law relating to appreciation of evidence of hostile witnesses is not to completely discard the evidence given by them. This Court has held that even the evidence given by hostile witness may contain elements of truth.

22. This Court has held in *State of U.P. vs. Chetram and others,* AIR 1989 SC 1543, that merely because the witnesses have been declared hostile the entire evidence should not be brushed aside. [See para 13 at page 1548].

23. Similar view has been expressed by three-judge Bench of this Court in *Khujji alias Surendra Tiwari vs. State of Madhya Pradesh,* [AIR 1991 SC 1853]. At para 6, page 1857 of the report this Court speaking through Justice Ahmadi, as His Lordship then was, after referring to various judgments of this Court laid down that just because the witness turned hostile his entire evidence should not be washed out.

24. Apart from that, the learned counsel submitted that the statement of the appellant under Section 313 was accompanied by written document. There the appellant had taken a defence plea that he wanted to save the deceased and in the process got his right hand burnt.

25. However, neither the Trial Court nor the High Court had considered this aspect of the case. The learned counsel for the appellant has further submitted that the case of the prosecution as presented is totally improbable. He had strenuously urged that it was impossible for one individual to hold in one hand, a

woman, who was struggling desparately to free herself from his grasp and to pour by the other hand three litres kerosene on her from a can with a small opening and then lit the matchstick, which requires the involvement by both the hands. The courts should have considered this aspect of the matter which would show the inherent improbability in the prosecution case.

26. It cannot be denied, as it has come on evidence, that as the deceased was wearing a polyster saree, the burn injuries were aggravated which could not have been so if she would have been wearing a cotton dress. The fact that she was wearing a polyster saree is not disputed by the prosecution. The learned counsel submitted that considering the aforesaid facts into consideration by this Court, the case cannot come under Section 302 IPC.

27. The learned counsel appearing for the State submitted that the case of the appellant was twice considered by the Trial Court and also by the High Court and both the courts have found concurrently against him and overruled the aforesaid contentions.

28. Learned counsel further submitted that the case falls squarely under Section 300, thirdly of IPC.

29. We have considered the relevant submission. We are of the view that in a case relating to circumstantial evidence, the Court should see the circumstances very carefully before arriving at a finding of guilt of the person concerned and yet if there is any doubt which is inconsistent with the innocence of the accused, the benefit should go to the accused.

30. In the instant case, it is clear that the appellant had no pre-meditation to kill the deceased or cause any bodily harm or injury to the deceased. Everything has happened on the spur of the moment. The appellant must have lost self-control on some provocative utterances of the deceased. These possibilities cannot be ruled out, having regard to the evidence

of PW.1. However, the fact that kerosene was sprinkled on the deceased by the appellant possibly cannot be disputed, in view of concurrent finding by both the courts and having regard to the materials on record.

31. But whether the case falls under Section 300, thirdly of IPC, is very doubtful. Having regard to the facts and circumstances of the case and in the light of defence of the deceased, this Court holds that the case falls under Section 304 Part II and the appellant has already suffered imprisonment for 11 years 2 months. In that view of the matter, this Court holds that the sentence which has already been undergone by the appellant is more than sufficient under Section 304 Part II. However, the sentence of fine is set aside.

32. Having regard to our finding, that the case falls under Section 304 Part II, the appeal is allowed to the extent indicated above. The appellant should be released forthwith, if not required in any other case.

R.P. Appeal partly allowed.

NARCOTICS CENTRAL BUREAU
v.
SUKH DEV RAJ SODHI
(Criminal Appeal No. 1079 of 2002)

MAY 20, 2011

[ASOK KUMAR GANGULY AND DEEPAK VERMA, JJ.]

Narcotic Drugs and Psychotropic Substances Act, 1985: s.50 –Requirement under – Compliance of – Held: s.50 is not complied with by merely informing the accused of his option to be searched either in the presence of a Gazetted officer or before a Magistrate – Requirement continues even after that and it is required that the accused person is actually brought before the Gazetted officer or the Magistrate and in order to impart authenticity, transparency and creditworthiness to the entire proceedings, an endeavour should be made by the prosecuting agency to produce the suspect before the nearest Magistrate.

The question which arose for consideration in the instant appeal was whether by merely giving the option to the accused, the appellant-prosecuting agency had complied with the requirement under Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and, therefore, the High Court erred in holding that the mandatory provision of Section 50 of the Act was not complied with, and violation of the said provision vitiated the conviction.

Dismissing the appeal, the Court

HELD: There is no reason to interfere with the finding of the High Court. The requirement under Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 is not complied with by merely informing the

accused of his option to be searched either in the presence of a gazetted officer or before a Magistrate. The requirement continues even after that and it is required that the accused person is actually brought before the gazetted officer or the Magistrate and in order to impart authenticity, transparency and creditworthiness to the entire proceedings, an endeavour should be made by the prosecuting agency to produce the suspect before the nearest Magistrate. In view of that in the instant case, the obligation under Section 50 of the Act was not discharged statutorily by the appellant. [Paras 6 and 7]

Vijaysinh Chandubha Jadeja v. State of Gujarat **(2011) 1 SCC 609 – followed.**

Case Law Reference:

(2011) 1 SCC 609	**Followed**	**Paras 5, 6**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1079 of 2002.

From the Judgment & Order dated 11.1.2002 of the High Court of Delhi at New Delhi in Crl. Appeal No. 91 of 1997.

P.K. Dey, Sadhana Sandhu, Rashmi, S.N. Terdal, Sushma Suri for the Appellant.

Khwairakpam Nobin Singh for the Respondent.

The Judgment of the Court was delivered by

GANGULY, J. 1. Heard learned counsel for the appellant. Despite notice, none appears for the respondent.

2. This is an appeal by the Narcotics Central Bureau impugning judgment and order dated 11.01.2002 passed by the High Court whereby the High Court, on consideration of the facts and the legal position of the case, was pleased to hold that the mandatory provision of Section 50 of the Narcotic Drugs

and Psychotropic Substances Act, 1985 (hereinafter referred to as 'NDPS Act') has not been complied with and the violation of the said Act has vitiated the conviction and on that ground, the High Court was pleased to set aside the conviction and did not examine any other fact of the case. In this appeal also, we do not go into other factual aspects.

3. It is not in dispute that pursuant to the High Court's order, the respondent is set at liberty.

4. Now, the learned counsel for the appellant submits that in the instant case, from the search notice (at Annexure P-1), it will appear that the requirement of Section 50 of the NDPS Act has been complied with. From the said notice, it appears that the accused was informed that he has the option of being searched either in the presence of gazetted officer or Magistrate and it appears that the accused wanted to be searched in the presence of gazetted officer. The learned counsel for the appellant submits that by giving the option to the accused, the appellant has complied with the requirement under Section 50 of the NDPS Act.

5. The obligation of the authorities under Section 50 of the NDPS Act has come up for consideration before this Court in several cases and recently, the Constitution Bench of this Court in the case of *Vijaysinh Chandubha Jadeja* v. *State of Gujarat* [(2011) 1 SCC 609] has settled this controversy. The Constitution Bench has held that requirement of Section 50 of the NDPS Act is a mandatory requirement and the provision of Section 50 must be very strictly construed.

6. From the perusal of the conclusion arrived at by this Court in *Vijaysinh Chandubha Jadeja*'s case, it appears that the requirement under Section 50 of the NDPS Act is not complied with by merely informing the accused of his option to be searched either in the presence of a gazetted officer or before a Magistrate. The requirement continues even after that and it is required that the accused person is actually brought

before the gazetted officer or the Magistrate and in Para 32, the Constitution Bench made it clear that in order to impart authenticity, transparency and creditworthiness to the entire proceedings, an endeavour should be made by the prosecuting agency to produce the suspect before the nearest Magistrate.

7. That being the law laid down by the Constitution Bench of this Court on interpretation of Section 50 of the NDPS Act, we do not think that the obligation under Section 50 of the Act has been discharged statutorily by the appellant in this case. We, therefore, find no reason to interfere with the finding made by the High court. The appeal is, accordingly, dismissed.

D.G. Appeal dismissed.

RAJPUT JABBARSINGH MALAJI
v.
STATE OF GUJARAT
(Criminal Appeal No. 943 of 2006)

MAY 24, 2011

[ASOK KUMAR GANGULY AND DEEPAK VERMA, JJ.]

PENAL CODE, 1860:

s.302 – Murder – Accused causing severe axe blow on the face of victim, resulting in his death – Conviction and sentence of imprisonment for life upheld by High Court – HELD: From the evidence of prosecution witnesses, recovery of blood stained scarf of accused and blood stained axe at the instance of the accused, the FSL report and the evidence of the wife of deceased corroborated by the medical evidence, it could not be disputed that the deceased had met the homicidal death on account of severe wounds on his face caused by the accused with the axe – In this view of the matter, there is no scope for any interference with the concurrent findings recorded by the two courts below.

Evidence Act, 1872:

s.6 – Res gestae witnesses – Name of assailant not mentioned in FIR – Subsequently, the wife of deceased disclosed to two witnesses the name of the assailant with full description of the incident – Witnesses in turn disclosing the name of the assailant in their statements u/s 161 CrPC – HELD: The two witnesses would be res gestae witnesses – The evidence of the wife of the deceased and other witnesses stands fully corroborated with each other's version – Their evidence is of sterling quality and deserves to be accepted – Penal Code, 1860 – s.302.

The appellant-accused was prosecuted for

commission of offence punishable u/s 302 IPC. The prosecution case was that on the night of the incident, at about 2.00 a.m., PW-3 raised shouts for help. On hearing the same, PW-2 and other family members reached there and found that PW-3 was crying to save her husband, the brother of PW-2. PW-2 found that his brother had received severe injuries on his face and was bleeding profusely. The victim was taken to the hospital where he was declared brought dead. Thereafter PW-2 lodged a complaint that some one had assaulted his brother with an axe and had run away. After the victim had been taken to the hospital, PW-3 informed PW-5 and PW-6, the other brothers of the victim, that the injury was caused on the person of the victim by the accused with an axe. The two witnesses also told PW-3 that while entering the filed, they had also seen the accused going away with an axe in his hand. PW-5 and WP-6, in their statements u/s 161 mentioned this fact. The accused made disclosure statements leading to recovery of his blood stained scarft and a blood stained axe from the place shown by him. The trial court convicted the accused of the offence charged and sentenced him to imprisonment for life. The High Court upheld the conviction and the sentence. Aggrieved, the accused filed the appeal.

Dismissing the appeal, the Court

HELD: 1.1. Though before taking the victim to the hospital, PW -3 had not disclosed the name of the appellant as assailant to anyone including the complainant who had lodged the FIR, but she has offered an explanation that at that time her uppermost anxiety was to take her injured husband to the hospital for treatment, therefore, the name of the appellant could not be mentioned in the FIR. Only after the victim was taken to the hospital, PW-3 informed PW-5 and PW-6, the brothers of the deceased, that the injury was caused on

the person of the deceased by the appellant with an axe. Their statements were recorded u/s 161 of Code of Criminal Procedure soon after the incident and this fact is clearly borne out from the records. [para 6 and 10] [983-F-H; 984-A; 985-A-B]

1.2. It has neither been challenged before this Court nor was challenged before the High Court or the trial court that the deceased had met with homicidal death, which even otherwise stands proved from the evidence of PW-1, who had performed the postmortem of the dead body of the deceased. He has disclosed the nature of fatal blow sustained by the deceased on his face and testified to the postmortem report in his examination in para-2 thereof which also describes the nature of injury sustained by the deceased. The said injury fully corroborates with the nature of injury, disclosed by PW-3 to others. Thus from this evidence, it could not be disputed that PW-3 was stating the truth and the deceased had met the homicidal death, on account of severe wounds inflicted upon his face by an axe. [para 11] [985-C-E]

1.3. The star witness in the case is PW-3, who was sleeping next to her husband alongwith her small child aged 1 ½ years. She happened to know the appellant as they all are related. According to her at about 2 a.m. midnight the appellant had inflicted a heavy and hard blow on the face of her husband with an axe. On hearing the painful shrieks of her husband, she woke up and saw the appellant standing with the axe in his hand. Since the electric bulb was already lit, it was throwing sufficient light in which PW-3 could comfortably recognise the appellant. She has also said that soon thereafter, she raised an alarm, on which several persons had gathered there. [para 13] [985-G-H; 986-A-B]

1.4. The statement of PW-3 stands fully proved and

corroborated from the evidence of PW-5 and PW-6, who were informed soon after the incident as to how, the injury was inflicted by the appellant on her husband. Their statements also reveal that they were in the vicinity of the scene of crime and were among the many members of the victim's family who had rushed to the spot as soon as they heard PW-3's wails and shrieks. Their evidence lends full support to the case of prosecution and corroborates the evidence of P.W.3. She had first disclosed the full description of the incident including the name of appellant to them, thus u/s 6 of the Evidence Act, 1872, they would be *res gestae* witnesses. [para 14] [986-C-D]

1.5. Another crucial link with commission of the offence by the appellant stands proved from the FSL report. The appellant's blood stained scarf, and the blood-stained axe used in the commission of the offence were sent for serological report alongwith other articles recovered from the place of occurrence. Human blood of group 'O' which was also the blood group of the deceased was found on all the articles including appellant's scarf and the axe. These findings could not be satisfactorily refuted by the appellant. Thus, from the FSL report and the evidence of P.Ws 2, 3, 5 and 6, it is clearly established beyond shadow of any doubt that the appellant was the person who had caused the fatal blow on the deceased causing his death. Thus, there is no scope for any interference in the concurrent findings recorded by the two courts below. [para 15-18] [986-G-H; 987-A-F]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 943 of 2006.

From the Judgment & Order dated 28/29.4.2005 of the High Court of Gujarat at Ahmedabad, in Criminal Appeal No. 597 of 1998.

S. Usha Reddy for the Appellant.

Kamaldeep Dayal, Hemantika Wahi, Suveni Banerjee for the Respondent.

The Judgment of the Court was delivered by

DEEPAK VERMA, J. 1. On account of homicidal death of Jethusing on the intervening night of 2/3.04.1994 at about 2 a.m. Appellant was charged and prosecuted for commission of the offence under Section 302 of the Indian Penal Code (for short 'IPC') and under Section 135 (1) of the Bombay Police Act. On appreciation of evidence available on record, Additional Sessions Judge, Banaskantha at Palanpur in Sessions Case No. 137 of 1994, decided on 07.03.1998, found the Appellant guilty for commission of the said offence and awarded him life imprisonment and a fine of Rs. 500/-, and in default to undergo further R.I, for 3 months under Section 302 of the IPC and 4 months simple imprisonment and fine of Rs. 100/- and in default to undergo further imprisonment of 15 days under Section 135 (1) of Bombay Police Act. The sentences were directed to run concurrently.

2. Feeling aggrieved thereof, Appellant filed Criminal Appeal No. 597 of 1998 before the Division Bench of the High Court of Gujarat at Ahmedabad. The High Court, after categorically examining the oral and documentary evidence available on record came to the conclusion that no case for interference was made out, affirmed the judgment and order of Trial Court and thus dismissed the appeal.

3. The Appellant therefore feeling aggrieved by the aforesaid impugned judgment and order of conviction recorded by the Division Bench of the High Court, is before us challenging the same on variety of grounds.

4. Before we proceed to decide the grounds raised at the time of hearing, it is necessary to narrate the facts of the case in nutshell, which stand as under:

5. On 2.4.1994 at about 6 o' Clock, deceased Jethusing and his agriculture partner Fueo Rabari had gone to cultivate the field of Karshanbhai Patel in their village and returned at about 12 O' clock midnight, after cultivating the same. Then Jethusing went to sleep in Oshri outside Orda, whereas his wife Pepaben and their son Pintu were also sleeping at the same place but on another cot. Father of the complainant i.e. Paragji and Feuo were sleeping in Verandah whereas, brother of the complainant named Vaghji was sleeping outside verandah and youngest brother of the complainant Deepji was watering castor plants. On the intervening night of 2/3.4.1994, at about 2.00 a.m., Pepaben raised shouts for help. On hearing the same, complainant – Viramji Paragji, his wife and other members of the family were woken up. Complainant and other family members, went to the place where Jethusing, his wife Pepaben and their son were sleeping. On reaching the spot, they found that Pepaben was raising alarm to save her husband Jethusing. Complainant found that Jethusing had received severe injuries on his face and was bleeding profusely. Looking to the gravity and seriousness of the matter, Viramji Paragji and his other brother Surajsing and Fueo placed injured Jethusing in the tractor to take him to Dhanera Hospital.

6. On way to hospital, they met Appellant and one Kanabhai Mulabhai, who also accompanied them to the hospital. The Doctor on duty examined him and declared the deceased brought dead. Thereafter, the complainant went to Dhanera Police Station and lodged his complaint. It is pertinent to mention here that at that time PW -3 Pepaben had not disclosed the name of the Appellant as assailant to anyone including the complainant who had lodged the FIR. To this she has offered an explanation that at that time her uppermost anxiety was to take her injured husband to the hospital for treatment, therefore, the name of the Appellant could not be mentioned in the FIR. Only after Jethusing was taken to the hospital, Pepaben informed PW-5 - Deepji Paragji and PW-6 - Vaghji Paragji, brothers of the deceased that injury was

caused on the person of the deceased by Appellant, with the aid of an axe. On hearing this, they informed Pepaben that while entering the field, they had also seen Appellant going away from the field, with an axe in his hand.

7. FIR lodged by complainant Viramji Paragji was handed over to the Police Sub Inspector of Aagathala Police Station, for investigation. After completion of usual formalities and collecting incriminating articles, statements of the witnesses were recorded by him, who were conversant with the facts of the case. Thereafter, arrangements were made for sending the body for postmortem at Dhanera Hospital.

8. Further investigation in the case was conducted by Circle Police Inspector, Tharad. While in police custody, Appellant made disclosure statements pursuant to which blood stained adhivato (scarf to be tied as head gear) and blood stained axe were discovered from the place shown by Appellant. The incriminating articles seized during the course of investigation were sent to Forensic Science Laboratory (FSL) for analysis. On completion of the investigation, the Appellant was charged and prosecuted for commission of the aforesaid offences as mentioned hereinabove.

9. The Appellant denied the charges and submitted that he is innocent and prayed for absolving the charges levelled against him. The criminal investigation machinery was set into motion on the strength of the report submitted by complainant PW-2 -Viramji Paragji on 03.04.1994 itself. No doubt, it is true that in the same, the name of the Appellant has not been mentioned but it has been categorically mentioned that someone had assaulted his brother with an axe and after assault had ran away. The assault was on the right side of the mouth, and on the forehead with some sharp weapon.

10. Formal FIR was registered at the Police Station on the strength of the aforesaid complaint. But as soon as PW-3, Pepaben had become little composed after the shock which

she faced due to the incident, she had disclosed the name of Appellant to PW-5, Deepji Paragji Rajput and PW-6, Vaghji Paragji Rajput (as stated hereinabove). Their statements were recorded under Section 161 of Code of Criminal Procedure (in short 'Cr.P.C.'), soon after the incident and this fact is clearly borne out from the records.

11. It has neither been challenged before us nor was challenged before the High Court or the District Sessions Court that deceased Jethusing had met with homicidal death, which even otherwise stands proved from the evidence of PW-1, Dr. Shamaldas Mohanlal Adhvan, who had performed the postmortem of the dead body of the deceased. He has disclosed the nature of fatal blow sustained by deceased on his face. He has testified to the postmortem report in his examination in para-2 thereof which also describes the nature of injury sustained by the deceased. The said injury fully corroborates with the nature of injury, disclosed by PW-3, Pepaben to others. Thus from this evidence, it could not be disputed before us that PW-3 was stating the truth and the deceased had met the homicidal death, on account of severe wounds inflicted upon his face by an axe.

12. We have accordingly heard Ms. Usha Reddy, learned counsel for the Appellant and Mr. Kamaldeep Dayal, Ms. Hemantika Wahi and Ms. Suveni Banerjee, learned counsel for the Respondent State at length and have also perused the records.

13. PW-2, Viramji Paragji who lodged the FIR had given the reasons as to why initially in the complaint the name of Appellant could not be mentioned but which was stated expressly by him subsequently on getting necessary information from PW-5, Deepji Paragji and PW-6, Vaghji Paragji who in turn were informed by PW-3, Pepaben, Wife of the deceased. The star witness in the case is PW-3, Pepaben, who was sleeping next to her husband alongwith her small child aged 1

½ years. She happened to know the Appellant as they all are related. According to her at about 2 a.m. midnight the Appellant had inflicted a heavy and hard blow on the face of her husband with an axe. On hearing the painful shriek of her husband, she woke up and saw the Appellant standing with the axe in his hand. Since the electric bulb was already lit, it was throwing sufficient light in which PW-3 could comfortably recognise Appellant. She has also said that soon, thereafter, she raised an alarm, on which several persons had gathered there.

14. The statement of Pepaben stands fully proved and corroborated from the evidence of PW-5 and PW-6, who were informed soon after the incident as to how, the injury was inflicted by the Appellant on her husband. Their statements also reveal that they were in the vicinity of the scene of crime and were among the many members of the victim's family who had rushed to the spot as soon as they heard the PW-3's wails and shrieks. Thus under Section 6 of the Indian Evidence Act, 1872 (hereinafter referred to as "the Act"), PW-5 and PW-6 were to be treated as *Res Gestae* witnesses. Their evidence lends full support to the case of prosecution and corroborates the evidence of P.W.3 Pepaben. She had first disclosed the full description of the incident including the name of Appellant to them, thus they would be *Res Gestae* witnesses. In the light of aforesaid evidence of PW-2, Viramji Paragji (complainant), PW-3, Pepaben, PW-5, Deepji Paragji and PW-6, Vaghji Paragji, it fully stands proved and established that the Appellant had caused the fatal blow on the person of the deceased causing his death. Single blow was so hard and powerful that it caused his death instantaneously.

15. However, at this stage it is also pertinent to point out that another crucial link with commission of the said offence by the Appellant stands proved from the FSL report. As mentioned hereinabove, during the course of investigation Appellant's blood stained scarf, blood-stained axe, used in the commission of the offence were recovered from the place of discovery.

Same were sent for serological report alongwith mattress, sand, shirt, big scarf, waistcoat, turban, watch, belt etc. belonging to the deceased. Human blood of group 'O' which was also the blood group of the deceased was found in all the articles including Appellant's scarf and the axe. These findings could not be satisfactorily refuted by the Appellant. Thus from the FSL report it is conclusively established that it was Appellant and only Appellant who had caused the fatal blow on the deceased. There could not have been any other better link connecting the Appellant with the commission of the said offence.

16. After critical examination of the evidence of P.W.3 Pepaben, P.W.2 Pragji, P.W.5 Deepji and P.W.6 Wagji, it is clearly established that Appellant was the person who had caused the fatal blow on the deceased. Their evidence stands fully corroborated with each other's version. There was no reason why they should have unnecessarily implicated the Appellant, had he not been the perpetrator of the crime. Their evidence is of sterling quality and deserves to be accepted.

17. Thus, in our considered opinion, the prosecution has fully established beyond shadow of any doubt that it was Appellant and none else who had caused the fatal blow on the person of the deceased which ultimately caused his death.

18. In this view of the matter, looking to the facts of the case from all the angles, we are of the considered opinion that there is no scope for any interference in the concurrent findings recorded by the two courts below. Appeal being devoid of any merit and substance, deserves to be dismissed. It is accordingly dismissed.

R.P. Appeal dismissed.

STATE OF RAJASTHAN

v.

ISLAM

(Criminal Appeal No. 1318 of 2005)

MAY 24, 2011

[ASOK KUMAR GANGULY AND DEEPAK VERMA, JJ.]

Penal Code, 1860 – ss. 302 and 304 (Part-II) – Accused hit the victim on his head with deadly weapon, resulting in his death – Convicted u/s. 302 and sentenced to life imprisonment by trial court – High Court converted the sentence from s. 302 to s. 304 (Part-II) as accused had already undergone detention for more than six years – On appeal held: Order of conversion of sentence not justified – In the background of the consistent evidence, it cannot be said that accused had no intention to kill the deceased – There was some pre-meditation on the part of accused when he went to his house after a minor scuffle and came back armed with a deadly weapon and in furtherance of that intention struck the deceased with that weapon repeatedly at a vital part of his body – Also, none of the ingredients to bring the case under exception (4) to s. 300 proved – Thus, order of High Court is set aside and that of the trial court is restored.

Constitution of India, 1950 – Article 136 – Order of acquittal passed by the High Court – Interference with – Held: Is permissible, when consideration by the High Court is misconceived and perverse.

Administration of criminal justice – Possibility of two views – One pointing to the guilt of the accused and other his innocence – Courts to adopt view in favour of accused.

It is alleged that altercation took place between respondent No. 1 and others who had assembled for a

meeting. Respondent No. 1 and others went back home and came back armed with Farsa. Respondent No. 1 hit 'J' repeatedly on his head with Farsa. The trial court convicted respondent No. 1 under Section 302 IPC and sentenced him to life imprisonment. The High Court set aside the conviction of respondent No. 1 under Section 302 and converted it under Section 304 Part-II IPC considering that the relations between respondent No. 1 and 'J' were cordial; that only one blow by respondent No. 1 on the head of 'J' proved fatal; and that respondent No. 1 had already undergone detention for more than six years. Therefore, the appellant filed the instant appeal.

Allowing the appeal, the Court

HELD: 1.1 When this Court exercises its jurisdiction under Article 136, it definitely exercises a discretionary jurisdiction but such discretionary jurisdiction has to be exercised in order to ensure that there is no miscarriage of justice. If the consideration by the High Court is misconceived and perverse, there is nothing in law which prevents this Court from exercising its jurisdiction under Article 136 against an order of acquittal when such acquittal cannot be sustained at all, in view of the evidence of record. [Para 15] [996-F-H]

1.2 In criminal cases if two views are possible, one pointing to the guilt of the accused and the other to the innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. *A miscarriage of justice which may arise from acquittal of the guilty is no less than from a conviction of an innocent.* **The principle to be followed by appellate court considering an appeal against an order of acquittal is to interfere only when there are** *compelling and substantial reasons to do so.* **[Paras 16 and 17] [897-A-C]**

1.3 In reversing an acquittal, this Court keeps in mind that presumption of innocence in favour of the accused is fortified by an order of acquittal and if the view of the High Court is reasonable and founded on materials on record, this Court should not interfere. However, if this Court is of the opinion that the acquittal is not based on a reasonable view, then it may review the entire material and there would be no limitation on this Court's jurisdiction under Article 136 to come to a just decision quashing the acquittal. [Paras 19, 20] [998-C-D]

2.1 It cannot be said that respondent No. 1 had no intention to kill the deceased. It may be true that initially there was no pre-mediation or intention of respondent No. 1 but the intention can develop on the spot and in the instant case, there is some amount of pre-meditation on the part of respondent No. 1 when after attending the assembly in which there was a minor scuffle, respondent No. 1 went to his house and came back to the place of occurrence armed with a Farsa, a deadly weapon and in furtherance of that intention struck the deceased with that weapon repeatedly and at a vital part of his body and caused very grievous injuries. In the background of this consistent evidence against respondent No. 1, the conversion of the conviction of respondent No. 1 from Section 302 IPC to Section 304 (Part II) IPC cannot be sustained and the entire approach of the High Court is misconceived, if not perverse. The judgment and order of conviction passed by the trial court is approved and the same is restored. [Paras 12 and 13] [995-D-H; 996-A-B]

2.2 In order to bring a case under exception (4) to Section 300 IPC, the evidence must show that the accused acted without any pre-mediation and in a heat of passion and without having taken undue advantage and he had not acted in a cruel or unusual manner. Every

one of these circumstances is required to be proved to attract exception (4) to Section 300 IPC and it is not sufficient to prove only some of them. In the facts of the case, none of the said ingredients have been proved from the evidence to bring the case under exception (4) to Section 300 IPC. The High Court's finding to the contrary is totally against the evidence on record. [Paras 13 and 14] [996-B-D]

State of U.P. vs. Sahai **AIR 1981 SC 1442;** *State of MP vs. Bachhudas* **(2007) 9 SCC 135;** *State of Punjab vs. Parveen Kumar* **(2005) 9 SCC 769;** *Rajesh Kumar vs. Dharamvir* **1997(4) SCC 496;** *State of UP vs. Abdul* **1997(10) SCC 135;** *State of UP vs. Premi* **2003(9) SCC 12;** *State of TN vs. Suresh* **1998(2) SCC 372;** *State of MP vs. Paltan Mallah* **2005(3) SCC 169;** *Gaurishanker Sharma vs. State of UP* **AIR 1990 SC 709;** *State of Maharashtra vs. Pimple* **AIR 1984 SC 63;** *State Delhi Administration vs. Laxman Kumar* **1985 (4) SCC 476;** *Dharma v Nirmal Singh alias Bittu & Anr.* **1996 (7) SCC 471 – relied on.**

Case Law Reference:

AIR 1981 SC 1442	**Relied on.**	**Para 18**
(2007) 9 SCC 135	**Relied on.**	**Para 18**
(2005) 9 SCC 769	**Relied on.**	**Para 18**
1997(4) SCC 496	**Relied on.**	**Para 18**
1997(10) SCC 135	**Relied on.**	**Para 18**
2003(9) SCC 12	**Relied on.**	**Para 18**
1998(2) SCC 372	**Relied on.**	**Para 18**
2005(3) SCC 169	**Relied on.**	**Para 18**
1979 (2) SCC 297	**Relied on.**	**Para 18**

AIR 1990 SC 709	**Relied on.**	**Para 18**
AIR 1984 SC 63	**Relied on.**	**Para 18**
1985 (4) SCC 476	**Relied on.**	**Para 20**
1996 (7) SCC 471	**Relied on.**	**Para 20**

CRIMINAL APPELALTE JURISDICTION : Criminal Appeal No. 1318 of 2005.

From the Judgment & Order dated 19.2.2003 of the High Court of Judicature for Rajasthan at Jaipur Bench, Jaipur in DB Criminal Appeal No. 401 of 1997.

Dr. Manish Singhvi, AAG, Ansar Ahmad Chaudhary for the Appellant.

C.L. Sahu, Rajendra Sahu, Hema Sahu, Rishabh Sahu for the Respondents.

The Judgment of the Court was delivered by

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

2. The State of Rajasthan is in appeal before us impugning the judgment dated 19.2.2003 passed by the High Court whereby the High Court by its judgment disposed of two appeals, being Criminal Appeal No. 401 of 1997 and Criminal Appeal No. 380 of 1997. The appeal of the State is in respect of Criminal Appeal No. 401 of 1997. By the judgment of acquittal rendered by the High Court in the aforesaid criminal appeal, it inter alia, confirmed the conviction of the other accused, namely, Rujdar, Ilias, Muvin, and Manna under Section 323 IPC but modified their sentence awarded to them by enhancing the fine instead of imposing imprisonment.

3. The appeal of the accused Asru, Guncheri, Mohammada, Kalto, Roshan and Titta was allowed and they were acquitted from the charges under Sections 148 and 336/149 IPC.

4. So far as Islam is concerned, the High Court set aside his conviction under Section 302 and converted it under Section 304 Part II IPC considering that Islam had already undergone detention for more than six years. The High Court also imposed a fine of Rs. 30,000(Rupees Thirty Thousand) on Islam and held that the same would meet the ends of justice.

5. Impugning that judgment, when the State filed Special Leave Petition before this Court, a Bench of this Court, while granting leave, passed the following order:-

6. "Delay condoned.

Leave granted to the extent of respondent No. 1-Islam only. As to other respondents the special leave petition is dismissed.

Issue warrants bailable in an amount of Rs. 10,000/- only requiring production of accused- respondent no. 1 before the Trial Court on the dates to be appointed by it or before this Court as directed. The bail bonds shall be furnished to the satisfaction of the Trial Court."

7. Therefore, the purpose of our examination is confined to the question whether in passing the order of conversion of sentence from Section 302 IPC to Section 304 Part II IPC in respect of respondent no. 1, the High Court exercised its judicial discretion properly. It may be mentioned in this connection that the Trial Court, namely, Court of Additional District & Sessions Judge, Deeg convicted respondent no. 1 under section 302 IPC and convicted him to undergo life imprisonment and a fine of Rs. 1000/-, in default, to further undergo imprisonment of six months.

8. Learned counsel for the appellant while taking us though the judgment of the Trial Court drew our attention to the evidence of PW 7, PW 9, PW 12, PW 16 ad PW 17 and submitted that these are all eye-witnesses and there is consistent evidence of these eye-witnesses about the involvement of respondent no. 1 in the commission of crime,

namely, the murder of Jenu. The material facts relevant for our consideration are that on the date of the incident, i.e. 18.3.1988, a meeting was held in the morning for raising some funds for repairing the mosque and in the said meeting, an altercation took place between respondent no. 1 and various other persons of the area who assembled for the meeting. One of the person assembled there told PW 7 that he had been treacherous in misappropriating public funds for repair of the mosque. There was a minor shuffle amongst those who had assembled there. It is the consistent evidence of the witnesses mentioned above that after that, respondent no. 1 along with others went home and came back armed with a 'Farsa'. It is also the consistent evidence that respondent no. 1 hit Jenu thrice on his head with the Farsa. This evidence has been consistently repeated by PW 7, PW 9, PW 16 and PW 17. PW 12 said that Islam hit Jenu with Farsa on his head but the number of times had not been mentioned by him.

9. Appreciating the evidence of these witnesses, the Trial Court reached the finding that respondent no. 1 can be held guilty under Section 302 IPC and accordingly found him guilty under Section 302 IPC and sentenced him for life imprisonment. The High Court has noted the injuries on the deceased. The injuries on the deceased are as follows:

1. One incised wound 7 cm X 1 cm X bone deep on left frontal region of head.

2. One incised wound 6.5 cm X 1 cm X bone deep on Rt. Frontal region of head.

3. One incised wound 8 cm X 1 cm X bone deep on Rt. Parietal region of head.

10. PW 3 Dr. Ashok Kumar Gupta in his evidence said the cause of death of the deceased was in view of the head injury leading to compression of Brain and Coma. From the

nature of the injuries, it is clear that they were inflicted by a deadly and sharp weapon and undoubtedly Farsa is one such weapon.

11. In the context of this evidence, the judgment of the High Court is rather surprising. The High Court while converting the conviction of the respondent no. 1 from Section 302 IPC to Section 304 Part-II in paragraph 12 held that the relations between respondent no. 1 and the deceased Jenu were cordial and only one blow was caused by Islam on the head of the deceased and that proved fatal. The High Court further said that the injury inflicted by respondent no. 1 was not pre-meditated and the respondent no. 1 did not take any undue advantage or nor acted in a cruel manner and as such, the case of respondent Islam is covered by Explanation IV appended to Section 300 IPC and could only be held guilty under Section 304 Part II IPC.

12. We fail to appreciate the aforesaid reasoning by the High Court in the context of the consistent evidence discussed above. It cannot be said that respondent no. 1 had no intention to kill the deceased. After attending the assembly in which there was a minor scuffle, respondent no. 1 Islam admittedly went to his house and came back armed with a Farsa which is a deadly weapon. Thereafter, he hit the deceased repeatedly on the head, a vital part of human body, with Farsa and caused very grevious injuries. It may be true that initially there was no pre-mediation or intention of the respondent no. 1 but it is well settled that intention can develop on the spot and in the instant case, there is some amount of pre-meditation on the part of respondent no. 1 when he had gone to his house and came back to the place of occurrence armed with a deadly weapon and in furtherance of that intention struck the deceased with that weapon repeatedly and at a vital part of his body. In the background of this consistent evidence against respondent no. 1, this Court is of the opinion that the conversion of the conviction of respondent Islam from Section 302 IPC to Section

304 Part II IPC cannot be sustained and the entire approach of the High Court is misconceived, if not perverse.

13. The finding of the High Court that the act of the respondent no. 1 is coming under the fourth exception cannot be sustained at all. It is clear that respondent no. 1 did not strike the deceased at the first instance, but he struck him after an interval of time since he left the place of occurrence, went to his home and then came back armed with a Farsa. In order to bring a case under exception (4) to section 300 IPC, the evidence must show that the accused acted without any pre-mediation and in a heat of passion and without having taken undue advantage and he had not acted in a cruel or unusual manner. Every one of these circumstances is required to be proved to attract exception (4) to section 300 IPC and it is not sufficient to prove only some of them.

14. In the facts of this case, none of above ingredients have been proved from the evidence to bring the case under exception (4) to Section 300 IPC. The High Court's finding to the contrary is totally against the evidence on record.

15. The learned counsel for respondent no. 1 has urged that this Court should not interfere in exercise of its jurisdiction under Article 136 of the Constitution when an order of acquittal was granted by the High Court and respondent no. 1 had suffered imprisonment for 6 years. There is no such absolute proposition in law as has been said to be advanced by the learned counsel for respondent no. 1. When this Court exercises its jurisdiction under Article 136, it definitely exercises a discretionary jurisdiction but such discretionary jurisdiction has to be exercised in order to ensure that there is no miscarriage of justice. If the consideration by the High Court is misconceived and perverse as indicated above, there is nothing in law which prevents this Court from exercising its jurisdiction under Article 136 against an order of acquittal when such acquittal cannot be sustained at all, in view of the evidence of record.

16. The golden thread which runs through the administration of justice in criminal cases is that if two views are possible, one pointing to the guilt of the accused and the other to the innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from a conviction of an innocent.

17. The principle to be followed by appellate court considering an appeal against an order of acquittal is to interfere only when there are compelling and substantial reasons to do so.

18. Thus, in such cases, this Court would usually not interfere unless

a. The finding is vitiated by some glaring infirmity in the appraisal of evidence. (*State of U.P. Vs. Sahai,* AIR 1981 SC 1442 at paras 19-21)

b. The finding is perverse. (*State of MP Vs. Bachhudas,* (2007) 9 SCC 135 at para 10 and *State of Punjab Vs. Parveen Kumar* (2005) 9 SCC 769 at para 9)

c. The order suffers from substantial errors of law and fact (*Rajesh Kumar Vs. Dharamvir* 1997(4) SCC 496 at para 5)

d. The order is based on misconception of law or erroneous appreciation of evidence (*State of UP Vs. Abdul* 1997(10) SCC 135; *State of UP Vs. Premi* 2003(9) SCC 12 at para 15)

e. High Court has adopted an erroneous approach resulting in miscarriage of justice (*State of TN Vs. Suresh* 1998(2) SCC 372 at paras 31 and 32; *State of MP Vs. Paltan Mallah* 2005(3) SCC 169 at para 8)

f. Acquittal is based on irrelevant grounds (*Arunachalam Vs. Sadhanatham* 1979(2) SCC 297 at para 4

g. High Court has completely misdirected itself in reversing the order of conviction by the Trial Court (*Gaurishanker Sharma Vs. State of UP,* AIR 1990 SC 709)

h. The judgment is tainted with serious legal infirmities (*State of Maharashtra Vs. Pimple,* AIR 1984 SC 63 at para 75)

19. In reversing an acquittal, this Court keeps in mind that presumption of innocence in favour of the accused is fortified by an order of acquittal and if the view of the High Court is reasonable and founded on materials on record, this Court should not interfere.

20. However, if this Court is of the opinion that the acquittal is not based on a reasonable view, then it may review the entire material and there will be no limitation on this Court's jurisdiction under Article 136 to come to a just decision quashing the acquittal (See 1985(4) SCC 476 at para 45; 1996(7) SCC 471 at para 4)

21. For the reasons aforesaid, this Court cannot approve the judgment of the High Court insofar as conversion of conviction in respect of respondent no. 1 from Section 302 to Section 304 Part-II is concerned. This Court approves the judgment and order of conviction passed by the Trial Court and restores the same. The bail bonds of respondent no. 1 are discharged. He is directed to immediately surrender before the Trial Court and serve out the sentence imposed on him by the Trial Court.

22. The appeal of the State is thus allowed.

N.J. Appeal allowed.

A SHANKAR
v.
STATE OF KARNATAKA
(Criminal Appeal No. 1006 of 2007)

JUNE 9, 2011

[DR. B.S. CHAUHAN AND SWATANTER KUMAR, JJ.]

Penal Code, 1860: ss.302 and 307, 324 – Charge-sheet filed u/ss.302, 307 against appellant-accused – Acquittal by trial court on the ground that prosecution failed to prove beyond reasonable doubt that the appellant had committed murder of the brother of the complainant or made an attempt to kill the complainant – Appeal against acquittal – Conviction by High Court u/ss.302 and 324 – Justification of – Held: Not justified – Contradiction between the statement of the complainant made in the court as compared to his statement before the police regarding the weapon of crime demolished the prosecution version – Delay in lodging FIR was not explained – Non-production of the FSL report in the court by the prosecution was fatal as in absence thereof it was difficult for the court to reach to the conclusion as to whether the offence was committed with scissors or knife – More so, after the incident, the I.O. was busy in searching the brother of the appellant and he made no attempt to search the appellant – These factors clearly indicated that investigation was not conducted fairly – High Court committed an error in recording the finding of fact that prosecution succeeded in proving case beyond reasonable doubt – Conviction set aside – FIR – Evidence – Investigation.

Evidence: Contradiction/discrepancies in the evidence – Effect of – Held: In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock

and horror at the time of occurrence – Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness, such evidence cannot be safe to rely upon – Penal Code, 1860.

Appeal: Appeal against acquittal – Acquittal by trial court – Scope of interference by the appellate court – Held: The appellate court while reversing the judgment of acquittal must bear in mind the presumption of innocence of the accused.

FIR: Delay in lodging FIR – Effect of – Held: In the instant case, the alleged occurrence took place at 2.00 p.m. and the police station was hardly at a distance of 1 K.M. from the place of the occurrence and complainant had never deposed that he had become unconscious – The delay was, therefore, not explained and was fatal to the prosecution case – Penal Code, 1860.

The prosecution case was that the victim-deceased was the elder brother of the complainant-PW-8. On the fateful day, the accused-appellant came to the barber saloon of the deceased and demanded Rs.150/- from the deceased. Since the deceased did not give the money demanded, the appellant got angry and threatened to see him later. The appellant came back at 9.30 p.m. to the shop of the deceased, sought shelter therein, had food, and slept there with the deceased and the complainant-PW-8. At about 2 a.m., PW-8 heard sounds and woke up. He saw that the appellant was hitting the deceased with a knife on the chest and when PW-8 shouted, the appellant hit him also with the knife on the left abdomen and hands and ran away. The deceased died of assault and PW-8 got injured, and was taken to the hospital for treatment.

The trial court held that prosecution failed to prove beyond reasonable doubt that the appellant had committed murder of the deceased or made an attempt

to kill PW-8 and acquitted the appellant of the charges under Sections 302 and 307 IPC. On appeal, the High Court convicted the appellant under Section 302 and Section 324 IPC and awarded him life imprisonment. The instant appeal was filed challenging the order of the High Court.

Allowing the appeal, the Court

HELD: 1.1. While lodging the complaint, PW-8 stated that the appellant came to his brother's shop and demanded money from him and since his brother did not give the money demanded, the appellant got angry and threatened that he would take care of him later. However, the evidence of PW-8 in his deposition in the court did not mention about the first visit of the appellant and demand of Rs. 150/- from the victim. [Para 12] [1010-F-G]

1.2. *Medical Evidence & Ocular Evidence:* **PW.5 who conducted post mortem examination on the body of the deceased explained in his deposition that it was not normally possible to cause injuries to the deceased with weapon Ext.MO.1 if held with both arms together while inflicting the injuries. However, if the sharp edge and tip of the scissors is held open while assaulting, such injuries could be caused. PW.6 who examined PW.8 deposed that the injuries found on his person could be caused by sharp edged weapon. Thus, in view of that, there could be no dispute that as per the opinion of doctors, it was possible to cause the injuries found on the person of the deceased and PW-8 with scissors in case the sharp edge and tip of the scissors is held open at the time of assault. In his oral complaint on 26.3.1996, PW.8 had stated that the accused caused the injuries with knife. He deposed in the Court that the accused stabbed his brother with a scissors on the stomach and stabbed PW.8 with the scissors on his left side of stomach, on**

right hand and on the left shoulder. Thus, it is apparent from the deposition that PW.8 was not sure as to whether injuries were caused by knife or scissors. No explanation came forward as to whether PW.8 was capable to understand the distinction between knife and scissors. The contradiction in the statement of PW.8 in the court as compared with his statement before the police under Section 161 Cr.P.C. also demolished the aspect of motive. [Paras 10, 12, 14] [1010-A-C; 1011-D-H; 1012-A-B; 1013-E]

2. There was delay in lodging the FIR. In the instant case, the alleged occurrence took place at 2.00 p.m. and the police station was hardly at a distance of 1 K.M. from the place of the occurrence and PW.8 had never deposed that he had become unconscious. The delay was, therefore, not explained. PW.17, the I.O. consistently deposed that he was searching for the brother of the appellant. Admittedly, even as per the prosecution, author of the crime was the appellant and not his brother. There was, thus, no reason for the I.O. to apprehend the brother of the appellant. [Paras 15, 16] [1013-F-G]

3.1. In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case should not be made a ground on which the evidence can be rejected in its entirety. The court has

to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence. If the case in hand is examined in the light of these settled legal proposition, the prosecution definitely made an attempt to establish the presence of the accused in the shop and PW.8 was the only eye witness. His presence also cannot be doubted in view of the fact that he himself got injured in the incident. However, the question would arise as to under what circumstances he had told his sister and brother-in-law that his brother had been killed by accused-appellant when in his substantive statement before the court he had deposed that he came to know about the death of his brother after being discharged from the hospital and he remained there as indoor patient for 15 days. Such a statement made in the court also would create a doubt as to whether he could be the author of the complaint for the reason, that in the complaint lodged by him he had stated that his brother had died. Similarly, non-production of the FSL report in the court by the prosecution was fatal as in absence thereof it was difficult for the court to reach to the conclusion as to whether the offence was committed with M.O.1. More so, after the incident, the I.O. was busy in searching the brother of the accused and he made no attempt to search the accused. These factors clearly indicated that investigation was not conducted fairly. [Paras 17, 18] [1013-H; 1014-A-D; 1015-B-F]

State Represented by Inspector of Police v. Saravanan & Anr. **AIR 2009 SC 152: 2008 (14) SCR 405;** *Arumugam v. State* **AIR 2009 SC 331: 2008 (14) SCR 309;** *Mahendra Pratap Singh v. State of Uttar Pradesh* **(2009) 11 SCC 334: 2009 (2) SCR 1033;** *Dr. Sunil Kumar Sambhudayal Gupta & Ors. v. State of Maharashtra* **JT 2010 (12) SC 287: 2010 (15) SCR 452;** *Vijay @ Chinee v. State of M.P.* **(2010) 8 SCC 191: 2010 (8) SCR 1150;** *State of U.P. v. Naresh & Ors.*

(2011) 4 SCC 324:; *Brahm Swaroop & Anr. v. State of U.P.* **AIR 2011 SC 280: 2010 (15) SCR 1;** *State of Rajasthan v. Rajendra Singh* **(2009) 11 SCC 106 – relied on.**

3.2. It is settled legal proposition that in exceptional circumstances the appellate court under compelling circumstances should reverse the judgment of acquittal of the court below if the findings so recorded by the court below are found to be perverse, i.e., the conclusions of the court below are contrary to the evidence on record or its entire approach in dealing with the evidence is found to be patently illegal leading to miscarriage of justice or its judgment is unreasonable based on erroneous law and facts on the record of the case. While dealing so, the appellate court must bear in mind the presumption of innocence of the accused and further that acquittal by the court below bolsters the presumption of his innocence. The High Court committed an error in recording the finding of fact that the prosecution succeeded in proving the case beyond reasonable doubt. The High Court failed to meet the grounds pointed out by the trial court discarding the case of prosecution and thus, the findings of fact recorded by the High Court remain perverse. [Paras 19, 20] [1015-G-H; 1016-A-C]

Abrar v. State of U.P. **(2011) 2 SCC 750: 2010 (13) SCR 1217;** *Rukia Begum & Ors. v. State of Karnataka* **(2011) 4 SCC 779 – relied on.**

Case Law Reference:

2008 (14) SCR 405	**relied on**	**Para 17**
2008 (14) SCR 309	**relied on**	**Para 17**
2009 (2) SCR 1033	**relied on**	**Para 17**
2010 (15) SCR 452	**relied on**	**Para 17**

2010 (8) SCR 1150	**relied on**	**Para 17**
(2011) 4 SCC 324	**relied on**	**Para 17**
2010 (15) SCR 1	**relied on**	**Para 17**
(2009) 11 SCC 106	**relied on**	**Para 17**
2010 (13) SCR 1217	**relied on**	**Para 19**
(2011) 4 SCC 779	**relied on**	**Para 19**

CRIMINAL APPELALTE JURISDICTION : Criminal Appeal No. 1006 of 2007.

From the Judgment & Order dated 28.2.2007 of the High Court Karnataka, Bangalore in Criminal Appeal No. 1069 of 2000.

Sanjay Mishra (for Dinesh Kumar Garg) for the Appellant.

Rashmi Nandakumar (for Anitha Shenoy) for the Respondent.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This criminal appeal has been filed under Section 2(a) of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 against the judgment and order dated 28.2.2007 of the High Court of Karnataka, Bangalore, in Criminal Appeal No.1069 of 2000 by which the High Court has reversed the judgment and order dated 31.10.1998 passed by the XVth Additional City Sessions Judge, Bangalore, in Sessions Case No.366 of 1996, acquitting the appellant of the charges under Sections 302 and 307 of the Indian Penal Code, 1860 (hereinafter called 'IPC').

2. Facts and circumstances, as per the prosecution case giving rise to this appeal had been that the law was put into motion by younger brother of the deceased, Shankara (PW.8), who lodged a complaint orally on 26.3.1996 that the appellant

came to the Barber Saloon of Murthy Prasad, deceased, on 25.3.1996 at about 8 p.m. and demanded Rs.150/- from the deceased. Since the deceased did not give the money demanded, the accused got angry and threatened that he would take care of him later. Appellant accused again came back at 9.30 p.m. to the shop of the complainant, sought shelter therein, had food, and slept there with the deceased and the complainant. At about 2 a.m. the complainant heard sounds and after being awaken he saw that the appellant was hitting his elder brother with a knife on the chest and on shouting of the complainant the appellant hit him also with the same on the left abdomen and hands and ran away. Murthy Prasad died of assault and the complainant got injured, and was taken to the hospital for treatment.

3. On the basis of the said oral complaint, an FIR No.82/96 dated 26.3.1996 (Ext.P4) was recorded. The investigation ensued and the appellant was arrested on 31.3.1996. After conclusion of the investigation, charge sheet was filed against the appellant and he was put to trial under Sections 302 and 307 IPC. In order to prove the guilt of the appellant, prosecution examined 17 witnesses. The appellant was examined under Section 313 of Code of Criminal Procedure, 1973 (hereinafter referred to as "Cr.P.C.") wherein apart from denying the evidence against him given by the witnesses directly, he also denied to have gone to the Saloon of the deceased at all as alleged by the prosecution.

4. After considering the entire evidence on record, the Trial Court came to the conclusion that prosecution failed to prove beyond reasonable doubt that the appellant had committed murder of Murthy Prasad or made an attempt to kill the complainant Shankara (PW.8). Thus, vide judgment and order dated 31.10.1998, the appellant was acquitted of the charges under Sections 302 and 307 IPC.

5. Being aggrieved, the State of Karnataka preferred

Criminal Appeal No.1069 of 2000 which has been allowed by the High Court convicting the appellant under Section 302 IPC for committing the murder of Murthy Prasad, deceased and awarding him life imprisonment. The appellant also stood convicted under Section 324 IPC for causing injuries to the complainant Shankara (PW.8) and has been awarded six months imprisonment and a fine of Rs.5,000/-. In default of depositing the fine to undergo simple imprisonment for a period of one month. Both the sentences have been directed to run concurrently. Hence, this appeal.

6. Shri Sanjay Mishra, learned counsel appearing for the appellant has submitted that the High Court has committed an error in interfering with the well reasoned judgment of acquittal by the Trial Court and relying upon the evidence on record while ignoring the material inconsistencies between the evidence of the witnesses; and medical and ocular evidence. No motive was proved by the prosecution to commit the offence. There had been an inordinate delay of 4 hours in lodging the F.I.R. as the murder was alleged to have been committed at 2 a.m. while the complaint was lodged at 6 a.m. on the same day, though the Police Station was at a distance of only one kilometre. There had been discrepancy relating to the seizure and kind of weapon used in the offence. Therefore, the appeal deserves to be allowed.

7. Per contra, Ms. Rashmi Nandakumar, learned counsel appearing for the State of Karnataka vehemently opposed the appeal contending that the High Court has rightly reversed the findings recorded by the Trial Court being the First Court of Appeal after appreciating the evidence properly. The Court below had mis-appreciated the material evidence of the witnesses. More so, the trial Court had failed to give due weightage to the evidence of injured witness, namely Shankara (PW.8). Hence, the appeal lacks merit and no interference is required.

8. We have considered the rival submissions made by learned counsel for the parties and perused the record.

9. The post mortem examination report dated 26.3.1996 revealed that following injuries were there on the person of Murthy Prasad:

(1) Vertically placed incised wound over the front of tip of right thumb measuring 3 cm x 0-5 cms x 0-5 cms deep;

(2) Incised wound over top of left shoulder measuring 2 cms x 0-5 cms x skin deep;

(3) Incised wound over left side of chest situated 8 cms vertically below left arm fit, measuring 2 cms x 0-5 cms;

(4) Incised wound over left side lower part of chest situated 23 cms below later 1/3rd of left collar bone, vertical measuring 2 cms x 0-5 cms x 5 cms, deep;

(5) Incised wound over left side lower part of chest situated 20 cms below left arm fit, oblique measuring 2.5 cms x 0-5 cms x 0-5 cms, deep;

(6) Incised wound over left side lower part of front of abdomen measuring 2.5 cms x 0-5 cms x 1 cms, deep;

(7) Horizontally placed stab wound present over the left side of hip situated 3 cms behind and 2 cms below the level of left anterior iliac spine measuring 2.5 cms. x 2 cms x 9 cms deep, the front end is pointed and back end blunt, margins are clean cut, the wound is directed backwards, downwards, and to right by cutting sciatic nerve and underlying vessels edged clean cut;

(8) Incised wound over left side upper part of neck situated 2 cms below middle of ramus of mandible, measuring 1 cms x 0-5 cms x 0-5 cms, deep;

(9) Stab incised wound present over left side back of chest situated 12 cms below the level of 7th cervicle spine 5 cms to left of midline measuring 3 cms x 1.5 cms chest cavity deep.

The post mortem report further revealed that so far as injury no.9 was concerned, the weapon had cut the skin and muscles of chest had entered the chest cavity in 5th intercostals space, and pierced the lower lobe of left lung on which it measures 2 cms x 0.5 cms x 0.5 cms deep. According to the opinion of the Doctor, the death was due to shock and haemorrhage as a result of the aforesaid injuries.

10. The medical examination report of complainant Shankara, aged 18 years dated 26.3.1996 revealed the following injuries on his person :

(1) Incised wound seen on the left side of abdomen measuring 1-1/2 cm x 0.5 cm x just below the last rib on the left side at mid clavicular line;

(2) Incised wound seen on the front of right fore at lower 1/3rd measuring 1-1/2 cm x 1 cm, skin deep;

(3) Incised wound seen on the medial side of left thumb, 2-1/2 cm x 1/2 cm;

(4) Incised wound seen on the left upper arm on the detoid muscle measuring 1-1/2 cm x 1/2 cm skin deep;

(5) Incised wound seen on the left cheek measuring 1-1/2 cm x 1/2 cm skin deep.

11. Dr. B.R.S. Kashyap (PW.5) who conducted post

mortem examination on the body of Murthy Prasad explained in his deposition in the court that it was not normally possible to cause injuries to the deceased with weapon Ext.MO.1 if held with both of its arms together while inflicting the injuries. However, if the sharp edge and tip of the scissors is held open while assaulting, the injuries can be caused. So far as the evidence of Dr. H. Venkatesh (PW.6) who examined Shankara (PW.8) complainant is concerned, he deposed that injuries found on his person could be caused of sharp edged weapon. Thus, in view of the above, there could be no dispute that as per the opinion of Doctors, it was possible to cause the injuries found on the person of the deceased and the complainant with scissors in case the sharp edge and tip of the scissors is held open at the time of assault.

12. **Material Contradictions :**

(I) **Evidence of Witnesses:**

Murthyalappa (PW.2), and Smt. Ramanjanamma (PW.3), the brother-in-law and sister of the deceased, respectively, deposed in the Court that they made a visit to the hospital where Shankara (PW.8) had been admitted and he had told to both of them that the appellant had killed Murthy Prasad, and caused injuries to him. Though Shankara (PW.8) complainant himself deposed in his examination-in-chief that he came to know about the death of his brother only after being discharged from the hospital living therein as indoor patient for 15 days.

Shankara (PW.8), while lodging the complaint stated as under:

"On 25.3.1996 at about 8.00 P.M. the accused younger brother of Rudresh came to the Super Hair Style Shop of the deceased, elder brother of the complainant viz., Murthy Prasad and demanded Rs.150/- from him. Since he did not give the money demanded, the accused got angry and threatened that he would take care of him later. He once

again came back at 9.30 P.M. to the shop of the complainant and with intent to murder the complainant and his elder brother, he sought shelter in the shop, had food and slept there itself."

But, in the court Shankara (PW.8) deposed:

"Last year on one day at about 8 p.m. the accused came to our saloon and enquired me about my brother. I informed the accused that my brother had gone out and he will be returning soon. Accused stayed in my saloon only. My brother Murthy Prasad returned to Saloon at about 9 p.m. Myself, my brother and accused took meals in the saloon and slept in the saloon."

Thus, it is evident that Shankara (PW.8) in his deposition in court did not mention about the first visit of the appellant and demand of Rs.150/- from Murthy Prasad.

(II) **Medical Evidence & Ocular Evidence:**

As per the medical evidence, injury nos.7 and 9 found on the person of Murthy Prasad deceased had been fatal and could be caused with the pointed part of the scissors, if used holding sharp edge and tip of the scissors open, at the time of assault.

In his oral complaint on 26.3.1996, Shankara (PW.8) had stated that the accused caused the injuries with **knife**. He deposed in the Court:

"Accused was stabbing my brother with a **scissors**. He stabbed on the stomach of my brother… Accused also stabbed me from the **scissors** on my left side of stomach, on right hand and on the left shoulder…Now I see the scissors M.O.1, the accused assaulted me and my brother with M.O.1". (Emphasis added)

Thus, it is apparent from the above that Shankara (PW.8) was not sure as to whether injuries were caused by knife or scissors. No explanation came forward as to whether the complainant, Shankara (PW.8) was capable to understand the distinction between knife and scissors.

(III) **Identity of the accused:**

As per Ramanjanamma (PW.3), brother of one Rudresh murdered Murthy Prasad. According to Sriram (PW.4), the brother of Umesh assaulted them: "I do not know who is brother of Umesh. I do not know the accused." Shankara (PW.8) refers to the accused as brother of Rudresh. Abdul Suban (PW.17) stated that "I tried to ascertain and search for Rudresh but he was not found. I did not enquire the father of the accused and his family members about Rudresh".

(IV) **FSL Report:**

As per Abdul Suban (PW.17), he sent all the seized articles including M.O.1 for FSL examination through Police Constable 2313 on 2.6.1996 and received back on 7.6.1996. However, FSL report was not produced before the Court. Abdul Suban (PW.17) has admitted that he received the Post Mortem report and FSL report and after completing the investigation he submitted the charge sheet on 27.6.1996. No explanation has been furnished as to why this FSL has not been produced before the court as it was necessary to ascertain as to whether M.O.1 was actually used in the commission of offence or not.

(V) **Recovery of weapon:**

As per Abdul Suban (PW.17) the accused in the presence of panchas had seen the occurrence and also took out a scissors hidden under a stone slab near the saloon. He seized the scissors M.O.1 in the presence of Panchas under Panchnama Exh. P-8. As per the evidence of Ganganarasaiah (PW.9) the scissors was in the bucket which was filled with

water. The bucket was inside the shop. The police alone saw it. Narayanaswamy (PW.15) stated that the accused told him that he committed the offence and he took out a scissors kept under a stone slab. Police seized the same and wrapped in a cloth and drawn a mahazar. He signed the mahazar and stated that M.O.1 was the scissors seized by the police.

13. The trial Court has taken into consideration each and every discrepancy/contradictions referred to hereinabove. However, the High Court has dealt with the case observing that presence of Shankara (PW.8) at the place of occurrence has not been disputed. Injuries found on his person are also supported by the evidence and particularly other statements made by Shankara (PW.8) in the Court which were worth acceptance regarding his staying outside for some time. The High Court came to the conclusion that there was nothing unnatural in his statement. However, the High Court did not deal with the contradictions referred hereinabove.

14. The contradiction in the statement of Shankara (PW.8) in the court as compared with his statement before the police under Section 161 Cr.P.C. also demolishes the aspect of motive.

15. There was delay in lodging the FIR. In the present case, the alleged occurrence took place at 2.00 p.m. and the police station was hardly at a distance of 1 K.M. from the place of the occurrence and Shankara (PW.8) had never deposed that he had become unconscious, the delay has not been explained.

16. Abdul Suban (PW.17), the I.O. consistently deposed that he was searching for Rudresh. Admittedly, even as per the prosecution, author of the crime had been Shankar-appellant and not his brother Rudresh. We fail to understand as for what reason the I.O. was trying to apprehend the brother of the accused.

17. In all criminal cases, normal discrepancies are bound

to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence. "Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility." Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. "*Irrelevant details which do not in any way corrode the credibility of a witness cannot be labelled as omissions or contradictions."* The omissions which amount to contradictions in material particulars, i.e., materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited. [Vide: *State Represented by Inspector of Police v. Saravanan & Anr.,* AIR 2009 SC 152; *Arumugam v. State,* AIR 2009 SC 331; *Mahendra Pratap Singh v. State of Uttar Pradesh,* (2009) 11 SCC 334; *Dr. Sunil Kumar Sambhudayal Gupta & Ors. v. State of Maharashtra,* JT 2010 (12) SC 287; *Vijay @ Chinee v. State of M.P.,* (2010) 8 SCC 191; *State of U.P. v. Naresh & Ors.,* (2011) 4 SCC 324; and *Brahm Swaroop & Anr. v. State of U.P.,* AIR 2011 SC 280].

Where the omission(s) amount to a contradiction, creating a serious doubt about the truthfulness of a witness and other witness also make material improvements before the court in

order to make the evidence acceptable, it cannot be safe to rely upon such evidence. (Vide : *State of Rajasthan v. Rajendra Singh,* (2009) 11 SCC 106).

18. If the case in hand is examined in the light of the aforesaid settled legal proposition, the prosecution has definitely made an attempt to establish the presence of the accused in the shop and Shankara (PW.8) is the only eye witness. His presence also cannot be doubted in view of the fact that he himself got injured in the incident. However, the question does arise as under what circumstances he has told his sister and brother-in-law that his brother has been killed by accused-appellant when in his substantive statement before the court he has deposed that he came to know about the death of his brother after being discharged from the hospital and he remained there as indoor patient for 15 days. Such a statement made in the court also creates a doubt as to whether he could be the author of the complaint for the reason, that in the complaint lodged by him on 26.3.1996 he has stated that his brother had died. Similarly, non-production of the FSL report in the court by the prosecution is fatal as in absence thereof it was difficult for the court to reach to the conclusion as to whether the offence has been committed with M.O.1.

More so, after the incident, Abdul Suban (PW.17) had been busy in searching Rudresh, brother of the accused and he made no attempt to search the accused. These factors clearly indicate that investigation has not been conducted fairly.

19. It is settled legal proposition that in exceptional circumstances the appellate court under compelling circumstances should reverse the judgment of acquittal of the court below if the findings so recorded by the court below are found to be perverse, i.e., the conclusions of the court below are contrary to the evidence on record or its entire approach in dealing with the evidence is found to be patently illegal leading to miscarriage of justice or its judgment is unreasonable based on erroneous law and facts on the record

of the case. While dealing so, the appellate court must bear in mind the presumption of innocence of the accused and further that acquittal by the court below bolsters the presumption of his innocence. (Vide: *Abrar v. State of U.P.,* (2011) 2 SCC 750; and *Rukia Begum & Ors. v. State of Karnataka,* (2011) 4 SCC 779).

20. In view of the above, we are of the considered opinion that the High Court committed an error in recording the finding of fact that the prosecution succeeded in proving the case beyond reasonable doubt. The High Court failed to meet the grounds pointed out by the trial Court discarding the case of prosecution and thus, the findings of fact recorded by the High Court remain perverse.

In view of the above, the appeal succeeds and is allowed. The judgment and order of the High Court dated 28.2.2007 is hereby set aside and judgment and order of the trial Court dated 31.10.1998 passed in Sessions Case No.366 of 1996 is restored. The appellant has been enlarged on bail by this Court vide order dated 26.7.2010. The bail bonds stand discharged.

D.G. Appeal allowed.

STATE OF U. P.
v.
MOHD. IQRAM & ANR.
(Criminal Appeal No. 1693-1694 of 2005)

JUNE 13, 2011

[DR. B. S. CHAUHAN AND SWATANTER KUMAR, JJ.]

Penal Code, 1860:

s.302/34 – Murder – Circumstantial evidence – Shrieks of victim heard in the night by police party on general patrolling – Three persons seen scaling down the wall near the room of victim – Two of them (accused) apprehended – Accused led the police and witnesses to the room of victim where she was found lying unconscious – She died in hospital – Accused totally strangers to the area – Medical evidence that death could be caused by strangulation by hands – Conviction by trial court – Acquittal by High Court – HELD: Circumstantial evidence is so strong that it points unmistakably to the guilt of accused and incapable of any other hypothesis – Accused were identified as the persons scaling down the wall and apprehended upon immediate chase – High Court erred in holding that the finding of identification was doubtful – Findings recorded by High Court are perverse being based on irrelevant considerations and inadmissible material – Judgment of High Court set aside and that of trial court restored – Circumstantial evidence – Constitution of India, 1950 – Article 136 – Appeal against acquittal.

Evidence:

Burden of proof – HELD: Once presence of accused at the scene of crime where they were apprehended is established, onus stood shifted on the defence to have

brought forth suggestions for their presence there at the dead of night – They were under an obligation to rebut the burden discharged by prosecution – High Court erred in concluding that prosecution had failed to discharge its burden – Penal Code, 1860 – s.302/34.

Code of Criminal Procedure, 1973:

s.313 – Affording of opportunity to accused to explain incriminating material against him – Conviction of two accused and acquittal of third one by trial court – High Court in the appeal filed by convicts making observations that greater possibility was that the acquitted accused committed the murder after he had forcible sexual intercourse with the victim, and acquitted both the accused – HELD: Court cannot place reliance on incriminating material against accused, unless it is put to him during his examination u/s 313 – This prohibition is mandatory in nature – Besides, the trial court did not frame any charge u/s 376 – Observations in post-mortem report cannot be termed to be substantive piece of evidence when the doctor did not say anything about the same in his statement in court which only is the substantive piece of evidence in law – Evidence – Proving of contents of post-mortem report.

Appeal against Acquittal – HELD: In exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse leading to miscarriage of justice, the appellate court should interfere with the order of acquittal – In the instant case, the circumstantial evidence is so strong that it points unmistakably to the guilt of the respondents and is incapable of explanation of any other hypothesis than that of their guilt – Therefore, findings of fact recorded by the High Court are perverse, being based on irrelevant considerations and inadmissible material.

JUDGMENT:

Observations by High Court against acquitted person –

Trial court convicted two accused and acquitted the third one – Convicts filed appeal – High Court acquitting the two accused made observation that it was possible that the accused acquitted by trial court committed the crime – HELD: It was not permissible for the High Court to castigate the person who had been acquitted by the trial court and whose acquittal had not been challenged before it.

Accused-respondents nos. 1 and 2 along with another accused 'SK', were prosecuted for causing the death of the wife of accused 'SK'. The prosecution case was that 'SK' obtained a decree of divorce against his wife 'R' who, as per the decree was permitted to reside in a room with an enclosed open area belonging to 'SK' and was granted maintenance of Rs.150/- per month. 'R' had challenged the decree in an appeal. On 15.5.1980 at about 9 p.m., when the Sub Inspector of Police (PW.6) alongwith the Head Constable (PW.7) and two constables was on general patrolling, they heard shrieks emanating from the house of 'SK' and saw three persons scaling down the wall of the 'Sahan' towards the west of the room under occupation of 'R'. The two accused-respondents nos. 1 and 2 were caught and the third one who managed to escape was named by them as 'SK'. The respondents led the police party to the room of 'R' where she was found lying unconscious. Meanwhile 'PW.3', the brother of 'SK' also reached there and took 'R' to the hospital. The respondents were taken to the Police Station where an FIR was lodged. On receiving the information of the death of 'R' the case was converted into one u/s 302 IPC. The trial court, after taking into consideration the facts that the respondents-accused were strangers to the area, the evidence neither suggested rape nor theft and the death was possible in the medical opinion to have been caused by strangulation with hands, convicted the accused-respondents u/s 302/34 IPC and sentenced them to

imprisonment for life. On appeal by the respondents, the High Court acquitted them. The High Court, also, made observations that greater possibility was that it was accused 'SK' who strangulated 'R' to death after he had forcible sexual intercourse with her.

Allowing the appeals filed by the State, the Court

HELD: 1. The observation by the High Court that the weapon used in the offence had not been recovered is totally unwarranted and uncalled for. More so, the nature of the injuries, as per the post mortem report and evidence of the doctor (PW-1), itself reveal that for causing such injuries, no weapon was required. [para 11] [1032-B]

2.1. So far as the issue of rape of the deceased prior to her murder by accused 'SK', her ex-husband, is concerned, the trial court has recorded findings of fact on this aspect in the negative. Undoubtedly, the post-mortem report contains such observations, but the doctor (PW.1) has not made any such reference either in his examination-in-chief or cross-examination. Nor had this aspect ever been put to any of the three accused in their statements recorded u/s 313 Cr.P.C. It was not permissible for the High Court to make such observations about the post-mortem report. [para 12] [1032-C-F]

2.2. Besides, 'SK' has been acquitted by the trial court. The State did not prefer any appeal against his acquittal. This Court is of the considered opinion that it was not permissible for the High Court to castigate 'SK' with such observations holding him guilty of committing rape and subsequently murdering his ex-wife 'R'. Undoubtedly, the post-mortem report had been proved but that does not mean that each and every content thereof is stood proved or can be held to be admissible. Such observations cannot be termed to be a substantive

piece of evidence. The doctor (PW.1) did not even whisper about the same in his statement made in the court which is the only substantive piece of evidence in law. The post-mortem report had been examined at the time of framing of the charges. The trial court did not frame any charge u/s 376 IPC or s. 376 read with s. 511 IPC. More so, no witness had ever mentioned anything in this respect. Thus, such observations could not be made by the High Court. [para 12] [1032-E-H; 1033-A-C]

State of Bihar and Ors. v. Radha Krishna Singh & Ors., **1983 (2) SCR 808 = AIR 1983 SC 684; and** *Madan Mohan Singh v. Rajni Kant* **AIR 2010 SC 2933; relied on**

3.1. The court cannot place reliance on incriminating material against the accused, unless it is put to him during his examination u/s 313 Cr.P.C. Thus, the High Court committed an error by taking into consideration the inadmissible evidence for the purpose of deciding the criminal appeals and holding the person as guilty who already stood acquitted by the trial court. [para 12] [1032-H; 1033-A-B]

3.2. Section 313 Cr.P.C. is based on the fundamental principle of fairness. This provision is mandatory in nature and casts an imperative duty on the court and confers a corresponding right on the accused to have an opportunity to offer an explanation for the incriminatory material appearing against him. Circumstances which were not put to the accused in his examination u/s 313 Cr.P.C. cannot be used against him and have to be excluded from consideration. [para 13] [1033-D-F]

Sharad Birdhichand Sarda v. State of Maharashtra, **1985 (1) SCR 88 = AIR 1984 SC 1622;** *State of Maharashtra v. Sukhdeo Singh & Anr.,* **1992 (3) SCR 480 =AIR 1992 SC 2100; *and*** *Paramjeet Singh @ Pamma v. State of*

Uttarakhand, **2010 (11) SCR 1064 =AIR 2011 SC 200; relied on**

4.1. So far as the question of the source of light and identification of the accused is concerned, the depositions of 'PW.3', 'PW.6', 'PW.7' and 'PW.8' reveal that there were minimum three torches which had been flashed simultaneously on the persons who were scaling down the wall and were being chased by the police as well as by the local residents including 'PW.8'. In such a fact-situation, failure of electric supply does not become fatal. [para 15] [1034-D-E]

4.2. 'PW.6' and 'PW.7' have identified the respondents being the persons who were scaling down the wall and had been apprehended upon an immediate chase. Therefore, the High Court erred in recording the finding that identification was doubtful. [para 15] [1034-F]

5.1. Once the prosecution had brought home the evidence of the presence of the accused at the scene of the crime, then the onus stood shifted on the defence to have brought forth suggestions as to what could have brought them to the spot at that dead of night. The accused were apprehended and, therefore, they were under an obligation to rebut this burden discharged by the prosecution, and having failed to do so, the trial court was justified in recording its findings on this issue. The High Court committed an error by concluding that the prosecution had failed to discharge its burden. Thus, the judgment proceeds on a surmise that renders it unsustainable. [para 15] [1034-G-H; 1035-A-B]

5.2. It is a settled legal proposition that in exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse i.e. the conclusions of the courts below are contrary to the

evidence on record or its entire approach in dealing with the evidence is patently illegal, leading to miscarriage of justice or its judgment is unreasonable based on erroneous law and facts on the record of the case, the appellate court should interfere with the order of acquittal. While doing so, the appellate court should bear in mind the presumption of innocence of the accused and further that the acquittal by the courts below bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for the interference. [1035-C-E]

Babu v. State of Kerala, **2010 (9) SCR 1039 =2010 (9) SCC 189;** *Dr. Sunil Kumar Sambhudayal Gupta & Ors. v. State of Maharashtra*, **(2010) 13 SCC 657;** *Brahm Swaroop & Anr. v. State of U.P.,* **2010 (15) SCR 1 =AIR 2011 SC 280;** *S. Ganesan v. Rama Raghuraman & Ors.,* **(2011) 2 SCC 83;** *V.S. Achuthanandan v. R. Balakrishna Pillai & Ors.,* **(2011) 3 SCC 317;** *State of M.P. v. Ramesh & Anr*., **(2011) 4 SCC 786;** *Abrar v. State of U.P*., **(2011) 2 SCC 750; *and*** *Rukia Begum & Ors. v. State of Karnataka*, **(2011) 4 SCC 779 - referred to.**

5.3. In the instant case, the circumstantial evidence is so strong that it points unmistakably to the guilt of the respondents and is incapable of explanation of any other hypothesis than that of their guilt. Therefore, findings of fact recorded by the High Court are perverse, being based on irrelevant considerations and inadmissible material. The judgment of the High Court is set aside, and that of the trial court is restored. [para 17-18] [1035-H; 1036-A-C]

Case Law Reference:

1985 (1) SCR 88	**relied on**	**para 13**

1992 (3) SCR 480	**relied on**	**para 13**
2010 (11) SCR 1064	**relied on**	**para 13**
1983 (2) SCR 808	**relied on**	**para 14**
AIR 2010 SC 2933	**relied on**	**para 14**
2010 (9) SCR 1039	**referred to**	**para 16**
2010 (15) SCR 1	**relied on**	**para 16**
(2010) 13 SCC 657	**referred to**	**para 16**
(2011) 2 SCC 83	**referred to**	**para 16**
(2011) 3 SCC 317	**referred to**	**para 16**
(2011) 4 SCC 786	**referred to**	**para 16**
(2011) 2 SCC 750	**referred to**	**para 16**
(2011) 4 SCC 779	**referred to**	**para 16**

CRIMINAL APPELALTE JURISDICTION : Criminal Appeal No. 1693-1694 of 2005.

From the Judgment & Order dated 25.4.2003 of the High Court of Judicature at Allahabad in Criminal Appeal No. 14 and 60 of 1981.

R.K. Gupta, Rajiv Dubey (for Kamlendra Mishra) for the Appellant.

K. Sarada Devi for the Respondents.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. These appeals have been preferred by the State of U.P. against the judgment and order dated 25.04.2003 passed by the High Court of Judicature at Allahabad in Criminal Appeal Nos. 14 and 60 of 1981, reversing the judgment and order of the Sessions Court dated

20.12.1980 in Session Trial No. 382 of 1980 passed by the learned District Judge, Saharanpur, by which both the respondents stood convicted under Section 302 read with Section 34 of the Indian Penal Code, 1860 (hereinafter called as 'IPC') and had been awarded life imprisonment.

2. The brief resume of the facts as emerging from the FIR and the evidence adduced by the parties is set forth:

(A) One Rashmi, deceased, aged about 30 years had been married to Suresh Kumar (accused, acquitted by the Sessions Court), but her relations with him and her mother in law always remained strained. They had no child. Suresh Kumar obtained a decree of divorce on 30.01.1980 under Section 13 of the Hindu Marriage Act, 1955 and as per the decree, Rashmi, deceased, was permitted to reside in a room with an enclosed open area towards its West, apart from the rest of the house, and she was granted maintenance @ Rs.150/- per month till her life time or remarriage, whichever was earlier. Being aggrieved, Rashmi, deceased, had preferred an appeal against the said decree of divorce dated 30.01.1980 and the same was pending before the District Judge, Saharanpur.

(B) On 15.0.5.1980 at about 9.00 P.M., S.I. Brahm Pal Singh (PW.6) of Police Station Sadar Bazar accompanied by Head Constable Balvir Singh (PW.7) and other two constables was on a routine check-up and general patrolling. On reaching the West of Adarsh School in the close vicinity of the house of Rashmi, deceased, he and his companions heard shrieks emanating from the house of Suresh Kumar accused known as "Jagadhari Walon Ki Kothi". The police party saw three persons scaling down the wall of the Sahan towards West of the room under the occupation of Rashmi, deceased.

(C) On being challenged and flashing of torch light, two of them ran towards North West and the third towards South. On a chase, the present two respondents who were running towards North West, were caught hold by Samay Singh (PW.8)

and one Sharif who was present there. The other accused who ran towards South, managed to escape. He was named as Suresh Kumar by the present two respondents after they had been apprehended. The respondents led the police party inside the Sahan of the said house. The lock inside the door opening in the Sahan was broken by S.I. Brahm Pal Singh (PW.6) and a woman was seen lying unconscious on the floor in the room on a cot. In the meanwhile, Mahesh Kumar (PW.3), (brother of Suresh Kumar), also came down from the upper storey besides other persons. Mahesh Kumar (PW.3) took Rashmi, deceased, by car to S.B.D. Hospital, Saharanpur. The respondents had been taken to the police station Sadar Bazar where FIR was lodged by S.I. Brahm Pal Singh (PW.6). However, on receiving the information of death of Rashmi, deceased, at about 11.00 P.M. from Mahesh Kumar (PW.3), the case was converted under Section 302 IPC and investigation ensued.

(D) The post-mortem of the dead body was conducted by Dr. G.R. Sharma (PW.1) on 16.05.1980, according to which the deceased was about 30 years of age and had died about 18 hours from the time of conducting post-mortem. The doctor found the following ante-mortem injuries on her person:

(1) Lacerated wound 1 ½ cm x 1 ½ cm x ¼ cm on left eyelid with contusion 7.5 x 2 cm extending from left eyelid to left temple region.

(2) Abrasion 4 x ½ cm on left cheek.

(3) Abrasion 1 ½ cm x ¾ cm on left side neck, 2 cm below angle of mandible.

(4) Abrasion ½ cm x ½ cm with contusion 1 ½ cm x 1 cm on the right side of neck, 4 cm below angle of mandible.

(5) Abrasion 1 ½ cm x 1 cm on back of left shoulder joint top.

(6) Abrasion 1 cm x 1 cm on back of left elbow joint.

(7) Contusion 5 cm x 3 cm on right forearm upper 1/3rd medial side.

(8) Contusion 4 cm x 2 cm on back of inner angle of scapula.

(E) Suresh Kumar was also arrested on 23.05.1980 and he was kept bapurdah. He was subjected to test identification parade on 6.6.1980 and was identified by S.I. Brahm Pal Singh (PW.6), Head Constable Balvir Singh (PW.7) and Samay Singh (PW.8) besides Babu Ram and Surendra Pal. As all the three accused pleaded not guilty, they were put to trial. The prosecution, in all, examined 13 witnesses. The respondent Mohd. Iqram also examined one Bhugan (DW.1), the Pradhan of village Taharpur in his defence.

(F) On consideration of the evidence on record, the learned trial court convicted and sentenced the two respondents as mentioned hereinabove, but acquitted Suresh Kumar (husband of deceased Rashmi) giving him benefit of doubt entirely on the premise that he might have been known to the identifying witnesses from before, and he was shown to the witnesses before being put to test identification.

(G) Being aggrieved, the two respondents filed Criminal Appeal Nos. 14 and 60 of 1981 before the Allahabad High court which have been allowed by the judgment and order dated 25.04.2003. Hence, these appeals.

3. Shri R.K. Gupta, learned counsel appearing on behalf of the State of U.P., has submitted that the High Court committed an error in acquitting the respondents without appreciating the facts on record. The trial court had convicted the respondents on circumstantial evidence making clear cut observations that the chain of circumstances was complete; the said respondents had been arrested from the place of

occurrence; their presence was not likely to be there as they were not the residents of the area; there had been no theft or dacoity in the area. Rashmi, deceased, was strangulated with hands without the aid of any weapon. The High Court ordered acquittal on the basis that no weapon had been recovered and probably Suresh Kumar, who had been acquitted by the trial court had committed the murder after committing rape on the deceased, though the trial court had recorded a finding that there had been no violence with the body of the deceased even prior to her strangulation. The High Court has placed reliance on inadmissible evidence which is not permissible in law. The judgment and order of the High Court is liable to be set aside and the appeals deserve to be allowed.

4. On the contrary, Smt. K. Sarada, learned amicus curiae, has vehemently opposed the appeals contending that the High Court had given cogent reasons while acquitting the respondents. This Court should not interfere with the said order as it is based on proper appreciation of evidence. No motive could be established against the respondents, thus, appeals are liable to be dismissed.

5. We have considered the rival submissions made by both the learned counsel for the parties and perused the record.

6. As it is a case of acquittal, this Court has to be slow in interfering with the impugned judgment and order and it is permissible to reverse the judgment of acquittal only on settled principles of law. This Court will have to record conclusions that the findings of fact recorded by the High Court are perverse and, for that purpose, it is necessary for us to make reference to the evidence on record very briefly.

7. Mahesh Kumar (PW.3) is the brother of accused Suresh Kumar, husband of Rashmi, deceased. He had deposed that on 15.5.1980 at about 9.00 P.M., he was on the roof of his house alongwith his another brother. He heard shrieks from the room of Rashmi, deceased. He flashed the light of torch

towards the same and found that 2-3 persons were running away from there. He immediately came down stairs and found that some persons had already gathered there. He found that these two respondents had been apprehended by the police and local persons present there. He had gone alongwith these respondents and police to the room of the deceased and found her lying on the cot. Mukesh Kumar (PW.3) took her to the hospital where she was declared dead. S.I. Brahm Pal Singh (PW.6) has supported the prosecution case by stating that when he was on patrol duty on 15.5.1980 and reached near the place of occurrence, he heard some noise from the residence of Rashmi, deceased. He immediately went towards the said house and found that three persons were scaling down the Western wall of the building. The police party chased them alongwith other persons and apprehended them. Samay Singh (PW.8) and Sharif had also reached there. One person escaped. Constable Balvir Singh (PW.7) who had accompanied S.I. Brahm Pal Singh (PW.6) deposed that they found three persons scaling down the Western wall of the house and police alongwith other persons chased them and apprehended two persons while one escaped. Samay Singh (PW.8) has also made a similar statement supporting the case of the prosecution. Om Prakash Chaudhry, a practicing advocate, had deposed about the strained relationship between accused Suresh Kumar and deceased Rashmi and further deposed that Rashmi, deceased, had told him 2-3 times that she had an apprehension of being killed by Suresh Kumar, accused and his mother in law. The prosecution case stands further supported by Dr. G.R. Sharma (PW.1), who had conducted the post-mortem examination and in the report opined that injuries on the person of Rashmi, deceased, could be caused by strangulation and use of force.

8. After appreciating the aforesaid evidence including the deposition of Bhugan (DW.1), the trial court came to the conclusion that Suresh Kumar, accused, had no motive and his

identification was also not reliable and acquitted him by giving the benefit of doubt.

9. The respondents were convicted by giving cogent reasons on the basis of the following grounds:

- None of the accused persons belonged to the locality or even to the city.
- No suggestion came to be made from their side as to what could have brought them to the spot at the moment.
- They were utter strangers to the area operating under cover of darkness and seen scaling down the wall in a bid to run away.
- Upon being taken into custody they took the police party inside the western Sahan and then to the apartment occupied by the deceased.
- The medical evidence did not suggest that there was rape or anything of the kind attempted on Smt. Rashmi. Nor did the investigation reveal any case of theft.
- The purse of the deceased was found intact in the room besides the sum of Rs.107/- and odd. None of the articles was shown to have been taken away. The object behind those who operated inside the room, therefore, could not have other than to kill Smt. Rashmi.
- Death was possible in the medical opinion also, to be caused by strangulation with the hands without the application of any other instrument or weapon.

10. The High Court after appreciating the evidence acquitted the respondents on the basis of the following findings:

(I) The simple fact of their running in the lane at that moment could not be sufficient to fasten the guilt on their heads. There is no corroboration of any independent witness that the accused had scaled down the Western wall of the house.

(II) The deceased was a continuous source of trouble to her husband Suresh Kumar. She was not reconciled to the divorce granted in favour of her husband and she had challenged the same before the appellate court and her husband had also been burdened with the liability to pay maintenance to her till her life time. Further observations made by the Court read as under:

> "The post-mortem report shows that seminal fluid was found in her vaginal part and several ante-mortem injuries had also been inflicted on her. The autopsy indicated as if she was subject to forcible intercourse also before her death. The greater possibility is that it was her husband who cut short her life after inflicting several injuries on her and strangulating her, but before doing that he even had forcible sexual intercourse with her exhibiting sadistic tendency. He did her to death this way, removing the thorn from his way for all times to come. After committing the crime, he managed the vanishing trick from the scene. The said feature is that the case was given a different profile relating to him, not coming up to the standard required to find him guilty."

(III) There was no electric supply at the relevant time. Thus, identification of the accused while scaling down the wall becomes doubtful.

(IV) The weapon used in the offence had not been recovered.

11. In the aforesaid fact-situation, the case requires very close scrutiny.

Dr. G.R. Sharma (PW.1) had deposed that the injuries could be caused by strangulation by hands. Thus, the question of recovering any weapon as mentioned by the High Court, is totally unwarranted and uncalled for. More so, nature of the injuries itself reveal that for causing such injuries, no weapon was required. Non-use of weapon cannot be illogical, keeping in view the findings recorded in the post mortem report.

12. So far as the issue of rape of the deceased prior to her murder by Suresh Kumar, accused, her ex-husband, is concerned, the trial court has recorded findings of fact on this aspect in the negative. Undoubtedly, post-mortem report contains such observations, but Dr. G.R. Sharma (PW.1) has not made any such reference either in his examination-in-chief or cross-examination. Nor this aspect had ever been put to either of the three accused in their statements recorded under Section 313 of Code of Criminal Procedure, 1973 (hereinafter called 'Cr.P.C.'). We fail to understand as under what circumstances it was permissible for the High Court to make such observations about the post-mortem report. Accused Suresh Kumar has been acquitted by the trial court. The State, for reasons best known to it, did not prefer any appeal against the said order of acquittal. We are of the considered opinion that it was not permissible for the High Court to castigate the accused Suresh Kumar with such observations holding him guilty of committing rape and subsequently murder of his ex-wife Rashmi. Undoubtedly, the post-mortem report had been proved but that does not mean that each and every content thereof is stood proved or can be held to be admissible. Such observations cannot be termed to be a substantive piece of evidence. Dr. G.R. Sharma (PW.1) did not even whisper about the same in his statement made in the court which is the only substantive piece of evidence in law. The court cannot place reliance on incriminating material against the accused, unless

it is put to him during his examination under Section 313 Cr.P.C. Thus, the High Court committed an error by taking into consideration the inadmissible evidence for the purpose of deciding the criminal appeals and holding the person guilty who had already been acquitted by the trial court. The post-mortem report had been examined at the time of framing of the charges. The trial court did not frame any charge under Section 376 IPC or Section 376 read with Section 511 IPC. More so, no witness had ever mentioned anything in this respect. Thus, it is beyond any stretch of imagination of any person, how such observations could be made by the High Court.

13. No matter how weak or scanty the prosecution evidence is in regard to certain incriminating material, it is the duty of the Court to examine the accused and seek his explanation on incriminating material that has surfaced against him. Section 313 Cr.P.C. is based on the fundamental principle of fairness. The attention of the accused must specifically be brought to inculpatory pieces of evidence to give him an opportunity to offer an explanation if he chooses to do so. Therefore, the court is under a legal obligation to put the incriminating circumstances before the accused and solicit his response. This provision is mandatory in nature and casts an imperative duty on the court and confers a corresponding right on the accused to have an opportunity to offer an explanation for such incriminatory material appearing against him. Circumstances which were not put to the accused in his examination under Section 313 Cr.P.C. cannot be used against him and have to be excluded from consideration. (Vide: *Sharad Birdhichand Sarda v. State of Maharashtra,* AIR 1984 SC 1622; *State of Maharashtra v. Sukhdeo Singh & Anr.,* AIR 1992 SC 2100; and *Paramjeet Singh @ Pamma v. State of Uttarakhand,* AIR 2011 SC 200)

14. In *State of Bihar and Ors. v. Radha Krishna Singh & Ors.,* AIR 1983 SC 684, this Court dealt with the issue of prohibitive value of the contents of an admitted document and held as under :-

> "Admissibility of a document is one thing and its probative value quite another-these two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and weight of its probative value may be nil....."

(See also: *Madan Mohan Singh v. Rajni Kant,* AIR 2010 SC 2933)

Thus, even if the post mortem report revealed any sexual assault on the deceased victim, such contents are not admissible, in spite of the fact that the post mortem report had been exhibited and proved by Dr. G.R. Sharma (PW.1), in view of the facts mentioned hereinabove.

15. So far as the question of the source of light and identification of the accused are concerned, the depositions of Mahesh Kumar (PW.3), brother of Suresh Kumar-accused, Brahm Pal Singh, S.I. (PW.6), Balvir Singh (PW.7) and Samay Singh (PW.8) reveal that there were minimum three torches which had been flashed simultaneously on the persons who were scaling down the wall and were being chased by the police as well as by the local residents including Samay Singh (PW.8). In such a fact-situation, failure of electric supply does not become fatal.

Brahm Pal Singh (PW.6) and Balvir Singh (PW.7) have identified the respondents being the persons who were scaling down the wall and had been apprehended upon an immediate chase. Therefore, the High Court erred in recording the finding that identification was doubtful.

Once the prosecution had brought home the evidence of the presence of the accused at the scene of the crime, then the onus stood shifted on the defence to have brought forth suggestions as to what could have brought them to the spot at that dead of night. The accused were apprehended and therefore, they were under an obligation to rebut this burden

discharged by the prosecution, and having failed to do so, the trial court was justified in recording its findings on this issue. The High Court committed an error by concluding that the prosecution had failed to discharge its burden. Thus, the judgment proceeds on a surmise that renders it unsustainable.

The trial court did not find evidence of Bhugan (DW.1), examined by Mohd. Iqram, one of the respondents , worth acceptance.

16. The High Court did not even make any reference to him. It is a settled legal proposition that in exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse i.e. the conclusions of the courts below are contrary to the evidence on record or its entire approach in dealing with the evidence is patently illegal, leading to miscarriage of justice or its judgment is unreasonable based on erroneous law and facts on the record of the case, the appellate court should interfere with the order of acquittal. While doing so, the appellate court should bear in mind the presumption of innocence of the accused and further that the acquittal by the courts below bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference.

(See : *Babu v. State of Kerala,* (2010 (9) SCC 189; *Dr. Sunil Kumar Sambhudayal Gupta & Ors. v. State of Maharashtra,* (2010) 13 SCC 657; *Brahm Swaroop & Anr. v. State of U.P.,* AIR 2011 SC 280; *S. Ganesan v. Rama Raghuraman & Ors.,* (2011) 2 SCC 83; *V.S. Achuthanandan v. R. Balakrishna Pillai & Ors.,* (2011) 3 SCC 317; *State of M.P. v. Ramesh & Anr.,* **(**2011) 4 SCC 786**;** *Abrar v. State of U.P.,* (2011) 2 SCC 750; and *Rukia Begum & Ors. v. State of Karnataka,* (2011) 4 SCC 779).

17. In the instant case, the circumstantial evidence is so strong that it points unmistakably to the guilt of the respondents

and is incapable of explanation of any other hypothesis that of their guilt. Therefore, findings of fact recorded by the High Court are perverse, being based on irrelevant considerations and inadmissible material.

18. In view of the above, the appeals succeed and are allowed. The judgment and order of the High Court dated 25.04.2003 is hereby set aside. The judgment and order of the trial court dated 20.12.1980 in Sessions Trial No.382 of 1980 is restored. A copy of the order be sent to the Chief Judicial Magistrate, Saharanpur to ensure that the respondents be apprehended and sent to jail for serving out the unserved part of the sentence awarded by the trial court.

R.P. Appeals allowed.

BHAGALOO LODH AND ANR.

v.

STATE OF U.P.

(Criminal Appeal No. 207 of 2007)

JUNE 14, 2011

[DR. B.S. CHAUHAN AND SWATANTER KUMAR, JJ.]

Penal Code, 1860 – s.302 r/w s.34 – Homicidal death due to sharp edged weapon – Conviction under s.302 r/w s.34 – Challenge to – Held: Prosecution furnished satisfactory explanation for delay of 9 hours in lodging the FIR – PW1 explained that the incident occurred at night and he could not go to the police station, which was at a distance of 18 Kms, out of fear – Both eye-witnesses were closely related to the deceased but their testimonies had been found trustworthy by both the courts below, and thus cannot be discarded – Conviction accordingly upheld.

FIR – Delay in filing of FIR – Effect of – Held: Prompt and early reporting of the occurrence by the informant with all its vivid details gives an assurance regarding truth of its version – In case there is some delay in filing the FIR, the complainant must give explanation for the same – In absence of such an explanation, the delay may give presumption that allegations/accusations were false – Delay in lodging the FIR does not make the complainant's case improbable when such delay is properly explained.

Evidence – Evidence of a close relative – Held: Can be relied upon provided it is trustworthy – Such evidence cannot be disbelieved merely on the ground that the witnesses are inter-related to each other or to the deceased.

According to the prosecution, pursuant to a quarrel, the two accused-appellants alongwith a co-accused-'RL'

caught hold of PW1's brother while another co-accused-'BS' gave him several blows by a sharp edged weapon "Karauli" due to which PW1's brother died on the spot. 'RL' died during the course of trial. The Sessions Court convicted the appellants and accused-'BS' under Sections 302/34 IPC and sentenced them to life imprisonment. High Court upheld the conviction of the appellants and co-accused 'BS'.

Before this Court, the appellants challenged their conviction inter alia stating that the FIR was lodged after a delay of 9 hours and the prosecution failed to furnish any plausible explanation for the same; and that PW1 and PW2, the alleged eye-witnesses, were very close relatives of the deceased, and thus, their testimonies cannot be relied upon safely.

Dismissing the appeal, the Court

HELD:1. The autopsy on the body of the deceased was conducted by PW.4 and he found 12 ante-mortem incised wound injuries. The cause of death spelt out in the post-mortem report was shock and haemorrhage as a result of ante-mortem injuries. In his deposition in the Trial Court, PW 4 reiterated the said cause of death and also stated therein that the ante-mortem injuries suffered by the deceased were attributable to a sharp edged weapon, like *karauli* and were sufficient in the ordinary course of nature to cause death. [Para 5] [1045-B-C; 1046-E-F]

2. Prompt and early reporting of the occurrence by the informant with all its vivid details gives an assurance regarding truth of its version. In case there is some delay in filing the FIR, the complainant must give explanation for the same. In absence of such an explanation, the delay may give presumption that allegations/accusations were false and had been given after thought or a coloured

version of events. Undoubtedly, delay in lodging the FIR does not make the complainant's case improbable when such delay is properly explained. However, deliberate delay in lodging the complaint is always fatal. In the instant case, so far as the delay in lodging the FIR is concerned, it has been explained by PW.1. The incident occurred at 9.00 P.M. on 25.10.1999 and the FIR was lodged on 26.10.1999 at 6.10 A.M. at the police station at a distance of 18 K.M. from the place of incident. PW.1 mentioned that on account of fear of the accused persons, he could not go to the police station to lodge the FIR at night. This explanation has been found by both the courts below to be perfectly convincing, and after considering all the facts and circumstances of the case, the courts below had drawn an inference that the explanation furnished was quite satisfactory. There is no cogent reason to take a view contrary to the view taken by the courts below. [Para 7, 9] [1046-G-H; 1047-A-B-D-F]

Sahib Singh v. State of Haryana, **AIR 1997 SC 3247;** *Gorige Pentaiah Pentaiah v. State of A.P. & Ors.*, **(2008) 12 SCC 531;** *Kishan Singh (dead) thr. Lrs. v. Gurpal Singh & Ors.*, **AIR 2010 SC 3624) – relied on.**

3.1. So far as the issue of accepting the evidence of closely related witnesses is concerned, both the courts below had placed a very heavy reliance on the depositions of PW.1 and PW.2, inspite of the fact that PW.1 was the brother of the deceased and PW2 was closely related to PW.1. The daughter of PW.1 got married with the nephew (sister's son) of PW.2. Both of them had supported the prosecution case. Both of them have been extensively cross-examined by the defence, but nothing could be extracted therefrom which could impair their credibility. The courts below found that evidence of both the eye-witnesses inspired confidence and was worth acceptance as both of them had given full version of the

incident. More so, both the courts below held that the witnesses had no reason to falsely implicate the appellants and the co-accused and spare the real assailants. [Para 10] [1047-F-H; 1048-A-B]

3.2. Evidence of a close relation can be relied upon provided it is trustworthy. Such evidence is required to be carefully scrutinised and appreciated before resting of conclusion to convict the accused in a given case. But where the Sessions Court properly appreciated evidence and meticulously analysed the same and the High Court re-appreciated the said evidence properly to reach the same conclusion, it is difficult for the superior court to take a view contrary to the same, unless there are reasons to disbelieve such witnesses. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are inter-related to each other or to the deceased. In view thereof, no fault can be found with the evidence recorded by the courts below accepting while the evidence of closely related witnesses. [Para 14] [1049-B-F]

M.C. Ali & Anr. v. State of Kerala, **AIR 2010 SC 1639;** *Myladimmal Surendran & Ors. v. State of Kerala*, **AIR 2010 SC 3281;** *Shyam v. State of Madhya Pradesh*, **(2009) 16 SCC 531;** *Prithi v. State of Haryana*, **(2010) 8 SCC 536;** *Surendra Pal & Ors. v. State of U.P. & Anr.*, **(2010) 9 SCC 399 and** *Himanshu @ Chintu v. State (NCT of Delhi)*, **(2011) 2 SCC 36 – relied on.**

4. The incident had occurred outside the village and not inside the village. Therefore, it is likely that some other persons might have come there after the accused had run away from the place of occurrence. PW.1 had deposed that a resident of a far away village, who got married in the same village was also with him. However, no question had been put to PW.5, (I.O.) by the defence as to why the said person had not been examined. [Para 12]

5.1. The accused examined defence witnesses, DW.1 and DW.2, to prove alibi that the appellants could not be present on the place of occurrence as they had been in their agricultural field. So far as the evidence of DW.1 is concerned, he has deposed that the appellants had been working in their paddy field at the time of occurrence of the crime. However, the courts below did not believe his statement for the reason that the witness had never got his statement recorded by the Investigating Officer, nor did he disclose such fact to any other person. He was examined first time in the court. Similarly, statement of DW.2 was not found worth acceptance. The said witness was present in the morning at the place of occurrence when the Investigating Officer reached there. The appellants had been named in the FIR. DW.2 also admitted that he knew that a murder case had been registered against the appellants, but he did not disclose to the Investigating Officer or to any other person that the appellants could not be the assailants. DW.2 also admitted that his father was the Pradhan and he had defeated a very close relative of the deceased. [Paras 2, 13] [1042-A-B; 1048-F-H; 1049-A-B]

5.2. In the statement under Section 313 of CrPC, the appellants had not taken the defence that they could not be present at the place of occurrence as at the time of occurrence they were working in their paddy (agricultural) field. Thus, in view of the above, the deposition of the two witnesses examined in their defence becomes meaningless. [Para 11] [1048-C-D]

6. The facts and circumstances of the present case do not warrant any review of the judgments and orders of the courts below. [Para 15] [1049-G]

Case Law Reference:

AIR 1997 SC 3247	**relied on**	**Para 7**

(2008) 12 SCC 531	**relied on**	**Para 7**
AIR 2010 SC 3624)	**relied on**	**Para 7**
AIR 2010 SC 1639	**relied on**	**Para 14**
AIR 2010 SC 3281	**relied on**	**Para 14**
(2009) 16 SCC 531	**relied on**	**Para 14**
(2010) 8 SCC 536	**relied on**	**Para 14**
(2010) 9 SCC 399	**relied on**	**Para 14**
(2011) 2 SCC 36	**relied on**	**Para 14**

CRIMINAL APPELALTE JURISDICTION : Criminal Appeal No. 207 of 2007.

From the Judgment & Order dated 28.4.2004 of the High Court of Judicature at Allahabad, Lucknow Bench in Criminal Appeal No. 956 of 2002.

J.P. Dhanda, Atishi Dipankar for the Appellants.

T.N. Singh, Manoj Kumar Dwivedi, R.K. Gupta, S.K. Dwivedi, Aviral Shukla, Abhinav Shrivastava, G.V. Rao for the Respondent.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This criminal appeal has been preferred against the judgment and order dated 28.4.2004 passed by the High Court of Judicature at Allahabad (Lucknow Bench) in Criminal Appeal No. 956 of 2002 dismissing the appeal against the judgment and order dated 12.7.2002 passed by the Sessions Court, Hardoi, in Sessions Trial No. 108 of 2000 convicting the appellants and co-accused Bhagaloo Singh, under Sections 302/34 of Indian Penal Code, 1860 (hereinafter called as 'IPC') and sentencing them to undergo rigorous imprisonment for life.

2. Facts and circumstances giving rise to this case are that:

(A) An FIR dated 26.10.1999 was lodged by Rajesh Singh (PW.1) in Police Station-Tandiyanwan, Fatehpur District, Hardoi, against the appellants and two other co-accused Ram Lakhan and Bhagaloo Singh that the said four accused had killed Vinod Kumar on 25.10.1999 at 9.00 P.M. Vinod Kumar, aged 22 years was friend of Raj Kumar, the son of Ram Lakhan, accused, and thus had visiting terms with the family. One day, when he went to the house of Ram Lakhan, accused, he saw Bhagaloo Singh, accused in compromising position with the daughter of Ram Lakhan, accused and reprimanded him. Bhagaloo Singh was living with Ram Lakhan, accused and helping him in his agricultural work. Bhagaloo Singh had told Vinod Kumar not to disclose the factum of his intimacy with the daughter of Ram Lakhan to anyone. Thus, a quarrel took place between the two and Bhagaloo Singh, accused threatened Vinod Kumar to face the dire consequences. It is in that consequence that the two appellants, alongwith Ram Lakhan caught hold of Vinod Kumar (deceased) and Bhagaloo Singh gave several blows by a sharp edged weapon "Karauli". Vinod Kumar died immediately on the spot after having 12 injuries. There had been enmity in these groups of parties and there had been criminal cases between them.

(B) On the basis of the said FIR, Case Crime No.155/1999 was registered under Sections 302/34 IPC and investigation ensued. The dead body of Vinod Kumar was recovered and sent for post mortem examination. Buddhi Narain Lal (PW.5), Investigating Officer completed the investigation and submitted chargesheet under Sections 302/34 IPC. All the four accused pleaded not guilty and claimed trial. Thus, they were put to trial under Sections 302/34 IPC in Sessions Trial No. 108/2000.

(C) The prosecution in order to prove its case examined five witnesses, namely, Rajesh Singh (PW.1), Devi Gulam Singh (PW.2) as eye-witnesses, Dr. R.K. Porwal (PW.4),

Constable Shailendra Singh (PW.3), and Buddhi Narain Lal, I.O. (PW.5). The accused also examined Jag Dev (DW.1) and Salim (DW.2) to prove alibi that the appellants could not be present on the place of occurrence as they had been in their agricultural field.

After conclusion of the trial, the Sessions Court convicted and sentenced the appellants along with Bhagaloo Singh under Sections 302/34 IPC and sentenced them to undergo rigorous imprisonment for life vide judgment and order dated 12.7.2002.

It may be pertinent to mention here that accused, Ram Lakhan had died during the course of trial.

(D) Being aggrieved, the appellants and co-accused Bhagaloo Singh preferred Criminal Appeal No. 956 of 2002 before the Allahabad High Court (Lucknow Bench) which has been dismissed vide impugned judgment and order dated 28.4.2004. Hence, the appellants filed this appeal.

3. Shri J.P. Dhanda, learned counsel appearing for the appellants, has submitted that the appellants had falsely been implicated in the case due to enmity as there had earlier been criminal cases between the parties. The FIR was lodged with a delay of 9 hours and the prosecution failed to furnish any plausible explanation for the same. Rajesh Singh (PW.1) and Devi Gulam Singh (PW.2), the alleged eye-witnesses, were very close relatives of the deceased, and thus, their testimonies cannot be relied upon safely. Prosecution failed to examine any independent witness. Thus, the appeal deserves to be allowed.

4. On the contrary, Shri T.N. Singh, learned counsel appearing for the State has opposed the appeal contending that the prosecution furnished satisfactory explanation of delay of 9 hours in lodging the FIR, as nobody could go to the police station at a distance of 18 Kms. out of fear. Both the eye-witnesses were closely related to the deceased but their testimonies had been found trustworthy by both the courts

below, and thus cannot be discarded. More so, the law does not prohibit to rely upon the evidence of the closely related witnesses of the deceased or victim if it is found to be reliable. In view of the above, appeal lacks merit and is liable to be dismissed.

5. The autopsy on the body of the deceased Vinod Kumar was conducted Dr. R.K. Porwal (PW.4) on 26.10.1999 and he found the following ante-mortem injuries:

(i) Incised wound size 1 cm x 0.5 x muscle deep present on left temporal region, 1.5 cm lateral to left eyeball.

(ii) Incised wound size 16 cm x 5 cm x bone deep present in front of the neck, 2 cm above the xiphisenuim the trachea is clean cut, margins of the wounds are clean cut.

(iii) Incised wounds size 2 cm x 1 cm x chest cavity deep present on left side of the chest at the level of nipple at 9 O' clock position. Wound is 6 cm medial to nipple underlying heart is clean cut.

(iv) Incised wound size 2.5 cm x 1 cm x muscle deep present on right side of chest at 4 O'clock position from right nipple. It is 6 cm away from right nipple.

(v) Incised wound size 2 cm x 0.7 cm x chest cavity deep (lower chest) present on right side of chest, 7 cm away from right nipple at 4 O' clock position underlying lower is lacerated.

(vi) Incised wound size 6 cm x 1 cm x chest cavity deep. Present on right side of chest left O'clock position, 9 cm away from nipple margins of the wounds are clean out.

(vii) Incised wound size 6 cm x 2.5 cm x chest cavity deep on left side of chest 1.5 cm left to midline.

(viii) Incised wound size 1.5 cm x 1 cm x muscle deep present on left side of chest 4 cm lateral to midline at the level of xiphislesinim.

(ix) Incised wound size 5 cm x 2.5 cm x abdominal cavity deep present on left side of upper abdomen 1 cm lateral to medline at the level of T8 spine intestine is coming out of the wound.

(x) Incised wound 1 cm x 0.5 cm x muscle deep present side of back at the level of T9 spine 8 cm lateral to midline.

(xi) Incised wound size 1.5 cm x 0.5 cm x muscle deep present on right side of back at left the level of T12 spine 6 cm lateral to medline.

(xii) Incised wound size 1 cm x 0.5 x muscle deep present on left side of back at the level of T10 spine 7 cm lateral to midline.

The cause of death spelt out in the post-mortem report was shock and hemorrhage as a result of ante-mortem injuries. It is pertinent to mention that in his deposition in the Trial Court, Dr. Porwal reiterated the said cause of death and also stated therein that the ante-mortem injuries suffered by the deceased were attributable to a sharp edged weapon, like karauli and were sufficient in the ordinary course of nature to cause death.

6. The fact of homicidal death of Vinod Kumar, the place of occurrence and time of his death are not in dispute. Shri Dhanda has raised very limited issues referred to hereinabove and the case is restricted only to those issues.

7. Prompt and early reporting of the occurrence by the informant with all its vivid details gives an assurance regarding truth of its version. In case there is some delay in filing the FIR, the complainant must give explanation for the same. In absence of such an explanation, the delay may give presumption that allegations/accusations were false and had been given after

thought or had given a coloured version of events. Undoubtedly, delay in lodging the FIR does not make the complainant's case improbable when such delay is properly explained. However, deliberate delay in lodging the complaint is always fatal. (Vide: *Sahib Singh v. State of Haryana,* AIR 1997 SC 3247; *Gorige Pentaiah Pentaiah v. State of A.P. & Ors.,* (2008) 12 SCC 531; and *Kishan Singh (dead) thr. Lrs. v. Gurpal Singh & Ors.,* AIR 2010 SC 3624).

8. So far as the delay in lodging the FIR is concerned, it has been explained by Rajesh Singh (PW.1) as under:

> "I had not gone to lodge report in Police Station Tandiyanwan due to fear. We looked the corpse at night. I and Hanif went to Tandiyanwan Police Station by motorcycle in next morning".

9. The incident occurred at 9.00 P.M. on 25.10.1999 and the FIR was lodged on 26.10.1999 at 6.10 A.M. at the police station at a distance of 18 K.M. from the place of incident. Rajesh Singh (PW.1) has mentioned that on account of fear of the accused persons, he could not go to the police station to lodge the FIR at night. This explanation has been found by both the courts below to be perfectly convincing, and after considering all the facts and circumstances of the case, the courts below drawn an inference that the explanation furnished was quite satisfactory. We do not see any cogent reason to take a view contrary to the view taken by the courts below.

10. So far as the issue of accepting the evidence of closely related witnesses is concerned, both the courts below had placed a very heavy reliance on the depositions of Rajesh Singh (PW.1) and Devi Gulam Singh (PW.2), in spite of the fact that Rajesh Singh (PW.1) was the brother of the deceased Vinod Kumar and Devi Gulam Singh was also closely related to Rajesh Singh (PW.1). The daughter of Rajesh Singh (PW.1) got married with Sarvesh, the nephew (sister's son) of Devi Gulam Singh (PW.2). Both of them had supported the prosecution case. Both of them have been extensively cross-examined by

the defence, but nothing could be extracted therefrom which could impair their credibility. The courts below found that evidence of both the eye-witnesses inspired confidence and was worth acceptance as both of them had given full version of the incident.

More so, both the courts below have held that the witnesses had no reason to falsely implicate the appellants and the co-accused and spare the real assailants.

11. In the statement under Section 313 of Code of Criminal Procedure, 1973, the appellants had not taken the defence that they could not be present at the place of occurrence as at the time of occurrence they were working in their paddy field. Thus, in view of the above, the deposition of the two witnesses examined in their defence becomes meaningless.

12. The incident had occurred outside the village and not inside the village. Therefore, it is likely that some other persons might have come there after the accused had run away from the place of occurrence. Rajesh Singh (PW.1) had deposed that one Sushil Kumar, a resident of far away village of district Hardoi, who got married in the same village was also with him. However, no question had been put to Buddhi Narain Lal (PW.5), I.O. by the defence as to why Sushil Kumar had not been examined.

13. So far as the evidence of defence witness, namely Jag Dev (DW.1) is concerned, he has deposed that the present appellants had been working in their paddy field at the time of occurrence of the crime. However, the court below did not believe his statement for the reason that the witness had never got his statement recorded by the Investigating Officer, nor did he disclose such fact to any other person. He was examined first time in the court. Similarly, statement of Salim (DW.2) has been found not worth acceptance. The said witness was present in the morning at the place of occurrence when the Investigating Officer reached there. The appellants had been named in the FIR. Salim (DW.2) also admitted that he knew

that a murder case had been registered against the appellants, but he did not disclose to the Investigating Officer or to any other person that the appellants could not be the assailants. Salim (DW.2) has also admitted that his father was the Pradhan and he had defeated Saroj Singh, a very close relative of Vinod Kumar, deceased.

14. Evidence of a close relation can be relied upon provided it is trustworthy. Such evidence is required to be carefully scrutinised and appreciated before resting of conclusion to convict the accused in a given case. But where the Sessions Court properly appreciated evidence and meticulously analysed the same and the High Court re-appreciated the said evidence properly to reach the same conclusion, it is difficult for the superior court to take a view contrary to the same, unless there are reasons to disbelieve such witnesses. Thus, the evidence cannot be disbelieved merely on the ground that the witnesses are inter-related to each other or to the deceased. (Vide: *M.C. Ali & Anr. v. State of Kerala,* AIR 2010 SC 1639; *Myladimmal Surendran & Ors. v. State of Kerala,* AIR 2010 SC 3281; *Shyam v. State of Madhya Pradesh,* (2009) 16 SCC 531; *Prithi v. State of Haryana,* (2010) 8 SCC 536; *Surendra Pal & Ors. v. State of U.P. & Anr.,* (2010) 9 SCC 399; and *Himanshu @ Chintu v. State (NCT of Delhi),* (2011) 2 SCC 36).

In view of the law laid hereinabove, no fault can be found with the evidence recorded by the courts below accepting the evidence of closely related witnesses.

15. In view of the above, we are of the considered opinion that the facts and circumstances of present case do not warrant any review of the judgments and orders of the courts below. The appeal lacks merit and is accordingly dismissed.

B.B.B. Appeal dismissed.

STATE OF RAJASTHAN
v.
TALEVAR & ANR.
(Criminal Appeal No. 937 of 2005)

JUNE 17, 2011

[DR. B.S. CHAUHAN AND SWATANTER KUMAR, JJ.]

Evidence Act, 1872:

s.114, Illustration (a) – Presumption on the basis of articles recovered in a case of dacoity with murders – Out of 8 accused two accused-respondents acquitted by High Court – Appeal by State – HELD: Admittedly, there is no evidence of identification of the accused – Recovery on disclosure statements was not in close proximity of time from date of incident – More so, recovery is either of cash, small things or a scooter, which can change hands without any difficulty – Therefore, no presumption can be drawn against the accused u/s 114, Illustration (a) – No adverse inference can be drawn on the basis of the recoveries made on their disclosure statements to connect them with the crime – Penal Code, 1860 – ss. 395, 396 and 397.

Code of Criminal Procedure, 1973:

Appeal against acquittal – HELD: Only in exceptional cases, where there are compelling circumstances and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal – The appellate court should bear in mind the presumption of innocence of the accused and further that the trial court's acquittal bolsters the presumption of his innocence – Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference – In the instant case, there is no reason to interfere with the well reasoned

judgment and order of the High Court acquitting the respondents – Penal Code, 1860 – ss. 395.396 and 397 – Constitution of India, 1950 – Article 136.

An FIR was lodged by P.W.13 on the morning of 17.12.1996 stating that in the previous night 8-10 miscreants committed dacoity in his house in which the dacoits killed two persons, namely, his chowkidar and his neighbour, and decamped with cash, jewellery and silver wares. Respondent no. 2 was arrested on 24.12.1996 and respondent no. 1 on 19.1.1997. On the basis of disclosure statements made by them, some cash and some articles were recovered. In all, nine accused including the two respondents faced the trial. One of the accused died pending trial. The trial court convicted all the remaining 8 accused. On appeal, the High Court while maintaining conviction and sentence of imprisonment for life awarded to six of the accused, acquitted the respondents.

In the instant appeal filed by the State, the question for consideration before the Court was: whether adverse inference could be drawn against the accused merely on the basis of recoveries made on their disclosure statements.

Dismissing the appeal, the Court

HELD: 1.1. Admitted facts remained, so far as the two respondents/accused are concerned, that no test identification parade was held at all. Further, none of the eye witnesses, particularly, 'PW.12', 'PW.13', 'PW.2', 'PW.14' and 'PW.15', identified either of the respondents in the court. Therefore, there is no evidence so far as their identification is concerned. [para 6] [1057-G]

1.2. As regards the adverse inference on the basis of the recoveries made on disclosure statements made by

the accused, the law on this issue can be summarized to the effect that where only evidence against the accused is recovery of stolen properties, then although the circumstances may indicate that the theft and murder might have been committed at the same time, it is not safe to draw an inference that the person in possession of the stolen property had committed the murder. It also depends on the nature of the property so recovered, whether it was likely to pass readily from hand to hand. Suspicion should not take the place of proof. [para 7.7] [1060-C]

Gulab Chand v. State of M.P., **1995 (3) SCR 27 = AIR 1995 SC 1598;** *Tulsiram Kanu v. State,* **AIR 1954 SC 1;** *Geejaganda Somaiah v. State of Karnataka*, **2007 (3) SCR 899 = AIR 2007 SC 1355,** *Sanwat Khan v. State of Rajasthan*, **AIR 1956 SC 54;** *Earabhadrappa v. State of Karnataka* **1983 (2) SCR 552 = AIR 1983 SC 446;** *Sanjay @ Kaka etc. etc. v. The State (NCT of Delhi)* **AIR 2001 SC 979;** *Ronny Alias Ronald James Alwaris & Ors. v. State of Maharashtra,* **AIR 1998 SC 1251;** *Baiju vs state of m.p.* **1978 (2) SCR 1978= AIR 1978 SC 522;** *Mukund @ kundu mishra vs state of m.p.* **1997 AIR 2622 – referred to.**

1.3. In the instant case, respondent no. 2 was arrested on 24.12.1996 and a silver glass and one thousand rupees were alleged to have been recovered on his disclosure statement on 29.12.1996. Again on disclosure statement dated 2.1.1997, a scooter alleged to have been used in the dacoity, was recovered. Similarly, respondent no. 1 was arrested on 19.1.1997 and on his disclosure statement on 26.1.1997, two thousand rupees, a silver key ring and a key of an Ambassador car alleged to have been used in the crime were recovered. Thus, it is evident that recovery on the disclosure statements of either of the respondents/accused persons was not in close proximity of the time from the date of incident. More

so, recovery is either of cash, small things or vehicles which can be passed from one person to another without any difficulty. In such a fact situation, the inescapable conclusion is that no presumption can be drawn against the two respondents/accused u/s 114 Illustration (a) of the Evidence Act. No adverse inference can be drawn on the basis of recoveries made on their disclosure statements to connect them with the commission of the crime. [para 8] [1060-D-H]

2. The instant appeal has been preferred by the State against the judgment and order of acquittal of the respondents by the High Court. The law on the issue is settled to the effect that only in exceptional cases where there are compelling circumstances and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial court's acquittal bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference. In the instant case, there is no reason to interfere with the well reasoned judgment and order of the High Court acquitting the respondents. [para 9-10] [1061-A-E]

Brahm Swaroop & Anr. v. State of U.P., **AIR 2011 SC 280*;*** *V.S. Achuthanandan v. R. Balakrishna Pillai & Ors*., **(2011) 3 SCC 317*; and*** *Rukia Begum & Ors. v. State of Karnataka*, **(2011) 4 SCC 779, relied on**

Case Law Reference:

1995 (3) SCR 27	**referred to**	**para 7.1**
2007 (3) SCR 899	**referred to**	**para 7.2**
AIR 1956 SC 54	**referred to**	**para 7.2**

AIR 1954 SC 1	**referred to**	**para 7.3**
1983 (2) SCR 552	**referred to**	**para 7.4**
AIR 2001 SC 979	**referred to**	**para 7.5**
AIR 1998 SC 1251	**referred to**	**para 7.6**
1978 (2) SCR 1978	**referred to**	**para 7.6**
1997 AIR 2622	**referred to**	**para 7.6**
AIR 2011 SC 280	**relied on**	**para 9**
(2011) 3 SCC 317	**relied on**	**para 9**
(2011) 4 SCC 779	**relied on**	**para 9**

CRIMINAL APPELALTE JURISDICTION : Criminal Appeal No. 937 of 2005.

From the Judgment & Order dated 27.10.2004 of the High Court of Judicature for Rajasthan, Jaipur bench at Jaipur in D.B. Criminal Appeal No. 1579 of 2002.

Manish Singhvi, AAG, Milind Kumar, Altaf Hussain, Harbans Lal Bajaj for the appearing parties.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This appeal has been preferred by the State of Rajasthan against the judgment and order dated 27.10.2004 passed by the High Court of Judicature for Rajasthan, Jaipur Bench, in Criminal Appeal No. 1579 of 2002 acquitting the respondents, setting aside their conviction and the sentence passed by Additional District and Sessions Judge, (Fast Track), Laxmangarh, Alwar, dated 2.11.2002 in Sessions Case No. 4 of 2002 (14/2000) for the offences punishable under Sections 395, 396 and 397 of the Indian Penal Code, 1860 (hereinafter called the IPC).

2. The facts and circumstances giving rise to this case are as under:

A. Santosh Jagwayan (PW.13) lodged an FIR on 17.12.1996 at 8.30 A.M., that in the intervening night between 16th and 17th December, 1996 on hearing the noise, he sent his Chowkidar Gopal Nepali (deceased) to the roof of his house. Gopal Nepali went upstairs and opened the gate of the roof and found that 8 to 10 accused persons were trying to enter into the house by breaking upon the door of the roof. They immediately fired shot at Gopal Nepali (deceased) and entered into the house. The accused persons locked Shashi Devi (PW.12) wife of complainant, Preeti (PW.14) and Sandhya (PW.15), his daughters, in the bathroom and started looting the moveable properties. In the meanwhile, his neighbours raised their voice. Thus, the accused immediately fired a shot at Mrs. Anita Yadav, as a result of which, she died on the spot. Kripa Dayal Yadav (PW.2), husband of Anita Yadav (deceased) caught hold of one of the accused but he was beaten with the butt of the gun by the other accused persons and they got the accused released from his clutches. The accused decamped with cash, jewellery and silver wares etc.

B. On the basis of the said complaint, an FIR No. 240 of 1996 (Ex.P-30) was registered under Sections 395, 396, 397 and 398 IPC and investigation ensued. The dead bodies of Gopal Nepali and Anita Yadav were recovered and sent for post-mortem examination. Kuniya - accused/respondent was arrested on 24.12.1996. He made a disclosure statement (Ex.P-76) on 29.12.1996 on the basis of which a silver glass and one thousand rupees were recovered vide recovery memo (Ex.P-53). Further, on his disclosure statement, a scooter bearing No. RJ-05-0678 was recovered vide recovery memo (Ex.P-52) on 2.1.1997.

C. Another accused Talevar – respondent, was arrested on 19.1.1997 and on his disclosure statement made on

26.1.1997, two thousand rupees, a silver key ring and a key of Ambassador car was recovered vide seizure memo (Ex.P-45).

D. Some more recoveries were made from the other accused persons. After completing the investigation chargesheet was filed against 9 accused persons including the two respondents. As all of them pleaded not guilty, they were put to trial for the offences punishable under Sections 395, 396 and 398 IPC.

E. In the Sessions trial prosecution examined 34 witnesses in support of its case. The ornaments and stolen articles were identified by Shashi Devi (PW.12) and Santosh Jagwayan (PW.13). The trial court vide judgment and order dated 2.11.2002 convicted 8 accused including the two respondents. One accused named Ram Krishan, died during the trial. All of them stood convicted under the provisions of Sections 395, 396 and 397 IPC. All the accused were awarded punishment to undergo life imprisonment and a fine of Rs. 1,000/- and in default of payment of fine, to further undergo six months rigorous imprisonment under Section 396 IPC. All of them were convicted for the offence punishable under Section 397 IPC and a sentence to undergo rigorous imprisonment for seven years and a fine of Rs.500/- and in default of payment of fine, to further undergo three months rigorous imprisonment. They were further convicted under Section 395 IPC, awarded life imprisonment and fine of Rs. 1,000/- and in default of payment of fine, to further undergo six months rigorous imprisonment. Accused namely, Ghurelal, Chunchu @ Bhagwan Singh, Kallu, Rajpal and Samay Singh were further convicted under Sections 3/25 and 3/27 of the Arms Act and sentence was awarded to undergo three years rigorous imprisonment and a fine of Rs. 500/- each of them, in default of payment of fine, to further undergo three months rigorous imprisonment.

F. Being aggrieved by the said decision, all the accused including the two respondents preferred Criminal Appeal No. 1579 of 2002, which has been decided by the High Court vide

judgment and order dated 27.10.2004 acquitting the two respondents/accused though maintaining the conviction and sentence in respect of other accused. Hence, this appeal by the State against their acquittal.

3. Dr. Manish Singhvi, learned Additional Advocate General for the State of Rajasthan, has submitted that recovery of some of the looted property had been made on the basis of the disclosure statements made by the said respondents. The law provides for a presumption that they had participated in the crime and, therefore, the High Court has wrongly acquitted the said accused and thus, the appeal deserves to be allowed.

4. On the contrary, Shri Altaf Hussain, learned counsel appearing for the said two accused, has vehemently opposed the appeal contending that mere recovery of looted property on the disclosure statement of the accused, is not enough to bring home the charges of offence of loot or dacoity, when the recovery is made after expiry of a considerable period from the date of incident and particularly when the nature of the looted property is such which can change hands easily. Thus, no inference can be drawn against the respondents. The order of acquittal made by the High Court has been passed on proper appreciation of facts and application of law. The appeal lacks merit and is liable to be dismissed.

5. We have considered the rival submissions made by the learned counsel for the parties and perused the record.

6. Admitted facts remained so far as the two respondents/ accused are concerned, that no test identification parade was held at all. Further none of the eye witnesses, particularly, Shashi Devi (PW.12), Santosh Jagwayan (PW.13), Kripa Dayal Yadav (PW.2), Preeti (PW.14) and Sandhya (PW.15), identified either of the said respondents in the court. Therefore, there is no evidence so far as their identification is concerned.

7. Thus, the sole question remains to be decided whether

adverse inference could be drawn against the accused merely on the basis of recoveries made on their disclosure statements.

7.1. In *Gulab Chand v. State of M.P.,* AIR 1995 SC 1598, this Court upheld the conviction for committing dacoity on the basis of recovery of ornaments of the deceased from the possession of the person accused of robbery and murder *immediately* after the occurrence.

7.2. In *Geejaganda Somaiah v. State of Karnataka,* AIR 2007 SC 1355, this Court relied on the judgment in *Gulab Chand* (supra) and observed that simply on the recovery of stolen articles, no inference can be drawn that a person in possession of the stolen articles is guilty of the offence of murder and robbery. But culpability for the aforesaid offences will depend on the facts and circumstances of the case and the nature of evidence adduced.

It has been indicated by this Court in *Sanwat Khan v. State of Rajasthan,* AIR 1956 SC 54, that no hard and fast rule can be laid down as to what inference should be drawn from certain circumstances.

7.3. In *Tulsiram Kanu v. State,* AIR 1954 SC 1**,** this Court has indicated that the presumption permitted to be drawn under Section 114, Illustration (a) of the Evidence Act 1872 has to be drawn under the *'important time factor'. I*f the ornaments in possession of the deceased are found in possession of a person *soon after the murder,* a presumption of guilt may be permitted. But if a long period has expired in the interval, the presumption cannot be drawn having regard to the circumstances of the case.

7.4. In *Earabhadrappa v. State of Karnataka* AIR 1983 SC 446, this Court held that the nature of the presumption under Illustration (a) of Section 114 of the Evidence Act must depend upon the nature of evidence adduced. No fixed time-limit can be laid down to determine whether *possession is recent or*

otherwise. Each case must be judged on its own facts. The question as to what amounts to recent possession sufficient to justify the presumption of guilt varies according "as the stolen article is or is not calculated to pass readily from hand to hand". If the stolen articles were such as were not likely to pass readily from hand to hand, the period of one year that elapsed could not be said to be too long particularly when the appellant had been absconding during that period.

7.5. Following such a reasoning, in *Sanjay @ Kaka etc. etc. v. The State (NCT of Delhi),* AIR 2001 SC 979, this Court upheld the conviction by the trial court since disclosure statements were made by the accused persons on ***the*** *next day* of the commission of the offence and the property of the deceased was recovered at their instance from the places where they had kept such properties, on the same day. The Court found that the trial Court was justified in holding that the disclosure statements of the accused persons and huge recoveries from them at their instance by itself was a sufficient circumstance on the very next day of the incident which clearly went to show that the accused persons had joined hands to commit the offence of robbery. Therefore, recent and unexplained possession of stolen properties will be taken to be presumptive evidence of the charge of murder as well.

7.6**.** In *Ronny Alias Ronald James Alwaris & Ors. v. State of Maharashtra,* AIR 1998 SC 1251, this Court held that apropos the recovery of articles belonging to the family of the deceased from the possession of the appellants *soon after the robbery and the murder of the* deceased remained unexplained by the accused, and so the presumption under Illustration (a) of Section 114 of the Evidence Act would be attracted :

> "It needs no discussion to conclude that the murder and the robbery of the articles were found to be part of the same transaction. The irresistible conclusion would

> therefore, be that the appellants and no one else had committed the three murders and the robbery."
>
> (See also: *Baijur v. State of Madhya Pradesh,* AIR 1978 SC 522; and *Mukund alias Kundu Mishra & Anr. v. State of Madhya Pradesh,* AIR 1997 SC 2622).

7.7. Thus, the law on this issue can be summarized to the effect that where only evidence against the accused is recovery of stolen properties, then although the circumstances may indicate that the theft and murder might have been committed at the same time, it is not safe to draw an inference that the person in possession of the stolen property had committed the murder. It also depends on the nature of the property so recovered, whether it was likely to pass readily from hand to hand. Suspicion should not take the place of proof.

8. In the instant case, accused Kuniya was arrested on 24.12.1996 and a silver glass and one thousand rupees were alleged to have been recovered on his disclosure statement on 29.12.1996. Again on disclosure statement dated 2.1.1997, a scooter alleged to have been used in the dacoity, was recovered. Similarly, another accused Talevar was arrested on 19.1.1997 and on his disclosure statement on 26.1.1997, two thousand rupees, a silver key ring and a key of Ambassador car alleged to have been used in the crime were recovered. Thus, it is evident that recovery on the disclosure statements of either of the respondents/accused persons was not in close proximity of time from the date of incident. More so, recovery is either of cash, small things or vehicles which can be passed from one person to another without any difficulty. In such a fact situation, we reach the inescapable conclusion that no presumption can be drawn against the said two respondents/ accused under Section 114 Illustration (a) of the Evidence Act. No adverse inference can be drawn on the basis of recoveries made on their disclosure statements to connect them with the commission of the crime.

9. The instant appeal has been prepared by the State against the judgment and order of acquittal of the respondents by the High Court. The law on the issue is settled to the effect that only in exceptional cases where there are compelling circumstances and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial Court's acquittal bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference.

(See : *Brahm Swaroop & Anr. v. State of U.P.,* AIR 2011 SC 280; *V.S. Achuthanandan v. R. Balakrishna Pillai & Ors.,* (2011) 3 SCC 317; and *Rukia Begum & Ors. v. State of Karnataka,* (2011) 4 SCC 779).

10. In view of the above, we do not find any reason to interfere with the well reasoned judgment and order of the High Court acquitting the said respondents. The appeal lacks merit and is accordingly dismissed.

R.P. Appeal dismissed.

GHURELAL AND ORS.
v.
STATE OF RAJASTHAN
(Criminal Appeal No. 1636 of 2005)

JUNE 17, 2011

[DR. B.S. CHAUHAN AND SWATANTER KUMAR, JJ.]

Penal Code, 1860:

ss. 395, 396 and 397 – Dacoity with two murders – Conviction of six accused-appellants affirmed by High Court – HELD: There are concurrent findings of fact of courts below about involvement and participation of all accused-appellants in the crime – They had been properly identified in test identification parades as well as in court by witnesses – The looted property recovered also correctly identified – Recovery of looted property as also weapons and vehicle used in offence on disclosure statement made by accused, also stood proved – There is no cogent reason to take a view contrary to that taken by courts below.

The six accused-appellants along with three others were prosecuted for committing offences punishable u/ss 395, 396, 397 and 398 IPC. An FIR was lodged by PW-13 on the morning of 17.12.1996 stating that in the previous night, 8-10 miscreants committed dacoity in his house, shot dead his chowkidar and one of the neighbours and decamped with cash, jewellery and silver wares etc. Nine accused were arrested. On the disclosure statements made by the accused, two 12-bore guns, one revolver, and one katta, some empty cartridges, some live cartridges, one ambassador car, and the looted jewellery, cash and silver wares etc. were recovered. One of the accused died pending trial. The trial court convicted all the remaining 8 accused u/ss 395, 396 and 397 IPC and

sentenced them to imprisonment for life. Five of the accused were also convicted u/ss 3/25 and 3/27, Arms Act. On appeal, the High Court upheld the conviction and sentence of the accused u/ss 395, 396 and 397 IPC and acquitted two. Aggrieved, the six convicts filed the appeal.

Dismissing the appeal, the Court

HELD: 1.1. There are concurrent findings of fact so far as the involvement and participation of all the six accused-appellants is concerned. They had been properly identified in the test identification parades as well as in the court by the witnesses. More so, the looted property, particularly, ornaments, jewellery, silver glasses have been recovered and identified correctly. In respect of this, the findings recorded by the trial court as well as by the High Court are based on the evidence of 'PW.26', the Judicial Magistrate, who conducted the Test Identification Parades and by the statements of 'PW.20', the Tahsildar, who conducted the proceedings of identification of stolen articles. According to 'PW.20', 'PW.12' and 'PW.13' accurately identified the stolen articles. Similarly, 'PW.26', the Judicial Magistrate, has deposed that on 23.12.96, he had conducted the identification parade of accused 'RV', 'K' and 'G'; and 'PW.13', 'PW.12' and PW-2 identified the three accused correctly. He further deposed that on 6.1.1997, he conducted the identification parade of accused 'SS', 'BS' and 'R' wherein PW.13 identified accused 'SS' and 'BS' correctly, but in place of accused 'R', he identified another accused. PW.12 identified accused 'SS', 'BS' and 'R' accurately. PW.26 also prepared memos Ext.P-3 and Ext.P-4 of the identification parades. These two witnesses have been cross-examined. However, nothing could be elicited by the defence to discredit their testimonies. [para 7] [1069-B-H; 1070-A-B]

1.2. The post-mortem report of the two deceased stood proved by the doctor (PW.21) who had conducted the autopsies. He deposed that the victims had died of the gun shot injuries. He also deposed that he had examined 'PW.2' on 17.12.1996 and had found 7 simple injuries on his body which had been caused by a blunt weapon. The said injury had been caused within 12 hours of examination. Thus, he corroborated the injuries as well as the manner and the weapon with which such injuries were caused. [para 9] [1070-E-F]

2.1. So far as the recovery is concerned, it stood proved by the Investigating Officer (PW-34), who stated that on the disclosure statements made by the accused u/s 27 of the Evidence Act and at their instances, he had recovered the stolen articles, alleged gun, revolver, pellet, scooter and an ambassador car used by the appellants at the time of committing dacoity. He also faced grilling cross-examination at length, but nothing came out from his statement to draw an adverse inference against the prosecution. [para 8] [1070-C-D]

2.2. The recoveries made at the instances of the appellants stood proved by examining the panel witnesses, except in case of recovery made on disclosure statement of accused 'G' in respect of one gun of 12 bore, live cartridges, some jewellery and a few silverwares, as the two panch witnesses, namely, 'PW.30' and 'PW.31' turned hostile. Both the courts below have held that the recovery from accused 'G' cannot be disbelieved merely because the panch witnesses turned hostile. There is no cogent reason to take a view contrary to the view taken by the two courts below. [para 10] [1070-H; 1071-A-B]

3. No material discrepancy in the statements of the witnesses has been pointed out which goes to the root of the case. There is no cogent reason to interfere with

the concurrent findings of fact, recorded by the courts below. [para 11] [1071-C]

CRIMINAL APPELALTE JURISDICTION : Criminal Appeal No. 1636 of 2005.

From the Judgment & Order dated 27.10.2004 of the High Court of Judicature for Rajasthan Bench at Jaipur in D.B. Criminal Appeal No. 1579 of 2002.

Manish Singhvi, AAG, Milind Kumar, Altaf Hussain, Harbans Lal Bajaj for the appearing parties.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This appeal has been preferred against the judgment and order dated 27.10.2004 passed by the High Court of Judicature for Rajasthan, Jaipur Bench in D.B. Criminal Appeal No. 1579 of 2002, upholding the conviction and the sentence of the appellants vide judgment and order dated 2.11.2002 in Sessions Case No. 4 of 2002 (14/2000) passed by Additional District and Sessions Judge, (Fast Track), Laxmangarh, Alwar, convicting the appellants under Sections 395, 396 and 397 of the Indian Penal Code, 1860 (hereinafter called the IPC).

2. Facts and circumstances giving rise to this appeal are as under:

A. Santosh Jagwayan (PW.13) lodged an FIR on 17.12.1996 at 8.30 A.M. that in the intervening night between 16th and 17th December, 1996, on hearing a noise, he sent his Chowkidar Gopal Nepali (deceased) to the roof of his house. Gopal Nepali went upstairs, opened the gate of the roof, and found that 8 to 10 accused persons were trying to enter into the house by breaking upon the door of the roof. They immediately fired a shot at Gopal Nepali (deceased) and entered into the house. The accused persons locked Shashi

Devi (PW.12), wife of complainant and Preeti (PW.14) and Sandhya (PW.15), his daughters, in the bathroom and started looting moveable properties. Meanwhile, the complainant's neighbours raised their voices. Thus, the accused immediately fired a shot at one of the neighbours, Mrs. Anita Yadav (deceased), and as a result, she died on the spot. Kripa Dayal Yadav (PW.2), husband of Anita Yadav caught hold of one of the accused but was beaten with a gun's butt by the other accused persons who managed to get the accused released from his clutches. The accused decamped with cash, jewellery and silver wares etc.

B. On the basis of the said complaint, an FIR No. 240 of 1996 (Ex.P-30) was registered under Sections 395, 396, 397 and 398 IPC and investigation ensued. The dead bodies of Gopal Nepali and Smt. Anita Yadav were recovered and sent for post-mortem examination.

C. During the course of investigation, the appellants were arrested. Raghuveer was arrested on December 19, 1996 and one Ambassador car was recovered at his instance. On his further disclosure and instance, one Kondhani of silver, 2 silver glasses, one silver Katori, one silver spoon and one torch were recovered. Raghuveer, Ghurelal and Kallu were put to the identification parade. On December 24, 1996, co-accused Ram Krishan (now dead) was arrested. On his arrest, case for offence under Section 120B, IPC was also added. On the information and at the instance of accused Kallu, a 12 bore gun, one silver Katori, one pair of ear tops and one earring was recovered on December 29, 1996. On the information furnished by Ghurelal, one golden ring, one ear 'jhala', one necklace, one Ilaychidani, one silver spoon and one Kondhani were recovered on December 30, 1996. On January 1, 1997, accused appellants Rajpal, Samay Singh and Chunchu @ Bhagwan Singh were arrested. One 12 bore gun, one worship platter, 4 silver glasses, one Katori and Rs.2,000/- in cash were recovered from Chunchu @ Bhagwan. On the information

furnished by accused Samay Singh, one 32 bore revolver, two empty cartridges, 4 live cartridges, 5 glasses, one Katori, one silver spoon and two coin of silver along with Rs.8,900/- in cash and two notes of Nepal currency were recovered. On the information of appellant Rajpal, one 32 bore Katta, one empty cartridge, 5 live cartridges, two golden bangles (Kangan), 3 silver button, one Katori of silver, one silver glass and Rs.1000/- in cash were recovered. Some recoveries were also made at the instance of co-accused Kuniya and Talevar (acquitted by the High Court). Appellants Samay Singh, Chunchu and Rajpal were also put to the identification parade.

D. After completing the investigation, the police filed challan for offences punishable under Sections 395, 396, 397, 120B and 412 IPC, and under Sections 3/25 and 3/27 of the Arms Act, 1950. The charges were framed against the accused appellants. The accused denied the charges and claimed to be tried. Prosecution produced as many as 34 witnesses and exhibited 80 documents (Ex.P-1 to Ex.P-80) in support of its case. The accused appellants were examined under Section 313 of the Code of Criminal Procedure, 1973. They denied the correctness of the statements made against them and pleaded that they have been falsely implicated.

E. The trial court convicted all the accused under the provisions of Section 396 IPC and awarded them punishment to undergo life imprisonment and a fine of Rs. 1,000/-, and in default of payment of fine, to further undergo six months rigorous imprisonment. All of them were also convicted for the offence punishable under Section 397 IPC, and a sentence to undergo rigorous imprisonment for seven years and a fine of Rs.500/- and in default of payment of fine, three months rigorous imprisonment was awarded. They were further convicted under Section 395 IPC, awarded life imprisonment and fine of Rs. 1,000/- and in default of payment of fine, to further undergo six months rigorous imprisonment. Accused Ghurelal, Chunchu @ Bhagwan Singh, Kallu, Rajpal and Samay Singh were further

convicted under Sections 3/25 and 3/27 of the Arms Act and to each, a sentence was awarded to undergo three years rigorous imprisonment and a fine of Rs. 500/- and in default of payment of fine, to further undergo three months rigorous imprisonment.

F. Being aggrieved by the said decision, all the accused preferred Criminal Appeal No. 1579 of 2002 which has been decided by the High Court vide judgment and order dated 27.10.2004 acquitting the accused Talevar and Kuniya, though maintaining the conviction and sentence in respect of the other accused. Hence, this appeal.

3. Shri Altaf Hussain, learned counsel appearing for the appellants has submitted that the appellants had not been kept baparda. Therefore, the identification was not proper. He further submitted that there had been most material discrepancies in the deposition of witnesses which go to the root of this case, and therefore, the conviction and sentence of the appellants is liable to be set aside.

4. On the other hand, Shri Manish Singhvi, learned Additional Advocate General, appearing for the State of Rajasthan, has opposed the appeal contending that it is a case wherein two persons had been killed and one seriously injured, valuable moveable properties have been looted, appellants-accused have been identified by all the witnesses in jail as well as in court, and recoveries on their disclosure had been made and proved. Therefore, no interference is required, the appeal lacks merit and is liable to be dismissed.

5. We have considered the rival submissions made by learned counsel for the parties and perused the record.

6. In the instant case, 9 persons were put to trial. One accused, namely, Ram Krishan died during the course of trial. Two persons, namely, Talevar and Kuniya stood acquitted by the High Court by the same impugned judgment and order. The

appeal against their acquittal i.e. Criminal Appeal No. 937 of 2005 is being dealt with separately. Therefore, we are concerned only with the remaining six appellants.

7. There are concurrent findings of fact so far as the involvement and participation of all the six accused-appellants are concerned. They had been properly identified in the Test Identification Parades as well as in the Court by the witnesses. More so, the looted property, particularly, ornaments, jewellery, silver glasses have been recovered and identified correctly. In respect of this, the findings recorded by the Trial Court as well as by the High Court are based on the evidence of Shri G.L. Sharma (PW.26), Judicial Magistrate, who conducted the Test Identification Parade and by the statements of Narendra Singh Kulhari (PW.20), the Tahsildar who conducted the proceedings of identification of stolen articles. According to Narendra Singh Kulhari (PW.20), Smt. Shashi Devi (PW.12) and Santosh Jagwayan (PW.13) accurately identified the stolen articles as 15 silver glasses, 5-7 katories, silver spoons, silver plates, tagri, golden ear rings and 21 coins of silver as well as packet of notes. Similarly, Shri G.L. Sharma, (PW.26), Judicial Magistrate, has deposed that on December 23, 1996, he had conducted the identification parade of accused Raghuveer, Kallu and Ghurelal. He further deposed that Santosh Jagwayan (PW.13), Smt. Shashi Devi (PW.12) and Kripa Dayal Yadav (PW.2) were summoned for identifying the accused. Santosh Jagwayan (PW.13) and Smt. Shashi Devi (PW.12) have also identified the accused Raghuveer, Kallu and Ghurelal. Thereafter, Kripa Dayal Yadav was summoned and he identified accused Raghuveer, Kallu and Ghurelal. All the three identified the aforesaid accused correctly. He further deposed that on January 6, 1997, on the order of the Chief Judicial Magistrate, Alwar, he also conducted the identification parade of the accused. Witnesses Santosh Jagwayan (PW.13), Smt. Shashi (PW.12) and Kripa Dayal Yadav (PW.2) appeared for identifying the accused. First of all, Santosh Jagwayan (PW.13) was called to identify the accused. He identified the accused

Samay Singh and Bhagwan Singh, but in place of accused Rajpal, he identified another accused Suraj. Smt. Shashi Devi (PW.12) identified accused Samay Singh, Bhagwan Singh and Rajpal accurately. He also prepared memos Ex.P-3 and Ex.P-4 of the identification parade. These two witnesses have been cross-examined. However, nothing could be elicited by the defence to discredit their testimonies.

8. So far as the recovery is concerned, it stood proved by Laxman Gaur (PW.34), the Investigating Officer that on the disclosure statements made by the accused under Section 27 of the Indian Evidence Act, 1872 and at their instances, he had recovered the stolen articles, alleged gun, revolver, pellets, scooter and an ambassador car used by the appellants at the time of committing dacoity. He also faced grilled cross-examination at length, but nothing came out from his statement which may enable us to draw an adverse inference against the prosecution.

9. The post-mortem report of Smt. Anita Yadav and Gopal Nepali stood proved by Dr. Jitendra Bundel (PW.21) who deposed that he had conducted the autopsy on the body of Smt. Anita Yadav and she had gun shot injuries, lot of pellets in her body, and that she died of excessive bleeding because of gun shot injuries. Similarly, he deposed that Gopal Nepali also died because of gun shot injuries. He also deposed that he had examined Kripa Dayal Yadav (PW.2) on 17.12.1996 and had found 7 simple injuries on his body which had been caused by a blunt weapon. The said injury had been caused within 12 hours of examination. Thus, he corroborated the injuries as well as the manner and the weapon with which such injuries were caused.

10. The recoveries made at the instances of the appellants stood proved by examining the panel witnesses, except in case of recovery made on disclosure statement of Ghurelal in respect of one gun of 12 bore live cartridges, one golden ear ring, one necklace of gold, one Iliayachi Dani made of silver,

one silver spoon and one silver bowl, as the two panch witnesses, namely, Sher Singh (PW.30) and Udaibir Singh (PW.31) turned hostile. Both the courts below have held that the recovery from Ghurelal, one of the accused, cannot be disbelieved merely because the panch witnesses turned hostile. We do not find any cogent reason to take a view contrary to the view taken by the two courts below.

11. Shri Altaf Hussain, learned counsel appearing for the appellants, had taken us through the entire evidence. He could not point out any material discrepancy in the statements of the witnesses which goes to the root of the case. Nor could he satisfy us how the judgment impugned requires any interference. We do not find any cogent reason to interfere with the concurrent findings of fact, recorded by the courts below. The appeal lacks merit and is accordingly dismissed.

12. It is evident from the record, particularly, the order dated 28.4.2006 that all the six appellants had already served 9 years of actual imprisonment and, thus, had been enlarged on bail by this Court. Thus, their bail bonds are cancelled and they are directed to surrender within a period of two weeks from today, failing which, the Chief Judicial Magistrate, Laxmangarh, Alwar, will take them into custody and send them to jail to serve out the remaining part of the sentence. A copy of the judgment and order be sent to the learned Chief Judicial Magistrate, Alwar, for compliance.

R.P. Appeal dismissed.

WAMAN & ORS.
v.
STATE OF MAHARASHTRA
(Criminal Appeal No. 364 of 2009)

JUNE 29, 2011

[P. SATHASIVAM AND A.K. PATNAIK, JJ.]

Penal Code, 1860:

ss. 302/149, 447/149, 147 and 148 – Conviction under – Long standing land and water dispute between parties – Comment passed by A1 on two victims resulting in quarrel between the parties – A2 to A13 armed with weapons rushed to the place of incident and assaulted the victims – Victims later succumbed to their injuries – Incident witnessed by PW 1 to 4 (family members of victims) – Accused arrested and weapons recovered at their instance – Conviction of A1 to A6 and A16 u/ss. 302/149, 447/149, 147 and 148 by courts below – Acquittal of the remaining accused – On appeal, held: Prosecution has established long standing land and water dispute among the deceased and the accused – Evidence of eye-witnesses PWs.1-4 (family members of victims) are acceptable – Contradictions are trivial in nature and not related to the major overt act attributed to each accused – Medical evidence corroborate the assertion of prosecution witnesses – Though no weapon was recovered from A-12, the evidence of PWs. 1-4, weapons seized from various accused, incised wounds on different body parts coupled with medical evidence clearly implicate A-12 also in the commission of murder – It is not the case of solitary blow but number of blows by various accused thus, the intention and knowledge to cause death has been amply demonstrated and proved – Thus, there is no error or infirmity or valid legal ground for interference in the order passed by the courts below – Evidence – Witnesses.

s. 149 – Nature of – When attracted – 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 – It must be within the knowledge of the other members as one likely to be committed in prosecution of common object – If members of the assembly knew or were aware of the likelihood of a particular offence being committed in prosecution of a common object, they would be liable for the same u/s. 149 – Criminal law – Common object.

Witnesses – Related witnesses – Credibility of – Held: Relationship is not a factor to affect the credibility of a witness – If the evidence of a witness is found to be consistent and true, the fact of he being a relative cannot discredit his evidence – Courts have to scrutinize the evidence of a related witness meticulously and carefully.

Criminal trial – Non-explanation of injuries sustained by deceased or injury on accused – Effect of, on prosecution case – Held: Ordinarily, the prosecution is not obliged to explain each minor injury on an accused even though caused in the course of occurrence, however, if the prosecution fails to explain a grievous injury on one of the accused persons, established to have been caused in the course of the same occurrence then the prosecution case is looked at with a little suspicion – If the evidence is clear, cogent and creditworthy then non-explanation of certain injuries sustained by the deceased or injury on the accused ipso facto cannot be the basis to discard the entire prosecution case.

According to the prosecution, there was a long standing land and water dispute between the parties. On the fateful day, 'AB', 'SB' and their family members (PW1, PW2 and PW3) were working in the fields and A1 was also present nearby. A1 passed a comment on 'SB' and 'AB' which resulted in a quarrel between them. Thereafter, A2 to A13 armed with weapons rushed to the

place of incident and assaulted 'SB and 'AB', and as a result 'SB' and 'AB' succumbed to their injuries. The accused persons were arrested and various weapons were recovered at their instance. The trial court acquitted A-7, A-9, A-10 and A-11 of the various offences punishable under the Penal Code. A-1 to A-6 and A-12 were convicted for the offences punishable under Sections 302/149, 447/149, 147 and 148 IPC and sentenced accordingly. However, A1 to A6 and A12 were acquitted of the offences punishable under Section 323/149 IPC. The trial of A-13, juvenile offender was forwarded to the juvenile court. A-8 died after framing of charge and trial against her got abated. Aggrieved, A-1 to A-6 and A-12 filed an appeal. The High Court dismissed the same. Therefore, the appellants filed the instant appeal.

Dismissing the appeal, the Court

HELD: 1. The prosecution has established long standing land and water dispute among the deceased and the accused, the evidence of eye-witnesses PWs.1-4 are acceptable, contradictions are trivial in nature and medical evidence corroborate the assertion of prosecution witnesses. All those materials were correctly analysed and accepted by the trial court and upheld by the High Court. On perusal of all the said materials, the conclusion are accepted. In those circumstances, interference by this Court under Article 136 is not warranted. There is no error or infirmity or valid legal ground for interference in the order passed by the courts below. [Para 30] [1095-D-F]

2.1 Merely because the witnesses are related to the complainant or the deceased, their evidence cannot be thrown out. If their evidence is found to be consistent and true, the fact of being a relative cannot by itself discredit their evidence. In other words, the relationship is not a factor to affect the credibility of a witness and the courts

have to scrutinize their evidence meticulously with a little care. [Para 12] [1085-C-D]

2.2 PW-1, wife of 'AB' and mother of 'SB'; PW-2, wife of 'SB' and daughter-in-law of PW-1; PW-3, daughter-in-law of 'AB' and PW-1; and PW-4, sister-in-law of PW-3 narrated how the incident took place. There is some variance in the testimony while describing particular weapon held by the persons and injuries on the body of the deceased. The testimony of these witnesses is convincing and trustworthy about the incident and there is no reason to disbelieve their statements. [Paras 13, 14, 15, 16 and 17] [1085-E; 1086-C, G; 1087-B-E-F]

Sarwan Singh and Ors. vs. *State of Punjab* **(1976) 4 SCC 369;** *Balraje alias Trimbak* vs. *State of Maharashtra* **(2010) 6 SCC 673: 2010 (6) SCR 764;** *Prahalad Patel* vs. *State of Madhya Pradesh* **(2011) 4 SCC 262;** *Israr vs. State of U.P.* **(2005) 9 SCC 616: 2004 (6) Suppl. SCR 695;** *S. Sudershan Reddy* vs. *State of A.P.* **(2006) 10 SCC 163;** *State of U.P.* vs. *Naresh and Ors.* **(2011) 4 SCC 324 – referred to.**

3. The evidence of all the witnesses-PWs-1 to 4 is corroborated by medical evidence. On the analysis of the statements of PWs 1 to 4 and the assertion of PW-7, doctor who conducted the autopsy on the body of deceased 'AB' and 'SB' as well as his explanation as to the nature of injuries with reference to the weapons used by the accused, it is held that the prosecution has established its charge that both the deceased died due to the injuries sustained in the incident. [Paras 18 and 21] [1087-G; 1090-D-E]

4.1 The statements of the prosecution witnesses are verified and considered with reference to the objection raised as regards the contradictions in the evidence of the prosecution witnesses. The contradictions are minor in nature and not related to the major overt act attributed

to each accused. These persons made statements to the police immediately after the occurrence, and their evidence was recorded before the court nearly after 1 year. Even otherwise, the prosecution witnesses all are hailing from agricultural family and are villagers. The minute details as stated in their earlier statements cannot be expected before the court. [Para 22] [1090-F-H; 1091-A-E]

4.2 It is clear that not all contradictions have to be thrown out from consideration but only those which go to the root of the matter are to be avoided or ignored. In the instant case, merely on the basis of minor contradictions about the use and nature of weapons, injuries, their statements cannot be ignored in toto. On the other hand, the conclusion of the trial court as upheld by the High Court about the acceptability of those witnesses, is concurred with. [Para 25] [1092-E-F]

Gurbachan Singh vs. Satpal Singh and Ors. **(1990) 1 SCC 445: 1989 (1) Suppl. SCR 292;** *Sohrab s/o Beli Nayata and Anr. vs. The State of Madhya Pradesh* **(1972) 3 SCC 751: 1973 (1) SCR 472 – referred to.**

5.1 Ordinarily, the prosecution is not obliged to explain each injury on an accused even though the injuries might have been caused in the course of occurrence, if the injuries are minor in nature, however, if the prosecution fails to explain a grievous injury on one of the accused persons which is established to have been caused in the course of the same occurrence then certainly the court looks at the prosecution case with a little suspicion on the ground that the prosecution has suppressed the true version of the incident. However, if the evidence is clear, cogent and creditworthy then non-explanation of certain injuries sustained by the deceased or injury on the accused *ipso facto* cannot be the basis to discard the entire prosecution case. The statements

relating to evidence pertaining to injuries caused by the accused persons cannot be accepted. [Para 26] [1092-G-H; 1093-A-E]

5.2 The disclosure of the weapons by the accused persons were not duly proved as panchas turned hostile. The trial court and the High Court rightly discussed that the accused persons are cultivators and generally they carry with them axes, farshas, sticks, spears etc. In such circumstances, the entire evidence is to be considered together. [Para 27] [1093-E-F]

6.1 It is true that no weapon was recovered from A-12 but prosecution witnesses implicated him for causing fatal injuries along with the other accused persons. The prosecution witnesses have asserted that A-12 gave blow of iron pipe on 'AB'. The said iron pipe was recovered from the house of 'M' which also proved that A-12 had participated in the offence with such weapon and therefore, he was rightly punished along with other accused Nos. 1-6 under Section 148 for committing offence of rioting armed with deadly weapons. Furthermore, considering the evidence of PWs. 1-4, weapons seized from various accused, incised wounds on different body parts coupled with medical evidence clearly implicate A-12 also in the commission of murder. It is not the case of solitary blow but number of blows by various accused thus, the intention and knowledge to cause death has been amply demonstrated and proved. A12 was also charged under Section 149 as a member of unlawful assembly with the requisite common object and knowledge. Inasmuch as the prosecution evidence insofar as women accused are not cogent, their acquittal cannot be applied to A12 who was in the company of A-1 to A-6. Apart from conviction under Section 302, A12 was convicted under Section 149. [Paras 28 and 29] [1094-A-E]

6.2 Section 149 creates a specific offence and deals with punishment of the offence. Only thing whenever the court convicts any person or persons of any offence with the aid of Section 149, a clear finding regarding the common object of the assembly must be given and the evidence disclosed must show not only the nature of the common object but also that the object was unlawful. In order to attract Section 149 it must be shown that the incriminating act was done to accomplish the common object of unlawful assembly. It must be within the knowledge of the other members as one likely to be committed in prosecution of common object. If members of the assembly knew or were aware of the likelihood of a particular offence being committed in prosecution of a common object, they would be liable for the same under Section 149. [Para 29] [1094-D-H]

Case Law Reference:

(1976) 4 SCC 369	**Referred to.**	**Para 8**
2010 (6) SCR 764	**Referred to.**	**Para 9**
(2011) 4 SCC 262	**Referred to.**	**Para 10**
2004 (6) Suppl. SCR 695	**Referred to.**	**Para 10**
(2006) 10 SCC 163	**Referred to.**	**Para 10**
(2011) 4 SCC 324	**Referred to.**	**Para 11**
1989 (1) Suppl. SCR 292	**Referred to.**	**Para 23**
1973 (1) SCR 472	**Referred to.**	**Para 24**

CRIMINAL APPELALTE JURISDICTION : Criminal Appeal No. 364 of 2009.

From the Judgment & Order dated 15.3.2007 of the High Court of Judicature at Bombay, Nagpur Bench in Criminal Appeal No. 521 of 2002.

J.P. Dhanda, Amrendra Kumar Singh for the Appellants.

Dushyant Parashar, Asha G. Nair 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 15.03.2007 passed by the Division Bench of the High Court of Judicature at Bombay, Nagpur Bench, Nagpur in Criminal Appeal No. 521 of 2002 whereby the High Court dismissed the appeal of the appellants herein and confirmed the order dated 22.08.2002 passed by the Additional Sessions Judge, Gondiya convicting the accused persons under various Sections of Indian Penal Code (hereinafter referred to as "IPC").

2. **Brief facts:**

(a) On 29.10.2000 at about 12:30 p.m., Kamalabai Atmaram Bohare (PW-1), Kusmanbai Suresh Bohare (PW-2) and Pushpabai Ramesh Bohare (PW-3) were working in their fields situated at village Shivantola. At that time, Atmaram Bohare and Suresh Bohare (deceased persons) were also present there. Gowardhan (A-1) was also standing on the road side. Suresh Bohare and Atmaram Bohare after putting paddy at the threshing machine were coming back to their home. When they reached near the D.P. of electricity situated in the land of Kamalabai, Gowardhan (A-1) passed a comment on them and a quarrel between the parties took place. Immediately after starting of quarrel, A-2 to A-13 rushed there with weapons and started assaulting Suresh Bohare and Atmaram Bohare.

(b) Gowardhan (A-1) was having Farsha and he gave a blow of it on the leg of Suresh Bohare. Mahadeo(A-2) who possessed sword gave a blow of it on the leg of Suresh Bohare. Abhiman (A-3), who was having an axe in his hand gave a blow on the back of Suresh Bohare. Kalpanabai (A-11), gave a blow of spade on the head of Suresh Bohare. Pramilabai (A-10) who was having stick also beat Suresh with

it. At the same time, Manoj (A-5) and Waman (A-4) who were having axe in their hands, gave blows on the head of Atmaram. During this, Jaipal (A-6) and Kantabai (A-8) gave an axe blow and stick blow respectively to Atmaram. Shantabai (A-7) and Parvatabai (A-9) gave scissors blow on the mouth of Atmaram. Due to this sudden attack by the accused persons, Suresh Bohare and Atmaram Bohare sustained serious injuries and they fell down on the ground. On hearing the commotion, PWs 1-3 and one Sakhubai Rakhade (PW-4) rushed towards the place of incident. The accused persons fled away. Suresh and Atmaram were brought to home and were taken to Amagaon Hospital from where they were immediately shifted to KTS Hospital at Gondiya. The doctor on duty declared Suresh brought dead and after sometime Atmaram also died in the hospital. On the oral complaint of Kamlabai (PW-1), a case with FIR No. 183/2000 was registered on 29.10.2000 against 13 accused persons under Sections 147, 148, 302 r/w 149, 323 r/w 149 and 447 r/w 149 of IPC.

(c) During the course of investigation, the accused persons were arrested and various weapons were recovered at their instance. After completion of investigation, they were charge sheeted.

(d) After examining the witnesses, the Additional Sessions Judge, Gondiya vide his order dated 22.08.2002, acquitted A-7, A-9, A-10 and A-11 of the offences punishable under Sections 302, 447 and 323 r/w 149 of the IPC and Sections 147 and 148 of IPC and convicted A-1 to A-6 and A-12 for the offences punishable under Section 302 r/w 149 IPC and awarded life imprisonment with a fine of Rs. 1000/- in default to suffer rigorous imprisonment for one month. Each of them were also convicted for the offences punishable under Section 447 r/w 149 of IPC and were directed to suffer rigorous imprisonment for one month and to pay a fine of Rs. 200/- each in default to suffer rigorous imprisonment for 7 days. A-1 to A-6 and A-12 were also convicted under Sections 147 and 148

of IPC but acquitted of the offences punishable under Section 323 r/w 149 of IPC. A-13 being a juvenile offender, her trial was forwarded to the juvenile court. A-8 died after framing of charge and trial against her got abated.

(e) Aggrieved by the order dated 22.08.2002 of the trial Court, A-1 to A-6 and A-12 preferred an appeal before the Division Bench of the High Court of Judicature at Bombay. The Division Bench, by impugned judgment and order dated 15.03.2007, dismissed the appeal of the appellants and affirmed the order dated 22.08.2002 passed the Additional Sessions Judge, Gondiya.

(f) Aggrieved by the said decision, A-4 to A-6 and A-12 only filed this appeal by way of special leave petition before this Court.

3. Heard Mr. J.P. Dhanda, learned counsel for the appellants and Mr. Dushyant Parashar, learned counsel for the State.

4. *Submissions by the counsel:*

(a) After taking us through the entire prosecution case, defence of the accused and the materials placed, learned counsel for the appellants submitted that inasmuch as all the prosecution witnesses, particularly, eye-witnesses PWs. 1-4, who are female members of the family of the complainant and close relatives, the evidence of these related witnesses cannot be relied upon. He also submitted that the courts below committed an error in convicting the appellants mainly on the ground that the weapons of offence were recovered on their disclosure statements. He further pointed out that with the same allegations and similar circumstances, the women accused persons were acquitted by the trial Court and it is not justified in convicting the male accused based on the very same evidence. He also pointed out that in view of contradictions among the eye-witnesses, namely, PWs. 1-4, conviction based

on their evidence cannot be sustained. Finally he submitted that insofar as Dilip (A-12) is concerned, in the absence of recovery of any weapon from him which is also the finding of the trial Court convicting him for the offence under Section 302 along with other accused cannot be sustained.

(b) On the other hand, learned counsel for the State submitted that there is no bar in accepting the evidence of related witnesses. He pointed out that because of their relationship, courts have analysed their evidence carefully and meticulously and ultimately accepted their version. According to him, there is no contradiction in the evidence of PWs. 1-4, as alleged even otherwise, minor contradictions in their statement would not affect the ultimate conviction arrived at by the trial Court and affirmed by the High Court. He further pointed out that recovery of weapons and the medical evidence show that the prosecution has proved its case beyond reasonable doubt. Lastly, he submitted that inasmuch as two persons were murdered in the incident and after analyzing the entire materials the trial Court ultimately convicted the accused persons which was affirmed by the High Court, interference by this Court exercising jurisdiction under Article 136 is not warranted and it is not a fit case to interfere by this Court.

5. We have carefully considered the rival contentions and perused all the relevant materials.

Discussion:

6. The incident took place on 29.10.2000. The complainant and others were working in the field. At that time, Atmaram Bohare and Suresh Bohare (the deceased persons) were also in the field at the place of incident. At about 12:30 p.m., Govardhan (A-1) was standing on the road side and the deceased persons were going home. They had a long standing land and water dispute. On hearing something from A-1 all the other accused rushed there and started abusing and beating the two victims. According to the prosecution, all the accused

persons were armed with various weapons and they gave blows on the victims. Due to this incident, both Atmaram Bohare and Suresh Bohare sustained serious injuries and they fell down on the ground. According to the prosecution, the incident was witnessed by Kamlabai Bohare PW-1, Kusmanbai Bohare PW-2, Pushpabai Bohare PW-3 and Sakhubai Rakhade PW-4. PW-1 is wife of Atmaram Bohare (since deceased), PW-2 is wife of Suresh Bohare (since deceased), PW-3 is daughter-in-law of Atmaram Bohare, PW-4 though claimed as an independent witness, is sister-in-law of Pushpabai Bohare (PW-3). It is the case of the prosecution that all the above mentioned 4 persons (PWs 1-4) witnessed the occurrence of the incident. It is true that all 4 are related to the family of the deceased. Now, let us consider their evidence and acceptability which was relied on by the trial Court and affirmed by the High Court.

Evidence of relatives of complainant/deceased:

7. In view of the stand of the counsel for the appellants that since PWs 1-4, eye-witnesses are closely related to the deceased and complainant, conviction can not be based on such evidence, let us state the law on the admissibility/ acceptability or otherwise of their evidence as considered by this Court.

8. In *Sarwan Singh and Others vs. State of Punjab,* (1976) 4 SCC 369, a three-Judge Bench of this Court, while considering the evidence of interested witness held that it is not the law that the evidence of an interested witness should be equated with that of a tainted witness or that of an approver so as to require corroboration as a matter of necessity. The evidence of an interested witness does not suffer from any infirmity as such, but the courts require as a rule of prudence, not as a rule of law, that the evidence of such witnesses should be scrutinized with a little care. Once that approach is made and the court is satisfied that the evidence of the interested witness has a ring of truth such evidence could be relied upon

even without corroboration. The fact of being a relative cannot by itself discredit the evidence. In the said case, the witness relied on by the prosecution was the brother of the wife of the deceased and was living with the deceased for quite a few years. This Court held that "but that by itself is not a ground to discredit the testimony of this witness, if it is otherwise found to be consistent and true".

9. In *Balraje alias Trimbak vs. State of Maharashtra,* (2010) 6 SCC 673, this Court held that the mere fact that the witnesses were related to the deceased cannot be a ground to discard their evidence. It was further held that when the eye-witnesses are stated to be interested and inimically disposed towards the accused, it has to be noted that it would not be proper to conclude that they would shield the real culprit and rope in innocent persons. The truth or otherwise of the evidence has to be weighed pragmatically and the court would be required to analyze the evidence of related witnesses and those witnesses who are inimically disposed towards the accused. After saying so, this Court held that if after careful analysis and scrutiny of their evidence, the version given by the witnesses appears to be clear, cogent and credible, there is no reason to discard the same.

10. The same principles have been reiterated in *Prahalad Patel vs. State of Madhya Pradesh,* (2011) 4 SCC 262. In para 15, this Court held that "though PWs 2 and 7 are brothers of the deceased, relationship is not a factor to affect credibility of a witness. In a series of decisions this Court has accepted the above principle (vide *Israr vs. State of U.P.,* (2005) 9 SCC 616 and *S. Sudershan Reddy vs. State of A.P.,* (2006) 10 SCC 163)

11. The above principles have been once again reiterated in in *State of U.P. vs. Naresh & Ors.,* (2011) 4 SCC 324. Here again, this Court has emphasized that relationship cannot be a factor to affect the credibility of an witness. The following statement of law on this point is relevant:

"29. …. The evidence of a witness cannot be discarded solely on the ground of his relationship with the victim of the offence. The plea relating to relatives' evidence remains without any substance in case the evidence has credence and it can be relied upon. In such a case the defence has to lay foundation if plea of false implication is made and the Court has to analyse the evidence of related witnesses carefully to find out whether it is cogent and credible. [Vide *Jarnail Singh vs. State of Punjab* (2009) 9 SCC 719, *Vishnu & Ors. v. State of Rajasthan,* (2009) 10 SCC 477; and *Balraje @ Trimbak* (supra)]"

12. It is clear that merely because the witnesses are related to the complainant or the deceased, their evidence cannot be thrown out. If their evidence is found to be consistent and true, the fact of being a relative cannot by itself discredit their evidence. In other words, the relationship is not a factor to affect the credibility of a witness and the courts have to scrutinize their evidence meticulously with a little care.

Evidence of PWs 1-4:

13. Kamalabai (PW-1), wife of Atmaram and mother of Suresh has narrated how the incident took place one year back after Diwali. According to her, at about 9.00 a.m., she along with Kusumanbai, PW-2 and Pushpabai, PW-3 had gone to her field. At about 12.00 noon Atmaram and Suresh kept the 'Dhan' on threshing machine and they were coming back to their house for meal. At that time, Goverdhan A1 was standing on the road side and he told 'Dhavare' 'Aalera'. Goverdhan was holding Farsha and he gave its blow on the leg of Suresh. Mahadeo was holding sword, he gave its blow on the leg of Suresh. Abhiman gave an axe blow on the back of Suresh. Kalpana gave stick blow on the back of Suresh. Manoj gave axe blow on the head of Atmaram. Waman also gave axe blow on the head of Atmaram. Dilip gave blow of iron pipe to Atmaram. Jaipal gave axe blow to Atmaram. Kantabai beat Atmaram by stick. Shantabai and Parvatabai gave blow of

scissors on the mouth of Atmaram. She deposed that this incident took place in her field near D.P. of M.S.E.B. The place of occurrence was shown by her to the police. Even in the cross-examination, she reiterated the same. Though certain discrepancies were pointed out in her statement under Section 161 Cr.P.C. and her deposition before the Court, on going through the same, we are satisfied that she witnessed the occurrence and telling the truth.

14. Kusmanbai (PW-2), wife of Suresh Bohare and daughter-in-law of PW-1 reiterated what PW-1 deposed before the Court. She stated in her deposition that she noticed that Goverdhan beat Suresh with Farsha. Mahadeo gave a blow of sword to Suresh. Abhiman gave a blow of axe on the leg of Suresh. Kalpana gave a blow of the spade on the back of Suresh. Pramila and Mangala gave stick blows to Suresh. Waman also gave a blow of axe to Atmaram. Manoj gave an axe blow on the head of Atmaram. Dilip also gave a blow of pipe on the head of Atmaram. Jaipal gave an axe blow on the leg of Atmaram. Parvatabai gave a blow of scissors on the mouth of Atmaram. She asserted that she saw this incident from 30-40 feet and at that time she was cutting the crop in the field in which her house was situated. She also stated that Atmaram and Suresh were conscious till they were brought to their house. Here again, certain omissions in the statement recorded under Section 161 Cr.P.C. were pointed out. As stated to the evidence of PW-1, there is no material difference in the evidence of PW-2 merely because there is some omission in the statement under Section 161 Cr.P.C. and her evidence before the Court, there is no need to reject her testimony as claimed by the appellants.

15. Pushpa Bohare (PW-3), daughter-in-law of Atmaram and PW-1 also deposed in the same line as that of PWs 1 and 2. She also implicated the appellants and the role played by them as explained by PWs 1 and 2. She also specified various weapons used in the commission of offence and implicated all

the appellants including A12 who used iron pipe (Art.47). She asserted that she did inform the police that Dilip (A-12) gave a blow of iron pipe to Atmaram.

16. Sakhubai (PW-4), is sister-in-law of Pushpabai (PW-3). She also narrated that the incident had occurred around 12 noon. At that time, she was going towards her field. She heard a shout from the side of Goverment well as 'Dhawa Dhawa'. She noticed that fighting was going on in the field of Atmaram. She saw accused Nos. 1 to 6 and 12 were beating Suresh. Farsha and axes were used for the attack. Manoj (A-5) gave an axe blow to Atmaram. She also reiterated that all these persons beat Atmaram. She also affirmed that PW-1, wife of Atmaram and PWs 2 & 3, daughters-in-law of PW-1 were also present at the scene of occurrence. She asserted that she did inform the police that Manoj(A-5) beat Atmaram by axe. She also informed the police that Pramilabai was possessing spade and Manoj was possessing sword. Merely because these statements were not noted by the police, her deposition can not be rejected.

17. It is true that there is some variance in the testimony while describing particular weapon held by the persons and injuries on the body of the deceased. However, as rightly analyzed by the trial Court and accepted by the High Court, the testimony of these witnesses is convincing and trustworthy about the incident and there is no reason to disbelieve their statements as claimed by the learned counsel for the appellants.

18. **Medical Evidence**

It is important to note that the evidence of all these witnesses i.e. PWs-1 to 4 is corroborated by medical evidence. We have already noted that in the said incident, both Atmaram Bohare and Suresh Bohare died. Dr. Satish Humane, PW-7, Medical Officer, KTS Hospital, Gondiya conducted autopsy on the body of Suresh Bohare. He noted the following injuries on the body of Suresh Bohare in Ext.67

"(i) Deep incised wound – U/3rd (L) lateral side of thigh 4 ½" X 1" X MS. Deep (1/2")

(ii) Deep incised wound M/3rd (L) Leg. 4" X 1" X MS. Deep (1/2")

(iii) Deep incised wound L/3rd (L) Lateral side of leg. 5" X 1 ½" X MS Bone vs. deep i.e. Abs. with fracture BB L/3rd (L) Leg.

(iv) Inprint contusion (R) scapular region 3" X1".

(v) Inprint contusion (R) intra scapular region 2" X 1"

(vi) Abro-contusion (R) memory region ½" X ½"

(vii) Abro contusion U/3rd (L) F.A. 1" X ½"

(viii) Abrasion – (L) Elbow Jt. 1" X ½"

19. Dr. Satish Humane noted the following injuries on the body of Atmaram Bohare in Ext. 68

"(i) Incised wound – (R) Frontal region of Head 2 ½" X ¼" X bone deep.

(ii) Incised wound – (1) Frontal region of Head 2" X ¼" X bone deep.

(iii) Incised wound (L) parietal region of Head 2" X ¼" X scalp deep.

(iv) Incised wound 1/3rd (R) thigh 4" X ½" X MS Deep

(v) Incised wound L/3rd (L) thigh 4 ½" X ½" X MS Deep

(vi) Incised wound M/3 (R) Leg 2" X ½" X MS Deep

(vii) Incised wound – upper lip 2" X ½" X MS Deep

(viii) Incised wound – (L) Eyebrow 1 ½" X ½" X MS Deep

(ix) Contusion – (R) Parotid region 2 ½" X 2".

(x) Abrasions (B) Elbow Jt. 1 ½" X 1" each.

(xi) Fracture ® frontal & (L) frontal region of Head."

20. About the nature of injuries sustained by Suresh Bohare, Dr. Satish Humane (PW-7) has opined that he died due to haemorrhage and shock as a result of multiple injuries. His Post Mortem report is marked as Ext.67. Insofar as injuries of Atmaram, PW-7 has deposed that there was fracture of right frontal and left frontal region of the head. There were blood clots under right and left frontal region and left parietal region of head. There was a fracture of right and left frontal region and left pareito temporal region of skull, intra cranial haemorrhage present in brain, heart was empty, both lungs and other organs were intact and pale. There was no food material in the stomach. Injury Nos. 1 to 8 may be caused by hard and sharp object and 9 & 10 may be caused by hard and blunt object. In his opinion, the said injuries were caused within 18-30 hours before Post Mortem examination and according to him, Atmaram Bohare died due to haemorrhage and shock as a result of head injury. His Post Mortem report has been marked as Ext. 68. He also explained to the Court that injury on the head of Atmaram Bohare was fatal and sufficient to cause instantaneous death. He further explained that injury Nos. 1, 2

and 3 coupled with fracture on leg on the person of Suresh Bohare were sufficient to cause instantaneous death. Though an argument was advanced from the side of the appellants that the deceased Suresh Bohare had sustained injuries only on thighs and legs which are not fatal parts of the body, Dr. Satish Humane (PW-7) has explained before the Court during his cross-examination that there was cutting of major vessels and those injuries were life fatalling. He further deposed that after cutting of major blood vessels, the person may die within 15 to 30 minutes. He also reiterated and asserted that injury Nos. 1, 2 and 3 on person of Suresh Bohare are collectively sufficient to cause death.

21. The analysis of the statements of PWs 1 to 4 and the assertion of Dr. Satish Humane, PW-7 who conducted the autopsy on the body of deceased Atmaram Bohare and Suresh Bohare as well as his explanation as to the nature of injuries with reference to the weapons used by the accused, we hold that the prosecution has established its charge that both the deceased died due to the injuries sustained in the incident. We accept the prosecution case and agree with the conclusion arrived at by the trial Court as affirmed by the High Court.

Contradictions in the evidence of PWs

22. Let us consider the argument of the appellants as to contradictions in the evidence of prosecution witnesses. According to the counsel for the appellants, the prosecution witnesses were not consistent with the statements as to the weapons used by the accused persons. He also pointed out that after the statements were recorded under Section 161 Cr.P.C. before the police, they improved their version before the court. On these grounds, the counsel for the appellants submitted that no reliance need be given to those witnesses and courts below have committed an error in considering this aspect. We have already adverted to the statements of PWs., particularly, eye-witnesses PWs. 1-4 as to the narration of the

incident, overt act of each of the accused persons, weapons handled, injuries sustained by both the deceased Suresh Bohare and Atmaram Bohare as well as medical evidence by Dr. Satish Humane (PW-7) and post-mortem reports marked as Exs. 67 and 68. In fact, the very same objection was raised before the trial Court and the High Court and while considering the said objection both the courts analysed their evidence in detail. We also verified and considered their statements with reference to the objection raised by the counsel for the appellants. First of all, the contradictions are minor in nature and not related to the major overt act attributed to each accused. It is relevant to point out that these persons made statements to the police immediately after the occurrence, i.e., on 29.10.2000 and their evidence was recorded before the court in the month of December 2001 nearly after 1 year. Even otherwise, the prosecution witnesses all are hailing from agricultural family and are villagers, we cannot expect minute details as stated in their earlier statements and before the court. In this regard, it is useful to refer various decisions rendered by this Court as to the minor contradictions in the statements of prosecution witnesses and the admissibility of the same.

23. In *Gurbachan Singh vs. Satpal Singh & Ors.* (1990) 1 SCC 445, this Court has held that despite minor contradictions in the statements of prosecution witnesses, the prosecution case therein has not shaken and ultimately accepting their statement set aside the order of acquittal passed by the High Court and restored the sentence imposed upon them by the trial Court.

24. In *Sohrab s/o Beli Nayata and Anr. vs. The State of Madhya Pradesh* (1972) 3 SCC 751 about minor contradictions in the statements of prosecution witnesses, Their Lordships have held in paragraph 8 as under:

> "…..It appears to us that merely because there have been discrepancies and contradictions in the evidence of some

> or all of the witnesses does not mean that the entire evidence of the prosecution has to be discarded. It is only after exercising caution and care and sifting the evidence to separate the truth from untruth, exaggeration, embellishments and improvement, the Court comes to the conclusion that what can be accepted implicates the appellants it will convict them. This Court has held that falseus in uno falsus in omnibus is not a sound rule for the reason that hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishments. In most cases, the witnesses when asked about details venture to give some answer, not necessarily true or relevant for fear that their evidence may not be accepted in respect of the main incident which they have witnessed but that is not to say that their evidence as to the salient features of the case after cautious scrutiny cannot be considered though where the substratum of the prosecution case or material part of the evidence is disbelievable it will not be permissible for the Court to reconstruct a story of its own out of the rest….."

25. It is clear that not all contradictions have to be thrown out from consideration but only those which go to the route of the matter are to be avoided or ignored. In the case on hand, as observed earlier, merely on the basis of minor contradictions about the use and nature of weapons, injuries, their statements cannot be ignored in toto. On the other hand, we agree with the conclusion of the trial Court as affirmed by the High Court about the acceptability of those witnesses, accordingly, we reject the claim of the appellants as to the same.

26. Ordinarily, the prosecution is not obliged to explain each injury on an accused even though the injuries might have been caused in the course of occurrence, if the injuries are minor in nature, however, if the prosecution fails to explain a grievous injury on one of the accused persons which is established to have been caused in the course of the same

occurrence then certainly the court looks at the prosecution case with a little suspicion on the ground that the prosecution has suppressed the true version of the incident. However, if the evidence is clear, cogent and creditworthy then non-explanation of certain injuries sustained by the deceased or injury on the accused ipso facto cannot be the basis to discard the entire prosecution case. In the earlier part of our order, we have adverted to the statement of Dr. Satish Humane who was examined as PW-7. He highlighted ante-mortem injuries suffered by Atmaram Bohare and Suresh Bohare. From his evidence, it is clear that there was fracture of right and left frontal region of the head of Atmaram Bohare. There were blood clots under right and left frontal region and left parietal region of the head. There was a fracture of right and left frontal region and left temporal region of skull. In the case of Suresh though it was argued that inasmuch as he sustained injuries on thighs and legs which are not vital parts of the body, the post-mortem doctor (PW-7) has explained before the court that there was cutting of the major vessels and expressed that those injuries were fatal to life. He further explained that after cutting of the major blood vessels a person may die within 15 to 30 minutes. In view of the same, we are unable to accept the statements relating to evidence pertaining to injuries caused by the accused persons.

27. It is true that the disclosure of the weapons by the accused persons were not duly proved as panchas turned hostile. As rightly discussed by the trial Court and the High Court that the accused persons are cultivators and generally they carry with them axes, farshas, sticks, spears etc. In such circumstances if we consider the entire evidence together, the defence plea is liable to be rejected.

Special reference to Dilip, A-12

28. Learned counsel for the appellants finally submitted that in the absence of recovery of any weapon from Dilip A-12 and

evidence relating to him is similar to female accused who were all acquitted, in fairness the courts could have acquitted A-12 also. On going through the materials placed, we are unable to accept the said contention. It is true that no weapon was recovered from A-12 but prosecution witnesses implicated him for causing fatal injuries along with the other accused persons. Considering the evidence of PWs. 1-4, weapons seized from various accused, incised wounds on different body parts coupled with medical evidence clearly implicate A-12 also in the commission of murder. It is not the case of solitary blow but number of blows by various accused hence the intention and knowledge to cause death has been amply demonstrated and proved.

29. Even otherwise, A-12 was also charged under Section 149 IPC as a member of unlawful assembly with the requisite common object and knowledge. Inasmuch as the prosecution evidence insofar as women accused are not cogent, their acquittal cannot be applied to A-12 who was in the company of A-1 to A-6. As mentioned above, apart from conviction under Section 302 Dilip A-12 was convicted under Section 149. Section 149 creates a specific offence and deals with punishment of the offence. Only thing whenever the court convicts any person or persons of any offence with the aid of Section 149, a clear finding regarding the common object of the assembly must be given and the evidence disclosed must show not only the nature of the common object but also that the object was unlawful. In order to attract Section 149 it must be shown that the incriminating act was done to accomplish the common object of unlawful assembly. It must be within the knowledge of the other members as one likely to be committed in prosecution of common object. If members of the assembly knew or were aware of the likelihood of a particular offence being committed in prosecution of a common object, they would be liable for the same under Section 149. The trial Judge on thorough analysis held that the prosecution has made out a case against the accused-appellants not only under Section

302 read with Section 149, the prosecution has very well established offences punishable under Section 147, 148 and the accused A-1 to A-6 including A-12 used force and violence being members of unlawful assembly in prosecution of common object of causing death of Suresh Bohare and Atmaram Bohare. The deadly weapons in their hands were axes, farshas, sticks, iron pipe etc. Though there is no recovery of weapon from Dilip A-12 but weapons have been recovered from other accused and prosecution witnesses have asserted that Dilip A-12 gave blow of iron pipe on Atmaram. The said iron pipe was recovered from the house of Mahadeo which also proved that A-12 had participated in the offence with such weapon and therefore he was rightly punished along with other accused Nos. 1-6 under Section 148 for committing offence of rioting armed with deadly weapons.

30. We are satisfied that the prosecution has established long standing land and water dispute among the deceased and the accused, the evidence of eye-witnesses PWs.1-4 are acceptable, contradictions are trivial in nature and medical evidence corroborate the assertion of prosecution witnesses. All those materials were correctly analysed and accepted by the trial Court and affirmed by the High Court. On perusal of all the above said materials, we agree with the said conclusion. In those circumstances, interference by this Court under Article 136 is not warranted. We do not find any error or infirmity or valid legal ground for interference in the order passed by the courts below, consequently, the appeal fails and the same is dismissed.

N.J. Appeal dismissed.

UNION OF INDIA AND ORS.
v.
VIKRAMBHAI MAGANBHAI CHAUDHARI
(Civil Appeal No. 2602 of 2006)

JULY 1, 2011

[P. SATHASIVAM AND A.K. PATNAIK, JJ.]

Service Law – Central Civil Services (Classification, Control and Appeal) Rules, 1965 – r.29 – Department of Posts – Disciplinary proceedings against respondent-Postal Assistant – Punishment imposed – Chief Post Master General vide notification dated 29.05.2001 took up the case of the respondent for review u/r.29(1)(vi) – Review proceedings challenged – Tribunal quashed notification dt. 29.05.2001 on the ground that it did not specify any time limit for review – Justification of – Held: Justified – Inasmuch as the Notification dated 29.05.2001 did not specify any time limit within which power under r.29(1)(vi) was exercisable by the authority specified, such Notification was not in terms with r.29 and the Tribunal was fully justified in quashing the same.

The respondent, a M.O. Postal Assistant in the Department of Posts, disobeyed the orders of his superiors by refusing to accept M.O. forms. Departmental action was initiated against the respondent and he was suspended by an order of the Superintendent of Post Office. However, later, the suspension order of the respondent was revoked and disciplinary action was initiated against him under Rule 16 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 whereupon the disciplinary authority awarded punishment of 'Censure' to the respondent.

Subsequently, the Chief Post Master General vide notification dated 29.05.2001 took up the case of the

respondent for review under Rule 29(1)(vi) of the Rules and directed the Superintendent of Post Office to initiate disciplinary proceedings against the respondent under rule 14 of the Rules. Challenging the review proceedings, the respondent filed application before the tribunal. The Tribunal allowed the application and also quashed the notification dated 29.05.2001 on the ground that it did not specify any time limit for review. The order was upheld by the High Court. Hence the instant appeal.

Dismissing the appeal, the Court

HELD:1. The contention raised by the ASG, that there is no need to specify the period in the Notification authorizing concerned authority to call for the record for any enquiry and revise any order made under the Rules, cannot be accepted. [Para 6] [1102-G]

2. Rule 29(1) of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 indicates 6 categories of revisional authorities. While no period is mentioned in sub-clauses (i) to (iv) of Rule 29(1), sub-Clause (v) refers to a period of six months from the date of order proposed to be revised in cases where the appellate authority seeks to review the order of the disciplinary authority. On the other hand, Clause (vi) confers similar powers on such other authorities which may be specified in that behalf by the President by a general or special order and the said authority has to commence the proceedings within the time prescribed therein. Even though Rule 29(1)(vi) provides that such order shall also specify the time within which the power should be exercised, the fact remains that no time limit has been prescribed in the Notification. The argument that even in the absence of specific period in the Notification in view of Clause (v), the other authority can also exercise such power cannot be accepted. To put it clear, sub-Clause (v) applies to appellate authority and Clause

(vi) to any other authority specified by the President by a general or special order for exercising power by the said authority under sub-Clause (vi). There must be specified period and the power can be exercised only within the period so prescribed. [Paras 6, 7] [1102-E-H; 1103-A-D]

3. Inasmuch as the Notification dated 29.05.2001 has not specified any time limit within which power under Rule 29(1)(vi) is exercisable by the authority specified, such Notification is not in terms with Rule 29 and the Tribunal is fully justified in quashing the same. The High Court has also rightly confirmed the said conclusion by dismissing the Special Application of the appellants and quashing the Notification on the ground that it did not specify the time limit. [Para 8] [1103-E-F]

CIVIL APPELALTE JURISDICTION : Civil Appeal No. 2602 of 2006.

From the Judgment & Order dated 12.8.2005 of the High Court of Gujarat at Ahmedabad in Special Civil Application No. 16575 of 2005.

A.S. Chandhiok, ASG, S. Wasim A Quadri, Neha Rastogi, Saima Bakshi, A.K. Sharma, V.K. Verma for the Appellants.

Vishwajit Singh for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. This appeal by Union of India is directed against the final judgment and order dated 12.08.2005 passed by the High Court of Gujarat at Ahmedabad in Special Civil Application No. 16575 of 2005 whereby the High Court dismissed the application of the appellants herein upholding the order of the Central Administrative Tribunal (in short 'the Tribunal') in O.A. No. 333 of 2004 wherein the Tribunal by its order dated 20.04.2005 had quashed and set aside

Notification No. C-11011/1/2001-VP dated 29.05.2001.

2. **Brief facts:**

(a) On 08.06.2000, Vikrambhai Maganbhai Chaudhari, the respondent herein, while working as M.O. Postal Assistant, Bardoli, refused to accept M.O. forms along with the amounts tendered by Shri P.N. Singh, Shri H.K. Tiwari and Shri R.C. Pande for booking of money orders. Later, Mr. K.H. Gamit, Assistant Post Master, Bardoli and his immediate supervisor instructed him to accept the above said Money Orders in writing through office order book but the respondent did not obey the orders. Accordingly, departmental action was initiated against him and he was suspended by order of Superintendent of Post Office, Bardoli vide Memo No. B-1/PF/VMC/2000.

(b) However, on 23.06.2000, the suspension order of the respondent was revoked and disciplinary action was initiated against the respondent under Rule 16 of Central Civil Services (Classification, Control and Appeal) Rules, 1965 (hereinafter referred to as "the Rules"). Vide Memo No. P1/4(2)/05/01-02 dated 17.10.2001, the disciplinary authority awarded punishment of 'Censure' to the respondent.

(c) Thereafter, the case was taken up for review by the Chief Post Master General, Ahmedabad under Rule 29 of the Rules and he directed the Superintendent of Post Office, Bardoli to initiate disciplinary proceedings against the respondent under Rule 14 of the Rules and on completion send the matter to him for further action. Accordingly, a notice was issued to the respondent.

(d) Challenging the proceedings, the respondent filed Original Application No. 333 of 2004 before the Tribunal, Ahmedabad Bench, Ahmedabad. By order dated 20.04.2005, the Tribunal allowed the application filed by the respondent. Aggrieved by the said order, the appellants herein filed Special Civil Application being No. 16575 of 2005 before the High

Court of Gujarat at Ahmedabad. The High Court, by impugned order, dismissed the application filed by the appellants herein. Aggrieved by the said order and judgment, the appellants herein have filed this appeal by way of special leave petition before this Court.

3. Heard Mr. A.S. Chandhiok, learned ASG for the appellants. Mr. Vishwajit Singh, learned counsel filed appearance on behalf of the respondent but none appeared at the time of hearing.

4. Mr. Chandhiok, learned ASG after taking us through Rule 29 of the Rules submitted that the Tribunal was not justified in quashing the Notification dated 29.05.2001 and the High Court has also committed an error in confirming the same. He further submitted that the High Court and the Tribunal ought to have appreciated that the Notification in question does not become bad merely because the time limit has not been provided and according to him, even though Rule 29(1)(vi) provides that such order shall also specify the time within which this power should be exercised in view of Clause (v) which provides six months' outer limit for reviewing the order, the ultimate conclusion of the Tribunal and the High Court cannot be sustained.

5. Inasmuch as the Tribunal and the High Court granted relief in favour of the respondent on the basis of the interpretation of Rule 29(1)(vi) and the Notification dated 29.05.2001, it is desirable to refer the same. The Notification reads as under:-

"Ministry of Communications
[Department of Posts]

New Delhi, the 29th May, 2001

NOTIFICATION

No. So….. In exercise of the powers conferred by Clause

(VI) of Sub Rule (1) of Rule 29 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965, the President hereby specifies that in the case of a government servant serving in the Department of Posts, for whom the appellate authority is subordinate to the authority designated as the Principal Chief Postmaster General or the Chief Postmaster General (other than the Chief Postmaster General of Senior Administrative Grade) of a Circle, the said Principal Chief Postmaster General or the said Chief Postmaster General, as the case may be, shall be the revising authority for the purpose of exercising the powers under the said Rule 29.

[No. C-11011/1/2001-VP]

Sd/-
[B.P. Sharma]
Director (VP)"

The relevant clauses of Rule 29 are as under:-

(1) Notwithstanding anything contained in these Rules.

(i) the President; or

(ii) The Comptroller and Auditor-General, in the case of a Government servant serving in the India Audit and Accounts Department; or

(iii) the Member (Personnel) Postal Services Board in the case of a Government Servant serving in or under the Postal Services Board and (Adviser (Human Resources Development), Department of Telecommunication) in the case of Government Servant serving in or under the Telecommunication Board); or

(iv) the Head of a Department directly under the Central Government in the case of a Government Servant serving in a department or office (not being the Secretariat or the

Posts and Telegraphs Board) under the control of such head of a Department; or

(v) the appellant authority, within six months of the date of order proposed to be (revised); or

(vi) any other authority specified in this behalf by the President by a general or special order, and within such time as may be specified in such general or special order;

may at any time either on his or its own motion or otherwise call for the records of any inquiry and revise any order made under these rules…..

(2) No proceeding for revision shall be commenced until after

(i) the expiry of the period of limitation for an appeal, or

(ii) the disposal of the appeal, where any such appeal has been preferred."

6. As rightly observed by the Tribunal, the above sub-Rule (1) of Rule 29 indicates 6 categories of revisional authorities. If we go further it shows that while no period is mentioned in sub-clauses (i) to (iv), sub-Clause (v) refers to a period of six months from the date of order proposed to be revised. Since order was passed by exercising power under sub-Clause (vi), we have to see whether in the Notification specifying an authority a time limit has been mentioned or even in the absence of the same, the outer limit can be availed by exercising power under sub-Clause (v). According to learned ASG, there is no need to specify the period in the Notification authorizing concerned authority to call for the record for any enquiry and revise any order made under the Rules. We are unable to accept the said claim for the following reasons.

7. It is to be noted that in cases where the appellate authority seeks to review the order of the disciplinary authority,

the period fixed for the purpose is six months of the date of the order proposed to be revised. This is clear from sub-Clause (v) of sub-Rule 1 of Rule 29. On the other hand, Clause (vi) confers similar powers on such other authorities which may be specified in that behalf by the President by a general or special order and the said authority has to commence the proceedings within the time prescribed therein. Even though Rule 29(1)(vi) provides that such order shall also specify the time within which the power should be exercised, the fact remains that no time limit has been prescribed in the Notification. We have already pointed out that no period has been mentioned in the Notification. The argument that even in the absence of specific period in the Notification in view of Clause (v), the other authority can also exercise such power cannot be accepted. To put it clear, sub-Clause (v) applies to appellate authority and Clause (vi) to any other authority specified by the President by a general or special order for exercising power by the said authority under sub-Clause (vi). There must be specified period and the power can be exercised only within the period so prescribed.

8. Inasmuch as the Notification dated 29.05.2001 has not specified any time limit within which power under Rule 29(1)(vi) is exercisable by the authority specified, we are of the view that such Notification is not in terms with Rule 29 and the Tribunal is fully justified in quashing the same. The High Court has also rightly confirmed the said conclusion by dismissing the Special Application of the appellants and quashing the Notification on the ground that it did not specify the time limit. Consequently, the appeal fails and the same is dismissed. No order as to costs.

B.B.B. Appeal dismissed.

SUDAM @ RAHUL KANIRAM JADHAV

v.

STATE OF MAHARASHTRA

(Criminal Appeal Nos. 185-186 of 2011)

JULY 4, 2011

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

Penal Code, 1860: ss.302, 201 – Homicidal death – Death due to strangulation – Five deceased – Conviction based on circumstantial evidence – Appellant-accused living with the deceased woman as husband and wife, along with four children, two from her first husband and two from the appellant – By projecting himself to be single, appellant married another woman (PW-6) – When deceased woman discovered the illicit relationship of appellant and PW-6, she agreed to pay Rs.15000 to PW-6 to leave appellant – Appellant, thereafter, came back with the deceased woman and children to his village – After two days, the dead bodies of the deceased woman and children found in the village pond – Relying on circumstantial evidence, trial court convicted the appellant u/ss.302 and 201 and awarded death sentence – High Court confirmed conviction and death sentence – On appeal, held: All the deceased met homicidal death – The evidence of mother of deceased and PW.6 showed that deceased and four children were last seen alive with the appellant two days prior to recovery of dead bodies – Appellant had also made extra-judicial confession before PW.6 that he committed murder on account of the harassment meted out to him by his wife – The circumstances led to one and the only conclusion that the appellant had committed the murder of all the five persons – Accordingly conviction of appellant upheld – As regards sentence, the appellant killed the woman with whom he lived as husband

and wife, a woman who was in deep love with him and willing to pay Rs.15,000/- to PW.6 to save the relationship – The manner in which the crime was committed clearly showed it to be premeditated and well planned – He not only killed the deceased but crushed her head to avoid identification – Killing four children, tying the dead bodies in bundles of two each and throwing them in the Pond would not have been possible, had the appellant not meticulously planned the murders – It showed that the crime was committed in a beastly, extremely brutal, barbaric and grotesque manner – The offence resulted into intense and extreme indignation of the community and shocked the collective conscience of the society – The case in hand fell in the category of the rarest of the rare cases and the trial court did not err in awarding the death sentence and the High court in confirming the same – Sentence/ Sentencing.

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

The prosecution case was that the victim (deceased-woman) was living with the appellant as his wife. The

deceased-woman had two children from her first marriage and two children from her marriage to the appellant. The deceased-woman came to know about the illicit relationship of the appellant with PW-6. Thereafter, the appellant, PW-6 and the deceased-woman had serious dispute over the issue. The appellant orally agreed to divorce Pw-6 and pay Rs. 15,000/- to her. The said amount was agreed to be paid by deceased-woman. Thereafter, PW-6 went back to her village. The deceased-woman and her children came back with the appellant. After two days, the dead body of the deceased-woman and her four children were found floating in the village pond.

The trial court held that the circumstances clearly led to the only conclusion that the appellant had committed the murder of the four children and the deceased-woman and in order to cause disappearance of evidence of murder threw the dead bodies in the pond and convicted the appellant under Sections 302 and 201 IPC and awarded the death sentence. On appeal, the High Court concurred with the findings of the trial court and confirmed the conviction and the death sentence. The instant appeal was filed challenging the order of conviction and sentence.

Dismissing the appeal, the Court

HELD: 1.1. All the deceased met homicidal death. P.W.10 who had conducted the post mortem of the dead bodies of the four children clearly stated in his evidence that all the four children died of asphyxia due to throttling. P.W.4 who conducted post-mortem examination of deceased (victim-woman) opined that she died of asphyxia due to strangulation. In view of that there was no doubt that all the five deceased met homicidal death. [Para 6] [1111-D-E]

1.2. The evidence of PW.5, the mother of the deceased and PW.6 was to the effect that the deceased-woman along with the four children was living with the appellant. The appellant married PW.6 projecting himself to be single and the protest made by the deceased led to the divorce. The evidence of these witnesses and PW.8 showed that the deceased and four children were last seen alive with the appellant two days prior to the incident when the dead bodies of the four children were found floating in the Pond and of the deceased under a boulder. The appellant had also made extra-judicial confession before PW.6 and PW.9. He confessed to have committed the murder on account of the harassment meted out to him by his wife. The evidence of the said witnesses showed that the appellant had motive to commit the crime, was last seen with the deceased and had made extra-judicial confession before the two witnesses PW.6 and PW.9, admitting the commission of crime. Further, he absconded and he was unable to explain how the woman with whom he was living as husband and wife and the children met the homicidal death. To bring home the guilt on the basis of the circumstantial evidence, the prosecution has to establish that the circumstances proved lead to one and the only conclusion towards the guilt of the accused. In a case based on circumstantial evidence, the circumstances from which an inference of guilt is sought to be drawn are to be cogently and firmly established. The circumstances so proved must unerringly point towards the guilt of the accused. It should form a chain so complete that there is no escape from the conclusion that the crime was committed by the accused and none else. It has to be considered within all human probability and not in fanciful manner. In order to sustain conviction, circumstantial evidence must be complete and must point towards the guilt of the accused. Such evidence should not only be consistent with the guilt of the accused but

inconsistent with his innocence. The circumstances, lead to one and the only conclusion that the appellant had committed the murder of all the five persons. Accordingly the conviction of appellant is upheld. [Para 13] [1113-E-H; 1114-A-D]

2. The appellant had chosen to kill the woman with whom he lived as husband and wife, a woman who was in deep love with him and willing to pay Rs.15,000/- to PW.6 to save the relationship. Appellant had not only killed the two children of the deceased who were born from the first husband but also killed his own two children. He projected himself to be single and changed his name to dupe a woman and in fact succeeded in marrying her. However, when the truth came to light, he killed five persons. The manner in which the crime was committed clearly showed it to be premeditated and well planned. It seemed that all the four children and the woman were brought near the Pond in planned manner, strangulated to death and dead bodies of the children thrown in the pond to conceal the crime. He not only killed the deceased but crushed her head to avoid identification. Killing four children, tying the dead bodies in bundles of two each and throwing them in the Pond would not have been possible, had the appellant not meticulously planned the murders. It showed that the crime has been committed in a beastly, extremely brutal, barbaric and grotesque manner. It resulted into intense and extreme indignation of the community and shocked the collective conscience of the society. The appellant is a menace to the society who cannot be reformed. Lesser punishment shall be fraught with danger as it may expose the society to peril once again at the hands of the appellant. The case in hand fell in the category of the rarest of the rare cases and the trial court did not err in awarding the death sentence and the High court in confirming the same. [Para 14] [1114-F-H; 1115-A-D]

CRIMINAL APPELALTE JURISDICTION : Criminal Appeal No. 185-186 of 2011.

From the Judgment & Order dated 22.4.2009 of the High Court of Judicature at Bombay Aurangabad Bench in Confirmation Case No. 1 of 2009 and Criminal Appeal No. 128 of 2009.

Manoj Prasad, Sadashiv Gupta, Ajay Kr. Chaudhary for the Appellant.

Sushil Karanjakar, Sachin J. Patil, Sanjay Kharde, Asha Gopalan Nair for the Respondent.

The Judgment of the Court was delivered by

CHANDRAMAULI KR. PRASAD, J. 1. Appellant, an accused held guilty of committing the murder of four children and a woman with whom he was living as husband and wife and sentenced to death is before us with the leave of the Court.

2. Residents of Rupla Naik Tanda, a remote village in District Nanded in the State of Maharashtra were horrified when few of its natives found four dead bodies floating in the village pond in the morning of 21st August, 2007. A male child of six years alongwith a female child of ten years and another female child of ten years alongwith a male child of two to four years were tied separately. P.W.1 Yashwant Jadhav, Inspector of Rupla Naik Tanda outpost came to know about the presence of dead-bodies in the pond through a villager and reached there at 8.00 A.M. There besides the aforesaid dead-bodies, he found the body of an unidentified woman with Mangalsutra on her neck below a boulder. He accordingly informed the Mahur Police Station and on that basis crime under Section 302 and 201 of the Indian Penal Code was registered and the investigation was entrusted to the Police Inspector Parmeshwar Munde (P.W.14). He went to the spot took out the dead bodies from the Pond and prepared the inquest reports. During the

course of investigation, Maroti Madavi identified the dead body of the woman to be his daughter, Anita and the two children of deceased Anita born to her from the first husband and two children from the appellant herein. Search was made to apprehend the appellant but he was not found till 24th August, 2007. During the course of investigation, it further transpired that the deceased Anita who was living with the appellant as his wife had come to know about his illicit relationship with P.W.6, Muktabai. The deceased used to protest the said relationship. This relationship led to serious dispute amongst deceased Anita, Muktabai and the appellant. Appellant orally divorced Muktabai and agreed to pay Rs.15,000/- to her. It was the deceased Anita who promised to pay the amount. Thereafter, Muktabai went to her village and the appellant the deceased Anita and the four children came to Juna Pani where because of the strained relationship, appellant committed the murder of Anita and the four children.

3. Police after usual investigation submitted the charge-sheet under Section 201 and 302 of the Indian Penal Code and the appellant was ultimately committed to the Court of Session to face the trial. Appellant denied to have committed any offence and claimed to be tried.

4. In order to bring home the charge the prosecution has altogether examined 14 witnesses besides a large number of documents have been exhibited. There is no eye-witness to the occurrence and relying on the circumstantial evidence the trial court came to the conclusion that the circumstances proved clearly lead to one and the only conclusion that the appellant had committed the murder of the four children and Anita and in order to cause disappearance of evidence of murder threw the dead bodies in the Pond. For coming to the aforesaid conclusion, the trial court held that the appellant had motive to commit the crime and the five deceased were last seen in the company of the appellant. Further extra-judicial confessions given before PW.6, Muktabai and PW.9, Ishwar were reliable.

Failure to explain the circumstances under which all of them met homicidal death were taken into consideration to hold the Appellant guilty of the charge. Abscondence was another circumstance relied on by the trial court to hold the appellant guilty. The trial court awarded the death sentence. On appeal, the High Court concurred with the findings of the trial court and finding the case to be one amongst the rarest of the rare cases confirmed the death sentence.

5. We have heard Mr. Manoj Prasad, learned Counsel appearing for the appellant; whereas respondent-State is represented by Mr. Sushil Karanjakar.

6. All the deceased met a homicidal death has not been questioned before us. Dr. Bandiwan (P.W.10) who had conducted the post mortem of the dead bodies of the four children has clearly stated in his evidence that all the four children died of asphyxia due to throttling. Dr. Bhosale (P.W.4) who conducted post-mortem examination of deceased Anita in his evidence, has opined that she died of asphyxia due to strangulation. In view of this, we have no manner of doubt that all the five deceased met homicidal death.

7. Mr. Prasad, however, contends that the circumstantial evidence brought on record do not point out towards guilt of the appellant. Mr. Karanjakar, however, submits that the circumstances proved point towards the guilt of the appellant.

8. PW.5, Anusayabai is the mother of the deceased and she has stated in her evidence that her daughter Anita was earlier married to one Anil Gedam and they were blessed with two children. Because of differences, he deserted Anita and the deceased thereafter started residing with her. According to her evidence, Anita suddenly left her house with the children and she did not make any enquiry as she thought that she had gone to her husband's place. After few days, according to this witness she came to know that the deceased was not residing with her husband Anil but in fact residing with the appellant. She

went to the house of the appellant, saw the deceased along with her children residing there. According to her evidence when she came to know about the dead bodies of the children floating in the Pond she went there and identified the dead bodies. They were the two children of the deceased and her husband Anil, and other two children of the deceased and the appellant. She also found the dead body of her daughter Anita there.

9. PW.6, Muktabai has stated in her evidence that proposal for her marriage came on behalf of a person called Rahul and she was told that he is unmarried. Her evidence is that the prospective bridegroom came to her house and proposed to marry her claiming that he was single. After marriage, both of them resided at the village for eight to ten days and thereafter went to Karim Nagar and resided there for about a month. According to her evidence, she returned to her village along with her husband to attend the marriage of her cousin and while they were residing there the deceased Anita came there and informed her that the name of her husband is not Rahul but appellant Sudam and she had two children from him. Hearing this, the appellant fled away from there.

10. Muktabai has further deposed in her evidence that after some time the appellant came to her house and on being questioned, he disclosed that he was being harassed by the deceased Anita. Appellant further disclosed to this witness Muktabai that the two children were his from Anita. The deceased requested this witness to release the appellant, whereupon appellant undertook to maintain both PW.6, Muktabai and the deceased Anita but later refused to accept the aforesaid proposal. According to her, appellant orally divorced her and promised to give her Rs.15,000/-. Thereafter, according to this witness, Anita alongwith children went with the appellant. Few days thereafter, the Police came to her house and enquired the whereabouts of the appellant and the deceased. She was shown the photographs of four children and the deceased Anita. This witness has further stated that

after few days, appellant returned and on being asked, he disclosed that he had committed the murder of Anita and four children as Anita was harassing him.

11. PW.9, Ishwar had stated in his evidence that the appellant made an extra-judicial confession before him that he strangulated the four children and his first wife to death and threw their dead bodies in the Pond as he was being harassed by his first wife.

12. PW.8, Pralhad has stated in his evidence that on 19th August, 2007 when he was at his house the appellant along with his wife and four children came and asked for water. He has further stated in his evidence that he requested the appellant to stay back but he left the place along with his wife and four children and two to three days thereafter he came to know that he had killed his wife and the children.

13. Thus from the evidence of PW.5, Anusayabai the mother of the deceased and PW.6, Muktabai it is evident that the deceased Anita along with the four children were living with the appellant. The appellant had married PW.6, Muktabai projecting himself to be single and the protest made by the deceased led to the divorce. From the evidence of the aforesaid witnesses and further from the evidence of PW.8, Pralhad it is evident that Anita and four children were last seen alive with the appellant on 19th August, 2007. The dead bodies of the four children were found floating in the Pond and of Anita under a boulder on 21st August, 2007. Appellant has also made extra-judicial confession before PW.6, Muktabai and PW.9, Ishwar. He confessed to have committed the murder on account of the harassment meted out to him by his wife Anita. From the evidence of the aforesaid witnesses it is apparent that the appellant had motive to commit the crime, was last seen with the deceased and had made extra-judicial confession before the two witnesses PW.6, Muktabai and PW.9, Ishwar admitting the commission of crime. Further, he absconded and he is

unable to explain how the woman with whom he was living as husband and wife and the children met the homicidal death. In our opinion to bring home the guilt on the basis of the circumstantial evidence the prosecution has to establish that the circumstances proved lead to one and the only conclusion towards the guilt of the accused. In a case based on circumstantial evidence the circumstances from which an inference of guilt is sought to be drawn are to be cogently and firmly established. The circumstances so proved must unerringly point towards the guilt of the accused. It should form a chain so complete that there is no escape from the conclusion that the crime was committed by the accused and none else. It has to be considered within all human probability and not in fanciful manner. In order to sustain conviction circumstantial evidence must be complete and must point towards the guilt of the accused. Such evidence should not only be consistent with the guilt of the accused but inconsistent with his innocence. The circumstances referred to above, in our opinion lead to one and the only conclusion that the appellant had committed the murder of all the five persons. Accordingly we uphold his conviction.

14. Now we proceed to consider as to whether the case in hand fall in the category of rare of the rarest case. The appellant had chosen to kill the woman with whom he lived as husband and wife, a woman who was in deep love with him and willing to pay Rs.15,000/- to PW.6, Muktabai, to save the relationship. Appellant had not only killed the two children of the deceased who were born from the first husband but also killed his own two children. He projected himself to be single and changed his name to dupe a woman and in fact succeded in marrying her. However, when the truth came to light, he killed five persons. The manner in which the crime has been committed clearly shows it to be premeditated and well planned. It seems that all the four children and the woman were brought near the Pond in planned manner, strangulated to death and dead bodies of the children thrown in the pond to

conceal the crime. He not only killed Anita but crushed her head to avoid identification. Killing four children, tying the dead bodies in bundles of two each and throwing them in the Pond would not have been possible, had the appellant not meticulously planned the murders. It shows that the crime has been committed in a beastly, extremely brutal, barbaric and grotescue manner. It has resulted into intense and extreme indignation of the community and shocked the collective conscience of the society. We are of the opinion that the appellant is a menace to the society who cannot be reformed. Lesser punishment in our opinion shall be fraught with danger as it may expose the society to peril once again at the hands of the appellant. We are of the opinion that the case in hand falls in the category of the rarest of the rare cases and the trial court did not err in awarding the death sentence and the High court confirming the same.

15. In the result, we do not find any merit in these appeals and the same are dismissed accordingly.

D.G. Appeal dismissed.

M/S INTERGLOBE AVIATION LTD.

v.

N. SATCHIDANAND

(Civil Appeal No. 4925 of 2011)

JULY 4, 2011

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

Legal Services Authorities Act, 1987:

s.22-B – Permanent Lok Adalat for public utility services – Jurisdiction of – Air passenger – Ticket purchased at Hyderabad – Plane boarded at Delhi for Hyderabad – Delay in flight – After flight landed at Hyderabad, passenger detained for inquiry – Claim for damages by passenger for deficiency in service and alleged illegal detention – HELD: Permanent Lok Adalat, Hyderabad had jurisdiction to entertain the application of the passenger.

Jurisdiction of Permanent Lok Adalat – Exclusion clause in contract – Scope and interpretation of – HELD: Parties cannot, by agreement, confer jurisdiction on a court which does not have jurisdiction – Ouster of jurisdiction of some courts is permissible so long as the court on which exclusive jurisdiction is conferred had jurisdiction – In the instant case, as the clause provides that irrespective of the place of cause of action, only courts at Delhi would have jurisdiction, the said clause is invalid in law – Further, a clause ousting the jurisdiction of a court has to be construed strictly – Permanent Lok Adalat is a Special Tribunal and not a court – Interpretation of statutes.

ss.19 and 22-B – Lok Adalat constituted u/s 19 and Permanent Lok Adalat constituted u/s 22-B – Distinction between – Explained – Confusion in nomenclature clarified – HELD: Lok Adalats constituted u/s 19 on a regular or

permanent basis, may be referred to as 'Continuous Lok Adalats'.

Contract:

Airlines – e-ticketing – Conditions of carriage by reference – HELD: Placing the conditions of carriage on the web-site and referring to the same in the e-ticket and making copies of conditions of carriage available at the airport counters for inspection is sufficient notice in regard to the terms of conditions of the carriage and will bind the parties – The mere fact that a passenger may not read or may not demand a copy does not mean that he will not be bound by the terms of contract of carriage – Notice.

Carriage by Air Act, 1972:

Second Schedule – Clause 19 – Low cost carrier – Flight delayed after the passengers boarded the plane – Cancellation of flight and option given to passengers to continue the journey by the combined flight in the same aircraft – Passenger opted to avail the option – Combined flight also delayed – Application by passenger before Permanent Lok Adalat claiming damages for deficiency in service – HELD: Permanent Lok Adalat recorded a finding of fact that delay was due to dense fog/bad weather and want of ATC clearance due to air traffic congestion, which were beyond the control of the air carrier, and as a consequence, rightly held that the air carrier was not liable for payment of any compensation for the delay as such.

Liability of carrier to provide facilitation during delay – HELD: The issue of responsibility for delay in operating the flight is distinct and different from the responsibility of the airline to offer facilitation to the passengers grounded or struck on board due to delay – Even if no compensation is payable for the delay on account of bad weather or other conditions beyond the control of the air carrier, the airline will

be made liable to pay compensation if it fails to offer the minimum facilitation in the form of refreshment/water/ beverages, as also toilet facilities to the passengers who have boarded the plane, in the event of delay in departure, as such failure would amount to deficiency in service – In the instant case, though the claimant had to stay in the aircraft for 11 hours, it was because of his voluntary decision to take the later flight which was a combined flight and the delay in regard to combined flight was 4 hours 20 minutes – However, the airline served snacks and water two times – Further there was no complaint that toilet facilities were denied – Thus, the facilities offered by the carrier were reasonable and met the minimum facilitation as per DGCA guidelines applicable at the relevant point of time – Thus the airline was not liable to pay any damages – The order of the Permanent Lok Adalat affirmed by the High Court awarding damages and costs to the respondent is set aside and the application of respondent for compensation is rejected – Consumer fora and Permanent Lok Adalats can not award compensation merely because there was inconvenience or hardship or on grounds of sympathy , if there is no cause of action for claiming damages – Compensation – Cause of action.

Low cost carrier – Exclusion clause stipulating that in the event of flight delay, carrier would not provide any 'meals' – HELD: Such exclusion clause can apply to passengers who have not boarded the flight and who have the freedom to purchase food in the airport or the freedom to leave – It will not apply to passengers who are on board and the delay in the flight taking off, denies them access to food and water – Suggestion given to Airports and ATC authorities to allow passengers, who had boarded the aircraft, to get back to the airport lounge when there is delay in flight for a period beyond three hours.

The respondent, who was booked to travel on a 'low cost carrier', namely Indigo flight No.6E-301, from Delhi

to Hyderabad on 14.12.2007 scheduled to depart at 6.15 a.m., boarded the flight at around 5.45 a.m. Due to dense fog, bad weather and poor visibility at Delhi airport the flight was delayed. Around 11.15 a.m. an announcement was made that flight No. 6E-301 was cancelled and the passengers were given the options: (a) refund of air fare; or (b) credit for future travel on IndiGo; or (c) rebooking onto an alternative IndiGo flight at no additional cost. The respondent took the third option to continue the journey on the combined flight (flight no. 6E-305 scheduled to depart at 12.15 p.m.), by the same aircraft by remaining on board. Even the combined flight No.6E 305 could not take off on schedule, as the ATC did not give the clearance. Finally, the ATC clearance was given at 4.20 p.m. and the flight departed at 4.37 p.m. and reached Hyderabad around 7 p.m. The respondent and some other passengers were detained at the Hyderabad Airport for more than an hour in connection with an enquiry by the Security Personnel of IndiGo, in regard to a complaint by the on-board crew that they had threatened and misbehaved with the air hostesses when the flight was delayed.

The respondent filed a complaint against the appellant-Airlines at Hyderabad before the Permanent Lok Adalat for Public Utility Services, claiming a compensation of Rs. 5 lakh for the delay, deficiency in service, failure to provide him medical facilities, as he was diabetic and hyper tension patient and for illegal detention from 7.00 p.m. to 8.30 p.m. at Hyderabad Airport. The airline resisted the claim contending, inter alia, that the Permanent Lok Adalat at Hyderabad had no jurisdiction to entertain the complaint, as having regard to the jurisdiction clause in the contract of carriage, only the courts at Delhi had jurisdiction; that the delay was because of the factors which were beyond the control of the airlines, and was not on account of any negligence

or want of care or deficiency in service on its part; that the respondent did not disclose his ailments; that the flight being operated by a low cost carrier, the airline did not have any provision to serve any food or beverages; in spite of it, arrangements were made for supply of free snacks and water.

The Permanent Lok Adalat, by award dated 18.9.2009 held that it had territorial jurisdiction. It further held that the delay was due to poor visibility and bad weather conditions, reasons beyond the control of the appellant, but there was laxity and deficiency in service on the part of the appellant. Consequently, it awarded Rs.10,000/- as compensation and Rs.2,500/- as costs. The Permanent Lok Adalat did not examine the issue of wrongful confinement. The writ petition of the airline was dismissed by the High.

Allowing the appeal filed by the airline, the Court

HELD:

Jurisdiction of Permanent Lok Adalat:

1.1. The dispute was with reference to a contract of carriage of a passenger from Delhi to Hyderabad. The ticket was purchased at Hyderabad and, consequently, the contract was entered into at Hyderabad. A part of the cause of action also arose at Hyderabad as the respondent clearly alleged as one of the causes for claiming compensation, his illegal detention at the Hyderabad Airport by the security staff of the appellant when the flight landed. Therefore, the courts and tribunals at Hyderabad had jurisdiction to entertain the claims/ disputes. Section 22B of the Legal Services Authorities Act, 1987 (LSA Act) provides that Permanent Lok Adalats shall be established for exercising jurisdiction in respect of one or more public utility services for such areas as

may be specified in the notification. It is not disputed that the Permanent Lok Adalat for public utility services, Hyderabad was constituted for the area of Hyderabad and transport services by way of carriage of passengers by air is a public utility service. Therefore, the *Permanent Lok Adalat* at Hyderabad had jurisdiction to entertain the application against the appellant. [para 17] [1143-F-H; 1144-A-B]

1.2. The finding of the High Court that the term relating to exclusive jurisdiction should be ignored on the ground that the passengers would not have read it, cannot be endorsed. The fact that the conditions of carriage contain the exclusive jurisdiction clause is not disputed. The e-tickets do not contain the complete conditions of carriage but incorporate the conditions of carriage by reference. The interested passengers can ask the airline for a copy of the contract of carriage or visit the web-site and ascertain the same. Placing the conditions of carriage on the web-site and referring to the same in the e-ticket and making copies of conditions of carriage available at the airport counters for inspection is sufficient notice in regard to the terms of conditions of the carriage and will bind the parties. The mere fact that a passenger may not read or may not demand a copy does not mean that he will not be bound by the terms of contract of carriage. [para 18] [1144-C-G]

1.3. It is well settled that the parties cannot by agreement confer jurisdiction on a court which does not have jurisdiction; and that only where two or more courts have the jurisdiction to try a suit or proceeding, an agreement that the disputes shall be tried in one of such courts is not contrary to public policy. The ouster of jurisdiction of some courts is permissible so long as the court on which exclusive jurisdiction is conferred, had jurisdiction. In the instant case, the 'exclusive jurisdiction

clause', contained in the Indigo Conditions of Carriage, i.e. "All disputes shall be subject to the jurisdiction of the courts of Delhi only." is made applicable to all contracts of carriage with the appellant, relating to passengers, baggage or cargo anywhere in the country, irrespective of whether any part of the cause of action arose at Delhi or not. If the clause had been made to apply only where a part of cause of action accrued in Delhi, it would have been valid. But as the clause provides that irrespective of the place of cause of action, only courts at Delhi would have jurisdiction, the said clause is invalid in law, having regard to the principle laid down in *ABC Laminart*. The fact that in the instant case, the place of embarkation happened to be Delhi, would not validate a clause, which is invalid. [para 14-15] [1139-G-H; 1140-A-B; 1141-B-G]

ABC Laminart v. A.P. Agencies **1989 (2) SCR 1 = 1989 (2) SCC 163 – relied on**

1.4. Further, a clause ousting the jurisdiction of a court, which otherwise would have jurisdiction will have to be construed strictly. In the instant case, the relevant clause provides that all disputes shall be subject to the jurisdiction of the *courts at Delhi* only. But the respondent did not approach a "court". The claim was filed by the respondent before a *Permanent Lok Adalat* constituted under Chapter VI-A of the Legal Services Authorities Act, 1987 ('LSA Act'). The *Permanent Lok Adalat* is a Special Tribunal which is not a 'court' and, as such, the provision in the contract relating to exclusivity of jurisdiction of courts at Delhi will not apply. [para 16] [1141-H; 1142-A-B; 1143-D]

1.5. The confusion caused on account of the term *Permanent Lok Adalat* being used to describe two different types of Lok Adalats. The LSA Act refers to two types of Lok Adalats needs to be removed. The first is a *Lok Adalat* constituted u/s. 19 of the Act which has no

adjudicatory functions or powers and which discharges purely conciliatory functions. The second is a *Permanent Lok Adalat* established u/s. 22B(1) of LSA Act to exercise jurisdiction in respect of public utility services, having both conciliatory and adjudicatory functions. The word *Permanent Lok Adalat* should refer only to *Permanent Lok Adalats* established u/s. 22B(1) of the LSA Act and not to the Lok Adalats constituted u/s. 19. However in many states, when Lok Adalats are constituted u/s. 19 of LSA Act for regular or continuous sittings (as contrasted from periodical sittings), they are also called as *Permanent Lok Adalats* even though they do not have adjudicatory functions. To avoid confusion, the State Legal Services Authorities and the High Courts may ensure that *Lok Adalats* other than the *Permanent Lok Adalats* established u/s. 22B(1) of the Act in regard to public utility services, are not described as Permanent Lok Adalats. One way of avoiding the confusion is to refer to the Lok Adalats constituted u/s. 19 of the Act on a regular or permanent basis as '*Continuous Lok Adalats*'. [para 19] [1144-H; 1145-A-G]

LIC of India vs. Suresh Kumar **- 2011 (4) SCALE 137 – referred to.**

Low cost carrier vis-à-vis full service carrier:

2.1. The appellant is a low cost carrier. The passengers, who prefer to travel on budget fares, when opting for low cost carriers know fully well that they cannot expect from such carriers, the services associated with full service carriers. But the fact that an airline is a low cost carrier does not mean that it can dilute the requirements relating to safety, security and maintenance. Nor can it refuse to comply with the minimum standards and requirements prescribed by the Director General of Civil Aviation. The fact that it offers only 'no- frills' service does not mean that it can absolve

itself from liability for negligence, want of care or deficiency in service. [para 20] [1145-H; 1146-A-E]

Liability for damages for delay:

3. Clause 19 of Second Schedule to Carriage by Air Act, 1972 makes it clear that the carrier is not liable for damage occasioned by delay in the carriage by air of passengers. Further, the IndiGo Conditions of Carriage categorically state that the carrier will not be liable to pay any damages for delays, rescheduling or cancellations due to circumstances beyond the control of IndiGo. There is no dispute that in the instant case, the delay was for reasons beyond the control of the carrier. The guidelines show that the operating air carrier would not be liable to pay compensation to a passenger, in respect of either cancellation or delays attributable to meteorological conditions (weather/fog etc.,) or air traffic control directions/instructions, which are beyond the control of the air carrier. The Permanent Lok Adalat recorded a finding of fact that delay was due to dense fog/ bad weather and want of ATC clearance due to air traffic congestion, which were beyond the control of the air carrier and as a consequence rightly held that the air carrier was not liable for payment of any compensation for the delay as such. This was the position as on the date of the incident (14.12.2007) and even subsequently, after the issue of the guidelines dated 6.8.2010 by the DGCA. [para 25] [1153-F-H; 1154-A-C]

Liability to provide facilitation during delay:

4.1. The issue of responsibility for delay in operating the flight is distinct and different from the responsibility of the airline to offer facilitation to the passengers grounded or struck on board due to delay. If the obligation to provide facilitation to the passengers is legally recognized, either based on statutory

requirements or contractual obligations or recognized conventions, failure to provide the required minimum facilitation may, depending upon the facts of the case, amount to either breach of statutory/contractual obligation, negligence, want of care or deficiency in service on the part of the operating airline entitling the passengers for compensation. [para 26] [1154-D-F]

4.2. As per the DGCA's guidelines dated 5.12.2007 which were in force on 14.12.2007 (the relevant date), there was obligation to provide facilitation to passengers on the part of the carrier. Clause 35 provided, if the flight is delayed, after boarding, appropriate facilitation has to be given by the Airlines on board. Clause 36 provides that the Airlines, even low cost carriers, had to provide facilitation in terms of tea/water/snacks to the passengers of their delayed flights. [para 27] [1154-G-H]

4.3. Facilitation of passengers who are stranded after boarding the aircraft on account of delays is an implied term of carriage of passengers, accepted as an international practice, apart from being a requirement to be fulfilled under DGCA's directives. Such facilitation which relates to the health, survival and safety of the passengers, is to be provided, not only by full service carriers, but all airlines including low cost carriers. This obligation has nothing to do with the issue of liability or non-liability to pay compensation to the passengers for the delay. Even if no compensation is payable for the delay on account of bad weather or other conditions beyond the control of the air carrier, the airline will be made liable to pay compensation if it fails to offer the minimum facilitation in the form of refreshment/water/ beverages, as also toilet facilities to the passengers who have boarded the plane, in the event of delay in departure, as such failure would amount to deficiency in service. At the relevant point of time (14th December 2007), in the

event of delay, passengers on-board were to be provided by the air carriers, including low cost carriers, facilitation by way of snacks/water/tea apart from access to toilet. [para 28] [1155-A-F]

Ravennet Singh Bagga vs. KLM Royal Duth Airlines **1999 (4) Suppl. SCR 320 = 2000 (1) SCC 66 – referred to.**

<u>Effect of Indigo Conditions of Carriage on the liability for facilitation:</u>

4.4. The exclusion clause no doubt states that in the event of flight delay, IndiGo would not provide any "meals". But it can apply to passengers who have not boarded the flight and who have the freedom to purchase food in the airport or the freedom to leave. It will not apply to passengers who are on board and the delay in the flight taking off, denies them access to food and water. In the extra-ordinary situation where the passengers are physically under the complete care and control of the airline, as it happens when they have boarded the aircraft and have no freedom to alight from the aircraft, the duty of the airlines to protect and care for them, and provide for basic facilitation including the care for the health , welfare and safety would prevail over any term of the contract excluding any facilitation (except where the carrier itself cannot access food due to emergency situations), and the exclusion clause in question stood superseded. (The DGCA directives in force from 15.8.2010 clearly provide that passengers shall be offered free of cost meals and refreshment in relation to the waiting time). This is with reference to the passengers on board, in delayed flights which have not taken off. Subject to any directives of DGCA to the contrary, the exclusion clause will be binding in normal conditions, that is, during the flight period, once the flight has taken off, or where the passenger has not boarded. [para 31] [1157-H; 1158-A-F]

What was the period of delay:

5. The respondent's complaint is about the inordinate delay of eleven hours after boarding. It is true that the respondent was confined to the aircraft for nearly eleven hours on account of the delay. But, the delay in a sense was not of 11 hours (from 5.35 a.m. to 4.37 p.m). The respondent first took flight No.6E-301 which was scheduled to depart at 6.15 a.m. and boarded that flight at 5.45 a.m. When that flight was unduly delayed on account of the bad weather around 11.15 a.m. the said flight was cancelled and was combined with subsequent flight No.6E-305 due to depart at 12.15 p.m. If the respondent continued to sit in the aircraft, it was because of his voluntary decision to take the later flight which was a combination of flight No.6E-301 and 6E-305 which was due to depart at 12.15 p.m. (subject to ATC clearance) and that was delayed till 4.37 p.m. Therefore, the delay in regard to the combined flight which was due for departure at 12.15 p.m. was four hours and twenty minutes. The stay of eleven hours in the aircraft was a voluntary decision of the respondent, as he could have left the aircraft much earlier around 11.00 a.m. by either opting to obtain refund of the air fare or by opting for credit for future travel or by opting for an IndiGo flight on a subsequent day. Having opted to remain on board the respondent could not make a grievance of the delay, or non-availability of food of his choice or medicines. [para 33] [1159-F-H; 1160-A-B]

Whether the airline failed to provide facilitation to respondent?

6.1. When flight No.6E-301 was cancelled and combined with the subsequent flight No.6E-305, the on-board passengers including the respondent who opted to continue in the flight were offered snacks (sandwiches) and water free of cost, around 12 noon. As the combined

flight (No.6E-305) was also delayed, a second free offer of sandwiches and water was made around 3 p.m. But the second time, the respondent was offered a chicken sandwich and as he was a vegetarian, he was offered biscuits and water, instead. In the absence of prior intimation about the preference in regard to food and in emergency conditions, the non-offer of a vegetarian sandwich in the second round of free snacks cannot be considered to be a violation of basic facilitation. In fact, the appellant being a low cost carrier, on the relevant date, there was also no occasion for indicating such preferences. It is not the case of the respondent that toilet facilities were denied or not made available. In the circumstances, the appellant being a low cost carrier, the facilitations offered by it, were reasonable and also met the minimum facilitation as per the DGCA guidelines applicable at the relevant point of time. [para 34-35] [1160-C-H; 1161-A-B]

6.2. The respondent had not notified the Airlines that he was a patient suffering from an ailment which required medication or treatment. There is nothing to show that the respondent requested for any treatment or medicines during the period when he was on board. [para 36] [1161-C]

7. As regards the respondent's detention at Hyderabad, neither the Permanent Lok Adalat, nor the High Court has recorded any finding of wrongful or vexatious detention or harassment. Therefore, the question of awarding compensation under this head also does not arise. [para 37] [1162-B-C]

Whether the appellant is liable to pay damages:

8.1. The Permanent Lok Adalat has rightly held that when there was an inordinate delay after completion of

boarding, the carrier should take steps to secure the permission of the Airport and ATC authorities to take back the passengers, who had already boarded, to the airport lounge when there was an inordinate delay. But the observation that failure to take the passengers to the airport lounge was unexcusable and unbecoming behaviour on the part of the airlines was not warranted on the facts and circumstances of the case. The admitted position in the case is that the airlines made efforts in that behalf, but permission was not granted to it to send back the passengers to the airport lounge, in view of the heavy congestion in the airport. The airport and the ATC authorities are not parties to the proceedings. If permission was not granted for the passengers to be taken to the airport lounge, the airlines cannot be found fault with. [para 38] [1162-D-H; 1163-A]

8.2. Where the delay is for reasons beyond the control of the airlines, as in the instant case, due to bad weather and want of clearance from ATC, in the absence of proof of negligence or deficiency in service the airlines cannot be held responsible for the inconvenience caused to the passengers on account of the delay. The justification for damages given by the High Court that as the appellant did not operate IndiGo flight No.6E-301 as per schedule and caused inconvenience to a passenger who was a diabetic patient, he was entitled to nominal damages for deficiency in service, does not find support either on facts or in law. The order of the Permanent Lok Adalat affirmed by the High Court awarding damages and costs to the respondent is set aside and the application of respondent for compensation is rejected. [para 39 to 42] [1163-B-G; 1164-G]

9.1. Consumer fora and Permanent Lok Adalats can not award compensation merely because there was inconvenience or hardship or on grounds of sympathy.

What is relevant is whether there was any cause of action for claiming damages, that is whether there was any deficiency in service or whether there was any negligence in providing facilitation. If the delay was due to reasons beyond the control of the airline and if the airline and its crew have acted reasonably and in a bona fide manner, the carrier cannot be made liable to pay damages even if there has been some inconvenience or hardship to a passenger on account of the delay. [para 40] [1163-E-G]

9.2. If a flight had remained on tarmac without taking off, for eleven hours, after boarding was completed, it was because the Airport and ATC authorities refused to send the passengers to the Airport lounge. Normally if the aircraft has remained on tarmac for more than two or three hours after boarding is closed, without the flight taking off, the passengers should be permitted to get back to the airport lounge to get facilitation service from the airline. Whenever there is such delay beyond a reasonable period (say three hours), the passengers on board should be permitted to get back to the airport lounge. If for any unforeseen reason, the passengers are required to be on board for a period beyond three hours or more, without the flight taking off, appropriate provision for food and water should be made, apart from providing access to the toilets. Congestion in the airport on account of the delayed and cancelled flights can not be a ground to prevent the passengers on board from returning to the airport lounge. While the guidelines issued by the DGCA cover the responsibilities of the airlines, DGCA and other concerned authorities should also specify the responsibilities of the airport and the ATC authorities to ensure that no aircraft remains on tarmac for more than three hours after the boarding is closed and that if it has to so remain, then permit the passengers to

return to the airport lounge from the aircraft, till the aircraft is ready to take off. DGCA shall also ensure that the conditions of carriage of all airlines in India are in consonance with its Civil Aviation Directives. [para 41] [1163-H; 1164-A-F]

Case Law Reference:

1989 (2) SCR 1	**relied on**	**para 14**
2011 (4) SCALE 137	**referred to**	**para 19**
1999 (4) Suppl. SCR 320	**referred to**	**para 29**

CIVIL APPELALTE JURISDICTION : Civil Appeal No. 4925 of 2011.

From the Judgment & Order dated 31.12.2009 of the High Court of Judicature, Andhra Pradesh at Hyderabad in Writ Petition No. 27754 of 2009.

V. Giri, (A.C.) Mohd. Sadique T.A. Raj Shekhar, Liz Mathew, Amit Kumar Srivastava, R.V. Kameshwaran for the appearing parties.

The Judgment of the Court was delivered by

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

2. The appellant, an aviation company operating an air carrier under the name and style of *IndiGo Airlines* has filed this appeal aggrieved by the judgment of the Andhra Pradesh High Court dated 31.12.2009 dismissing its writ petition challenging the decision of the Permanent Lok Adalat for Public Utility Services, Hyderabad, dated 18.9.2009 awarding Rs.10,000 as compensation and Rs.2,000 as costs to the respondent herein.

Facts found to be not in dispute

3. The respondent and eight others were booked to travel

on Indigo flight No.6E-301 from Delhi to Hyderabad on 14.12.2007 scheduled to depart at 6.15 a.m. The respondent reached the airport, obtained a boarding pass and boarded the flight at around 5.45 a.m. Due to dense fog, bad weather and poor visibility at Delhi airport the flight was delayed. An announcement was made that the flight was unable to take off due to dense fog and poor visibility, and that the flight will take off as and when a clearance was given by ATC. As appellant was a 'low cost carrier' neither snacks nor beverages were offered. However sandwiches were offered for sale and the respondent purchased a sandwich by paying Rs.100. Around 11.15 a.m. an announcement was made that flight No. 6E-301 was cancelled and the passengers were given the following options: (a) refund of air fare; or (b) credit for future travel on IndiGo; or (c) rebooking onto an alternative IndiGo flight at no additional cost. As an extension of the third option, willing passengers were permitted to undertake the journey on the next flight, by combining the said flight (Flight No.6E-301) with the next flight (Flight No. 6E-305) which was scheduled to depart at 12.15 p.m., subject to improvement in weather conditions and clearance by Air Traffic Control ('ATC' for short).

4. As the same aircraft was to be used for the combined flight, several of the passengers including respondent took the third option, and opted to continue the journey on the combined flight, by the same aircraft by remaining on board. Several other passengers, who opted for refund of their airfare or obtaining credit for future travel or for re-booking on subsequent flights of their choice, left the aircraft.

5. In view of the cancellation of flight No.6E-301 and the DGCA regulations prescribing maximum duty hours for the crew, the crew of 6E-301 was replaced by the fresh crew of flight No.6E-305. Even the combined flight No.6E 305 could not take off on schedule as the ATC did not give the clearance. Several announcements were made about the delay on account of inclement weather conditions and the piling up of

delayed flights queuing for take off. In the meanwhile on account of cancellation of flights and delaying of several flights, the airport was getting overcrowded and congested. As a consequence, the airport authorities advised the flights which had completed boarding but had not taken off for want of ATC clearance, not to send back the boarded passengers to the airport lounge, but retain them in the aircraft itself, as the airport was not capable of handling the additional load. The respondent and some other passengers, who had opted for travel in the combined later flight by the same aircraft, protested about the delay and demanded lunch/refreshments as they were held up inside the aircraft. Each of the affected passengers, including the respondent, was provided with a sandwich and water, free of cost around noon time. A further offer of free sandwiches was made around 3.00 p.m. However as vegetarian sandwiches were exhausted, the second offer by the crew was of chicken sandwiches. Respondent and others, who declined chicken sandwiches, were offered biscuits and water free of cost. Finally the ATC clearance was given at 4.20 p.m. and the flight departed at 4.37 p.m. and reached Hyderabad around 7 p.m.

6. When the flight reached Hyderabad, the respondent and some other passengers were detained at the Hyderabad Airport for more than an hour in connection with an enquiry by the Security Personnel of IndiGo, in regard to a complaint by the on-board crew that they had threatened and misbehaved with the air hostesses when the flight was delayed.

The complaint and the response

7. The respondent filed a complaint against the appellant before the Permanent Lok Adalat for Public Utility Services, claiming a compensation of Rs.Five lakhs for the delay and deficiency in service resulting in physical discomfort, mental agony and inconvenience. The respondent listed the following reasons for the claim:

(a) confinement to the aircraft seat from 5.45 a.m. (time of boarding) to 4.37 p.m. (time of departure of flight) for nearly 11 hours leading to cramps in his legs;

(b) failure to provide breakfast, lunch, tea in the aircraft in spite of the fact that the respondent was detained in the aircraft for eleven hours (from 5.45 a.m. to 4.37 p.m.) before departure;

(c) failure to provide access to medical facilities to the respondent who was a diabetic and hyper tension patient;

(d) illegal detention from 7 p.m. to 8.30 p.m. at Hyderabad airport upon a false complaint by the crew of the aircraft;

(e) inability to celebrate his birthday on 15.12.2007, on account of the traumatic experience on the earlier day, apart from being prevented from attending court on 14.12.2007 and being prevented from attending office till 19.12.2007.

8. The respondent contended that the airlines failed to take necessary care of the passengers and failed to act reasonably by not resorting to the remedial steps in regard to following matters:

(a) In view of the foggy conditions and inclement weather, instead of issuing boarding passes, the passengers should have been asked to wait in the airport lounge itself until the weather/visibility improved, so that they could have had breakfast and lunch in the airport restaurant without being confined to the aircraft for a total period of eleven hours;

(b) When the flight could not take off due to bad weather

for a long time (nearly eleven hours), the appellant ought to have brought back the passengers from the aircraft to the terminal so that they could have avoided confinement to their narrow seats in the aircraft and at the same time had access to breakfast and lunch, proper toilet facilities, if necessary, medicines;

(c) Though the appellant was a low cost carrier with no provision for serving food, in the extraordinary circumstances of detention of the passengers in the aircraft for 11 hours (before departure), it should have provided breakfast and lunch of their choice and beverages, free of cost, on board.

(d) The respondent being a diabetic and hyper-tension patient was required to have timely meals and medicines, which he was denied. Though a free sandwich was provided around 12.30 p.m., at around 3.00 p.m. when second round of frees snacks were offered, he was offered a chicken sandwich which he could not accept being a vegetarian. Offering a few biscuits with water as an alternative was wholly insufficient.

(e) Since the toilets were being constantly used by the cooped up passengers in the aircraft for several hours, and as there was no proper air circulation, the air was unbreathable apart from the foul smell from the toilet leading to nausea and dizziness.

9. The appellant resisted the claim of the respondent on the following grounds :

(a) The Permanent Lok Adalat at Hyderabad had no jurisdiction to entertain the complaint. Having regard to the jurisdiction clause in the contract of carriage, only the courts at Delhi had jurisdiction.

Any complaint or case had to be filed only at Delhi.

(b) The delay was for reasons beyond the control of the airlines and its employees, due to dense fog and bad weather. As the visibility dropped to less than around 15 meters, flights could not take off and the consequential congestion at the airport led to further delay. Even after the fog had cleared, the Air Traffic Control clearance for take off was given only at 4.20 p.m. The delay was not on account of any negligence or want of care or deficiency in service on the part of the airlines, but due to bad weather conditions and want of ATC clearance, which were beyond the control of the airlines and therefore it was not liable to pay any compensation.

(c) The respondent was given the option of either re-booking in a different flight, or receive the refund of the airfare, or continue the journey in the same aircraft by taking the next combined flight to depart as per ATC clearance. The respondent opted for continuing the journey in the combined flight and he stayed in the aircraft. If he had opted for re-booking or refund, he could have left the aircraft by 12.00 Noon.

(d) The respondent did not disclose his alleged physical condition (about diabetes and hyper tension) either at the time of purchasing the ticket or during the period he was on board. If he was suffering from any ailment he ought to have given advance notice or ought to have accepted the offer for rebooking or refund and left the aircraft as was done by several other passengers.

(e) Being a flight operated by a low cost carrier, the appellant did not have any provision to serve any food or beverages. Only sandwiches and some

other snacks were available on sale basis. In spite of it, in view of the delay, arrangements were made for supply of free sandwiches and water, once around 12.30 p.m. and again around 3.00 p.m. The toilets were also functional all through the period. Thus there was no deficiency in service or want of care on its part.

10. In regard to the detention of respondent at Hyderabad Airport, the appellant submitted that the respondent and some of his fellow passengers became agitated and furious when the announcement regarding cancellation of flight No.6E 301 was made and started abusing and misbehaving with the crew using extremely vulgar and threatening language; that the respondent also threw the biscuits offered, at one of the crew members; and that a complaint was made against the respondent and other members by the crew and consequently when the flight reached Hyderabad there was an inquiry by appellant's Assistant Manager (Security). It was further submitted that during enquiry, the crew decided not to press the matter in the interests of customer relations and to avoid unnecessary complications; and therefore, even though CISF personnel advised that a written complaint may be given in regard to the misbehaviour, a written complaint was not given and the respondent and others were permitted to leave. The allegation of wrongful confinement and harassment was thus denied.

11. The Permanent Lok Adalat, by award dated 18.9.2009 held that it had territorial jurisdiction. It further held that the delay was due to poor visibility and bad weather conditions, reasons beyond the control of the appellant. It further held: (a) though the claim of the respondent that he was confined in the aircraft without providing food was not established, and though the airlines being a low cost carrier, was not bound to provide any food to its passengers, as the passengers were detained in the aircraft for long, not providing food of passenger's choice caused inconvenience and suffering to the passengers; (b)

though there was no evidence to show that the respondent had notified the airlines that he was a diabetic and it was not possible to hold the airlines responsible in any manner, the fact that he suffered on account of being a diabetic could not be ignored; and (c) though the relevant rules might not have permitted the passengers who had boarded the aircraft to return to the airport lounge, in view of the unduly long delay, the rules should have been relaxed and the airlines was under a *moral duty* to take the passengers to the lounge and keep them there till the flight was permitted to take off and failure to do so was inexcusable. The Permanent Lok Adalat did not examine the grievance regarding wrongful confinement at the Hyderabad airport for an hour and half stating that criminal offences were not within its purview. The Permanent Lok Adalat held that there was laxity and deficiency in service on the part of the appellant and consequently awarded Rs.10000 as compensation and Rs.2500 as costs.

12. The said decision of the Permanent Lok Adalat was challenged by the appellant by filing a writ petition. The High Court dismissed the writ petition by the impugned judgment dated 31.12.2009. In regard to jurisdiction the High Court held as follows:

> "Most of the passengers, who took tickets or most of the passengers who buy tickets in Indigo counters seldom, read the terms and conditions regarding jurisdiction of Court in case of disputes. In such a situation, the jurisdiction aspects of the contract between IndiGo and passenger must receive liberal approach by the Courts or else the consumerism would be at peril."

The High Court did not interfere with the award of the Permanent Lok Adalat on the following reasoning:

> "Whatever be the reason and whatever be the justification, for Indigo in not operating Flight 6E-301 as per schedule, it certainly caused inconvenience to the passenger who is

admittedly a diabetic patient. Therefore, he should at least receive nominal damages for the deficiency of service. This was what was precisely done by learned Permanent Lok Adalat in an unexceptional manner. We do not see any strong reason to exercise our extraordinary jurisdiction to find fault with the same."

13. The said order is under challenge in this appeal by special leave. On the contentions urged the following questions arise for consideration:

(i) Whether the Permanent Lok Adalat at Hyderabad did not have territorial jurisdiction?

(ii) When a flight is delayed due to bad weather, after the boarding of passengers is completed, what are the minimum obligations of an air carrier in particular a low cost carrier, to ensure passenger comfort?

(iii) When there is delay for reasons beyond the control of the airlines, whether failure to provide periodical lunch/ dinner or failure to take back the passengers to the airport lounge (so that they can have freedom to stretch their legs, move around and take food of their choice) can be termed as deficiency in service or negligence?

(iv) Whether the award of compensation of Rs.10,000/- with costs calls for interference?

Re: Question (i) : Jurisdiction of Permanent Lok Adalat

14. The Indigo Conditions of Carriage, containing the standard terms which govern the contract between the parties provide as follows: "All disputes shall be subject to the jurisdiction of the courts of Delhi only." The appellant contends that the ticket related to the travel from Delhi to Hyderabad, the complaint was in regard to delay at Delhi and therefore the cause of action arose at Delhi; and that as the contract provided

that courts at Delhi only will have jurisdiction, the jurisdiction of other courts were ousted. Reliance was placed on *ABC Laminart v. A.P. Agencies* [1989 (2) SCC 163] where this court held:

> "So long as the parties to a contract do not oust the jurisdiction of all the Courts which would otherwise have jurisdiction to decide the cause of action under the law it cannot be said that the parties have by their contract ousted the jurisdiction of the Court. If under the law several Courts would have jurisdiction and the parties have agreed to submit to one of these jurisdictions and not to other or others of them it cannot be said that there is total ouster of jurisdiction. In other words, where the parties to a contract agreed to submit the disputes arising from it to a particular jurisdiction which would otherwise also be a proper jurisdiction under the law, their agreement to the extent they agreed not to submit to other jurisdictions cannot be said to be void as against public policy. If on the other hand, the jurisdiction they agreed to submit to would not otherwise be proper jurisdiction to decide disputes arising out of the contract it must be declared void being against public policy.
>
> ……From the foregoing decisions it can be reasonably deduced that where such an ouster clause occurs, it is pertinent to see whether there is ouster of jurisdiction of other Courts. When the clause is clear, unambiguous and specific accepted notions of contract would bind the parties and unless the absence of ad idem can be shown, the other Courts should avoid exercising jurisdiction, As regards construction of the ouster clause when words like 'alone', 'only, 'exclusive' and the like have been used there may be no difficulty. Even without such words in appropriate cases the maxim 'expressio unius est exclusio alterius' -expression of one is the exclusion of another may be applied. What is an appropriate case shall depend on

the facts of the case. In such a case mention of one thing may imply exclusion of another. When certain jurisdiction is specified in a contract an intention to exclude all others from its operation may in such cases be inferred. It has therefore to be properly construed."

15. The 'exclusive jurisdiction clause', as noticed above is a standard clause that is made applicable to all contracts of carriage with the appellant, relating to passengers, baggage or cargo anywhere in the country, irrespective of whether any part of the cause of action arose at Delhi or not. If for example a passenger purchases a ticket to travel from Mumbai to Kolkata, or Chennai to Hyderabad, which involved travel without touching Delhi and if such ticket was purchased outside Delhi, obviously the Delhi courts will not have territorial jurisdiction as no part of the cause of action arises in Delhi. As per the principle laid down in *ABC Laminart*, any clause which ousts the jurisdiction of all courts having jurisdiction and conferring jurisdiction on a court not otherwise having jurisdiction would be invalid. It is now well settled that the parties cannot by agreement confer jurisdiction on a court which does not have jurisdiction; and that only where two or more courts have the jurisdiction to try a suit or proceeding, an agreement that the disputes shall be tried in one of such courts is not contrary to public policy. The ouster of jurisdiction of some courts is permissible so long as the court on which exclusive jurisdiction is conferred, had jurisdiction. If the clause had been made to apply only where a part of cause of action accrued in Delhi, it would have been valid. But as the clause provides that irrespective of the place of cause of action, only courts at Delhi would have jurisdiction, the said clause is invalid in law, having regard to the principle laid down in *ABC Laminart*. The fact that in this case, the place of embarkation happened to be Delhi, would not validate a clause, which is invalid.

16. There is another reason for holding the said clause to be invalid. A clause ousting jurisdiction of a court, which otherwise would have jurisdiction will have to be construed

strictly. In this case, we are concerned with a clause which provides that all disputes shall be subject to the jurisdiction of the *courts at Delhi* only. But in this case, the respondent did not approach a "court". The claim was filed by the respondent before a *Permanent Lok Adalat* constituted under Chapter VI-A of the Legal Services Authorities Act, 1987 ('LSA Act' for short). Section 22C provides that any party to a dispute may, *before the dispute is brought before any court, make an application to the Permanent Lok Adalat for settlement of the dispute.* When the statement, additional statements, replies etc., are filed in an application filed before it, the Permanent Lok Adalat is required to conduct *conciliation proceedings between the parties, taking into account, the circumstances of the dispute and assist the parties in their attempt to reach an amicable settlement of the dispute*. If the parties fail to reach an agreement, the *Permanent Lok Adalat* is required to decide the dispute. The *Permanent Lok Adalats* are authorized to deal with and decide only disputes relating to service rendered by notified public utility services provided the value does not exceed Rupees Ten Lakhs and the dispute does not relate to a non-compoundable offence. Section 22D provides that the *Permanent Lok Adalat* shall, while conducting the conciliation proceedings or deciding a dispute on merit under the LSA Act, be guided by the principles of natural justice, objectivity, fair play, equity and other principles of justice and shall not be bound by the Code of Civil Procedure, 1908 and the Indian Evidence Act, 1872. Section 22E provides that every award of the *Permanent Lok Adalat* shall be final and binding on the parties and could be transmitted to a civil court having local jurisdiction for execution. Each and every provision of Chapter VIA of LSA Act emphasizes that is the *Permanent Lok Adalat* is a Special Tribunal which is not a 'court'. As noted above, Section 22C of the LSA Act provides for an application to the Permanent Lok Adalat in regard to a dispute *before the dispute is brought before any court* and that after an application is made to the Permanent Lok Adalat, no party to the application shall invoke the jurisdiction of any court in the same

dispute, thereby making it clear that Permanent Lok Adalat is distinct and different from a court. The nature of proceedings before the Permanent Lok Adalat is initially a conciliation which is non-adjudicatory in nature. Only if the parties fail to reach an agreement by conciliation, the Permanent Lok Adalat mutates into an adjudicatory body, by deciding the dispute. In short the procedure adopted by *Permanent Lok Adalats* is what is popularly known as 'CON-ARB' (that is "conciliation cum arbitration") in United States, where the parties can approach a neutral third party or authority for conciliation and if the conciliation fails, authorize such neutral third party or authority to decide the dispute itself, such decision being final and binding. The concept of 'CON-ARB' before a Permanent Lok Adalat is completely different from the concept of judicial adjudication by courts governed by the Code of Civil Procedure. The *Permanent Lok Adalat* not being a 'court', the provision in the contract relating to exclusivity of jurisdiction of courts at Delhi will not apply.

17. The appellant next contended that even if the jurisdiction clause is excluded from consideration, only courts and tribunals at Delhi will have jurisdiction as the cause of action arose at Delhi and not at Hyderabad. The appellant contended that the respondent boarded the flight at Delhi and the entire incident relating to delay and its consequences took place at Delhi and therefore courts at Delhi alone will have jurisdiction. This contention is wholly untenable. The dispute was with reference to a contract of carriage of a passenger from Delhi to Hyderabad. The ticket was purchased at Hyderabad and consequently the contract was entered into at Hyderabad. A part of the cause of action also arose at Hyderabad as the respondent clearly alleged as one of the causes for claiming compensation, his illegal detention for an hour and half at the Hyderabad Airport by the security staff of the appellant when the flight landed. Therefore the courts and tribunals at Hyderabad had jurisdiction to entertain the claims/disputes. Section 22B provides that permanent Lok Adalats shall be

established for exercising jurisdiction in respect of one or more public utility services for such areas as may be specified in the notification. It is not disputed that the Permanent Lok Adalat for public utility services, Hyderabad was constituted for the area of Hyderabad and transport services by way of carriage of passengers by air is a public utility service. Therefore we hold that the *Permanent Lok Adalat* at Hyderabad had jurisdiction to entertain the application against the appellant.

18. One of the reasons assigned by the High Court to hold that Permanent Lok Adalat at Hyderabad had jurisdiction was that the term in the IndiGo conditions of carriage that only courts at Delhi will have jurisdiction should be ignored as most of the passengers buying tickets from IndiGo may not read the terms and conditions regarding jurisdiction of courts and therefore, the court should adopt a liberal approach and ignore such clauses relating to exclusive jurisdiction. The said reasoning is not sound. The fact that the conditions of carriage contain the exclusive jurisdiction clause is not disputed. The e-tickets do not contain the complete conditions of carriage but incorporate the conditions of carriage by reference. The interested passengers can ask the airline for a copy of the contract of carriage or visit the web-site and ascertain the same. Placing the conditions of carriage on the web-site and referring to the same in the e-ticket and making copies of conditions of carriage available at the airport counters for inspection is sufficient notice in regard to the terms of conditions of the carriage and will bind the parties. The mere fact that a passenger may not read or may not demand a copy does not mean that he will not be bound by the terms of contract of carriage. We cannot therefore, accept the finding of the High Court that the term relating to exclusive jurisdiction should be ignored on the ground that the passengers would not have read it.

19. We may also at this juncture refer to the confusion caused on account of the term *Permanent Lok Adalat* being

used to describe two different types of Lok Adalats. The LSA Act refers to two types of Lok Adalats. The first is a *Lok Adalat* constituted under Section 19 of the Act which has no adjudicatory functions or powers and which discharges purely conciliatory functions. The second is a *Permanent Lok Adalat* established under section 22B(1) of LSA Act to exercise jurisdiction in respect of public utility services, having both conciliatory and adjudicatory functions. The word *Permanent Lok Adalat* should refer only to *Permanent Lok Adalats* established under section 22B(1) of the LSA Act and not to the Lok Adalats constituted under section 19. However in many states, when Lok Adalats are constituted under section 19 of LSA Act for regular or continuous sittings (as contrasted from periodical sittings), they are also called as *Permanent Lok Adalats* even though they do not have adjudicatory functions. In *LIC of India vs. Suresh Kumar* - 2011 (4) SCALE 137, this court observed: "It is needless to state that Permanent Lok Adalat has no jurisdiction or authority vested in it to decide any lis, as such, between the parties even where the attempt to arrive at an agreed settlement between the parties has failed". The said decision refers to such a 'Permanent Lok Adalat' organized under section 19 of the Act and should not be confused with *Permanent Lok Adalats* constituted under section 22B(1) of the Act. To avoid confusion, the State Legal Services Authorities and the High Courts may ensure that *Lok Adalats* other than the *Permanent Lok Adalats* established under section 22B(1) of the Act in regard to public utility services, are not described as Permanent Lok Adalats. One way of avoiding the confusion is to refer to the Lok Adalats constituted under section 19 of the Act on a regular or permanent basis as '*Continuous Lok Adalats*'. Be that as it may.

Re : Question (ii) to (iv)

Low cost carrier vis-a-vis full service carrier

20. The appellant is a low cost carrier. It is necessary to

bear in mind the difference between a full service carrier and a low cost carrier, though both are passenger airlines. Low cost carriers tend to save on overheads, operational costs and more importantly on the services provided. Low cost carriers install the maximum number of seats possible in their aircraft, and attempt to operate the aircraft to optimum levels and fill the seats to capacity. The passengers, who prefer to travel on budget fares, when opting for low cost carriers know fully well that they cannot expect from them, the services associated with full service carriers. From the passenger's view point, the important difference between the two classes of airlines lies in the on-board service offered to them by the airlines. While full service carriers offer several services including free food and beverages on board, low cost carriers offer the minimal 'no-frills' service which does not include any free food or beverages except water. But the fact that an airline is a low cost carrier does not mean that it can dilute the requirements relating to safety, security and maintenance. Nor can they refuse to comply with the minimum standards and requirements prescribed by the Director General of Civil Aviation ('DGCA' for short). The fact that it offers only 'no- frills' service does not mean that it can absolve itself from liability for negligence, want of care or deficiency in service. Both types of carriers have clauses either excluding or limiting liability in respect of certain contingencies. The disclaimers by low cost carriers will be more wider and exhaustive when compared to full service carriers. DGCA and other authorities concerned with licensing low cost carriers, shall have to ensure that the terms of contract of carriage of low cost carriers are not unreasonably one sided with reference to their disclaimers. This becomes all the more necessary as the terms of contract of carriage are not incorporated in the tickets that are issued and usually passengers, who purchase the tickets, will not be able to know the actual terms and conditions of contract of carriage unless they visit the website of the airline or seeks a copy of the complete terms of contract of carriage. All that is required to be noted in the context of this case is that travel by a low cost carrier does not mean that the

passengers are to be treated with any less care, attention, respect or courtesy when compared to full service carriers or that there can be dilution in the minimum standards of safety, security or efficiency.

Relevant statutory provisions and DGCA directives

21. The Carriage of Air Act, 1972 gives effect to the convention for unification of certain rules relating to international carriage by air, and amendments thereto, to non-international carriage by air. Section 8 provides that the Central Government may by notification in the official gazette apply the rules contained in the first schedule to the Act and any provision of section 3 or section 5 or section 6 to such carriage by air, not being international carriage by air, as may be specified in the notification, subject, however, to such exceptions, adaptations, modifications as may be so specified. Notification No.SO.186E dated 30.3.1973 issued under section 8 of the Act applies to sections 4, 5 and 6 and the rules contained in the second schedule to the Act to all carriages by air (not being an international carriage) and also modified several rules in the second schedule to the Act apart from amending sections 4 and 5 and omitting section 6 of the Act. Chapter III of the Second Schedule to the said Act relates to "liability of the carrier" and clause 19 thereof (as amended by Notification No.SO.186(E) dated 30.3.1973 issued under section 8(2) of that Act) is extracted below:-

> "19. In the absence of a contract to the contrary, the carrier is not to be liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo."

22. Rule 134 of the Aircraft Rules 1937 provides that no person shall operate any scheduled air transport services except with the permission of the Central Government. Rule 133A of the said Rules provides that the special directions issued by the Director General of Civil Aviation ('DGCA' for short) by way of circulars/notices to aircraft owners relating to

operation and use of aircraft shall be complied with by the persons to whom such direction is issued. The Director General of Civil Aviation, Govt. of India, issued a circular No.8/2007 dated 5.12.2007, containing the guidelines for Aircraft operations during Low Visibility Conditions (Fog management) at IGI Airport, Delhi which were applicable on the relevant date (14.12.2007). Clauses 31, 32, 35 and 36 thereof are extracted below :

> "(31) Airlines shall augment their ground staff and position them at the airport with proper briefing for handling various passenger facilitation processes in co-ordination with the other airport agencies.
>
> (32) Airlines shall inform their passengers of the delay/ rescheduling/cancellation of their flights in through mobile/ SMS/other communication mean to avoid congestion at the airport.
>
> (35) Airlines shall ensure progressive boarding of the passengers out of security hold area in order to avoid congestion in the security hold. Passenger after check-in shall be made to proceed for security by the airlines after ensuring that the flight is ready to depart/is on ground. If delayed***,*** *after boarding, appropriate facilitation to be given by Airlines on board.*
>
> (36) *The Airlines, particularly LCC shall provide facilitation in terms of tea/water/snacks to the passenger of their delayed flights.* The coupon scheme extended by DIAL may be availed by airlines for the passenger facilitation purpose."

[emphasis supplied]

Other directives referred by way of comparison

23. We may, by way of comparison also refer to the following provisions of the subsequent circular/CAR (Civil

Aviation Requirements) dated 6.8.2010 issued by DGCA in regard to the facilities to be provided to passengers by airlines due to denied boarding, cancellation or delays in flights, which came into effect from 15.8.2010.

"**Introduction**

x x x

1.4 The operating airline would not have the obligation to pay compensation in cases where the cancellations and delays have been caused by an event(s) of force majeure i.e. extraordinary circumstance(s) beyond the control of the airline, the impact of which lead to the cancellation/delay of flight(s), and which could not have been avoided even if all reasonable measures had been taken by the airline. Such extraordinary circumstances may in particular, occur due to political instability, natural disaster, civil war, insurrection or riot, flood, explosion, government regulation or order affecting the aircraft, strikes and labour disputes causing cessation, slowdown or interruption of work or any other factors that are beyond the control of the airline.

1.5 Additionally, airlines would also not be liable to pay any compensation in respect of cancellations and delays clearly attributable to Air Traffic Control (ATC), meteorological conditions, security risks, or any other causes that are beyond the control of the airline but which affect their ability to operate flights on schedule.

Extraordinary circumstances should be deemed to exist where the impact of an air traffic management decision in relation to a particular aircraft or several aircraft on a particular day, gives rise to a long delay or delays, an overnight delay, or the cancellation of one or more flights by that aircraft, and which could not be avoided even though the airline concerned had taken all reasonable measures to avoid or overcome of the impact of the

relevant factor and, therefore, the delays or cancellations.

x x x x x x x x

3.4 Delay in Flight

3.4.1 The airlines shall provide facilities in accordance with Para 3.6.1 (a) if the passenger has checked in on time, and if the airline expects a delay beyond its original announced scheduled time of departure or a revised time of departure of:

(a) 2 hours or more in case of flights having a block time of up to 2 ½ hrs; or

(b) 3 hours or more in case of flights having a block time of more than 2 ½ hrs and up to 5 hours; or

(c) 4 hours or more in case of flights not falling under sub-para (1) and (b) of Para 3.4.1.

3.4.2. When the reasonably expected time of departure is more than 24 hours, after the scheduled time of departure previously announced, the airline shall provide facility to the passengers in accordance with the provisions of para 3.6.1(b) hereunder.

3.4.3 An operating airline shall not be obliged to adhere to Para 3.6 if the delay is caused due to extra ordinary circumstances as defined in Para 1.4 and Para 1.5 which could not have been avoided even if all reasonable measures had been taken.

x x x x x x x x

3.6 Facilities to be offered to Passengers

3.6.1 Passengers shall be offered free of charge the following:

(a) Meals and refreshments in relation to waiting time.

(b) Hotel Accommodation when necessary (including transfers).

3.6.2 Airlines shall pay particular attention to the needs of persons with reduced mobility and any other person (s) accompanying them.

3.8 General

3.8.1 The airlines shall display their policies in regard to compensation, refunds and the facilities that will be provided by the airline in the event of denied boardings, cancellations and delays on their respective websites as part of their passenger Charter of Rights. Passengers shall be fully informed by the airlines of their rights in the event of denied boarding, cancellations or delays of their flights so that they can effectively exercise their rights provided at the time of making bookings/ticketing, they have given adequate contact information to the airline or their agents. The obligation of airlines to fully inform the passenger(s) shall be included in ticketing documents and websites of the airlines and concerned third parties (GDS and travel agents) issuing such documents on airlines' behalf. "

(emphasis supplied)

24. We may also refer to Regulation (EC) No.261/2004 of the European Parliament and of the Council, establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, to know the European standards. Clause (17) of the preamble thereto provides thus :

"(17) Passengers whose flights are delayed for a specified time should be adequately cared for and should

be able to cancel their flights with reimbursement of their tickets or to continue them under satisfactory conditions."

(emphasis supplied)

Article 6 deals with delay, Article 8 deals with reimbursement and Regulation 9 deals with passengers' right to care. We extract below the relevant regulations:

"Article 6 (Delay)

1. When an operating air carrier reasonably expects a flight to be delayed beyond its scheduled time of departure:

(a) for two hours or more in the case of flights of 1,500 kilometres or less; or

(b) for three hours or more in the case of all intra-Community flights of more than 1,500 kilometres and of all other flights between 1,500 and 3,500 kilometres; or

(c) for four hours or more in the case of all flights not falling under (a) or (b),

Passengers shall be offered by the operating air carrier:

(i) *the assistance specified in Article 9(1)(a) and 9(2); and*

(ii) when the reasonably expected time of departure is at least the day after the time of departure previously announced, the assistance specified in Article 9(1)(b) and 9(1)(c); and

(iii) when the delay is at least five hours, the assistance specified in Article 8(1)(a).

2. In any event, the assistance shall be offered within the time limits set out above with respect to each distance bracket.

Article 8 (Right to reimbursement or re-routing)

xxxx

Article 9 (Right to care)

1. *Where reference is made to this Article, passengers shall be offered free of charge:*

(a) *meals and refreshments in a reasonable relation to the waiting time;*

(b) hotel accommodation in cases

— where a stay of one or more nights becomes necessary, or

— where a stay additional to that intended by the passenger becomes necessary;

(c) transport between the airport and place of accommodation (hotel or other).

2. In addition, passengers shall be offered free of charge two telephone calls, telex or fax messages, or e-mails."

(emphasis supplied)

Liability for damages for delay

25. Rule 19 of Second Schedule to Carriage by Air Act, makes it clear that the carrier is not liable for damage occasioned by delay in the carriage by air of passengers. The position would be different if under the contract, the carrier agrees to be liable for damages. On the other hand, the IndiGo Conditions of Carriage categorically state that the carrier will not be liable to pay any damages for delays, rescheduling or cancellations due to circumstances beyond the control of IndiGo. There is no dispute that in this case, the delay was for reasons beyond the control of the carrier. The guidelines show

that the operating air carrier would not be liable to pay compensation to a passenger, in respect of either cancellation or delays attributable to meteorological conditions (weather/fog etc.,) or air traffic control directions/instructions, which are beyond the control of the air carrier. The Permanent Lok Adalat recorded a finding of fact that delay was due to dense fog/bad weather and want of ATC clearance due to air traffic congestion, which were beyond the control of the air carrier and as a consequence rightly held that the air carrier was not liable for payment of any compensation for the delay as such. We may note this was the position as on the date of the incident (14.12.2007) and even subsequently, after the issue of the guidelines dated 6.8.2010 by the DGCA.

Liability to provide facilitation during delay

26. The issue of responsibility for delay in operating the flight is distinct and different from the responsibility of the airline to offer facilitation to the passengers grounded or struck on board due to delay. If the obligation to provide facilitation to the passengers is legally recognized, either based on statutory requirements or contractual obligations or recognized conventions, failure to provide the required minimum facilitation may, depending upon the facts of the case, amount to either breach of statutory/contractual obligation, negligence, want of care or deficiency in service on the part of the operating airline entitling the passengers for compensation.

27. We may consider whether there was any such obligation to provide facilitation to passengers by the appellant on 14.12.2007. As per the DGCA's guidelines dated 5.12.2007 which were in force on 14.12.2007, there was such obligation on the part of the carrier. Clause 35 provided if the flight is delayed, after boarding, appropriate facilitation has to be given by the Airlines on board. Clause 36 provides that the Airlines, even low cost carriers, had to provide facilitation in terms of tea/water/snacks to the passengers of their delayed flights.

28. Under the CAR circular dated 6.8.2010 which came into effect on 15.8.2010, in the event of delays attributable to air traffic control or meteorological conditions, the operating Airlines shall have to offer to the passengers free of cost, meals and refreshment in relation to waiting time, vide clause 3.6.1(a) read with clause 3.4.1. Facilitation of passengers who are stranded after boarding the aircraft on account of delays is an implied term of carriage of passengers, accepted as an international practice, apart from being a requirement to be fulfilled under DGCA's directives. Such facilitation which relates to the health, survival and safety of the passengers, is to be provided, not only by full service carriers, but all airlines including low cost carriers. This obligation has nothing to do with the issue of liability or non-liability to pay compensation to the passengers for the delay. Even if no compensation is payable for the delay on account of bad weather or other conditions beyond the control of the air carrier, the airline will be made liable to pay compensation if it fails to offer the minimum facilitation in the form of refreshment/water/beverages, as also toilet facilities to the passengers who have boarded the plane, in the event of delay in departure, as such failure would amount to deficiency in service. At the relevant point of time (14th December 2007), in the event of delay, passengers on-board were to be provided by the air carriers, including low cost carriers, facilitation by way of snacks/water/tea apart from access to toilet. [Note: The facilitation requirement was subsequently revised and upgraded with effect from 15.8.2010 as "adequate meals and refreshments" due during the waiting period].

29. We may at this juncture refer to the decision of this Court in *Ravneet Singh Bagga vs. KLM Royal Dutch Airlines* – 2000 (1) SCC 66, wherein the distinction between a deficiency in service and negligence is brought out. This Court held:

> "6. The deficiency in service cannot be alleged without attributing fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be performed by a person in pursuance of a contract or otherwise in relation to any service. The burden of proving the deficiency in service is upon the person who alleges it. The complainant has, on facts, been found to have not established any willful fault, imperfection, shortcoming or inadequacy in the service of the respondent. The deficiency in service has to be distinguished from the tortuous acts of the respondent. In the absence of deficiency in service the aggrieved person may have a remedy under the common law to file a suit for damages but cannot insist for grant of relief under the Act for the alleged acts of commission and omission attributable to the respondent which otherwise do not amount to deficiency in service…... If on facts it is found that the person or authority rendering service had taken all precautions and considered all relevant facts and circumstances in the course of the transaction and that their action or the final decision was in good faith, it cannot be said that there had been any deficiency in service. If the action of the respondent is found to be in good faith, there is no deficiency of service entitling the aggrieved person to claim relief under the Act. The rendering of deficient service has to be considered and decided in each case according to the facts of that case for which no hard and fast rule can be laid down. Inefficiency, lack of due care, absence of bonafide, rashness, haste or omission and the like may be the factors to ascertain the deficiency in rendering the service."

Effect of IndiGo Conditions of Carriage on the liability for facilitation

30. The next question is whether the exclusion clause in the IndiGo Conditions of Carriage can absolve liability to provide facilitation to passengers affected by delay. The relevant clause in the Indigo conditions of carriage is extracted below :

"Flight Delays, Reschedule or Cancellations

IndiGo reserves the right to cancel, reschedule or delay the commencement or continuance of a flight or to alter the stopping place or to deviate from the route of the journey or to change the type of aircraft in use without incurring any liability in damages or otherwise to the Customers or any other person whatsoever. Sometimes circumstances beyond IndiGo's control result in flight delays, reschedule or cancellations. In such circumstances, IndiGo reserves the right to cancel, reschedule or delay a flight without prior notice. Circumstances beyond IndiGo's control can include, without limitation, weather; air traffic control; mechanical failures; acts of terrorism; acts of nature; force majeure; strikes; riots; wars; hostilities; disturbances; governmental regulations, orders, demands or requirements; shortages of critical manpower, parts or materials; labour unrest; etc. IndiGo does not connect to other airlines and is not responsible for any losses incurred by Customers while trying to connect to or from other airlines.

If an IndiGo flight is cancelled, rescheduled or delayed for more than two/three hours (depending on the length of the journey), a Customer shall have to right to choose a refund; or a credit for future travel on IndiGo; or re-booking onto an alternative IndiGo flight at no additional cost subject to availability.

xxx xxx xxx

Please note that in the event of flight delay, reschedule or cancellation, IndiGo does not provide compensation for travel on other airlines, meals, lodging or ground transportation."

(emphasis supplied)

31. The said exclusion clause no doubt states that in the

event of flight delay, IndiGo would not provide any "meals". But it can apply to passengers who have not boarded the flight and who have the freedom to purchase food in the airport or the freedom to leave. It will not apply to passengers who are on board and the delay in the flight taking off, denies them access to food and water. In the extra-ordinary situation where the passengers are physically under the complete care and control of the airline, as it happens when they have boarded the aircraft and have no freedom to alight from the aircraft, the duty of the airlines to protect and care for them, and provide for basic facilitation would prevail over any term of the contract excluding any facilitation (except where the carrier itself cannot access food due to emergency situations). No public utility service can say that it is not bound to care for the health, welfare and safety of the passengers because it is a low cost carrier. At all events, the said clause in question stood superseded, in so far as flights taking off from IGI Airport, Delhi, having regard to the guidelines relating to Aircraft operations during low visibility conditions at IGI Airport, Delhi, which provide that all airlines including low cost carriers shall provide facilitation in terms of tea/water/snacks to the passengers of delayed flights. (The DGCA directives in force from 15.8.2010 clearly provide that passengers shall be offered free of cost meals and refreshment in relation to the waiting time). What we have stated above is with reference to the passengers on board, in delayed flights which have not taken off. Subject to any directives of DGCA to the contrary, the exclusion clause will be binding in normal conditions, that is, during the flight period, once the flight has taken off, or where the passenger has not boarded.

What was the period of delay?

32. The respondent's complaint is about the inordinate delay of eleven hours after boarding. The question is whether there was a delay of nearly eleven hours, as contended by the respondent. It is true that the respondent was confined to the aircraft for nearly eleven hours on account of the delay. But a

careful examination of the facts will show that the delay in a sense was not of 11 hours (from 5.35 a.m. to 4.37 p.m). The respondent first took flight No.6E-301 which was scheduled to depart at 6.15 a.m. and boarded that flight at 5.45 a.m. When that flight was unduly delayed on account of the bad weather around 11.15 a.m. the said flight was cancelled and was combined with subsequent flight No.6E-305 due to depart at 12.15 p.m. When flight No.6E-301 was cancelled all its passengers were given the option of refund of the fare or credit for future travel or re-booking on to an alternative Indigo flight. Because the delayed flight was combined with the subsequent flight and the same aircraft was to be used for the subsequent flight that was to take off at 12.15 p.m., the respondent and some others, instead of opting for refund of the air fare or re-booking on a subsequent flight, opted to continue to be in the aircraft and took the combined flight which was scheduled to depart at 12.15 p.m. subject to ATC clearance. In so far as flight No.6E-301 is concerned, after a delay of about five hours it was cancelled and the passengers could have left the aircraft as many did. If the respondent continued to sit in the aircraft, it was because of his voluntary decision to take the later flight which was a combination of flight No.6E-301 and 6E-305 which was due to depart at 12.15 p.m. (subject to ATC clearance) and that was delayed till 4.37 p.m. Therefore the delay in regard to the combined flight which was due for departure at 12.15 p.m. was four hours and twenty minutes.

33. The respondent was offered the choice of refund of fare, credit for a future travel on IndiGo or rebooking in a subsequent IndiGo flight. The third option was further extended by giving the option to remain on board by taking the subsequent combined flight using the same aircraft subject to ATC's clearance. The respondent consciously opted for the third choice of continuing in the combined flight and remained in the aircraft. Therefore, the stay of eleven hours in the aircraft was a voluntary decision of the respondent, as he could have left the aircraft much earlier around 11.00 a.m. by either opting

to obtain refund of the air fare or by opting for credit for future travel or by opting for an IndiGo flight on a subsequent day. Having opted to remain on board the respondent could not make a grievance of the delay, or non-availability of food of his choice or medicines.

Whether the airline failed to provide facilitation to respondent?

34. It is not in dispute that during the initial period of delay, when it was not known that there would be considerable delay, the respondent purchased a sandwich in the normal course. When flight No.6E-301 was cancelled and combined with the subsequent flight No.6E-305, the on-board passengers including respondent who opted to continue in the flight were offered snacks (sandwiches) and water free of cost, around 12 noon. As the combined flight (No.6E-305) was also delayed, a second free offer of sandwiches and water was made around 3 p.m. But the second time, what was offered to respondent was a chicken sandwich and as the respondent who was a vegetarian refused it, he was offered biscuits and water, instead. It is not the case of the respondent that toilet facilities were denied or not made available. In the circumstances, the appellant being a low cost carrier, the facilitations offered by it, were reasonable and also met the minimum facilitation as per the DGCA guidelines applicable at the relevant point of time.

35. In the absence of prior intimation about the preference in regard to food and in emergency conditions, the non-offer of a vegetarian sandwich in the second round of free snacks cannot be considered to be a violation of basic facilitation. While the dietary habits or religious sentiments of passengers in regard to food are to be respected and an effort should be made to the extent possible to cater to it, in emergency situations, non-offer of the preferred diet could not be said to be denial of facilitation, particularly when the airline had no notice of passengers' preference in food. In fact, the appellant

being a low cost carrier, there was also no occasion for indicating such preferences. We however note that in the subsequent DGCA guidelines which came into effect from 15.8.2010, the facilitation to be provided has been appropriately upgraded by directing that the delayed passengers are to be provided with meals and refreshment as and when due depending upon the period of delay.

36. There is nothing to show that respondent requested for any treatment or medicines during the period when he was on board. He had also not notified the Airlines that he was a patient suffering from an ailment which required medication or treatment. Therefore, the respondent could not expect any special facilitation, even if his condition would have added to his physical discomfort on account of delay.

Whether respondent is entitled to compensation for detention at Hyderabad?

37. The next question that arises for consideration is whether the appellant is liable to compensate the respondent for the detention for nearly one and half hours after disembarkation at Hyderabad. The appellant's version is that respondent started abusing and misbehaving with the crew members using vulgar and threatening language, that he threw the biscuits offered on a crew member, that he was detained for the purpose of enquiry by the Assistant Manager of the appellant at Hyderabad on the complaint of the crew members, but to avoid unnecessary complications and good customer relations, the crew members decided not to give written complaint and therefore he was permitted to leave after some time. The respondent's version is that the complaint by the crew was false and this was proved by the fact that they did not give a written complaint. There is no evidence as to what transpired and the two versions remained unsubstantiated. But the undisputed facts show he was asked to remain in view of a complaint by the crew, that CSIF personnel stated that unless there was written complaint, no action could be taken, that the

crew did not give written complaint and the respondent was permitted to leave after about an hour of disembarkation. On the facts and circumstances this cannot be termed to be unnecessary or deliberate harassment by the airlines. While the airlines ought to have been sensitive to the travails of the passengers who were cooped up in the aircraft for more than thirteen hours without adequate food or other facilities, the airlines also could not ignore any complaint by the crew about any unruly behaviour of any passenger. Be that as it may. In this case neither the Permanent Lok Adalat, nor the High Court has recorded any finding of wrongful or vexatious detention or harassment. Therefore the question of awarding compensation under this head also does not arise.

Whether the appellant is liable to pay damages?

38. The Permanent Lok Adalat has held that when there was an inordinate delay after completion of boarding, the airlines had a moral duty, irrespective of rules and regulations, to take back the passengers to the airport lounge by obtaining necessary approvals from the airport/ATC authorities and keep the passengers in the lounge till the clearance for the flight to take off was given and failure to do so was an unexcusable and unbecoming behaviour on the part of the airline. We agree that the carrier should take steps to secure the permission of the Airport and ATC authorities to take back the passengers who had already boarded to the airport lounge when there was an inordinate delay. But the assumption that the rules and regulations had to be ignored or without the consent and permission of the airport and ATC authorities, the airline crew ought to have taken back the passengers to the airport lounge, is not sound. The admitted position in this case is that the airlines made efforts in that behalf, but permission was not granted to the airlines to send back the passengers to the airport lounge, in view of the heavy congestion in the airport. The airport and the ATC authorities are not parties to the proceedings. If permission was not granted for the passengers

to be taken to the airport lounge, the airlines cannot be found fault with. Therefore, the observation that failure to take the passengers to the airport lounge was unexcusable and unbecoming behaviour on the part of the airlines, was not warranted on the facts and circumstances of the case.

39. The High Court has justified the award of damages on the ground that as appellant did not operate IndiGo flight No.6E-301 as per schedule and caused inconvenience to a passenger who is a diabetic patient, he was entitled to nominal damages for deficiency in service. Where the delay is for reasons beyond the control of the airlines as in this case due to bad weather and want of clearance from ATC, in the absence of proof of negligence or deficiency in service the airlines cannot be held responsible for the inconvenience caused to the passengers on account of the delay. The justification for damages given by the High Court does not find support either on facts or in law.

Conclusion

40. There can be no doubt that the respondent, like any other passenger forced to sit in a narrow seat for eleven hours, underwent considerable physical hardship and agony on account of the delay. But, it was not as a consequence of any deficiency in service, negligence or want of facilitation by the appellant. Consumer fora and Permanent Lok Adalats can not award compensation merely because there was inconvenience or hardship or on grounds of sympathy. What is relevant is whether there was any cause of action for claiming damages, that is whether there was any deficiency in service or whether there was any negligence in providing facilitation. If the delay was due to reasons beyond the control of the airline and if the appellant and its crew have acted reasonably and in a bona fide manner, the appellant cannot be made liable to pay damages even if there has been some inconvenience or hardship to a passenger on account of the delay.

41. If a flight had remained on tarmac without taking off,

for eleven hours, after boarding was completed, and if permission was refused to send the passengers to the Airport lounge, the Airport and ATC authorities have to be blamed for requiring the passengers to stay on board. Normally if the aircraft has remained on tarmac for more than two or three hours after boarding is closed, without the flight taking off, the passengers should be permitted to get back to the airport lounge to get facilitation service from the airline. Whenever there is such delay beyond a reasonable period (say three hours), the passengers on board should be permitted to get back to the airport lounge. If for any unforeseen reason, the passengers are required to be on board for a period beyond three hours or more, without the flight taking off, appropriate provision for food and water should be made, apart from providing access to the toilets. Congestion in the airport on account of the delayed and cancelled flights can not be a ground to prevent the passengers on board from returning to the airport lounge when there is a delay of more than two hours after completion of boarding. While the guidelines issued by the DGCA cover the responsibilities of the airlines, DGCA and other concerned authorities should also specify the responsibilities of the airport and the ATC authorities to ensure that no aircraft remains on tarmac for more than three hours after the boarding is closed and that if it has to so remain, then permit the passengers to return to the airport lounge from the aircraft, till the aircraft is ready to take off. DGCA shall also ensure that the conditions of carriage of all airlines in India is in consonance with its Civil Aviation Directives.

42. In view of our findings, this appeal is allowed. The order of the Permanent Lok Adalat affirmed by the High Court awarding damages and costs to the respondent is set aside and the application of respondent for compensation is rejected. We place on record, our appreciation for the assistance rendered by Shri V. Giri, senior counsel, as amicus curiae.

R.P. Appeal allowed.

KHIVRAJ MOTORS
v.
THE GUANELLIAN SOCIETY
(Civil Appeal No. 4926 of 2011)

JULY 04, 2011

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

Arbitration and Conciliation Act, 1996 – s. 11 – Application under, for appointment of arbitrator – Joint Development Agreement (JDA) in respect of land/property in question between appellant (as developer) and President of respondent Society (as owner of the property) – Power of Attorney executed by the President of the Society in favour of the appellant – Resolution by respondent Society that President was not authorized to deal with property, thus, JDA and Power of Attorney were null and void – Application filed by respondent Society u/s. 11 for appointment of arbitrator to resolve the dispute – Allowed by High Court – Maintainability of the application filed by respondent society u/s. 11 – Held: The application was maintainable as the appellant and the respondent in the application u/s. 11 were parties to the JDA containing a provision for settlement of disputes arising out of the agreement by arbitration – Arbitration agreement was an independent agreement incorporated and rolled into JDA – President did not execute JDA or the power of attorney in his individual capacity – The executant was the respondent Society represented by its President – Respondent Society is the first party under the JDA and not the President – Arbitrator entitled to examine the validity and binding nature of JDA.

Appellant as developer of the property/land in question and 'AJ', President of respondent society as the owner thereof, allegedly entered into a Joint Development Agreement for development of the said

land. Clause 18 of the agreement provided for settlement of disputes arising out of the said agreement by arbitration. 'AJ', President of the respondent Society executed a power of Attorney in favour of the appellant in connection with the development of the property. The respondent Society passed a resolution that the Managing Committee of the Society did not authorize its President to deal with the property and, therefore, the Joint Development Agreement and general power of attorney executed by him were null and void and not binding on the Society. The respondent Society filed an application under Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of an arbitrator for resolution of the disputes between the Society and the appellant. The application was allowed holding that the Joint Development Agreement was executed between the respondent Society and the appellant and 'AJ' had signed the said agreement, only in his capacity as the President of the Society and not in his individual capacity. Therefore, the appellant filed the instant appeal.

Dismissing the appeal, the Court

HELD: 1.1 'AJ' has neither executed the Joint Development Agreement nor the power of attorney in his individual capacity and the executant is the respondent Society represented by its President 'AJ'. Thus, the respondent Society is the first party under the Joint Development Agreement and not 'AJ'. If 'AJ' was executing the Joint Development Agreement in his personal capacity, there was no need for him to describe himself as the "President of the respondent Society" and sign the document for and on behalf of the respondent Society, as its President. Therefore, the application under Section 11 of the Arbitration and Conciliation Act, 1996 filed by the Society was maintainable as the petitioner and the respondent in the application under Section 11 were parties to the Joint Development Agreement

containing a provision (Clause 18) for settlement of disputes arising out of the agreement by arbitration. [Paras 8 and 9] [1171-B-H]

1.2 The respondent Society no doubt contended that the contract was concluded with unconscionable and unfair terms and that the Managing Committee of the Society had not authorized its President 'AJ' to enter into any such Joint Development Agreement. These allegations no doubt relate to the validity of the Joint Development Agreement, but would have no bearing on the validity of the arbitration agreement (Clause 18 of the agreement), which is an independent agreement incorporated and rolled into the Joint Development Agreement. The Arbitrator would examine the validity and binding nature of the Joint Development Agreement. There is nothing in the claims and contentions of the Society which excludes the operation of the arbitration agreement or necessitates rejection of the request for appointment of an arbitrator. Since arbitration has been delayed for one and a half years on account of the pendency of SLP, the Arbitrator is requested to proceed with the matter expeditiously. [Paras 10 and 11] [1172-A-E]

CIVIL APPELALTE JURISDICTION : Civil Appeal No. 4926 of 2011.

From the Judgment & Order dated 26.10.2009 of the High Court of Karantaka in Civil Miscellaneous Petition No. 55 of 2009.

Dushyant Dave, Shweta Bharti, Ahanthem Henry, Amit, Pawan, Suraj G. Raj, Vishnu Anand, Vineet Dwivedi for the Appellant.

Ajesh Kumar, Jaikriti S. Jadeja, Madhusmita Bora, Balaji Srinivasan for the Respondent.

The Judgment of the Court was delivered by

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

2. The appellant alleges that a joint development agreement dated 18.2.2007 was entered into between "Father A.John Bosco, President, The Gaunellian Society" as the owner, and the appellant as the developer, in regard to three acres of land and that clause 18 of the said agreement provided for settlement of disputes arising out of the said agreement by arbitration. It is further alleged by the appellant that on 20.2.2007, the said Father A. John Bosco, President, The Guanellian Society, executed a power of Attorney in favour of the appellant in connection with the development of the said property with power to enter into agreements of sale and also to transfer and convey an extent of 70% undivided share in the said property.

3. The Gaunellian Society, ('Society' for short) the respondent herein, at its Extraordinary Meeting held on 10.1.2008, passed a resolution that the Managing Committee of the Society had not authorized its President to deal with the property and therefore the joint development agreement and general power of attorney executed by him were null and void and not binding on the Society. On 17.4.2009 the respondent Society filed an application under section 11 of the Arbitration and Conciliation Act, 1996 ('Act' for short) for appointment of an arbitrator for resolution of the disputes between the Society and the appellant.

4. The appellant resisted the said petition alleging that the application by the Society was not maintainable for the following reasons :

(a) the lands was purchased and owned by Father A.John Bosco, in his individual capacity and not as the President of the Society;

(b) Father A. John Bosco entered into the joint

development agreement in respect of the property in his individual capacity and not as the President of the Society.

(c) Though the joint development agreement contained a provision for arbitration, as the respondent society was not a party to the joint development agreement containing the arbitration agreement, the petition under section 11 by the Society was not maintainable.

5. A designate of the Chief Justice of the Karnataka High Court by order dated 26.10.2009 allowed the said application and appointed a retired District Judge as the sole arbitrator. The High Court held that the joint development agreement was executed between the Society and the appellant and that Father A.John Bosco had signed the said agreement, only in his capacity as the President of the Society and not in his individual capacity and therefore the application under section 11 of the Act by the Society was maintainable.

6. The said order is contested by the appellant, inter alia, on the following grounds :

(i) The joint development agreement was entered into between Father A.John Bosco, as the owner of the property and the appellant, as developer. As the Society was not a party to the joint development agreement, there is no privity of contract between the Society and the appellant. The arbitration clause in the said agreement could not therefore be invoked by the Society for resolving any dispute relating to the joint development agreement.

(ii) Even if the Society is a party to the joint development agreement, as the Society had alleged that the appellant had adopted unfair means and exercised undue influence over Father A.John Bosco to get the joint development agreement executed by him, it would not be appropriate

for an arbitral tribunal, a private forum, to adjudicate upon such serious allegations. The civil court alone should decide such serious allegations so that the appellant could vindicate itself.

The appellant also attempted to raise several other contentions relating to title and merits of the dispute, which are wholly alien to the scope of the proceedings under Section 11 of the Act and therefore need not be considered.

7. In the special leave petition, the appellant specifically contended that the Society was not a signatory or party to the joint development agreement. Though, a typed copy of the joint development agreement is produced as an annexure to the special leave petition, it did not show who signed the joint development agreement as owner of the property. In view of the said averment in the special leave petition, this Court directed notice on the petition on 15.2.2010. The respondent society has produced alongwith its counter, a photocopy of the registered joint development agreement dated 18.2.2007 and the registered power of attorney dated 28.2.2007 executed in favour of the appellant. The appellant does not dispute the correctness of the said copies produced by the respondent society.

8. An examination of the photocopy of the joint development agreement shows clearly that it was not executed by Father A.John Bosco in his individual capacity. The document describes 'Father A.John Bosco, President, Gaunellian Society' as the first party or the owner. The signature of the first party/ owner on each page of the document is as under:

"For The Gaunellian Society
[Sd/- Fr. A.John Bosco]
President"

The said agreement is also signed by Mr. Pushpchand Chordia as the power of attorney holder of the partners of the appellant.

There are only the said two signatories to the agreement, that is the Society represented by its President and the appellant represented by its Attorney Holder. Fr. A.John Bosco has not executed the joint development agreement in his personal capacity. The power of attorney is also executed by the Society. Thus the respondent Society is the first party under the joint development agreement and not Father A.John Bosco. We may also note that if Father A. John Bosco was executing the joint development agreement in his personal capacity, there was no need for him to describe himself as the "President of the Gaunellian Society" and sign the document for and on behalf of the Gaunellian Society, as its President. Therefore the application under section 11 of the Act filed by the Society against the respondent was maintainable as the petitioner and the respondent in the application under section 11 were parties to the joint development agreement containing a provision (Clause 18) for settlement of disputes arising out of the agreement by arbitration.

9. The appellant has raised a contention that the owner of the property is not the Society and that Father A.John Bosco in his personal capacity was the owner and that he had entered into a joint development agreement and executed a power of attorney in his personal capacity in favour of the appellant. But as noticed above, Father A.John Bosco has neither executed the joint development agreement nor the power of attorney in his individual capacity and the executant is "The Gaunellian Society" represented by its President Father A.John Bosco. If the contention of the appellant that the owner is Father A. John Bosco, and not "The Gaunellian Society", is taken to its logical conclusion, the effect would be that there is no joint development agreement or power of attorney by the owner of the property in favour of the respondent and the joint development agreement and the power of attorney signed by a party who is not by the owner would be worthless papers. Be that as it may. We have referred to this aspect only to show the absurdity of the contention raised by the appellant.

10. The respondent Society has no doubt contended that the contract was concluded with unconscionable and unfair terms and that the Managing Committee of the Society had not authorized its President — Father A.John, Bosco to enter into any such joint development agreement. These allegations no doubt relate to the validity of the joint development agreement, but will have no bearing on the validity of the arbitration agreement (Clause 18 of the agreement), which is an independent agreement incorporated and rolled into the joint development agreement. The Arbitrator will examine the validity and binding nature of the joint development agreement. There is nothing in the claims and contentions of the Society which excludes the operation of the arbitration agreement or necessitates rejection of the request for appointment of an arbitrator.

11. The appeal is therefore dismissed with costs of Rs.25,000/- payable by the appellant to the respondent. We find that the arbitration has been delayed for nearly one and a half years on account of the pendency of this special leave petition. We therefore request the Arbitrator to proceed with the matter expeditiously.

12. We make it clear that what we have considered is the limited question as to who is the executant of the agreement. We have not pronounced upon the question whether Father A.John Bosco was authorized to execute such a joint development agreement. Nor have we considered the contentions relating to the title to the property.

NJ. Appeal dismissed.

THE SECRETARY, SH. A. P. D.JAIN PATHSHALA & ORS.
v.
SHIVAJI BHAGWAT MORE & ORS.
(Civil Appeal No. 4988 of 2011)

JULY 4, 2011

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

Shikshan Sevak Scheme 2000 (in State of Maharashtra):

Shikshan Sevak – Termination of services of – Jurisdiction of Grievance Redressal Committee – HELD: Grievance Committee cannot be a quasi-judicial forum nor can its decisions be made final and binding on parties in disputes relating to Shikshan Sevaks – Any order or opinion of the Grievance Committee on a complaint or grievance submitted by a Shikshan Sevak would be only recommendation to the State Government (Education Department) for taking further action – The direction of the High Court that when the grievance committee holds that the termination is bad, the Shikshan Sevak is deemed to continue on the rolls of the management is, therefore, erroneous and is set aside – It is open to Shikshan Sevak to seek appropriate remedy in accordance with law.

Grievance Redressal Committee – Constitution of – High Court in writ petitions directing that the Committee should be headed by a retired District Judge, the Committee would give opportunity to the parties to file their replies and that the Committee would be the only adjudicatory authority and no civil court would entertain any suit or application in respect of disputes which were required to be dealt with by the Committee – HELD: These changes by the High Court converted what was originally conceived by the State Government to be an administrative grievance redressal mechanism, into a quasi judicial adjudicatory Tribunal – Neither the Constitution nor

any statute empowers a High Court to create or constitute quasi judicial Tribunals for adjudicating disputes – It has no legislative powers – Nor can it direct the executive branch of the State Government to create or constitute quasi judicial Tribunals, otherwise than by legislative Statutes – Therefore, it is not permissible for the High Court to direct the State Government to constitute judicial authorities or Tribunals by executive orders, nor is it permissible for the State by executive order or resolution to create them for adjudication of rights of parties –The High Court in exercise of the power of judicial review, cannot issue a direction that the civil courts shall not entertain any suit or application in regard to a particular type of disputes (in the instant case, disputes relating to Shikshan Sevaks) nor can it create exclusive jurisdiction in a quasi-judicial forum like the Grievance Committee – The High Court, cannot, by a judicial order, nullify, supersede or render ineffectual the express provisions of an enactment – Constitution of India, 1950 – Articles 162; 226, 233, 234 and 247; 323-A and 323-B – The Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977- Code of Civil Procedure, 1908—s.9 – Jurisdiction of Civil Court – Judicial Review.

The Government of Maharashtra by Resolution dated 27.4.2000 sanctioned Shikshan Sevak Scheme for recognized private secondary/higher secondary schools/ junior Colleges/B.Ed. Colleges in the State. The Scheme provided for constitution of a three member Grievance Redressal Committee consisting of the officers of the Education Department for considering the grievances of Shikshan Sevaks. In the writ petitions challenging the said scheme, the High Court, by its order dated 16.8.2000, directed the State Government to reconstitute the Grievance Redressal Committee with a retired District Judge as its Chairman. It further directed that the Committee would give opportunity to the parties to file their replies and that no civil court would entertain any

suit or application in respect of disputes which were required to be dealt with by the Committee. By subsequent Government Resolution dated 27.7.2001, it was provided that the grievances would be considered by a Single Member Committee consisting of retired Judge, of the rank of Civil Judge, Senior Division.

Respondent no. 1 was appointed by appellant No.1 as Shikshan Sevak for the period 1.8.200 to 31.7.2003. According to him, his services were terminated on 11.6.2001. He filed an appeal before the Grievance Committee. As the Committee did not consider the issues raised by the respondent, he filed a writ petition seeking a direction to the Grievance Committee to decide the preliminary issues. The Committee allowed the appeal by order dated 28.7.2006, quashed the termination of respondent no. 1 and directed the employers to reinstate him in any of their schools with continuity of service, but without back wages. It also directed the Education Officer to approve the appointment of respondent no. 1 as a regular teacher. The employers filed a writ petition which was admitted by the Single Judge of the High Court. Since stay of order of the Grievance Committee was refused, the employers filed CA No. 4989 of 2011.

Respondent no. 1 filed another writ petition seeking a direction to the appellants to implement the order dated 28.7.2006 passed by the Grievance Committee. The High Court while issuing notice on 31.2.2008 directed the Education Officer to ensure compliance by the appellants of the order dated 28.7.2006 passed by the Grievance Committee. The application of the appellants seeking to vacate the interim order dated 31.2.2008, was dismissed by the High Court, *inter alia,* holding that "when the Grievance Committee comes to a conclusion that the order of termination is bad or illegal, the Shikshan Sevak whose services are terminated, would continue to be on

the rolls of the school." Aggrieved, the employers filed CA No. 4988 of 2011.

The questions for consideration before the Court were: (i) "Whether the High Court can direct the State Government to create a quasi judicial forum; and whether creation of such a forum by an executive order, by the State Government, in pursuance of such a direction, is valid?" (ii) "Whether the High Court could, by a judicial order, exclude the jurisdiction of civil courts to entertain any suits or applications in respect of disputes raised by *Shikshan Sevaks*?" (iii) "Whether the High Court was justified in holding that when the Grievance Committee holds that the order of termination is bad or illegal, it does not amount to ordering reinstatement, but the *Shikshan Sevak* would as a result continue to be in the employment of the employer?" and (iv) "Whether the orders dated 2.5.2008 and 5.8.2008 of the High Court call for interference?"

Allowing the appeals, the Court

HELD: 1.1. Creation, continuance or existence of a judicial authority in a democracy must not depend on the discretion of the executive but should be governed and regulated by appropriate law enacted by a Legislature. The provisions of the Constitution, namely, Articles 233, 234 and 247 for constituting sub-ordinate courts, and Articles 323A and 323B for constituting tribunals by law made by the legislature, make it clear that judicial Tribunals shall be created only by statutes or rules framed under authority granted by the Constitution. Therefore, the executive power of the State cannot be extended to creating judicial Tribunals or authorities exercising judicial powers and rendering judicial decisions. [para 15-16] [1190-F-H; 1191-D-H]

Ram Jawaya Kapur Vs. State of Punjab **– 1955 (2) SCR**

225 and *Bishamber Dayal Chandra Mohan vs. State of U.P.* **– 1982 (1) SCC 39;** *State of Karnataka vs. Vishwabharathi House Building Co-op., Society* **2003 (2) SCC 412;** *Durga Shankar Mehta v. Thakur Raghuraj Singh* **1955 (1) SCR 267;** *Associated Cement Companies Ltd. vs. P.N.Sharma* **1965 (2) SCR 366; and** *Kihoto Hollohan v. Zachillhu* **1992 Supp(2) SCC 651;** *Union of India v. Madras Bar Association* **2010 (11) SCC 1 – referred to.**

1.2. Under the *Shikshan Sevak* Scheme, as originally formulated by the Government Resolution dated 27.4.2000, the Grievance Redressal Committee was merely a mechanism to hear grievances of *Shikshan Sevaks* and give its recommendation to the Education Department, so that the department could take appropriate action. The Grievance Committee was not intended to be a quasi-judicial forum. But, the High Court while recommending various modifications to the said scheme, in its order dated 16.8.2000, issued specific directions making significant changes in the constitution and functioning of the Committee. Firstly, it directed a change in the constitution of the Committee by requiring a retired District Judge to head the Committee. Secondly, it directed that an opportunity should be given to the 'parties', that is, the complainant (*Shikshan Sevak*) and the person against whom the complaint was made (the employer) to file their statements/replies, before adjudicating upon the dispute. Thirdly, it directed that the committee should be the only adjudicatory authority and excluded the jurisdiction of the civil courts (and any other authority) to entertain any suit or application in regard to the disputes relating to selection, appointment, re-appointment or cancellation of appointment of *Shikshan Sevaks*. The changes by the High Court converted what was originally conceived by the State Government to be an administrative grievance redressal mechanism, into a quasi judicial adjudicatory Tribunal. This was reiterated

by a subsequent order of the High Court converting the committee into a one-man Tribunal consisting of a retired Judge (of the rank of Civil Judge, Senior Division). [para 8-9] [1185-C-H; 1186-A-B]

1.3. Neither the Constitution nor any statute empowers a High Court to create or constitute quasi judicial Tribunals for adjudicating disputes. It has no legislative powers. Nor can it direct the executive branch of the State Government to create or constitute quasi judicial Tribunals, otherwise than by legislative Statutes. Therefore, it is not permissible for the High Court to direct the State Government to constitute judicial authorities or Tribunals by executive orders, nor is it permissible for the State by executive order or resolution to create them for adjudication of rights of parties. [para 17] [1192-A-B]

2.1. Section 9 of the Code of Civil Procedure, 1908 provides that the courts shall, subject to the provisions of the Code, have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. The express or implied bar necessarily refers to a bar created by the Code itself or by any statute made by a Legislature. Therefore, the High Court in exercise of the power of judicial review, cannot issue a direction that the civil courts shall not entertain any suit or application in regard to a particular type of disputes (in the instant case, disputes relating to *Shikshan Sevaks*) nor can it create exclusive jurisdiction in a quasi-judicial forum like the Grievance Committee. The High Court, cannot, by a judicial order, nullify, supersede or render ineffectual the express provisions of an enactment. [para 18] [1192-D-F]

2.2. Constitution of a Grievance Committee as a public adjudicatory forum, whose decisions are binding on the parties to the disputes, by an executive order of

the Government is impermissible. Any such Grievance Committee created by an executive order, either on the direction of the High Court or otherwise, can only be fact finding bodies or recommending bodies which can look into the grievances; and any order or opinion of the Grievance Committee on a complaint or grievance submitted by a *Shikshan Sevak* would be only recommendations to the State Government (Education Department) for taking further action or making appropriate reports to enable judicial Tribunals to render decisions. [para 19] [1192-G-H; 1193-A-B]

3.1. An opinion by the Grievance Committee that the termination of the services of a *Shikshan Sevak* is illegal can not have the effect of either reinstating the employee into service, nor can it be deemed to be a declaration that the *Shikshan Sevak* continues to be an employee of school. Even if a *Shikshan Sevak* is wrongly removed, the department could only direct the school to take him back into service and if it does not comply, take action permissible in law for disobedience of its directions. Therefore, the decision of the Grievance Committee dated 28.7.2006 is not an enforceable or executable order but only a recommendation that can be made the basis by the Education Department to issue appropriate directions. Persons aggrieved by such directions of the State government will be entitled to challenge such directions either before the civil court or in writ proceedings. It is also open to the *Shikshan Sevak* to seek appropriate remedy if he is aggrieved by his termination, in accordance with law. [para 21-23] [1193-H; 1194-A-F]

3.2. The direction of the High Court in its order dated 5.8.2008 that when the grievance committee holds that the termination is bad, the *Shikshan Sevak* is deemed to continue on the rolls of the management is erroneous and is liable to be set aside. The impugned orders dated

2.5.2008 and 5.8.2008 are set aside. [para 20 and 23] [1193-F-G]

S.B. Dutt vs. University of Delhi **– AIR 1958 SC 1050;** *Executive Committee of Vaish Degree College, Shamli vs. Lakshmi Narain* **– 1976 (2) SCR 1006 – relied on**

Case Law Reference:

2003 (2) SCC 412	**referred to**	**para 13**
1955 (1) SCR 267	**referred to**	**para 14**
1965 (2) SCR 366	**referred to**	**para 14**
1992 Supp(2) SCC 651	**referred to**	**para 14**
2010 (11) SCC 1	**referred to**	**para 14**
1955 (2) SCR 225	**referred to**	**para 16**
1982 (1) SCC 39	**referred to**	**para 16**
AIR 1958 SC 1050	**relied on**	**para 20**
1976 (2) SCR 1006	**relied on**	**para 20**

CIVIL APPELALTE JURISDICTION : Civil Appeal No. 4988 of 2011.

From the Judgment & Order dated 5.5.2008 of the High Court of Aurangabad Bench in Writ Petition No. 7362 of 2007.

WITH

C.A. No. 4989 of 2011.

Uday S. Matte, N.R. Katneshwarkar, Sunil Kumar Verma for the Appellants.

Dilip Annasaheb Taur, Anil Kumar, Shankar Chillarge, Asha Gopalan Nair for the Respondent.

The Judgment of the Court was delivered by

R.V.RAVEENDRAN, J. 1. Leave granted in both the petitions.

2. The Government of Maharashtra by Government Resolution dated 27.4.2000 accorded sanction for implementation of the *Shikshan Sevak scheme* in all recognized private secondary/higher secondary schools/Junior colleges/B.Ed. colleges, in the state. The said scheme in essence provided for (i) appointment of Shikshan Sevaks for a term of one year on payment of a fixed honorarium, (ii) renewal of such appointment annually, if the work was found to be satisfactory, (iii) absorption of such Shikshan Sevaks into service as teachers on completion of the specified years of service. It provided for constitution of a three member Grievance Redressal Committee (consisting of the concerned Divisional Deputy Director of Education, the Assistant Director and the Education Officer) to consider and decide the grievances relating to selection, appointment, re-appointment or mid-year cancellation of appointment. The scheme provided as follows:

> "All the complaints received under the Shikshan Sevak scheme are to be referred to the aforesaid Three Member Committee. This committee will hold monthly meetings and *render its decision on the complaints and would inform the same to the concerned. An opportunity to put up the case would be given to the complainant."*
>
> [Emphasis supplied]

3. The Bombay High Court disposed of several writ petitions challenging the said scheme, by order dated 16.8.2000, recording the submission made on behalf of the state government that it would amend the scheme by incorporating the several modifications suggested by the court. While doing so, the High Court also directed the state

government to reconstitute the Grievance Redressal Committee with a retired District Judge as Chairman and the Deputy Director and Education Officer (Secondary) of the concerned region as members. The High Court further directed as follows :

> "All complaints relating to unsatisfactory work or misconduct etc. will be forwarded to the Committee who shall take decision within 30 days from the date of receipt of record after giving an *opportunity to the concerned parties to file their replies so as to avoid prolonged procedure of oral hearing.*
>
> All complaints in respect of appointment, termination etc. shall be dealt with only by the Committee constituted above and by no other authority. *As the scheme is being implemented on interim basis we direct that no Civil Court shall entertain any suit or application in respect of disputes which are required to be dealt with by the Committee*."
>
> (emphasis supplied)

4. In compliance with the said decision dated 16.8.2000, the State Government by Government Resolution dated 13.10.2000 modified the scheme. Clause (17) of the modified scheme implemented the direction of the High Court regarding the re-constitution of the Three Member Committee and provided that the Committee would function at Mumbai, Aurangabad and Nagpur, the area of jurisdiction of the committees corresponding to the jurisdiction of the benches of High Court at Mumbai, Aurangabad and Nagpur.

5. By order dated 21.6.2001 in subsequent writ petitions, the High Court recorded the following submissions of the State Government :

> "The learned Advocate General stated that the State Government will appoint a nine member Grievance

Committee and the pending grievances of the Shikshan Sevaks will be referred to the said Grievance Committee. The Committee will be headed by a retired Civil Judge, Sr. Division, who will be appointed in consultation with the Registrar of this Court. The learned Advocate General assured the Court that the appointment of the Committee member will be notified within a period of six weeks from today. He also stated that the Member of the Grievance Committee will be given salary and emoluments as paid to the member of the School Tribunal and necessary infrastructure will also be provided. He stated that the Committee will hold the proceedings in Mumbai, Aurangabad and Nagpur to consider the grievances of the Shikshan Sevaks of the respective regions."

Thereafter, Government Resolution dated 27.7.2001 was issued directing that the grievances will be considered by a Single Member committee consisting of retired Judge (higher level) at Mumbai, Aurangabad and Nagpur by way of circuit bench and *resolve the complaints of Shikshan Sevaks*.

Facts of this case

6. The appellants appointed the first respondent as a *Shikshan Sevak* on 29.7.2000 for the period 1.8.2000 to 31.7.2003. The first respondent alleges that his services were orally terminated on 11.6.2001. On the other hand, the appellants allege that services of first respondent came to an end in March-April, 2001 (as his appointment was not approved due to lack of prescribed qualifications); and the first respondent joined another school as an assistant teacher in July, 2001. The first respondent challenged his termination by filing an appeal before the School Tribunal. Later he withdrew the said appeal on 18.10.2003 and filed an appeal before the Grievance Committee in the year 2004. The appellants raised various preliminary objections about the maintainability of the complaint. As the Grievance Committee did not consider them, the appellants filed W.P. No.7597/2005 seeking a direction to

the Grievance Committee to decide the preliminary issues. The High Court admitted the said writ petition was admitted, but did not stay the proceedings before the Grievance Committee. Therefore, the Committee proceeded to hear the matter and allowed the appeal by order dated 28.7.2006. It quashed the termination dated 11.6.2001 and directed the appellants to reinstate the first respondent forthwith in any of their high schools without back wages but with continuity of service with a further direction to the Education Officer to approve the appointment of the first respondent as a regular teacher/ assistant teacher. The appellants filed W.P.No.6196/2006 challenging the order dated 28.7.2006. A learned Single Judge admitted the said writ petition on 2.5.2008 but refused to stay the order of the Grievance Committee. The said order dated 2.5.2008 refusing the interim relief is challenged in the second of these two appeals.

7. The first respondent filed a writ petition (W.P.No.7362/ 2007) in September, 2007 seeking a direction to the appellants to implement the order dated 28.7.2006 passed by the Grievance Committee. In the said writ petition, the High Court while issuing notice on 31.3.2008, directed the Education officer to ensure the compliance by the appellants, of the order dated 28.7.2006 passed by the Grievance Committee forthwith, unless the said order was challenged and a stay obtained. The appellants filed an application seeking vacation of the said interim order dated 31.3.2008 which was dismissed by the High Court by order dated 5.8.2008, holding as follows :

(i) The Grievance Committee had the power to decide the legality of the termination.

(ii) When the Grievance Committee comes to a conclusion that the order of termination is bad or illegal, the *Shikshan Sevak* whose services are terminated, would continue to be on the rolls of the school.

(iii) As the management receives grant-in-aid in regard to

Shikshan Sevak, the appellants were bound to comply with the direction issued by the Grievance Committee.

The said order is challenged in the first of these two appeals. This Court on 15.9.2008 while issuing notice granted interim stay of the orders dated 31.3.2008 and 5.8.2008.

The Issue

8. Under the *Shikshan Sevak* Scheme, as originally formulated by the State Government by Government Resolution dated 27.4.2000, the Grievance Redressal Committee was merely a mechanism to hear grievances of *Shikshan Sevaks* and give its recommendation to the Education Department, so that the department could take appropriate action. The Grievance Committee was not intended to be a quasi-judicial forum as was evident from the following: (a) The committee was constituted only to consider the grievances of the *Shikshan Sevaks* by giving them an opportunity of putting forth their grievances. (b) The scheme did not contemplate issue of notice to the employer, nor hearing both parties, nor rendering any adjudicatory decision. (c) The committee was a departmental committee with only the concerned officers as members.

9. The High Court while recommending various modifications to the said scheme, in its order dated 16.8.2000, issued specific directions making significant changes in the constitution and functioning of the committee. Firstly it directed a change in the constitution of the committee by requiring a retired District Judge to head the Committee. Secondly, it directed that an opportunity should be given to the 'parties', that is, the complainant (*Shikshan Sevak*) and the person against whom the complaint was made (the employer) to file their statements/replies, before adjudicating upon the dispute. Thirdly, it directed that the committee should be the only adjudicatory authority and excluded the jurisdiction of the Civil Courts (and any other authority) to entertain any suit or application in regard to the disputes relating to selection,

appointment, re-appointment or cancellation of appointment of *Shikshan Sevaks*. The aforesaid three changes by the High Court converted what was originally conceived by the State Government to be an administrative grievance redressal mechanism, into a quasi judicial adjudicatory Tribunal. This was reiterated by a subsequent order of the High Court converting the committee into a one-man Tribunal consisting of a retired Judge (of the rank of Civil Judge, Senior Division).

10. The appellants contend that the constitution of such a quasi judicial tribunal, by a judicial fiat to the state government, was without the authority of law and invalid, and consequently, the decisions by such a forum are void and unenforceable. On the contentions raised, the following questions arise for our consideration :

(i) Whether the High Court can direct the State Government to create a quasi judicial forum; and whether creation of such a forum by an executive order, by the State Government, in pursuance of such a direction, is valid?

(ii) Whether the High Court could, by a judicial order, exclude the jurisdiction of civil courts to entertain any suits or applications in respect of disputes raised by *Shikshan Sevaks*?

(iii) Whether the High Court was justified in holding that when the Grievance Committee holds that the order of termination is bad or illegal, it does not amount to ordering reinstatement, but the *Shikshan Sevak* would as a result continue to be in the employment of the employer?

(iv) Whether the orders dated 2.5.2008 and 5.8.2008 of the High Court call for interference?

11. In the State of Maharashtra, the conditions of service of employees of private schools are governed by the

Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977 ('Act' for short). The said Act applies to employees of primary schools, secondary schools, higher secondary schools, junior colleges of education or any other institutions by whatever name called including technical, vocational or art **institutions**. The term 'employee' was initially defined as any member of the teaching and non-teaching staff of a recognized school. Section 8 provided for constitution of School Tribunals consisting of single member who is an officer of the rank of Civil Judge (Senior Division). Section 9 gave a right of appeal to the employees of private schools to the Tribunal. The Tribunal was given the power to give appropriate reliefs and directions to the management including reinstatement, awarding of lesser punishment, restoration of rank, payment of arrears of emoluments etc., and also the power to levy penalty. When the *Shikshan Sevak Scheme* was introduced in the year 2000, it was assumed that the *Shikshan Sevaks* were not "employees" of private schools and therefore will not be entitled to approach the School Tribunals for relief. Therefore, the scheme provided a grievance redressal mechanism. When the validity of the scheme was challenged, the High Court was also of the view that the Act would not apply to *Shikshan Sevaks* as they were not 'employees' as defined under the Act. The High Court however was of the view that *Shikshan Sevaks* should have recourse to remedies similar to the regular employees of private schools and therefore directed reconstitution of the grievance committees on the lines of the School Tribunal. The Act was amended by Amendment Act 14 of 2007 whereby the definition of 'employee' was expanded to include *Shikshan Sevaks.* Ever since the amendments to the Act, by Act 14 of 2007, came into force, *Shikshan Sevaks* have the remedy of approaching the statutory School Tribunals constituted under the Act for redressal of their grievances and the Grievance Committees became redundant. Thus what falls for consideration in this case is the position that existed prior to the 2007 Amendment to the Act.

Re: Question (i)

12. Chapter VI of the Constitution of India deals with Subordinate Courts. Article 233 of the Constitution of India relates to appointment of District Judges. Article 234 relates to recruitment of persons other than District Judges to the judicial service and provides that appointment of persons to the judicial service of a State (other than District Judges) shall be made by the Governor of the State in accordance with the Rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State. Article 247 provides that notwithstanding anything contained in Chapter I of Part XI of the Constitution, Parliament may by law provide for the establishment of any additional courts for the better administration of laws made by the Parliament or of any existing laws with respect to a matter enumerated in the union list.

13. Part XIV-A of the Constitution of India deals with Tribunals. Article 323A provides for the creation of Administrative Tribunals. Article 323B provides that the appropriate Legislature may by law provide for the adjudication or trial by Tribunals of any disputes, complaints or offences with respect to all or any of the matters specified in clause (2) thereof with respect to which such Legislature has power to make laws. The matters enumerated in clause (2) of Article 323B do not include disputes relating to employees of educational institutions. This Court in *State of Karnataka vs. Vishwabharathi House Building Co-op., Society* – 2003 (2) SCC 412 has clarified that Articles 323A and 323B enabling the setting up of Tribunals, are not to be interpreted as prohibiting the legislature from establishing Tribunals not covered by the said Articles as long as there is legislative competence under an appropriate entry in the Seventh Schedule.

14. Courts and Tribunals are constituted by the State, to

invest judicial functions, as distinguished from purely administrative or executive functions, (vide *Durga Shankar Mehta v. Thakur Raghuraj Singh* – 1955 (1) SCR 267). 'Courts' refer to hierarchy of courts invested with state's inherent judicial power established to administer justice in pursuance of constitutional mandate. Tribunals are established under special Statutes to decide the controversies arising under those special laws. In *Associated Cement Companies Ltd. vs. P.N.Sharma* [1965 (2) SCR 366] this Court observed :

> "…Judicial functions and judicial powers are one of the essential attributes of a sovereign State, and on considerations of policy, the State transfers its judicial functions and powers mainly to the courts established by the Constitution; but that does not affect the competence of the State, *by appropriate measures,* to transfer a part of its judicial powers and functions to tribunals by entrusting to them the task of adjudicating upon special matters and disputes between parties."
>
> [emphasis supplied]

In *Kihoto Hollohan v. Zachillhu* [1992 Supp(2) SCC 651], this Court held:

> "Where there is a lis - an affirmation by one party and denial by another - and the dispute necessarily involves a decision on the rights and obligations of the parties to it and the authority is called upon to decide it, there is an exercise of judicial power. That authority is called a Tribunal, if it does not have all the trappings of a court."

In *Union of India v. Madras Bar Association* [2010 (11) SCC 1], a Constitution Bench of this Court held:

> "The term `Courts' refers to places where justice is administered or refers to Judges who exercise judicial functions. Courts are established by the state for

> administration of justice that is for exercise of the judicial power of the state to maintain and uphold the rights, to punish wrongs and to adjudicate upon disputes. Tribunals on the other hand are special alternative institutional mechanisms, *usually brought into existence by or under a statute to decide disputes arising with reference to that particular statute,* or to determine controversies arising out of any administrative law. Courts refer to Civil Courts, Criminal Courts and High Courts. Tribunals can be either private Tribunals (Arbitral Tribunals), or Tribunals constituted under the Constitution (Speaker or the Chairman acting under Para 6(1) of the Tenth Schedule) or Tribunals authorized by the Constitution (Administrative Tribunals under Article 323A and Tribunals for other matters under Article 323B) or Statutory Tribunals which are created under a statute (Motor Accident Claims Tribunal, Debt Recovery Tribunals and consumer fora)."
>
> (emphasis supplied)

15. Apart from constitutional provisions, Tribunals with adjudicatory powers can be created only by Statutes. Such Tribunals are normally vested with the power to summon witnesses, administer oath, and compel attendance of witnesses and examine them on oath, and receive evidence. Their powers are derived from the statute that created them and they have to function within the limits imposed by such statute. It is possible to achieve the independence associated with a judicial authority only if it is created in terms of the Constitution or a law made by the Legislature. Creation, continuance or existence of a judicial authority in a democracy must not depend on the discretion of the executive but should be governed and regulated by appropriate law enacted by a Legislature. In this context, it is worthwhile to refer to the following observations of the European Commission of Human Rights in *Zand vs. Austria* (Appeal No.7360 of 1976 decided on 12.10.1978): "The judicial organization in a democratic society must not depend on the

discretion of the executive, but should be regulated by law emanating from the Parliament".

16. Article 162 of the Constitution, no doubt, provides that subject to the provisions of the constitution, the executive power of a State shall extend to the matters upon which the Legislature of the State has competence to legislate and are not confined to matters over which legislation has been already passed. It is also well settled that so long as the State Government does not go against the provisions of the Constitution or any law, the width and amplitude of its executive power under Article 162 cannot be circumscribed; and if there is no enactment covering a particular aspect, the Government could carry on the administration by issuing administrative directions or instructions, until the legislature makes a law in that behalf. (See *Ram Jawaya Kapur Vs. State of Punjab* – 1955 (2) SCR 225 and *Bishamber Dayal Chandra Mohan vs. State of U.P.* – 1982 (1) SCC 39. But the powers of the State to exercise executive powers on par with the legislative powers of the legislature, is "subject to the provisions of the Constitution". The provisions of the Constitution, namely Articles 233, 234 and 247 for constituting sub-ordinate courts, and Articles 323A and 323B for constituting tribunals by law made by the legislature, make it clear that judicial Tribunals shall be created only by statutes or rules framed under authority granted by the Constitution. If the power to constitute and create judicial Tribunals by executive orders is recognized, there is every likelihood of Tribunals being created without appropriate provisions in regard to their constitution, functions, powers, appeals, revisions, and enforceability of their orders, leading to chaos and confusion. There is also very real danger of citizen's rights being adversely affected by *ad hoc* authorities exercising judicial functions, who are not independent or competent to adjudicate disputes and render binding decisions. Therefore, the executive power of the State cannot be extended to creating judicial Tribunals or authorities exercising judicial powers and rendering judicial decisions.

17. Neither the Constitution nor any statute empowers a High Court to create or constitute quasi judicial Tribunals for adjudicating disputes. It has no legislative powers. Nor can it direct the executive branch of the State Government to create or constitute quasi judicial Tribunals, otherwise than by legislative Statutes. Therefore, it is not permissible for the High Court to direct the State Government to constitute judicial authorities or Tribunals by executive orders, nor permissible for the State by executive order or resolution create them for adjudication of rights of parties.

Re: Question (ii)

18. Section 9 of the Code of Civil Procedure provides that the courts shall, subject to the provisions of the Code, have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. The express or implied bar necessarily refers to a bar created by the Code itself or by any statute made by a Legislature. Therefore, the High Court in exercise of the power of judicial review, cannot issue a direction that the civil courts shall not entertain any suit or application in regard to a particular type of disputes (in this case, disputes relating to *Shikshan Sevaks*) nor create exclusive jurisdiction in a quasi-judicial forum like the Grievance Committee will be entitled to deal with them. The High Court, cannot, by a judicial order, nullify, supersede or render ineffectual the express provisions of an enactment.

19. Therefore, we hold that constitution of a Grievance Committee as a public adjudicatory forum, whose decisions are binding on the parties to the disputes, by an executive order of the Government is impermissible. Secondly, the High Court cannot in exercise of judicial power interfere with the jurisdiction of the civil courts vested under Code of Civil Procedure. Any such Grievance Committee created by an executive order, either on the direction of the High Court or otherwise, can only be fact finding bodies or recommending bodies which can look into the grievances and make appropriate recommendations

to the government or its authorities, for taking necessary actions or appropriate reports to enable judicial Tribunals to render decisions. The Grievance Committee cannot be public quasi-judicial forum nor can its decisions be made final and binding on parties, in disputes relating to *Shikshan Sevaks*. Therefore, it has to be held that any order or opinion of the Grievance Committee on a complaint or grievance submitted by a *Shikshan Sevak* were only recommendations to the State Government (Education Department) for taking further action and nothing more.

Re : Questions (iii) & (iv)

20. Even assuming that the committees constituted under the *Shikshan Sevaks* scheme were quasi judicial tribunals, they cannot direct reinstatement nor direct that the employees are deemed to continue in service by declaring the termination to be bad. It is well settled that courts would not direct reinstatement of service nor grant a declaration that a contract of personnel service subsists and that the employee even after removal is deemed to be in service. [See : *S.B. Dutt vs. University of Delhi* – AIR 1958 SC 1050]. The three recognized exceptions to the said rule are : (i) where a public servant having the protection of Article 311 of the Constitution is dismissed from service is in contravention of the provision; (ii) where a dismissed workman seeks reinstatement before Industrial Tribunals/Labour Courts under the industrial law; and (iii) where a statutory body acts in breach or violation of the mandatory obligation imposed by Statute. [See : *Executive Committee of Vaish Degree College, Shamli vs. Lakshmi Narain* – 1976 (2) SCR 1006]. The direction of the High Court in its order dated 5.8.2008 that when the grievance committee holds that the termination is bad, the *Shikshan Sevak* is deemed to continue on the rolls of the management is therefore erroneous and liable to be set aside.

21. If a Grievance Committee opines that the termination or cancellation of appointment of a *Shikshan Sevak* was bad,

the State Government may consider such opinion/ recommendation and if it decides to accept it, take appropriate action by directing the school to take back the *Shikshan Sevak,* and if the school fails to comply, take such action as is permissible including stoppage of the grant. An opinion by the Grievance Committee that the termination of the services of a *Shikshan Sevak* is illegal can not however have the effect of either reinstating the employee into service, nor deemed to be a declaration that the *Shikshan Sevak* continues to be an employee of school. Even if a *Shikshan Sevak* is wrongly removed, the department could only direct the school to take him back into service and if it does not comply, take action permissible in law for disobedience of its directions.

22. Therefore the decision of the committee dated 28.7.2006 is not an enforceable or executable order but only a recommendation that can be made the basis by the Education Department to issue appropriate directions. It is needless to add that persons aggrieved by such directions of the state government will be entitled to challenge such directions either before the civil court or in a writ proceedings.

23. In view of the above, the appeals are allowed and the orders dated 2.5.2008 and 5.8.2008, are set aside. The order of the Grievance Committee is treated as a recommendation rendered for the benefit of the Education Department which can on the basis of the said opinion take appropriate action in accordance with law. It is also open to the *Shikshan Sevak* to seek appropriate remedy if he is aggrieved by his termination, in accordance with law.

R.P. Appeals allowed.