TATA MOTORS LTD.

v.

TALATHI OF VILLAGE CHIKHALI AND ORS.

(Civil Appeal No. 10187 of 2010)

JULY 4, 2010

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

Maharashtra Land Revenue Code, 1966: ss.39, 168 – Non-agricultural cess – Liability to pay – Lease of land granted to the appellant by the Pimpri-Chinchwad New Development Authority – Demand on the appellant for payment of non-agricultural cess – Challenged by appellant on the ground that it was a government lessee and, therefore not liable to pay the amount demanded and in the alternate, appellant took plea that it was tenant of the Development Authority and demand for non-agricultural assessment could be made only on the Development Authority and not against the tenant – Held: s.2(11) r/w s.38 defines a 'government lessee' as a lessee under a lease granted by a Collector in regard to unalienated unoccupied land belonging to the government – In the instant case, the land was not leased by the Collector to the appellant – The lease deed stated that the lands leased were held by the Development Authority – There was also nothing to show that the lands belonged to government and that the Development Authority granted the lease in favour of appellant, acting as an agent of the state government – Therefore, the leased lands were not government lands and the lessor was not the government – Therefore, the contention that the appellant was a 'government lessee' and, therefore, not liable to pay the non-agricultural assessment is rejected – However, by virtue of Pimpri-Chanchwad New Town Development authority (Disposal of Land) Regulations, 1973 r/w the lease deed statutory liability was imposed on the appellant-lessee to pay the non-agricultural assessment to the

state government – Having regard to the statutory liability created under the 1973 Regulations, the position of the lessee would be similar to a tenant referred to in sub-section 1(c) of s.168 which provides that in case of land in possession of a tenant, such tenant if he is liable to pay land revenue therefor under the relevant tenancy laws, shall be primarily liable to the state government for the payment of land revenue, including all arrears – The liability of the appellant as tenant, to pay the land revenue, though not under a 'tenancy law' in its strict sense, but is nevertheless under a statutory regulation governing the tenancy and, therefore, the demand by the state government directly against the appellant, can be justified by the principle underlying s.168(1)(c) – Maharashtra Regional and Town Planning Act – ss.113, 114 and 118 – Pimpri-Chanchwad New Town Development authority (Disposal of Land) Regulations, 1973 – Regulations 10(iv), (v) – Land laws and agricultural tenancy.

Words and phrases: Word 'occupant' – Meaning of, in the context of Maharashtra Land Revenue Code, 1966.

The appellant was granted a lease of land under lease deed dated 3.1.1995 by Pimpri-Chinchwad New Development Authority for a term of 99 years commencing from 21.11.1994. The appellant utilised the said plot and the adjoining plot obtained on lease from Maharashtra Industrial Development Corporation (MIDC) for construction of factory. The appellant commenced construction of its plant and on completion commenced actual use for industrial purpose in 1999. The competent authority served demand notices on the appellant for payment of non-agricultural cess and additional non-agricultural cess for the period 1995-96 to 2001-02. The appellant filed writ petition before the High Court challenging the demand notices on the ground that it being a "government lessee" was not liable to pay the demand amount. The appellant also took an alternate plea

that it was a tenant of the Development Authority and was, therefore, not liable to pay the non-agricultural cess assessment under the provisions of the Maharashtra Land Revenue Code, 1966.

The High Court rejected the contention of the appellant that it was government lessee. It held that as a lessee under the Development Authority, the appellant was liable to pay the non-agricultural assessment. The High Court, however, held that having regard to section 115 of the Code, non-agricultural assessment could be levied only with effect from the date on which the land was actually used for non-agricultural purpose, and as appellant commenced actual non-agricultural use in the year 1999, the non-agricultural assessment was due by it only from 1999-2000. As a consequence, the High Court allowed the writ petition in part, quashed the demand relating to the period 1995-96 to 1998-99 and upheld the claim for the non-agricultural assessment from the year 1999-2000 onwards.

The questions which arose for consideration in the instant appeal were whether the appellant was a 'government lessee' and, therefore, not liable to pay the non-agricultural assessment and whether the appellant was a tenant of the Development Authority and the demand for non-agricultural assessment could be made only on the Development Authority and not against the tenant.

Dismissing the appeal, the Court

HELD: 1.1. Section 39 of the Maharashtra Land Revenue Code, 1966 makes the occupant liable to pay the land revenue and Government lessee to pay rent fixed. The expressions "to hold land" or "to be a land holder or holder of land" is defined in section 2(12) and mean to be lawfully in possession of land, whether such

possession is actual or not. It is not in dispute that the land in question is unalienated land and that in regard to such land, only the 'occupant' as defined in the Code is primarily liable to pay the non-agricultural assessment to the state government. Section 2(23) makes it clear that where the land is in the actual possession of a tenant, the superior landlord or the land holder is deemed to be the occupant. It is also not in dispute that the Pimpri-Chinchwad New Development Authority is the 'occupant' and the appellant is not the occupant, but only a tenant under the occupant. There is no dispute that a government lessee is not liable to pay any land revenue. Section 2(11) read with section 38 defines a 'government lessee' as a lessee under a lease granted by a Collector in regard to unalienated unoccupied land belonging to the government. In this case, the lands in question for which the non-agricultural assessment was demanded, were not leased by the Collector to the appellant. The lease deed states that the lands leased were held by the Development Authority, and the lessor is the Development Authority. Therefore the leased lands were not government lands and the lessor was not the government. There was also nothing to show that the lands belonged to government and that the Development Authority granted the lease in favour of appellant, acting as an agent of the state government. A lessee of the Development Authority is not a government lessee as the Development Authority is not the government and the lease lands are not government lands. Therefore, the contention that the appellant was a 'government lessee' and, therefore, not liable to pay the non-agricultural assessment is rejected. [Paras 4-6] [875-B-C; 876-B; 877-H; 878-A-B]

1.2. The appellant relied upon a state government Circular dated 29.3.1975 which clarified that as on that date, Maharashtra Industrial Development Corporation

(MIDC) was the agent of the state government and, therefore, not liable to pay any assessment to the government in respect of the lands held by it as agent of the state government; that any lessee under MIDC would, therefore, become a government lessee and will not be liable to pay the non-agricultural assessment under the provision of Code, and that consequently the industrial lessees, under MIDC, were not required to pay any non-agricultural assessment in addition to the lease money. The question whether the appellant is liable to pay non-agricultural assessment in regard to the land taken on lease from the Development Authority will have to be decided with reference to the relevant statutory provisions and the terms of lease and not with reference to position prevailing with reference to some other lease taken by the appellant from MIDC. The status, objects, functions and area of operation of MIDC and the Development Authority are different. Any decision or clarification issued in regard to lands held by MIDC or lands leased by MIDC will not apply to lands held or leased by the Development Authority. The circular dated 29.3.1975 relied upon by the appellant is not relevant as it applies only to lessees of MIDC, which as agent of the state government granted certain leases and consequently such lessees as government lessees were exempted from paying the non-agricultural assessment. The said notification did not refer to Pimpri-Chinchwad New Town Development Authority as the agent of the state government in regard to grant of leases to appellant and others. In fact there was no document which showed the state government to be the owner of the lands leased by the Development Authority, nor any document to show that the state government had either constituted or recognized the Development Authority as its agent in regard to leased lands. [Paras 7, 8] [878-G-H; 879-A-B-E-H; 880-A-B]

1.3. It is evident from section 113, 114 and 118 of Maharashtra Regional and Town Planning Act (MRTP Act) that the Development Authority is a body corporate which can acquire, hold, manage and dispose of land. The fact that the Development Authority requires the consent of the state government to dispose of any of its land by way of leases in excess of 99 years will not alter the position that the lands leased are lands of the Development Authority. There is no provision in MRTP Act which requires the New Town Development Authority, to hold and dispose of any government land as agent of the state government. In contrast, MRTP Act contains a specific provision enabling the state government to require a corporation or company (other than a New Town Development Authority, which is specific to a new Town), to execute development work and dispose of its lands as its agent. MIDC is a corporation which would fall under sub-section 113(3A) whereas the Development Authority falls under section 113(2) of MRTP Act. The circular issued with reference to MIDC was, therefore, of no assistance to contend that land leased by the Development Authority to appellant was a government land. The contention of appellant that the Development Authority is the agent of state government and that the appellant is a government lessee are, therefore, rejected. [Para 10] [881-H; 882-A-E; 883-B-C]

2.1. There is no dispute that section 39 of the Land Revenue Code, fastens liability to pay land revenue upon the occupant and not on the tenant of the occupant. Section 168(1)(a) of the Code also reiterates that in the case of unalienated land, the occupant shall be primarily liable to the state government for making the payment of land revenue including all arrears. Sub-section (2) of section 168 provides that in case of default of the person primarily liable, the land revenue shall be recoverable from any person in possession of the land. It is no doubt

true that the primary liability to pay the land revenue which includes non-agricultural assessment is on the occupant, under Section 39 of the Code. The definition of 'occupant' excludes not only 'government lessee' but also every tenant. Whenever the person in actual possession of the land is the tenant, the land holder or the superior landlord who granted the lease to such tenant is deemed to be an occupant. In this case the appellant has taken the lease from the Development Authority and therefore the Development Authority as the landlord and occupant, will be primarily liable to pay the land revenue. [Paras 11, 12] [883-D-H; 884-A-E]

2.2. In exercise of the powers conferred by Section 159 of the MRTP Act, the Development Authority, with the previous approval of the state government, has made regulations for regulating the disposal of land acquired by it or vesting in it in the Pimpri-Chinchwad New Town, known as the "Pimpri-Chinchwad New Town Development Authority (Disposal of Land) Regulations, 1973". Regulation 1(ii) provides that the said Regulations shall apply to the lands acquired by or vested in the Pimpri-Chinchwad New Town Development Authority for the development of Pimpri-Chinchwad New Town. Regulation 5 provides that the Development Authority may from time to time dispose of plots of land on lease, to the persons eligible, in consideration of a premium and an annual ground rent. Part IV of the Regulation contains the conditions of lease. Regulations 10(iv) and 10(v) relating to the question of payment of rates and taxes and land revenue and cesses. Regulation 16 provides that in the event of conflict between the Regulations and provisions of a lease deed entered into by the Development Authority, the provisions of the Regulations will prevail. There is however no conflict between the Regulations and the terms of the lease. Clause 2(c) of the lease deed dated 3.1.1995 between the Development

Authority as lessor and appellant as lessee, reiterates the terms and conditions of lease contained in the Regulations by providing that the lessee would be liable to pay any future rates or taxes recoverable under law from the lessee. Thus there is a statutory liability upon the appellant as lessee to pay the land revenue (non-agricultural assessment) to the state government. Section 39 of the Code makes the Development Authority, as 'occupant', liable to pay the non-agricultural assessment and the said liability is, in turn, statutorily passed on to the appellant as lessee under the Regulations 10(iv) and (v) and the clause 2(c) of the lease deed. [Paras 13, 14] [884-F-H; 885-A-D-G]

Nagpur Improvement Trust v. Nagpur Timber Merchants Association **1997 (5) SCC 105: 1997 (3) SCR 21 – referred to.**

2.3. Whether the demand for land revenue could be directly made against the lessee of the occupant, when the land revenue code makes the occupant primarily liable. But for the statutory obligation created under regulation 10(iv) and (v) of the Regulations, in the normal course, a demand should have been made upon the occupant (landlord) who is primarily liable and only if the landlord fails to pay, recourse could be had to sub-section (2) of section 168 which enabled a claim being made against the tenant in terms of the said sub-section. But where the liability to pay land revenue is fastened on the lessee under the statutory regulations, it is not necessary for the state government to make a claim upon the occupant, leading to a demand by the Development Authority, in turn, upon its lessee, for payment of land revenue. The state government can directly make the demand on the lessee, by taking note of the liability statutorily fastened on the lessee under the Regulations. When the liability of the lessee to pay the land revenue

is not open to challenge, having regard to the provisions of the Regulations and terms of the lease, no purpose would be served by requiring the state government to recover the amount from the Development Authority (occupant) and then require the Development Authority to make a demand upon the lessee to recover the amount. Having regard to the statutory liability created upon the lessee, under the Pimpri-Chinchwad New Town Development Authority (Disposal of land Regulations), 1973, the position of the lessee would be similar to a tenant referred to in sub-section 1(c) of section 168 of the Code which provides that in the case of the land in possession of a tenant, such tenant if he is liable to pay land revenue therefor under the relevant tenancy laws, shall be primarily liable to the state government for the payment of land revenue, including all arrears. The liability of the appellant as tenant, to pay the land revenue, though not under a 'tenancy law' in its strict sense, but is nevertheless under a statutory regulation governing the tenancy and therefore the demand by the state government directly against the appellant, can be justified by the principle underlying section 168(1)(c) of the Code. A demand can directly be made upon the lessee, the lessee can give a representation or file objections before the revenue authorities of the state government, if it has any grievance in regard to the determination of the quantum of the non-agricultural assessment or the demand therefor. [Paras 15, 16] [886-A-H; 887-A-D]

2.4. Sub-section (2) of section 168 of the Code, no doubt, provides that in case of default by any person who is primarily liable under sub-section (1), the land revenue including arrears shall be recoverable from any person in possession of the land provided that where such person is a tenant the amount recoverable from him shall not exceed the demands of the year in which the

recovery is made. This sub-section no doubt implies the demand should be made upon the occupant and only if the occupant defaults, a demand can be made upon the person in occupation, that is the lessee. Sub-section (2) of section 168 will operate where the tenant is not primarily liable under section 168(1) of the Code, or where there is no statutory liability upon the lessee to bear and pay the land revenue. The procedure under sub-section (2) would apply where the liability to pay the land revenue is on the lessor, and where the lessee is not liable therefor or where the liability of the lessee to pay the land revenue is merely contractual, as contrasted from a statutory obligation. Where the liability of the lessee is a statutory liability, there is no reason why that recovery should be delayed and protracted by requiring a demand by the state government on the lessor and a consequential demand by the lessor on the lessee. If the lessee commits default in paying the land revenue, it may amount to a breach leading to re-entry under clause (4) of the lease deed. Be that as it may. However, having regard to the pendency of these proceedings, if the payment of the land revenue dues is made within four months from today it shall not be treated as a default or breach of the terms of the lease deed for the purpose of re-entry. In view of that there is no error in the order of the High Court. However the appellant is given liberty to file representations/objections before the concerned Revenue Authority, if it has any objection or grievance in regard to the quantum of non-agricultural assessment claimed in regard to the property leased to it. As the appellant had the benefit of interim stay against recovery, the appellant shall be liable to pay interest on the arrears/ dues at the rate of 9% per annum from 26.2.2002. [Paras 17, 18] [887-D-H; 888-A-D]

Case Law Reference:

1997 (3) SCR 21	**referred to**	**Para 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 10187 of 2010.

From the Judgment & Order dated 4.7.2007 of the High Court of Judicature at Bombay in Writ Petition No. 1435 of 2002.

R.F. Nariman, Kavin Gulati, Nandini Gore, Debmalya Banerjee, Abhishek Ray, Manik Karanjawala for the Appellant.

Madhavi Divan, Sanjay Kharde, Asha Gopalan Nair, Shivaji M. Jadhav for the Respondents.

The Judgment of the Court was delivered by

R.V.RAVEENDRAN, J. 1. Under Lease Deed dated 3.1.1995, Pimpri-Chinchwad New Town Development Authority (6th respondent herein – for short 'the Development Authority') granted a lease of land measuring 164.5 acres in Sectors No.15 and 15A in Village Chikhali, Taluka Haveli, District Pune, converted to industrial use, to the appellant herein for a term of 99 years commencing from 21.11.1994. The consideration for the lease was a premium of Rs.17,91,40,500/- (at the rate of Rs.25/- per sq.ft.) paid by the appellant apart from a yearly rent of rupee one. The appellant utilized the said plot and adjoining plot obtained on lease from Maharashtra Industrial Development Corporation (for short 'MIDC') for construction of its factory. The appellant commenced construction of its plant in or about the year 1997 and on completion, commenced actual use for industrial purpose, in the year 1999.

2. The appellant was served with a demand notice dated 26.2.2002 by the Gar Kamgar Talathi, Chikhali, demanding payment of Rs.45,25,538/- as non-agricultural cess and additional non-agriculture cess, for the period 1995-96 to 2001-02. As the said payment was not made, default notices dated 1.3.2002 and 5.3.2002 were issued under Section 174 of the Maharasthra Land Revenue Code, 1966 ('Code' for short) informing that if the amount demanded was not paid within

seven days, the amount due will be recovered with 25% of the amount due as penalty. At that stage the appellant filed a writ petition before the Bombay High Court for quashing the demand notice 26.2.2002, 1.3.2002 and 5.3.2002. The appellant contended that it was a "government lessee". Alternatively, it was contended that it was the tenant of the Development Authority. It was submitted that neither a government lessee nor a tenant of the Development Authority was liable to pay the non-agricultural assessment under the provisions of the Code.

3. The High Court, by judgment dated 4.7.2007 rejected the contention that appellant was a government lessee. It held that as lessee under the Development Authority, the appellant was liable to pay the non-agricultural assessment. The High Court however held that having regard to section 115 of the Code, non-agricultural assessment could be levied only with effect from the date on which the land was actually used for non-agricultural purpose, and as appellant commenced actual non-agricultural use in the year 1999, the non-agricultural assessment was due by it only from 1999-2000. As a consequence, the High Court allowed the writ petition in part, quashed the demand relating to the period 1995-96 to 1998-99 and upheld the claim for the non-agricultural assessment from the year 1999-2000 onwards. The said order is challenged in this appeal by special leave contending that it is not liable to pay the non-agricultural assessment as it is a government lessee. Alternatively it is contended that being the tenant of the 'occupant', it is liable to pay the land revenue, as only the 'occupant' is liable to pay the land revenue under section 39 of the said Code. On the contentions raised, the following questions arise for consideration:

(i) Whether the petitioner is a 'government lessee' and therefore not liable to pay the non-agricultural assessment?

(ii) Whether the appellant being a tenant of the Development Authority, the demand for non-

agricultural assessment could be made only on the Development Authority and not against the tenant?

The relevant statutory provisions

4. The answers to the aforesaid two questions would depend upon the provisions of the Maharashtra Land Revenue Code, 1966. Section 39 makes the occupant liable to pay the land revenue and the said section is extracted below:

> "39. Occupant to pay land revenue and Government lessee to pay rent fixed.
>
> Every occupant shall pay as land revenue the assessment fixed under the provisions of this Code and rules made thereunder; and every Government lessee shall pay as land revenue lease money fixed under the terms of the lease."
>
> (emphasis supplied)

The term "land revenue" and "occupant" referred in the said section are defined in Section 2(19) and section 2(23) and the said definitions are extracted below:

> "(19) – "land revenue" means all sums and payments, in money received or legally claimable by or on behalf of the State Government from any person on account of any land or interest in or right exercisable over land held by or vested in him, under whatever designation such sum may be payable and any cess or rate authorised by the State Government under the provisions of any law for the time being in force; and includes premium, rent, lease money, quit rent, judi payable by a inamdar or any other payment provided under any Act, rule, contract or deed on account of any land;
>
> "(23) – "occupant" means a holder in actual possession of unalienated land, other than a tenant or Government

> lessee ; provided that, where a holder in actual possession is a tenant, the land holder or the superior landlord, as the case may be, shall be deemed to be the occupant;

The expressions "to hold land" or "to be a land holder or holder of land" is defined in section 2(12) and mean to be lawfully in possession of land, whether such possession is actual or not.

The term "tenant" and "government lessee" referred in the definition of "occupant" are defined in Section 2(40) and Section 2(11) and they are extracted below:

> "(40) "tenant" means a lessee, whether holding under an instrument, or under an oral agreement, and includes a mortgagee of a tenant's rights with possession; but does not include a lessee holding directly under the State Government;
>
> (11) "Government lessee" means a person holding land from Government under a lease as provided by section 38".

Section 38 referred in the definition of 'Government Lessee' is extracted below :

> "It shall be lawful for the Collector at any time to lease under grant or contract any unalienated unoccupied land to any person, for such period, for such purpose and on such conditions as he may, subject to rules made by the State Government in this behalf, determine, and in any such case the land shall, whether a survey settlement has been extended to it or not, be held only for the period and for the purpose and subject to the conditions so determined. The grantee shall be called a Government lessee in respect of the land so granted."

Chapter XI of the Code deals with realization of land revenue and other revenue demands. Section 168 in Chapter XI of the

Code dealing with the liability for land revenue is extracted below:

"168. Liability for land revenue.

(1) In the case of

(a) unalienated land, the occupant or the lessee of the State Government,

(b) alienated land, the superior holder, and

(c) land in the possession of a tenant, such tenant if he is liable to pay land revenue therefor under the relevant tenancy law, shall be primarily liable to the State Government for the payment of the land revenue, including all arrears of land revenue, due in respect of the land. Joint occupants and joint holders who are primarily liable under this section shall be jointly and severally liable.

(2) In case of default by any person who is primarily liable under this section, the land revenue, including arrears as aforesaid, shall be recoverable from any person in possession of the land.

Provided that, where such person is a tenant, the amount recoverable from him shall not exceed the demands of the year in which the recovery is made.

Provided further that, when land revenue is recovered under this section from any person who is not primarily liable for the same, such person shall be allowed credit for any payments which he may have duly made to the person who is primarily liable, and shall be entitled to credit, for the amount recovered from him, in account with the person who is primarily liable".

5. It is not in dispute that the land in question is unalienated

land and that in regard to such land, only the 'occupant' as defined in the Code is primarily liable to pay the non-agricultural assessment to the state government. Section 2(23) makes it clear that where the land is in the actual possession of a tenant, the superior landlord or the land holder is deemed to be the occupant. It is also not in dispute that the Development Authority is the 'occupant' and the appellant is not the occupant, but only a tenant under the occupant.

Re : Question (i)

6. There is no dispute that a government lessee is not liable to pay any land revenue. Section 2(11) read with section 38 defines a 'government lessee' as a lessee under a lease granted by a Collector in regard to unalienated unoccupied land belonging to the government. In this case the lands in question for which the non-agricultural assessment has been demanded, were not leased by the Collector to the appellant. The lease deed states that the lands leased were held by the Development Authority, and the lessor is the Development Authority. Therefore the leased lands were not government lands and the lessor was not the government. There is also nothing to show that the lands belonged to government and that the Development Authority granted the lease in favour of appellant, acting as an agent of the state government. A lessee from the Development Authority is not a government lessee as the Development Authority is not the government and the lease lands are not government lands. Therefore the appellant cannot call itself a government lessee. The first contention is therefore rejected.

7. Though the issue is thus simple and straightforward, the appellant however contended that it is a 'government lessee' in a rather round-about manner, relying upon a state government Circular dated 29.3.1975 which clarified that as on that date, MIDC was the agent of the state government and therefore not liable to pay any assessment to the government in respect of the lands held by it as agent of the state

government; that any lessee under MIDC would therefore become a government lessee and will not be liable to pay the non-agricultural assessment under the provision of Code, but will only be liable to pay the lease money fixed under the lease; and that consequently the industrial lessees, under MIDC, were not required to pay any non-agricultural assessment in addition to the lease money. It is submitted by the appellant that in regard to the adjoining land taken by it on lease from MIDC, it is not required to pay the non-agricultural assessment on account of appellant being treated as government lessee, under the said Circular dated 29.3.1975. It is contended that in principle, there is no difference between the MIDC and the Development Authority and having regard to the provisions of the Maharashtra Regional and Town Planning Act, 1966 (for short 'MRTP Act'), the Development Authority should also be treated as agent of the state government and consequently, the appellant should be treated as a government lessee which is not liable to pay any non-agricultural assessment, in regard to the lands taken on lease under deed dated 3.1.1995.

8. The question whether the appellant is liable to pay non-agricultural assessment in regard to the land taken on lease from the Development Authority will have to be decided with reference to the relevant statutory provisions and the terms of lease and not with reference to position prevailing with reference to some other lease taken by the appellant from MIDC. The status, objects, functions and area of operation of MIDC and the Development Authority are different. Any decision or clarification issued in regard to lands held by MIDC or lands leased by MIDC will not apply to lands held or leased by the Development Authority. As noticed above, the circular dated 29.3.1975 relied upon by the appellant is not relevant as it applies only to lessees of MIDC, which as agent of the state government granted certain leases and consequently such lessees as government lessees were exempted from paying the non-agricultural assessment. The said notification did not refer to Pimpri-Chinchwad New Town Development Authority as

the agent of the state government in regard to grant of leases to appellant and others. In fact there is no document which shows the state government to be the owner of the lands leased by the Development Authority, nor any document to show that the state government had either constituted or recognized the Development Authority as its agent in regard to leased lands.

9. To know whether the Development Authority was an agent of the state government and to ascertain its status, it is necessary to refer to the relevant provisions of the Maharashtra Regional and Town Planning Act, 1966 (for short 'MRTP Act'). Section 113 of MRTP Act provides for designation of new towns and constitution of Development Authorities for those new towns. Sub-sections (1), (2), and (4) of that section are extracted below:

> "113. (1) If the State Government is satisfied that it is expedient in the public interest that any area should be developed as a site for a new town as reserved or designated in any draft or final Regional Plan it may by notification in the Official Gazette, designate that area as the site for the proposed new town. The new town shall be known by the name specified in the notification.
>
> (2) After publication of the notification under sub-section (1) for the purpose of acquiring, developing and disposing of land in the area of a new town, the State Government shall by another notification in the Official Gazette, constitute a New Town Development Authority…….
>
> xxx xxx xxx
>
> (4) Every Development Authority shall be a body corporate with perpetual succession and a common seal with power to acquire, hold and dispose of property, both moveable and immoveable, and contract and sue or be sued by such name as may be specified in the notification under sub-Section (2)".

Section 114 lays down the object of Development Authority and sub-section (1) thereof is extracted below:

> "114(1) The objects of a Development Authority shall be to secure the laying out and development of the new town in accordance with proposals approved in that behalf under the provisions of this Act, and for that purpose every such Authority shall subject to the provisions of section 113A have power to acquire, hold, manage and dispose of land and other property to carry out buildings and other operations, to provide water, electricity, gas, sewerage and other services, amenities and facilities and generally to do anything necessary or expedient for the purpose of the new town or for purposes incidental thereto."

Section 116 empowers Development Authorities to acquire lands. Section 118 deals with disposal of lands by Development Authorities and sub-section (1) thereof which is relevant is extracted below:

> "118.(1) Subject to any directions given by the State Government under this Development Act, a Development Authority may dispose of any land acquired by it or vesting in it to such persons, in such manner, and subject to such terms or conditions as they consider expedient for securing the development of the new town in accordance with proposals approved by the State Government under this Act :
>
> Provided that, a Development Authority shall not have power, except with the consent of the State Government, to sell any land or to grant a lease of any land for a term of more than ninety-nine years, and the State Government shall not consent to any such disposal of land unless it is satisfied that there are exceptional circumstances which render the disposal of the land in that manner expedient."

10. It is evident from section 113,114 and 118 of MRTP

Act that the Development Authority is a body corporate which can acquire, hold, manage and dispose of land. Section 113 provides for constitution of a New Town Development Authority. Section 114 states the objects of such Development Authority. Section 118 of MRTP Act provides for disposal by the Development Authority of any land acquired by it or vesting in it. The Development Authority is therefore a body corporate which can acquire, hold, possess, manage, develop and dispose of land in its name and on its own behalf. The fact that the Development Authority requires the consent of the state government to dispose of any of its land by way of leases in excess of 99 years will not alter the position that the lands leased are lands of the Development Authority. There is no provision in MRTP Act which requires the New Town Development Authority, to hold and dispose of any government land as agent of the state government. In contrast, MRTP Act contains a specific provision enabling the state government to require a corporation or company (other than a New Town Development Authority, which is specific to a new Town), to execute development work and dispose of its lands as its agent. Sub-section (3A) of section 113 of MRTP Act provides:

> "(3A). Having regard to the complexity and magnitude of the work involved in developing any area as a site for the new town, the time required for setting up new machinery for undertaking and completing such work of development, and the comparative speed with which such work can be undertaken and completed in the public interest, if the work is done through the agency of a corporation including a company owned or controlled by the State or a subsidiary company thereof, set up with the object of developing an area as a new town, the state government may, notwithstanding anything contained in sub-section (2), require the work of developing and disposing of land in the area of a new town to be done by any such corporation, company or subsidiary company aforesaid, as an agent of the state government; and thereupon, such corporation

or company shall, in relation to such area, be declared by the state government, by notification in the official gazette, to be the New Town Development Authority for that area."

MIDC is a corporation which would fall under sub-section 113(3A) whereas the Development Authority falls under section 113(2) of MRTP Act. The circular issued with reference to MIDC is therefore of no assistance to contend that land leased by the Development Authority to appellant is a government land. The contention of appellant that the Development Authority is the agent of state government and that the appellant is a government lessee are therefore rejected.

Re : Question (ii)

11. The appellant next contends that even if it is not a government lessee, being a lessee of the 'occupant', it is not liable to pay the land revenue. There is no dispute that section 39 of the Land Revenue Code, fastens liability to pay land revenue upon the occupant and not on the tenant of the occupant. Section 168(1)(a) of the Code also reiterates that in the case of unalienated land, the occupant shall be primarily liable to the state government for making the payment of land revenue including all arrears. Sub-section (2) of section 168 provides that in case of default of the person primarily liable, the land revenue shall be recoverable from any person in possession of the land. It is therefore contended by the appellant that the state government can make the demand for any land revenue only upon the occupant, that is, the Development Authority in this case, which is primarily liable. It is submitted that only if it defaults, the amount could be recovered from the person in possession, as provided under section 168(2) of the Code. It is submitted that the notice of demand, directly issued to the appellant, should be quashed, as there is nothing to show that a demand was first issued to the Development Authority, that it defaulted in payment of the amount demanded, and that the impugned notices were issued only thereafter, under section 168(2) of the Act. It is submitted

that the liability to pay land revenue being that of the Development Authority, the demand notices issued to the lessee as if it is person primarily liable are liable to be quashed. It is further submitted that if and when the Development Authority pays the land revenue to the government, in turn, it would be entitled to make a demand upon the appellant, if the lease permitted such a demand; and when such a demand is made, the appellant as lessee would deal with the demand in terms of the lease and if there is any dispute between the Development Authority and the appellant as lessor and lessee, that will be settled in accordance with law.

12. It is no doubt true that the primary liability to pay the land revenue which includes non-agricultural assessment is on the occupant, under Section 39 of the Code. The definition of 'occupant' excludes not only 'government lessee' but also every tenant. Whenever the person in actual possession of the land is the tenant, the land holder or the superior landlord who granted the lease to such tenant is deemed to be an occupant. In this case the appellant has taken the lease from the Development Authority and therefore the Development Authority as the landlord and occupant, will be primarily liable to pay the land revenue. But the matter does not rest there.

13. In exercise of the powers conferred by Section 159 of the MRTP Act, the Development Authority, with the previous approval of the state government, has made regulations for regulating the disposal of land acquired by it or vesting in it in the Pimpri-Chinchwad New Town, known as the "Pimpri-Chinchwad New Town Development Authority (Disposal of Land) Regulations, 1973" ('Regulations' for short). Regulation 1(ii) provides that the said Regulations shall apply to the lands acquired by or vested in the Pimpri-Chinchwad New Town Development Authority for the development of Pimpri-Chinchwad New Town. Regulation 5 relates to disposal of land by lease. It provides that the Development Authority may from time to time dispose of plots of land on lease, to the persons

eligible, in consideration of a premium and an annual ground rent. Part IV of the Regulation contains the conditions of lease. Regulations 10(iv) and 10(v) relating to the question of payment of rates and taxes and land revenue and cesses are extracted below:

> "10(iv) The lessee shall during the continuance of the lease, pay all the rates, taxes, fees and other charges due and becoming due in respect of demised land by the Development Authority or lessee thereof.
>
> (v) The lessee shall during the continuance of the lease pay the land revenue cesses assessed or which may be assessed on the demised land".

Regulation 16 provides that in the event of conflict between the Regulations and provisions of a lease deed entered into by the Development Authority, the provisions of the Regulations will prevail. There is however no conflict between the Regulations and the terms of the lease. Clause 2 (c) of the lease deed dated 3.1.1995 between the Development Authority as lessor and appellant as lessee, reiterates the terms and conditions of lease contained in the Regulations by providing that the lessee would be liable to pay any future rates or taxes recoverable under law from the lessee. Thus there is a statutory liability upon the appellant as lessee to pay the land revenue (non-agricultural assessment) to the state government.

14. Section 39 of the Code makes the Development Authority, as 'occupant', liable to pay the non-agricultural assessment and the said liability is, in turn, statutorily passed on to the appellant as lessee under the Regulations 10(iv) and (v) and the clause 2(c) of the lease deed. This Court in *Nagpur Improvement Trust v. Nagpur Timber Merchants Association* - 1997 (5) SCC 105, recognized that the Improvement Trust or Development Authority under the terms of lease, can pass on the liability in regard to non-agricultural assessment to the lessees.

15. The only issue that remains for consideration is whether the demand for land revenue could be directly made against the lessee of the occupant, when the land revenue code makes the occupant primarily liable. But for the statutory obligation created under regulation 10(iv) and (v) of the Regulations, in the normal course, a demand should have been made upon the occupant (landlord) who is primarily liable and only if the landlord fails to pay, recourse could be had to sub-section (2) of section 168 which enabled a claim being made against the tenant in terms of the said sub-section. But where the liability to pay land revenue is fastened on the lessee under the statutory regulations, it is not be necessary for the state government to make a claim upon the occupant, leading to a demand by the Development Authority, in turn, upon its lessee, for payment of land revenue. The state government can directly make the demand as the lessee, by taking note of the liability statutorily fastened on the lessee under the Regulations. When the liability of the lessee to pay the land revenue is not open to challenge, having regard to the provisions of the Regulations and terms of the lease, no purpose would be served by requiring the state government to recover the amount from the Development Authority (occupant) and then require the Development Authority to make a demand upon the lessee to recover the amount. Having regard to the statutory liability created upon the lessee, under the Pimpri-Chinchwad New Town Development Authority (Disposal of land Regulations), 1973, the position of the lessee would be similar to a tenant referred to in sub-section 1(c) of section 168 of the Code which provides that in the case of the land in possession of a tenant, such tenant if he is liable to pay land revenue therefor under the relevant tenancy laws, shall be primarily liable to the state government for the payment of land revenue, including all arrears. The liability of the appellant as tenant, to pay the land revenue, though not under a 'tenancy law' in its strict sense, but is nevertheless under a statutory regulation governing the tenancy and therefore the demand by the state government directly against the appellant, can be justified by the principle

underlying section 168(1)(c). In the view we have taken, it is not necessary to consider the further submission that the term 'tenancy laws' used in section 168(1)(c) should be understood in a broad sense, and if so interpreted, would include any law regulating or governing tenancies, and as the Regulations govern tenancies by the Development Authority, the Regulations will fall within the term 'tenancy laws' and consequently the primary liability to pay land revenue would be upon the appellant under section 168(1)(c). Be that as it may.

16. However, as we have held that a demand can directly be made upon the lessee, the lessee can give a representation or file objections before the revenue authorities of the state government, if it has any grievance in regard to the determination of the quantum of the non-agricultural assessment or the demand therefor.

17. Sub-section (2) of section 168 no doubt provides that in case of default by any person who is primarily liable under sub-section (1), the land revenue including arrears shall be recoverable from any person in possession of the land provided that where such person is a tenant the amount recoverable from him shall not exceed the demands of the year in which the recovery is made. This sub-section no doubt implies the demand should be made upon the occupant and only if the occupant defaults, a demand can be made upon the person in occupation, that is the lessee. We are of the view that sub-section (2) of section 168 will operate where the tenant is not primarily liable under section 168(1) of the Code, or where there is no statutory liability upon the lessee to bear and pay the land revenue. The procedure under sub-section (2) would apply where the liability to pay the land revenue is on the lessor, and where the lessee is not liable therefor or where the liability of the lessee to pay the land revenue is merely contractual, as contrasted from a statutory obligation. Where the liability of the lessee is a statutory liability, we see no reason why that recovery should be delayed and protracted by requiring a

demand by the state government on the lessor and a consequential demand by the lessor on the lessee. We may further note, if the lessee commits default in paying the land revenue, it may amount to a breach leading to re-entry under clause (4) of the lease deed. Be that as it may. However, having regard to the pendency of these proceedings, if the payment of the land revenue dues is made within four months from today it shall not be treated as a default or breach of the terms of the lease deed for the purpose of re-entry.

18. In view of the above, we find no error in the order of the High Court. Consequently this appeal is dismissed reserving liberty however to the appellant to file representations/ objections before the concerned Revenue Authority, if it has any objection or grievance in regard to the quantum of non-agricultural assessment claimed in regard to the property leased to it. As the appellant had the benefit of interim stay against recovery, the appellant shall be liable to pay interest on the arrears/dues at the rate of 9% per annum from 26.2.2002.

D.G. Appeal dismissed.

SENIOR INTELLIGENCE OFFICER
v.
JUGAL KISHORE SAMRA
(Criminal Appeal No. 1266 of 2011)

JULY 05, 2011

[AFTAB ALAM AND R.M. LODHA, JJ.]

Narcotic Drugs and Psychotropic Substances Act, 1985 – Registration of case against accused for offences punishable under the NDPS Act – Issuance of summons to one of the accused and his brother (respondent) – Case of respondent that on going to the Directorate of Revenue Intelligence Office, they were tortured by the officials; that he suffered a heart attack and was later threatened with third degree methods – Application for anticipatory bail by respondent - Allowed by the Sessions Judge – Thereafter, respondent seeking modification of the order of anticipatory bail to the extent that the interrogation and examination of the respondent be conducted in the presence of his advocate and a cardiologist – Sessions Judge directing that the interrogation of the respondent to take place only in presence of his lawyer – Said order upheld by the High Court – On appeal, held: Respondent is not entitled as of right to the presence of his lawyer at the time of his interrogation in connection with the case – However, having regard to the facts and circumstances of the case, the interrogation of the respondent may be held within the sight of his advocate or any other person duly authorized by him who may watch the proceedings from a distance or from beyond a glass partition but will not be within the hearing distance and it will not be open to the respondent to have consultations with him in course of the interrogation – Thus, order passed by the Sessions Judge and upheld by the High Court is substituted by the said directions.

A case was registered against A1 to A3 for the offences punishable under the Narcotic Drugs and Psychotropic Substances Act, 1985. The Directorate of Revenue Intelligence Officers recorded the statement of A1 and A2. Thereafter, they summoned respondent and his brother A3. It was the respondent's case that on going to DRI offices, they were tortured and the respondent suffered a heart attack. On discharge from the hospital the respondent went directly to DRI office to enquire about A 3 and he was threatened with third degree methods and again had to be hospitalized. The respondent filed an application for anticipatory bail and the same was allowed. Thereafter, the respondent filed another application under Section 438(2) Cr .P. C. for modification of the order of anticipatory bail to the extent that the interrogation and examination of the respondent be conducted in the presence of his advocate and a cardiologist. The Metropolitan Sessions Judge partly allowed the application. Aggrieved, the appellant filed an application praying for cancellation of the anticipatory bail granted to the respondent. The High Court dismissed the same. The appellant then filed another application and the High Court cancelled the bail granted to A 3. A3 then filed a special leave petition and this Court set aside the order of the High Court and restored the bail granted to A3. Meanwhile, the appellant filed a revision before the High Court challenging the order passed by the Metropolitan Sessions Judge directing for the respondent's interrogation to take place only in presence of his lawyer. The High Court dismissed the revision. Therefore, the appellant filed the instant Special Leave Petition.

Partly allowing the appeal, the Court

HELD: 1.1. The respondent applied for and got anticipatory bail on the premise that he was not an accused in the case. There was no change in his position

or status since the grant of bail till he was summoned to appear before the Directorate of Revenue Intelligence Officers. On the facts of the case, therefore, it is futile to contend that the respondent is entitled, as of right, to the presence of his lawyer at the time of his interrogation in connection with the case. Moreover, the respondent's plea for the presence of his lawyer at the time of his interrogation clearly appears to be in teeth of the decision in ****Poolpandi*. Nonetheless, the submission that the respondent's right was recognized by this Court and preserved in *****Nandini Satpathy*** **and the decision in ****Poolpandi* **has no application to the instant case since the respondent is summoned for interrogation in connection with a case registered under the NDPS Act, which the counsel called a "regular criminal" case, while ****Poolpandi* **was a case under the Customs Act and so were the two cases before the constitution bench in *Ramesh Chandra Mehta* and in *Illias* that formed the basis of the decision in ****Poolpandi,* **the distinction sought to be drawn is illusory and non-existent. The decision in ****Poolpandi* **was in cases under the Customs Act, 1962 and the Foreign Exchange Regulation Act, 1973. Both these Acts have stringent provisions regarding search, seizure and arrest and some of the offences under each of these two Acts carry a punishment of imprisonment up to 7 years. It cannot be seen how a case registered under NDPS Act can be said to be a "regular criminal" case and the cases under the Customs Act and the Foreign Exchange Regulation Act, not as criminal cases. In view of the clear and direct decision in ****Poolpandi***, the order of the High Court, affirming the direction given by the Sessions Judge clearly unsustainable. [Para 26 and 51] [907-B-H; 908-A]**

1.2. The said direction in the case of ******Dr. Basu v. State of West Bengal* **that the arrestee may be permitted to meet his lawyer during interrogation, though not

throughout the interrogation, does not apply to the case of the respondent, because he being on bail cannot be described as an arrestee. But, it is stated on behalf of the respondent that he suffers from heart disease and on going to the DRI office, in pursuance to the summons issued by the authorities, he had suffered a heart attack. It is also alleged that his brother was subjected to torture and the respondent himself was threatened with third degree methods. The medical condition of the respondent was accepted by the Metropolitan Sessions Judge and that forms one of the grounds for grant of anticipatory bail to him. Taking a cue, therefore, from the direction made in ******DK Basu* **and having regard to the special facts and circumstances of the case, it is directed that the interrogation of the respondent may be held within the sight of his advocate or any other person duly authorized by him. The advocate or the person authorized by the respondent may watch the proceedings from a distance or from beyond a glass partition but he will not be within the hearing distance and it will not be open to the respondent to have consultations with him in course of the interrogation. The order passed by the Metropolitan Sessions Judge and upheld by the High Court is substituted by the said directions. [Paras 27, 28 and 29] [908-B-H; 909-A]

Poolpandi and Ors.* v. *Superintendent, Central Excise and Ors.* **(1992) 3 SCC 259: 1992 (3) SCR 247 - relied on.

***Nandini Satpathy v. P.L. Dani* **(1978) 2 SCC 424: 1978 (3) SCR 608;** *Ramesh Chandra Mehta* v. *State of West Bengal* **1969 (2) SCR 461;** *Illias* v. *Collector of Customs, Madras* **1969 (2) SCR 613;** ****D.K. Basu* v. *State of West Bengal* **(1997) 1 SCC 416: 1996 (10) Suppl. SCR 284 – referred to.**

Miranda v. *Arizona* **(1966) 384 US 436 - referred to.**

Case Law Reference:

1978 (3) SCR 608	**Referred to.**	**Paras 12, 14, 17, 18, 19, 25**
(1966) 384 US 436	**Referred to.**	**Para 14**
1969 (2) SCR 461	**Referred to.**	**Para 17**
1969 (2) SCR 613	**Referred to.**	**Para 17**
1992 (3) SCR 247	**Relied on.**	**Para 25, 26, 30**
1996 (10) Suppl. SCR 284	**Referred to.**	**Para 27, 28**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1266 of 2011.

From the Judgment & Order dated 22.3.2007 of the High Court of Judicature of Andhra Pradesh at Hyderabad in Criminal Revision Case No. 300 of 2007.

Mohan Jain, ASG, T.R. Andhyarujina, K.T.S. Tulsi, Soumik Ghosal, D.K. Thakur, Deepak Jain, N. Patil, M. Chatterji, B. Krishna Prasad, Gaurave Bhargava, Maheen Pradhan, Niraj Gupta for the appearing parties.

The Judgment of the Court was delivered by

AFTAB ALAM, J. 1. Leave granted

2. This appeal is directed against the judgment and order of the Andhra Pradesh High Court dated March 22, 2007 in Crl. R.C. No.300 of 2007 by which the High Court dismissed the criminal revision filed by the appellant and affirmed the order of the Metropolitan Sessions Judge dated December 15, 2006, directing that any interrogation of the respondent may be held only in the presence of his advocate.

3. The facts and circumstances in which this appeal arises need to be noticed first. On July 20, 2006, the officers of the Directorate of Revenue Intelligence (for short "DRI") Hyderabad, raided the premises of M/s Hy-Gro Chemicals Pharmatek Private Ltd. and found a shortage of 250kgs of Dextropropoxyphene Hydrochloride (DPP HCL). DPP HCL is a manufactured narcotic drug as specified in Government of India's notification S.O. 826(E), dated November 14, 1985, at Serial no.87.

4. C.K. Bishnoi (accused no.1) and P.V.Satyanarayana Raju (accused no.2), the Managing Director and the Production Manager, respectively, of M/s Hy-Gro Chemicals Pharmatek Private Ltd., admitted that the drug was clandestinely cleared to M/s J. K. Pharma Agencies, New Delhi, of which the respondent, Jugal Kishore Samra and his brother, Ramesh Kumar Samra (accused no.3) happen to be the partners. On the next day, i.e., July 21, 2006, a search was carried out at the Cargo Complex of the Indira Gandhi International Airport, New Delhi, and five drums containing DPP HCL were discovered. On examination of the cargo it was found that the contraband was manufactured by M/s Hy-Gro Chemicals Pharmatek Pvt. Ltd. and was sent to M/s J.K. Pharma Agencies by wrongly declaring the consignment as 5-Amino Salicylic Acid. The Directorate of Revenue Intelligence registered a case against C.K. Bishnoi, P.V.Satyanarayana Raju and Ramesh Kumar Samra for the offences punishable under sections 21 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "NDPS Act").

5. While the statements of accused no.1 and accused no.2 had already been recorded under section 67 of the NDPS Act, the DRI officials summoned the respondent and his brother (accused no.3). According to the respondent, on November 5, 2006, when he, accompanied by his brother and another person arrived at the DRI office in, Hyderabad, at 10:30pm, they were tortured by the DRI Officials. Unable to withstand the torture, the

respondent suffered a heart attack and was moved to a hospital. The respondent was discharged on November 7, 2006 and advised complete bed rest for a month. But he went directly to the DRI Office to enquire about the whereabouts of his brother. He was kept waiting for 2 days and was also given threats of third degree methods. On November 9, 2006, en route to the DRI Office, the respondent developed chest pain and was again hospitalized till November 11, 2006.

6. In this background, the respondent filed an application for anticipatory bail under section 438 of the Code of Criminal Procedure which was allowed by the Metropolitan Sessions Judge by order dated December 1, 2006, *on the ground that the respondent was not shown as an accused in the case* and, therefore, the bar under section 37 of the NDPS Act did not apply to him and further, the medical record filed by the respondent showed that he had been suffering from heart disease and had already undergone heart surgery on two occasions.

7. After the grant of anticipatory bail, the respondent filed another application under section 438(2) of the Cr .P. C. for modification of the order of anticipatory bail to the extent that the interrogation and examination of the respondent be conducted in the presence of his advocate and a cardiologist. The Metropolitan Sessions Judge, by order dated December 15, 2006, partly allowed the application of the respondent after perusing the medical record and holding that the presence of an advocate at the time of interrogation of the respondent by the DRI officials is necessary to ensure free and fair interrogation.

8. Aggrieved by the order of the Metropolitan Sessions Judge dated December 1, 2006, the appellant moved the Andhra Pradesh High Court in Crl. M.P. No.5772 of 2006 praying for cancellation of the anticipatory bail granted to the respondent. The High Court found no merit in the petition and

dismissed it by order dated January 31, 2007.

9. Here it may be noted that on the same day, i.e. January 31, 2007, another bench of the Andhra Pradesh High Court allowed another petition (Crl. M.P. No.5880 of 2006) filed by the appellant and cancelled the bail granted to the respondent's brother, Ramesh Samra by the Metropolitan Sessions Judge on December 19, 2006. Challenging the order of the High Court, however, Ramesh Kumar Samra, came to this Court in SLP (Crl.) No.1077/07. The special leave petition was allowed and by order dated December 10, 2009 this Court set aside the order of the High Court. The bail of Ramesh Kumar Samra too was, thus, restored.

10. Coming back to the case of the respondent, aggrieved by the order of the Metropolitan Sessions Judge dated December 15, 2006 directing for the respondent's interrogation to take place only in presence of his lawyer, the appellant sought to challenge it in revision before the High Court in Crl. R. C. No.300 of 2007. The High Court dismissed the revision petition by order dated March 22, 2007, upholding the order of the Sessions Judge and observing as follows:

> "9. In the present case, on account of the apprehension of the respondent, the lower court permitted the Advocate to be present during the course of interrogation. But the Advocate was directed not to interfere during the course of interrogation. The purpose of the respondent requesting the presence of the Advocate is only on account of the apprehension that the Investigating Officers are likely to apply third degree methods like physical assault, etc., therefore, the learned Sessions Judge passed the impugned order.
>
> 10. It is an undisputed fact that application of third degree method to the accused is prohibited and interrogation of the accused is a right provided to the Investigating Officer to elicit certain information regarding the commission of

the offence. Though the Advocate was permitted to be present during the course of interrogation, he was prevented from interference during the course of interrogation. When the police do not resort to apply third degree methods, there cannot be any problem for them to interrogate the respondent to elicit necessary information relating to the above crime in the presence of his Advocate.

11. After considering the above aspects, I am of the view that the order passed by the learned Sessions Judge is in no way affecting the right of the Investigating Officer to interrogate the respondent in the presence of his Advocate, therefore, I do not find any merit in this Revision Case."

11. Now, the matter has been brought to this Court by the appellant in appeal by grant of leave. At the special leave petition stage, the Court had made the direction that interrogation of the respondent can be carried out in accordance with the direction of the High Court. We are, however, informed that the respondent has not been interrogated so far and the appellant is awaiting the order of the Court on his appeal.

12. Mr. K. T. S. Tulsi, Senior Advocate, appearing for the respondent stoutly defended the order passed by the Sessions judge and affirmed by the High Court. He invoked the rights guaranteed under Articles 20(3), 22(1) and 22(2) of the Constitution of India to justify the respondent's plea that his interrogation can take place only in presence of his lawyer. In support of the submission he placed great reliance on a decision by a bench of three judges of this Court in *Nandini Satpathy* v. *P. L. Dani*, (1978) 2 SCC 424.

13. Nandini Satpathy, a former Chief Minister of the State of Orissa was named as one of the accused in a case registered under sections 5 (2) read with section 5 (1) (d) & (e) of the Prevention of Corruption Act, 1947, and under

sections 161, 165 and 120B and 109 of the Penal Code on the allegation of amassing assets disproportionate to her known and licit sources of income. For interrogation in connection with that case she was sent a long questionnaire along with summons to appear before the investigating officer on the fixed date and time and to answer those questions. She did not appear before the investigating officer as required by the summons where-upon the investigating officer filed a complaint against her under section 179 of the Penal Code. The Sub-Divisional Judicial Magistrate took cognizance of the offence and issued process against her. Questioning the order of the magistrate as violative of her right to silence she challenged it first before the High Court of Orissa and on being unsuccessful there brought the matter to this Court.

14. The decision of the Court in the case of *Nandini Satpathi* was delivered by Justice Krishna Iyer and it is a fine example of his Lordship's inimitable polemical style of writing. The boldness of *Miranda* v. *Arizona*, (1966) 384 US 436 as an instance of judicial innovation and positivism was still quite fresh and taking *Miranda* as a source of inspiration, Iyer J., pondered over issues of Judicial philosophy and speculated about the frontiers to which he would have liked to expand the constitutional guarantee under Article 20(3), maintaining, of course, the fine balance between the rights of the individual and the social obligation "to discover guilt, wherever hidden, and to fulfill the final tryst of the justice system with the society.

15. At the beginning of the judgment in paragraph 10, the Court framed 10 issues that arose for consideration, three of which may have some relevance for our present purpose and those are as follows:

"1. Is a person likely to be accused of crimes i.e. a suspect accused, entitled to the sanctuary of silence as one 'accused of any offence'? Is it sufficient that he is a potential-of course, not distant-candidate for accusation by the police?

3. Does the constitutional shield of silence swing into action only in court or can it barricade the 'accused' against incriminating interrogation at the stages of police investigation?

7. Does 'any person' in Section 161 Criminal Procedure Code include an accused person or only a witness?"

16. At the end of a lengthy debate, the Court proceeded to answer the issues in paragraph 57, which is reproduced below:

"57. We hold that Section 161 enables the police to examine the accused during investigation. The prohibitive sweep of Article 20(3) goes back to the stage of police interrogation-not, as contended, commencing in court only. In our judgment, the provisions of Article 20(3) and Section 161(1) substantially cover the same area, so far as police investigations are concerned. The ban on self-accusation and the right to silence, while one investigation or trial is under way, goes beyond that case and protects the accused in regard to other offences pending or imminent, which may deter him from voluntary disclosure of criminatory matter. We are disposed to read 'compelled testimony' as evidence procured not merely by physical threats or violence but by psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, overbearing and intimidatory methods and the like-not legal penalty for violation. So, the legal perils following upon refusal to answer, or answer truthfully, cannot be regarded as compulsion within the meaning of Article 20(3). The prospect of prosecution may lead to legal tension in the exercise of a constitutional right, but then, a stance of silence is running a calculated risk. On the other hand, if there is any mode of pressure, subtle or crude, mental or physical, direct or indirect, but sufficiently substantial, applied by the policeman for obtaining information from an accused strongly suggestive of guilt,

it becomes 'compelled testimony', violative of Article 20(3)."

17. It may be mentioned here that in holding, "the prohibitive sweep of Article 20(3) goes back to the stage of police interrogation-not, as contended, commencing in court only" the decision in *Nandini Satpathy* apparently went against two earlier constitution bench decisions of this Court in *Ramesh Chandra Mehta* v. *State of West Bengal*, 1969 (2) SCR 461 and *Illias* v. *Collector of Customs, Madras*, 1969 (2) SCR 613.

18. In *Nandini Satpathy*, the Court proceeded further, and though the issue neither arose in the facts of the case nor it was one of the issues framed in paragraph 10 of the judgment, proceeded to dwell upon the need for the presence of the advocate at the time of interrogation of a person in connection with a case. In paragraphs 61-65 of the judgment, the Court made the following observations:

"61. It may not be sufficient merely to state the rules of jurisprudence in a branch like this. The man who has to work it is the average police head constable in the Indian countryside. The man who has to defend himself with the constitutional shield is the little individual, by and large. The place where these principles have to have play is the unpleasant police station, unused to constitutional nuances and habituated to other strategies. Naturally, practical points which lend themselves to adoption without much sophistication must be indicated if this judgment is to have full social relevance. In this perspective we address ourselves to the further task of concretising guidelines.

62. Right at the beginning we must notice Article 22(1) of the Constitution, which reads:

> No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be

denied the right to consult, and to be defended by, a legal practitioner of his choice.

The right to consult an advocate of his choice shall not be denied to any person who is arrested. This does not mean that persons who are not under arrest or custody can be denied that right. The spirit and sense of Article 22(1) is that it is fundamental to the rule of law that the services of a lawyer shall be available for consultation to any accused person under circumstances of near custodial interrogation. Moreover, the observance of the right against self-incrimination is best promoted by conceding to the accused the right to consult a-legal practitioner of his choice.

63. Lawyer's presence is a constitutional claim in some circumstances in our country also, and, in the context of Article 20(3), is an assurance of awareness and observance of the right to silence. The *Miranda* decision has insisted that if an accused person asks for lawyer's assistance, at the stage of interrogation, it shall be granted before commencing or continuing with the questioning. We think that Article 20(3) and Article 22(1) may, in a way, be telescoped by making it prudent for the police to permit the advocate of the accused, if there be one, to be present at the time he is examined. Overreaching Article 20(3) and Section 161(2) will be obviated by this requirement. We do not lay down that the police must secure the services of a lawyer. That will lead to 'police-station-lawyer' system, an abuse which breeds other vices. But all that we mean is that if an accused person expresses the wish to have his lawyer by his side when his examination goes on, this facility shall not be denied, without being exposed to the serious reproof that involuntary self-crimination secured in secrecy and by coercing the will, was the project.

64. Not that a lawyer's presence is a panacea for all problems of involuntary self-crimination, for he cannot

supply answers or whisper hints or otherwise interfere with the course of questioning except to intercept where intimidatory tactics are tried, caution his client where incrimination is attempted and insist on questions and answers being noted where objections are not otherwise fully appreciated. He cannot harangue the police but may help his client and complain on his behalf, although his very presence will ordinarily remove the implicit menace of a police station.

65. We realize that the presence of a lawyer is asking for the moon in many cases until a public defender system becomes ubiquitous. The police need not wait for more than for a reasonable while for an advocate's arrival. But they must invariably warn –and record that fact- about the right to silence against self-incrimination; and where the accused is literate take his written acknowledgment."

19. It is on these passages in *Nandini Satpathy* that Mr. Tulsi heavily relies and which practically forms the sheet-anchor of his case.

20. The difficulty, however, is that *Nandini Satpathy* was not followed by the Court in later decisions. In *Poolpandi & Ors* v. *Superintendent, Central Excise & Ors.*, (1992) 3 SCC 259, the question before a three judge bench of this Court was directly whether a person called for interrogation is entitled to the presence of his lawyer when he is questioned during the investigation under the provisions of the Customs Act, 1962 and the Foreign Exchange Regulation Act, 1973. On behalf of the persons summoned for interrogation, strong reliance was placed on *Nandini Satpathy*. The Court rejected the submission tersely observing in paragraph of 4 of the judgment as follows:

"4. Both Mr. Salve and Mr. Lalit strongly relied on the observations in *Nandini Satpathy* v. *P.L. Dani*, (1978) 2 SCC 424. We are afraid, in view of two judgments of the

Constitution Bench of this Court in *Ramesh Chandra Mehta* v. *State of W.B.*, (1969) 2 SCR 461, and *Illias* v. *Collector of Customs, Madras*, (1969) 2 SCR 613, the stand of the appellant cannot be accepted. The learned counsel urged that since *Nandini Satpathy case* was decided later, the observations therein must be given effect to by this Court now. There is no force in this argument."

21. Further, in paragraph 6 of the judgment, the Court referred to the Constitution Bench decision in *Ramesh Chandra Mehta* and observed as follows:

"6. Clause (3) of Article 20 declares that no person accused of any offence shall be compelled to be a witness against himself. It does not refer to the hypothetical person who may in the future be discovered to have been guilty of some offence. In *Ramesh Chandra Mehta* case, the appellant was searched at the Calcutta Airport and diamonds and jewelleries of substantial value were found on his person as also currency notes in a suitcase with him, and in pursuance to a statement made by him more pearls and jewellery were recovered from different places. He was charged with offences under the Sea Customs Act. During the trial, reliance was placed on his confessional statements made before the Customs authorities, which was objected to on the ground that the same were inadmissible in evidence *inter alia* in view of the provisions of Article 20(3). While rejecting the objection, the Supreme Court held that in order that the guarantee against testimonial compulsion incorporated in Article 20(3) may be claimed by a person, it has to be established that when he made the statement in question, he was a person accused of an offence. Pointing out to the similar provisions of the Sea Customs Act as in the present Act and referring to the power of a Customs Officer, in an inquiry in connection with the smuggling of goods, to summon any person whose attendance he considers

necessary to give evidence or to produce a particular document the Supreme Court observed thus: (pp.469-70)

"The expression 'any person' includes a person who is suspected or believed to be concerned in the smuggling of goods. But a person arrested by a Customs Officer because he is found in possession of smuggled goods or on suspicion that he is concerned in smuggling is not when called upon by the Customs Officer to make a statement or to produce a document or thing, a person accused of an offence within the meaning of Article 20(3) of the Constitution. The steps taken by the Customs Officer are for the purpose of holding an enquiry under the Sea Customs Act and for adjudging confiscation of goods dutiable or prohibited and imposing penalties. The Customs Officer does not at that stage accuse the person suspected or infringing the provisions of the Sea Customs Act with the commission of any offence. His primary duty is to prevent smuggling and to recover duties of Customs when collecting evidence in respect of smuggling against a person suspected of infringing the provisions of the Sea Customs Act, he is not accusing the person of any offence punishable at a trial before a Magistrate."

The above conclusion was reached after consideration of several relevant decisions and deep deliberation on the issue, and cannot be ignored on the strength of certain observations in the judgment by three learned Judges in Nandini Satpathy case which is, as will be pointed out hereinafter, clearly distinguishable."

22. An argument in support of the right of the persons called for interrogation was advanced on the basis of Article 21 of the Constitution. The Court rejected that submission also observing in paragraph 9 of the judgment as follows:

"9. Mr. Salve has, next, contended that the appellant is within his right to insist on the presence of his lawyer on the basis of Article 21 of the Constitution. He has urged that by way of ensuring protection to his life and liberty he is entitled to demand that he shall not be asked any question in the absence of his lawyer. The argument proceeds to suggest that although strictly the questioning by the Revenue authorities does not amount to custodial interrogation, it must be treated as near custodial interrogation, and if the same is continued for a long period it may amount to mental third degree. It was submitted by both Mr. Salve and Mr. Lalit that the present issue should be resolved only by applying the 'just, fair and reasonable test', and Mr. Lalit further added that the point has to be decided in the light of the facts and circumstances obtaining in a particular case and a general rule should not be laid down one way or the other. Mr. Salve urged that when a person is called by the Customs authorities to their office or to any place away from his house, and is subjected to intensive interrogation without the presence of somebody who can aid and advise him, he is bound to get upset, which by itself amounts to loss of liberty. Reference was made by the learned counsel to the minority view in *Re Groban*, 352 US 330, 1 L Ed 2d 376, declaring that it violates the protection guaranteed by the Constitution for the State to compel a person to appear alone before any law enforcement officer and give testimony in secret against his will."

23. Referring to the facts in *Re Groban* and the view taken in the minority judgment in the case the decision in *Poolpandi* observed in paragraph 10 as follows:

"10…..We do not share the apprehension as expressed above in the minority judgment in connection with enquiry and investigation under the Customs Act and other similar statutes of our country. There is no question of whisking away the persons concerned in these cases before us for

secret interrogation, and there is no reason for us to impute the motive of preparing the groundwork of false cases for securing conviction of innocent persons, to the officers of the state duly engaged in performing their duty of prevention and detection of economic crimes and recovering misappropriated money justly belonging to the public. Reference was also made to the observation in the judgment in *Carlos Garza De Luna, Appt*. v. *United States*, American Law Reports 3d 969, setting out the historical background of the right of silence of an accused in a criminal case. Mr. Salve has relied upon the opinion of Wisdom, Circuit Judge, that the history of development of the right of silence is a history of accretions, not of an avulsion and the line of growth in the course of time discloses the expanding conception of the right than its restricted application. The Judge was fair enough to discuss the other point of view espoused by the great jurists of both sides of Atlantic before expressing his opinion. In any event we are not concerned with the right of an accused in a criminal case and the decision is, therefore, not relevant at all. The facts as emerging from the judgment indicate that narcotics were thrown from a car carrying the two persons accused in the case. One of the accused persons testified at the trial and his counsel in argument to the jury made adverse comments on the failure of the other accused to go to the witness box. The first accused was acquitted and the second accused was convicted. The question of the right of silence of the accused came up for consideration in this set up. In the cases before us the persons concerned are not accused and we do not find any justification for "expanding" the right reserved by the Constitution of India in favour of accused persons to be enjoyed by others."

24. In the end, the Court allowed the appeal filed by the Revenue authorities in the case in which the High Court had directed for interrogation to take place in presence of the

advocate and dismissed all the other appeals in the batch on behalf of the individuals in whose cases the High Court had declined to give any such direction.

25. It is seen above that the respondent applied for and got anticipatory bail on the premise that he was not an accused in the case. There was no change in his position or status since the grant of bail till he was summoned to appear before the DRI officers. On the facts of the case, therefore, it is futile to contend that the respondent is entitled, as of right, to the presence of his lawyer at the time of his interrogation in connection with the case. Moreover, the respondent's plea for the presence of his lawyer at the time of his interrogation clearly appears to be in teeth of the decision in *Poolpandi*.

Nonetheless, Mr. Tulsi contended that the respondent's right was recognized by this Court and preserved in *Nandini Satpathy* and the decision in *Poolpandi* has no application to the present case. According to Mr. Tulsi, the respondent is summoned for interrogation in connection with a case registered under the NDPS Act, which Mr. Tulsi called a "regular criminal" case, while *Poolpandi* was a case under the Customs Act and so were the two cases before the constitution bench in *Ramesh Chandra Mehta* and in *Illias* that formed the basis of the decision in *Poolpandi*. In our view, the distinction sought to be drawn by Mr. Tulsi is illusory and non-existent. The decision in *Poolpandi* was in cases under the Customs Act, 1962 and the Foreign Exchange Regulation Act, 1973. Both these Acts have stringent provisions regarding search, seizure and arrest and some of the offences under each of these two Acts carry a punishment of imprisonment up to 7 years. We, therefore, fail to see, how a case registered under NDPS Act can be said to be a "regular criminal" case and the cases under the Customs Act and the Foreign Exchange Regulation Act, not as criminal cases.

26. In view of the clear and direct decision in *Poolpandi*,

we find the order of the High Court, affirming the direction given by the Sessions Judge clearly unsustainable.

27. We may, however, at this stage refer to another decision of this Court in *D.K. Basu* v. *State of West Bengal*, (1997) 1 SCC 416. In this case, the Court, extensively considered the issues of arrest or detention in the backdrop of Articles 21, 22 and 32 of the Constitution and made a number of directions to be followed as preventive measures in all cases of arrest or detention till legal provisions are made in that behalf. The direction at serial number 10 in paragraph 35 is as follows:

> "(10). The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation."

28. Strictly speaking the aforesaid direction does not apply to the case of the respondent, because he being on bail cannot be described as an arrestee. But, it is stated on behalf of the respondent that he suffers from heart disease and on going to the DRI office, in pursuance to the summons issued by the authorities, he had suffered a heart attack. It is also alleged that his brother was subjected to torture and the respondent himself was threatened with third degree methods. The medical condition of the respondent was accepted by the Metropolitan Sessions Judge and that forms one of the grounds for grant of anticipatory bail to him. Taking a cue, therefore, from the direction made in *DK Basu* and having regard to the special facts and circumstances of the case, we deem it appropriate to direct that the interrogation of the respondent may be held within the sight of his advocate or any other person duly authorized by him. The advocate or the person authorized by the respondent may watch the proceedings from a distance or from beyond a glass partition but he will not be within the hearing distance and it will not be open to the respondent to have consultations with him in course of the interrogation.

29. The order passed by the Metropolitan Sessions Judge and affirmed by the High Court is substituted by the aforesaid directions made by us.

30. Before closing the record of the case, we may state that arguments were advanced before us, when does a person called for interrogation in connection with a case ceases to be a mere provider of relevant information or a witness and becomes an accused entitled to the Constitutional protections. Arguments were also addressed on Article 20(3), 22(1) and 22(2) and section 161 of the Cr.P.C. But, in the facts of the case we see no reason to go into those questions and we are satisfied that the present case is fully covered by the three judge bench decision of this Court in *Poolpandi*.

31. In the result, the orders passed by the High Court and the Metropolitan Session Judge are set aside and the appeal is allowed to the extent indicated above.

N.J. Appeal partly allowed.

RAJENDRA PRATAP SINGH YADAV

v.

STATE OF U.P. AND OTHERS

(Civil Appeal No. 4949 of 2011)

JULY 5, 2011

[DALVEER BHANDARI AND DEEPAK VERMA, JJ.]

Armed Forces: Short Service Commissioned Officer commissioned in the Army during the normal period – Entitlement of, for the benefits which were given to the Army officers commissioned during the emergency when the nation was at war with the foreign enemy – Held: Not entitled – The persons who joined the Army service after cessation of the foreign aggression and revocation of emergency cannot be treated like persons who have joined the Army during emergency due to foreign aggression and similar benefits cannot be given to such persons even by making rules – Respondent No. 4 was Commissioned Officer during period 1981-86 – He was appointed in 1994 in U.P. Provisional Police service – His appointment was not against the vacancies reserved for the Emergency Commissioned Officer under the 1973 Rules – He, therefore, cannot claim benefit under 1973 Rules– The 1973 Rules was a temporary statute and it died its natural death on expiry thereof – The 1980 Rules neither repealed nor replaced the 1973 Rules – The 1980 Rules were to have a limited application viz. regularisation of appointment of Demobilised Officers – Consequently, persons who joined the Army after the emergency was over, cannot be given the benefit which was extended to those persons who joined the Army during emergency – U.P. Non-technical (Class II) services (Reservation of Vacancies for Demobilised Officers) Rules, 1973 – r.3 – U.P. Non-technical (Class II) services (Reservation of Vacancies for Demobilised Officers) Rules, 1980.

Constitution of India, 1950: Article 14 – Differential treatment given to those who joined the Army during emergency cannot be termed as discriminatory and arbitrary.

Interpretation of statutes: Once a statute expires by efflux of time, the question of giving effect to a right arising thereunder may not arise.

Service jurisprudence: Seniority list – Sanctity of – Held: In service jurisprudence there is immense sanctity of a final seniority list – The seniority list once published cannot be disturbed at the behest of person who chose not to challenge it for four years – The sanctity of the seniority list must be maintained unless there are very compelling reasons to do so in order to do substantial justice – This is imperative to avoid unnecessary litigation and unrest and chaos in the services.

Respondent no.4 joined the Indian Army in 1981 as Short Service Commissioned Officer and was discharged from the Army in 1986. He was then appointed in 1994 as Deputy Superintendent of Police in Uttar Pradesh Provincial Police Service. The benefit of back service in Indian Army was given to respondent no.4 under the Uttar Pradesh Non-technical (Class II/Group 'B') Services (Appointment of Demobilised Officers) Rules, 1980 as amended in 1990. The appellants were also direct recruits in the Uttar Pradesh Provincial Police Service and were 4 to 10 years senior to respondent no.4.

The question which arose for consideration in the instant appeals was whether a Short Service Commissioned Officer who was commissioned in the Army during the normal period is entitled to certain benefits given to the Army officers who were commissioned during the emergency when the nation was at war with the foreign enemy.

Disposing of the appeals, the Court

HELD: 1. It is well known that many persons who joined the Army service during the foreign aggression could have opted for other career or other softer career or service but the nation itself being under peril, impelled by the spirit to serve the nation, they opted for joining the Army where the risk was little more. Such persons formed a class by themselves and by framing Rules an attempt had been made to compensate those who returned from the war if they compete in different services. The persons who joined the Army service after cessation of the foreign aggression and revocation of emergency cannot be treated like persons who have joined the Army during emergency due to foreign aggression and similar benefits cannot be given to such persons even by making rules. [Paras 8, 9] [920-D-F]

Ex-Captain A.S. Parmar and Others v. State of Haryana and Others **1986 (Supp) SCC 283;** *Union of India and Others etc. etc. v. Dr. S. Krishna Murthy and Others etc. etc.* **(1989) 4 SCC 689: 1989 (1) Suppl. SCR 275;** *Dhan Singh and others etc. etc. v. State of Haryana and others* **1991 Supp (2) SCC 190: 1990 (3) Suppl. SCR 423;** *Ram Janam Singh etc. v. State of U.P. and Another etc.* **(1994) 2 SCC 622: 1994 (1) SCR 316;** *Chittaranjan Singh Chima and Another v. State of Punjab and others* **(1997) 11 SCC 447: 1997 (1) SCR 1010;** *State of Punjab and Others* ***v.*** *Harbhajan Singh and Another* **(2007) 12 SCC 549: 2007 (11) SCR 752;** *State of U.P. and another etc. etc. v. Dinkar Sinha* **(2007) 10 SCC 548: 2007 (6) SCR 305 – relied on.**

2.1. Under Rule 3 of U.P. Non-technical (Class II) services (Reservation of Vacancies for Demobilised Officers) Rules, 1973, 10% of the permanent vacancies in all Non-Technical (Class-II) services were reserved for Emergency Commissioned Officers who joined the armed forces during the first emergency i.e. 1.11.1962 to

10.1.1968 and during the second emergency i.e. 3.12.1971 to 27.3.1977. Under Rule 1(2), these rules were to remain in force only for a period of 5 years. Rule 6 provided for seniority and pay and specifically provided that seniority of the candidates appointed against the 10% vacancies reserved under Rule 3 should be determined on the assumption that they entered the service at their second opportunity of competing of recruitment and they should be assigned the same year of allotment as successful candidates of the relevant competitive examination. Therefore, the benefit of the 1973 Rules cannot be extended after these Rules ceased to exist on 5.8.1978 and to the persons whose appointment in the civil posts was not under the vacancies reserved under Rule 3 of the 1973 Rules. When the 1973 Rules lapsed in 1978 some selections for the vacancies reserved under the 1973 Rules were concluded or the selection process was on but the appointments could not be made. To regularize the selection and appointment of these officers against the vacancies reserved under the 1973 Rules, a new set of Rules i.e. 1980 Rules were promulgated on 19.8.1980 by the State Government. [Paras 21, 22] [923-G-H; 924-A-D]

Mahesh Chand and Others v. State of U.P. and Others **(2000) 10 SCC 492: 2010 (11) SCR 1051;** *Narendra Nath Pandey and Others v. State of U.P. and others* **(1988) 3 SCC 527: 1988 (1) Suppl. SCR 574 – referred to.**

2.2. The 1973 Rules ceased to exist after five years i.e. on 5.8.1978. The life of the Rules, according to the judgment delivered in *Dilbag Singh* was extended upto 1980. In any event, no one could be given benefit of 1973 Rules after 1980. Admittedly, respondent No. 4 was appointed in 1994 and the benefit could not have been extended to respondent No.4. The 1973 Rules was a temporary statute. It died its natural death on expiry thereof. The 1980 Rules does not contain any repeal and

saving clause. The provisions of the relevant provisions of the General Clauses Act will, thus, have no application. Once a statute expires by efflux of time, the question of giving effect to a right arising thereunder may not arise. In any event, in this case, no such right accrued to the respondent. Reservation to the extent of 2% might have been fixed by reason of a government order issued in the year 1977 but the same had nothing to do with the 1973 Rules or with the 1980 Rules. Provision for reservation made in general by the State in exercise of its executive power could not have conferred a benefit in terms of the provisions of a rule which seeks to apply to a particular category of employees in the service. The 1980 Rules neither repealed nor replaced the 1973 Rules. The question of continuation of the 1973 Rules by the 1980 Rules, thus, did not and could not arise. The 1980 Rules provided for a new set of rules. They were to have a limited application viz. regularisation of appointment of Demobilised Officers. Consequently, persons who joined the Army after the emergency was over cannot also be given the benefit which was extended to those persons who joined the Army during emergency. Those who joined the Army during the period of emergency virtually joined the war which was being fought by the nation. The differential treatment given to those who joined the Army during emergency cannot be termed as discriminatory and arbitrary. [Paras 42-45] [930-B-H; 931-A-F]

Dilbag Singh v. State of U.P. and others **(1995) 4 SCC 495: 1995 (1) Suppl. SCR 38 – relied on.**

3. 'DS', a Short Service Commissioned Officer, who was appointed as Deputy Superintendent of Police against the 8% vacancies reserved under the Government Order dated 20.8.1977 made a representation claiming seniority under 1980 Rules. The State Government rejected his representation on

14.9.2000 saying that he was not selected and appointed against the vacancies reserved under the 1973 Rules. However, the High Court by its judgment dated 8.2.2002 allowed the prayer of 'DS'. Respondent No.4, after the judgment of the High Court and after four years from the date of publication of the final list, filed a representation before the State Government that he be similarly placed as 'DS' as he being assigned seniority of 1980 batch. The State Government granted seniority to respondent No. 4 and he was given a jump of 181 places and the final seniority list was disturbed by the State Government. The appointment of respondent no.4 was not against the vacancies reserved under the 1973 Rules, therefore, he cannot get benefit of 1973 Rules. Respondent no.4 did not join the armed forces during emergency and thus stealing a march over 181 officers is not only contrary to the Rules but is discretionary and arbitrary and violative of Articles 14 and 16 of the Constitution. Respondent No.4 and similarly placed employees could not have been given the benefit of the 1973 Rules. These Rules were not in existence when they were appointed. Therefore, they could not have derived any benefit from the 1973 Rules. [Paras 31, 32, 49, 50] [927-D-G; 932-C-E]

Rana Randhir Singh and others etc. etc. v. State of U.P. and others **1989 Supp (1) SCC 615 – Distinguished.**

4. In service jurisprudence, there is immense sanctity of a final seniority list. The seniority list once published cannot be disturbed at the behest of person who chose not to challenge it for four years. The sanctity of the seniority list must be maintained unless there are very compelling reasons to do so in order to do substantial justice. This is imperative to avoid avoidable litigation and unrest and chaos in the services. The respondent-State of U.P. is directed to prepare a fresh seniority list and place all three of them on their respective positions as

they had not received the benefit of 1973 seniority. There has been a considerable delay in this matter, therefore, the State of U.P. is directed to publish a fresh seniority list as expeditiously as possible, in any event within two months from the date of this judgment. [Paras 52- 54] [932-G-H; 933-A-B]

Case Law Reference:

1986 (Supp) SCC 283	**referred to**	**Para 13**
1989 (1) Suppl. SCR 275	**referred to**	**Para 14**
1990 (3) Suppl. SCR 423	**referred to**	**Para 15**
1994 (1) SCR 316	**referred to**	**Para 16, 40**
1997 (1) SCR 1010	**referred to**	**Para 17**
2007 (11) SCR 752	**referred to**	**Para 18**
2007 (6) SCR 305	**referred to**	**Para 19, 29, 35, 43**
1995 (1) Suppl. SCR 38	**relied on**	**Para 23, 33, 35, 42**
1989 Supp (1) SCC 615	**distinguished**	**Para 27, 48**
2010 (11) SCR 1051	**referred to**	**Para 33, 35**
1988 (1) Suppl. SCR 574	**referred to**	**Para 36**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4949 of 2011.

From the Judgment & Order dated 25.1.2007 of the High Court of Judicature at Allahabad in Civil Misc. Writ Petition No. 55114 of 2004.

WITH

C.A. Nos. 4950, 4951-4953 & 4954-4956 of 2011.

Dinesh Dwivedi, Dr. Rajeev Dhawan, P.S. Patwalia, Shail Kr. Dwivedi, AAG, D.K. Singh, Pradeep Shukla, (for Abhijit Sengupta), P.N. Gupta, Manish S. Srivastava, Mukesh Sharma, Asit Chaturvedi, Rajeev Dubey, Shekhar Kumar, Priyanka Singh, Anurag Sharma (for AP & J Chambers), Upendra Nath Mishra, Nikhil Majithia, Vandana Mishra, Manoj Kr. Dwivedi (for Gunnam Venkateswara Rao), Upendra Nath Mishra, Shrish Kumar Misra, Jitendra Mohan Sharma, Dr. Sandeep Singh, Sonia Mathur, Vijay K. Jain for the appearing parties.

The Judgment of the Court was delivered by

DALVEER BHANDARI, J. 1. Leave granted in all the Special Leave Petitions.

2. Since common questions of law arise in all these appeals, therefore, these appeals are being disposed of by a common judgment. The facts of Civil Appeal No. 4949 of 2011 arising out of Special Leave Petition (Civil) No.5098 of 2007 entitled *Rajendra Pratap Singh Yadav & Others v. State of U.P. & Others* are recapitulated for the sake of convenience.

3. The appellants and respondent No.4 - Rakesh Kumar Jolly are direct recruits to the Uttar Pradesh Provincial Police Service. It is stated that the appellants are 4 to 10 years senior to respondent No. 4, who was selected and appointed in the year 1994 as Deputy Superintendent of Police in Uttar Pradesh Provincial Police Service. Respondent No.4 was given benefit of his past service in the Indian Army as a Short Service Commissioned Officer of eight years vide order dated 29.11.2004 issued by the State Government. Since respondent No.4, though junior was placed above the appellants, therefore, the appellants filed a writ petition before the High Court of judicature at Allahabad.

4. According to the appellants, respondent No.4 could not have been given the benefit of past service. The benefit of back seniority was given to respondent No.4 under the U.P. Non-

technical (Class-II/Group 'B') Services (Appointment of Demobilised Officers) Rules, 1980, as amended in 1990. Demobilised Officer has been defined in Rule 3(b) of the Demobilisation Rules, 1980, which reads as under:

> "3. Definitions – In these rules unless the context otherwise requires –
>
> (a) ……
>
> (b) "Demobilised Officer" means Disabled Defence Service Officer, Emergency Commissioned Officer and the Short Service Commissioned Officer of the Armed Forces of the Union who was commissioned on or after November 1, 1962 but before January 10, 1968 or on or after December 3, 1971 and released at any time thereafter.
>
> (c) ……."

5. Respondent No.4 joined the Indian Army in 1981 and was discharged from the Army in 1986. He was a Short Service Commissioned Officer. The appellants raised the following questions in this case.

> (1) Whether a Short Service Commissioned Officer who was commissioned in the Army during the normal period is entitled to the certain benefits given to the Army officers who were commissioned during the emergency when the nation was at war with the foreign enemy.
>
> (2) Whether a demobilized Short Service Commissioned Officer who was commissioned in the army during normal period and whose selection in the civil post is not against the vacancies reserved for demobilized officers under U.P. Non-

Technical (class-II) Services (Reservation of Vacancies for Demobilised Officers) Rules, 1973 (hereinafter referred to as "1973 Rules") is entitled to seniority under the Uttar Pradesh non-technical (Class II/Group-B) Services (Appointment of Demobilised Officers) Rules, 1980 (hereinafter referred to as "1980 Rules")?

(3) Whether a demobilized Short Service Commissioned Officer who is not selected for appointment to a non-technical Class-II/Group-B service or post against the vacancies reserved for demobilised officers, as a result of recruitment, the process of which was concluded or commenced prior to 6th August, 1978, in accordance with the provisions of 1973 Rules is entitled to seniority and pay as meant for the persons appointed against the vacancies reserved under the 1973 Rules?

(4) Whether when a Short Service Commissioned Officer who has been selected and appointed against the vacancies reserved for such officers under the Government Order of 1977 which does not contemplate any seniority for the past services rendered in the Army, is entitled to seniority under the 1980 Rules?

(5) When the order of appointment itself provides that the seniority of the selected Short Service Commissioned Officer shall be determined according to the Uttar Pradesh Police Service Rules, 1942, can the Government dehors the terms of the appointment order grant him seniority of 8 years because he happened to be a Short Service Commissioned Officer?

6. The main argument articulated by the appellants is whether a Short Service Commissioned Officer who was

commissioned in the Army during the normal period is entitled to the certain benefits given to the Army officers who were commissioned during the emergency when the nation was at war with the foreign enemy.

7. It was submitted before the High Court that the person who had joined the Army after declaration of emergency due to foreign aggression and those who joined after the war came to an end stand on an entirely different footing. Those who joined the Army after revocation of emergency joined the Army as a career and belong to different class distinct from those who had joined the Army during war and emergency.

8. It is well known that many persons who joined the Army service during the foreign aggression could have opted for other career or other softer career or service but the nation itself being under peril, impelled by the spirit to serve the nation, they opted for joining the Army where the risk was little more. Such persons formed a class by themselves and by framing Rules an attempt had been made to compensate those who returned from the war if they compete in different services.

9. The persons who joined the Army service after cessation of the foreign aggression and revocation of emergency cannot be treated like persons who have joined the Army during emergency due to foreign aggression and similar benefits cannot be given to such persons even by making rules.

10. The appellants also submitted that whenever any particular period is spent in any service by a person is added to the service to which such person joined later; it is bound to affect the seniority of persons who have already entered in the service. As such, any period of earlier service should be taken into account for determination of seniority in the latter service only for special or compelling reasons, which stand test of reasonableness and on examination, can be held to be free from arbitrariness. Therefore, the decision of the Government of India to give seniority to respondent No.4, who did not join

the armed forces during emergency and thus stealing a march over 181 officers is not only contrary to the Rules but is discriminatory and arbitrary and violative of Articles 14 and 16 of the Constitution of India.

11. According to the appellants, the High Court in the impugned judgment did not appreciate the controversy involved in the case in proper perspective and dismissed the writ petition. The appellants aggrieved by the said judgment of the High Court filed these appeals before this court.

12. The appellants placed reliance on a number of judgments of this Court to strengthen their submissions.

13. In *Ex-Captain A.S. Parmar and Others v. State of Haryana and Others* 1986 (Supp) SCC 283 this court held that the seniority of the Military Service rendered by the Armed Forces Personnel who joined the Military Service during emergency would only be counted for the purpose of seniority in the civil service and the Military Service rendered subsequent to the lifting of emergency cannot be taken into account for the purpose of reckoning the seniority in the civil post.

14. In *Union of India and Others etc. etc. v. Dr. S. Krishna Murthy and Others etc. etc.* (1989) 4 SCC 689 this court observed that the persons who had joined the armed forces after the declaration of the emergency at the time when the security of the nation was in peril due to external aggression had voluntarily offered their services for the defence of the country. They belong to a separate class and there is no question of discrimination in giving the benefits of seniority to them in the civil services by framing Rules.

15. This court in *Dhan Singh and others etc. etc. v. State of Haryana and others* 1991 Supp (2) SCC 190 specifically held that the young persons who had joined the military service during emergency and those who were already in the service

and due to exigency of the service had been compelled to serve during the emergency form two distinct classes. Those who joined the Army before the proclamation of the emergency had chosen the career voluntarily and their services during emergency were a matter of course. The person who got enrolled or commissioned during the emergency, on the other hand, on account of the call of the nation joined the Army at that critical juncture of national emergency to save the motherland by taking a greater risk where danger to life of a member of the armed forces was higher. They include persons who could have pursued their studies, acquired higher qualifications and could join a higher post and those who could have joined the government service before attaining the maximum age prescribed and thereby gained seniority in the service. Foregoing all these benefits and avenues, they joined the Army keeping in view the needs of the country and assurances contained in conditions of service in executive instructions. The latter formed a class by themselves and they cannot be equated with those, who joined the Army before proclamation of the emergency.

16. In *Ram Janam Singh etc. v. State of U.P. and Another etc.* (1994) 2 SCC 622, this court while interpreting U.P. 1968 Rules, 1973 Rules and 1980 Rules, specifically held that the persons who had joined the Army after declaration of the emergency due to foreign aggression and those who joined after the war cannot stand on the same footing. Those who joined the Army after revocation of emergency, joined the Army as a career. This court specifically rejected the plea in para 14 to treat the persons who joined the Army service after cessation of foreign aggression and revocation of emergency to be treated alike the persons who had joined Army service during emergency due to foreign aggression. It was also held that any period of earlier service should be taken into account for determination of seniority for some very compelling reasons, which stand the test of reasonableness and on examination can be held free from arbitrariness.

17. In *Chittaranjan Singh Chima and Another v. State of Punjab and others* (1997) 11 SCC 447 this court while relying on the judgment in the case of *Ram Janam Singh (supra)* held that the preferential treatment could be given only to those who joined armed forces during emergency and grant of notional seniority in the civil services by taking into account service rendered in the armed forces cannot be extended to those who joined armed forces during normal times.

18. This court in *State of Punjab and Others v. Harbhajan Singh and Another* (2007) 12 SCC 549, while relying on judgment in the case of *Ram Janam Singh* (supra) held that the military service can be counted only if the person has joined during the emergency and not otherwise.

19. In *State of U.P. and another etc. etc. v. Dinkar Sinha* (2007) 10 SCC 548, this court specifically placed reliance on the judgment in Ram Jam Singh's case (supra) and held that a person, who joined the Army after the cessation of emergency cannot be given benefit of seniority of the services rendered in the Army after selection in the civil services.

20. The appellants also submitted that a demobilized Short Service Commissioned officer who was commissioned in the Army during the normal period and whose selection in the civil post is against the vacancies reserved for demobilized officers under the 1973 Rules is not entitled to seniority under the 1980 Rules.

21. Under Rule 3 of 1973 Rules, 10% of the permanent vacancies in all Non-Technical (Class-II) services were reserved for Emergency Commissioned Officers who joined the armed forces during the first emergency i.e. 1.11.1962 to 10.1.1968 and during the second emergency i.e. 3.12.1971 to 27.3.1977. Under Rule 1(2), these rules were to remain in force only for a period of 5 years. Rule 6 provided for seniority and pay and specifically provided that seniority of the candidates appointed against the 10% vacancies reserved under Rule 3 should be

determined on the assumption that they entered the service at their second opportunity of competing of recruitment and they should be assigned the same year of allotment as successful candidates of the relevant competitive examination. Therefore, the benefit of the 1973 Rules cannot be extended after these Rules ceased to exist on 5.8.1978 and to the persons whose appointment in the civil posts was not under the vacancies reserved under Rule 3 of the 1973 Rules.

22. When the 1973 Rules lapsed in 1978 some selections for the vacancies reserved under the 1973 Rules were concluded or the selection process was on but the appointments could not be made. To regularize the selection and appointment of these officers against the vacancies reserved under the 1973 Rules, a new set of Rules i.e. 1980 Rules were promulgated on 19.8.1980 by the State Government.

23. The appellants submitted that only Rules governing reservation is 1973 Rules, which ceased to exist after five years, i.e., on 5.8.1978. The appellants also submitted that no one could be given the benefit of 1973 Rules after 5.8.1978. The appellants further submitted that in *Dilbag Singh v. State of U.P. and others* (1995) 4 SCC 495 this court observed that 1973 Rules must be deemed to be in operation till 1980.

24. According to the appellants this is not the correct position of law, but in any event no one could derive any benefit after 1980. Respondent No.4 admittedly joined service much after 1980 and could not have been extended the benefit of the Rules.

25. According to the appellants, 1980 Rules do not deal with reservation. They are only Rules for appointment. The appellants also submitted that under 1980 Rules there is no provision with respect to reservation of vacancies to the demobilized officers of armed forces of the Union. These Rules are not replacement of 1973 Rules as generally misunderstood

and these rules are a new set of rules for the purpose of regularising appointments of demobilized officers whose selection process had commenced or concluded under the 1973 Rules but appointments were not made before expiry of the 1973 Rules i.e. 6.8.1978. Nomenclature of the 1980 Rules is different from the 1973 Rules which explain the purpose of these rules. The 1973 Rules provide for reservation of vacancies for the demobilized officers, whereas 1980 Rules provide for appointment of demobilized officers whose process of selection as per the 1973 Rules either got completed or commenced but appointments were not made before the expiry of the said 1973 Rules. The 1980 Rules have been given retrospective effect with effect from 6.8.1978 to regularize the appointment of the demobilized officers whose selection process was concluded or commenced before 6.8.1978 otherwise appointment orders of those officers after 6.8.1978 to 19.8.1980 would have been invalid who were given benefit of 1973 Rules. Rule 4 of the 1980 Rules prescribes a cut-off date which provides that benefits of the Rules shall be available only against the vacancies reserved for demobilized officers under 1973 Rules whose process of recruitment commenced or was completed prior to the 6.8.1978 when the 1973 Rules had lapsed. Therefore, a demobilized officer, whose selection was not against the vacancies reserved under the 1973 Rules and his process of selection started after 6.8.1978, by no stretch of imagination, is entitled to the seniority under the 1980 Rules.

26. The appellants also submitted that it is not in dispute that respondent No. 4 was appointed in the year 1994 against the 8% vacancies reserved under the Government Order dated 20.8.1977, which provides reservation to other categories of persons as well. There is no provision in the Government Order for granting seniority to a Short Service Commissioned officer for his past military service, who was appointed against the 8% vacancies reserved for the armed forces personnel as mentioned in the Government Order. Since the appointment of

respondent No.4 in the U.P. Police Service in the year 1994 was not against the vacancies reserved under the 1973 Rules, he could not have been granted seniority of eight years by the State Government.

27. In the case of *Rana Randhir Singh and others etc. etc. v. State of U.P. and others* 1989 Supp (1) SCC 615 this Court has specifically held that the seniority of the officers appointed in the U.P. Police Service after 1980 shall be determined in accordance with the provisions of Rule 21 of the U.P. Police Service Rules, 1942. Therefore, the respondent could not have been assigned seniority of eight years only because he happened to be a Short Service Commissioned Officer.

28. In reply to question No. 5 i.e. "*when the order of appointment itself provides that the seniority of the selected Short Service Commissioned Officer shall be determined according to the Uttar Pradesh Police Service Rules, 1942, can the Government dehors the terms of the appointment order grant him seniority of 8 years because he happened to be a Short Service Commissioned Officer",* the appellants submitted that it is trite law that the service conditions mentioned in the order of appointments are binding on the employee and employer alike if the same are not against the statutory rules governing the service conditions or public policy or the provisions of the Constitution of India. The appointment order of respondent No. 4 specifically mentions that the seniority of respondent No.4and other officers selected shall be determined in accordance with the U.P. Police Service Rules, 1942. It is also submitted that having accepted this service condition as mentioned in the appointment order, the claim of respondent No.4 for grant of eight years seniority as he was Short Service Commissioned Officer could not have been allowed.

29. In *Dinkar Sinha (supra)* the controversy has been set at rest where this court has categorically held that a person

whose appointment in the civil/police service is not against the vacancies reserved under the 1973 Rules cannot claim seniority under the 1980 Rules.

30. The appellants also submitted that the final seniority list of the officers of the U.P. Police Service was published on 1.2.2000 and respondent No. 4 was placed at Sl. No. 340. He was satisfied and felt contended with his placement in the seniority list. Once the seniority list was finalized and no representation was made by respondent No.4 for years, therefore, it ought not to have been disturbed. The final seniority list should not be disturbed or tinkered with unless it becomes imperative in the larger interest of justice.

31. It may be pertinent to mention that Dinkar Sinha, a Short Service Commissioned Officer, who was appointed as Deputy Superintendent of Police against the 8% vacancies reserved under the Government Order dated 20.8.1977 made a representation claiming seniority under 1980 Rules. The State Government rejected his representation on 14.9.2000 saying that he was not selected and appointed against the vacancies reserved under the 1973 Rules. However, the High Court vide its judgment dated 8.2.2002 allowed the prayer of Dinkar Sinha.

32. Respondent No.4, after the said judgment by the High Court and after four years from the date of publication of the final seniority list, filed a representation before the State Government that he was similarly placed as Dinkar Sinha and he should be assigned seniority of 1980 batch. The State Government rejected the representation of Dinkar Sinha but obliged respondent No. 4 and vide order dated 29.11.2004 granted him seniority of 1982 batch and thus, he was given a jump of 181 places. According to the appellants, the long drawn seniority should not have been disturbed after so many years.

33. It may also be pertinent mention here that *Dilbag Singh's (supra)* case was approved in *Mahesh Chand and Others v. State of U.P. and Others* (2000) 10 SCC 492.

34. The main submission of the learned counsel for the State of U.P. has been that individuals who were appointed under the 10% vacancies are not entitled for the benefit. He placed reliance on advertisement and the appointment letter of all the three respondents who got the benefit but their appointments were not made against 10% vacancies.

35. Dr. Rajiv Dhawan, learned senior counsel appearing in Civil Appeals No.4954 - 4956 of 2011 arising out of Special Leave Petition (Civil) Nos.26022-26024 of 2008 entitled '*Rajendra Singh v. Madhukar Dwivedi and Others'*, submitted that *Dilbag Singh (supra)* has been approved in *Mahesh Chand (supra),* which is a three Judges Bench judgment and binding on this court. He submitted that even the State of U.P. till 2007 has prepared all lists according to the judgment of *Mahesh Chand's (supra)* case. He further submitted that *Dinkar Sinha's (supra)* judgment is delivered by two judges and they were bound by the judgment of *Mahesh Chand (supra)* and they could not have taken a contrary view.

36. Dr. Dhawan also placed reliance on the judgment of this court in the case of *Narendra Nath Pandey and Others v. State of U.P. and others (1988) 3 SCC 527.* He submitted that despite Rules, the executive has the power to grant reservation by an executive order.

37. Mr. Dinesh Dwivedi, learned senior counsel appearing in Civil Appeals No.4951 – 4953 of 2011 arising out of Special Leave Petition (Civil) Nos. 25949-25951 of 2008 entitled '*Sudhir Kumar v. Sri Madhukar Dwivedi etc.'* submitted that Sudhir Kumar had joined the Army on 17.5.1976. On 19.3.1977 appellant was commissioned as a Short Service Commissioned Officer. On 12.5.1982 he was released from the Army services. In the year 1984 he appeared in Provincial Civil Services (Executive) Examination in Uttar Pradesh and passed in the year 1984. On 7.7.1986 the appellant joined State Civil Services as Deputy Collector. He was confirmed in the batch of 1985 for the purpose of seniority. On 25.6.1994,

Sudhir Kumar made a representation to the State Government to accord seniority to him at proper place and the batch in gradation list following the decisions of this court as accorded to other similarly situated demobilized officers by the State Government. Vide order dated 13.3.2003, the State Government decided the seniority of the appellant and fixed his name below the name of Santosh Kumar Dwivedi of 1976 batch and above Vinod Kumar Singh of 1977 batch.

38. The appellant being aggrieved by the judgment dated 30.9.2008 delivered by the High Court of judicature at Allahabad, Lucknow Bench in Writ Petition No.494 (S/B) of 2003 entitled *Madhukar Dwivedi v. State of U.P.,* Writ Petition No. 504 (S/B) of 2003 entitled *Arvind Narain Mishra and Another v. State of U.P. and others* and Writ Petition No. 1083 (S/B) of 2004 entitled *Har Charan Prakash v. State of U.P.* filed Civil Appeals No.4951 – 4953 of 2011 arising out of Special Leave Petition (Civil) Nos. 25949-25951 of 2008 in this Court.

39. According to Mr. Dwivedi the appellant was commissioned as a Short Service Commissioned Officer on 19.3.1977 during the period when the emergency was invoked and he ought to have been given the benefit of 1973 Rules. He cannot be denied the benefit on the ground that he was not appointed under the 10% vacancy quota or 1973 Rules.

40. Mr. Dwivedi placed reliance on *Ram Janam Singh (supra)* and particularly laid stress on para 12 of the judgment which reads as under:

> "… … …we fail to understand as to how persons who joined after the emergency was over i.e. after January 10, 1968 and before December 3, 1971 when another emergency was imposed in view of the foreign aggression, can be treated on a par or on the same level. It need not be pointed out that such persons were on the lookout for a career and joined the Armed Forces of their own volition. It can be presumed that they were prepared for the normal risk in the service of the Armed Forces. Those who joined Armed Forces after November 1, 1962 or December 3, 1971, not only joined Armed Forces but joined a war which was being fought by the nation. If the benefits extended to such persons who were commissioned during national emergencies are extended even to the members of the Armed Forces who joined during normal times, members of the Civil Services can make legitimate grievance that their seniority is being affected by persons recruited to the service after they had entered in the said service without there being any rational basis for the same."

41. We have carefully gone through the pleadings of these appeals and perused relevant judgments delivered by this court.

42. The 1973 Rules ceased to exist after five years i.e. on 5.8.1978. The life of the Rules, according to the judgment delivered in *Dilbag Singh (Supra)* was extended upto 1980. In any event, no one could be given benefit of 1973 Rules after 1980. Admittedly, respondent No. 4 was appointed in 1994 and the benefit could not have been extended to respondent No.4.

43. Same Rules came up for consideration in *Dinkar Sinha's case (supra)* wherein the Court observed as under:

> "31. The 1973 Rules was a temporary statute. It died its natural death on expiry thereof. The 1980 Rules does not contain any repeal and saving clause. The provisions of the relevant provisions of the General Clauses Act will, thus, have no application. Once a statute expires by efflux of time, the question of giving effect to a right arising thereunder may not arise. In any event, in this case, no such right accrued to the respondent. Reservation to the extent of 2% might have been fixed by reason of a government order issued in the year 1977 but the same had nothing to do with the 1973 Rules or with the 1980 Rules. Provision for reservation made in general by the State in exercise of its executive power could not have conferred a benefit

in terms of the provisions of a rule which seeks to apply to a particular category of employees in the service.

32. The 1980 Rules neither repealed nor replaced the 1973 Rules. The question of continuation of the 1973 Rules by the 1980 Rules, thus, did not and could not arise. The 1980 Rules provided for a new set of rules. They were to have a limited application viz. regularisation of appointment of Demobilised Officers."

44. Consequently, persons who joined the Army after the emergency was over cannot also be given the benefit which was extended to those persons who joined the Army during emergency. Those who joined the Army during the period of emergency virtually joined the war which was being fought by the nation. The benefit extended to such persons cannot be extended to the members of the armed forces who had joined the Army during normal periods.

45. Persons who have joined the Army during the foreign aggression could have opted for other career or softer career or service but the nation itself being under peril, impelled by the spirit to serve the nation, they opted for joining the Army where the risk was much more. Such persons formed a class by themselves and the benefit extended to them cannot be extended to the persons who joined the Army during the normal times. The differential treatment given to those who joined the Army during emergency cannot be termed as discriminatory and arbitrary.

46. Respondent No.4, after the judgment of the High Court and after four years from the date of publication of the final list, filed a representation before the State Government that he be similarly placed as Dinkar Sinha as he being assigned seniority of 1980 batch. The State Government granted seniority to respondent No. 4 and he was given a jump of 181 places and the final seniority list was disturbed by the State.

47. The appointment of respondent no.4 was not against the vacancies reserved under the 1973 Rules, therefore, he cannot get benefit of 1973 Rules.

48. In *Rana Randhir Singh's case (supra),* this Court clearly held that the seniority of the officers appointed in the U.P. Police Service after 1980 shall be determined in accordance with the provisions of Rule 21 of the U.P. Police Service Rules, 1942. Respondent no.4 was appointed in 1994, therefore, the 1942 Rules would be applicable to him as the said Rules are still in force.

49. Respondent no.4 did not join the armed forces during emergency and thus stealing a march over 181 officers is not only contrary to the Rules but is discretionary and arbitrary and violative of Articles 14 and 16 of the Constitution.

50. We are clearly of the view that respondent No.4 and similarly placed employees could not have been given the benefit of the 1973 Rules. These Rules were not in existence when they were appointed. Therefore, they could not have derived any benefit from the 1973 Rules.

51. Consequently, we are constrained to set aside the impugned judgment of the High Court. We have no hesitation in holding that respondent No.4 – Rakesh Kumar Jolly, Rajendra Singh and Sudhir Kumar were wrongly given the benefit of the 1973 Rules.

52. We deem it appropriate to reiterate that in service jurisprudence there is immense sanctity of a final seniority list. The seniority list once published cannot be disturbed at the behest of person who chose not to challenge it for four years. The sanctity of the seniority list must be maintained unless there are very compelling reasons to do so in order to do substantial justice. This is imperative to avoid avoidable litigation and unrest and chaos in the services.

53. We, therefore, direct the respondent-State of U.P. to

prepare a fresh seniority list and place all three of them on their respective positions as they had not received the benefit of 1973 seniority.

54. There has been a considerable delay in this matter, therefore, we direct the State of U.P. to publish a fresh seniority list as expeditiously as possible, in any event within two months from the date of this judgment.

55. In the facts and circumstances of this case we make it clear that the financial benefits which have already been extended to respondent No. 4 – Rakesh Kumar Jolly, Rajendra Singh and Sudhir Kumar may not be recovered from them.

56. These appeals are accordingly disposed of in terms of the aforesaid directions. In the facts and circumstances of the case, the parties are left to bear their own costs.

D.G. Appeals disposed of.

COMMISSIONER OF CENTRAL EXCISE, CHANDIGARH
v.
M/S. DOABA STEEL ROLLING MILLS.
(Civil Appeal Nos. 3400 of 2003)

JULY 6, 2011

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

HOT REROLLING STEEL MILLS ANNUAL CAPACITY DETERMINATION RULES, 1997:

Rule 5 read with rr. 4(2), 3(2), 3(3)—Re-determination of annual capacity of production of specified goods—Applicability of r.5—HELD: Rule 5 will be attracted for determination of annual capacity of production of the factory when any change in the installed machinery or part thereof is intimated to Commissioner of Central Excise in terms of r. 4(2)—Central Excise Act, 1944—s.3(A) (2).

CENTRAL EXCISE ACT, 1944:

Section 3A—Power of Central Government to charge excise duty on the basis of capacity of production in respect of notified goods—Purpose of—Explained – Held: Section 3A is an exception to s. 3, the charging section, and being in nature of a non obstante provision, provisions of s.3A override those of s.3 – Determination of annual capacity of production of specified goods is to be done as per specific formula prescribed in r.3(3) of the 1997 Rules – That being so, it must logically follow that r. 5 cannot be ignored in relation to a situation arising on account of an intimation under r. 4(2) of the 1997 Rules.

Section 3A(2)—Re-determination of annual production—Held: Second proviso to sub-s.(2) of s.3A contemplates re-determination of annual production in a case when there is an alteration or modification in any factor relevant to

production of specified goods, but such re-determination has again to be as per the formula in r.3(3) of the 1997 Rules.

INTERPRETATION OF STATUTES:

Tax statute – Interpretation of – Held: A taxing statute should be strictly construed—Intention of legislature is primarily to be gathered from the words used in the statute.

APPEAL:

Appeal by revenue—Held: It cannot be said that merely because in some cases revenue has not questioned the correctness of an order on the same issue, it would operate as a bar for revenue to challenge the order in another case—However, it is high time when Central Board of Direct and Indirect Taxes comes out with a uniform policy laying down strict parameters for guidance of field staff for filing appeals.

The Assessee (respondent in Civil Appeal N o. 3400 of 2003) was engaged in the manufacture of hot re-rolled steel products of non-alloy steel in a hot steel rolling mill, classifiable under Chapter 72 of the Central Excise Tariff Act, 1985. On 5.1.1998, the Commissioner, Central Excise, determined the annual capacity of production of the respondent at 7683.753 MT, as per the formula laid down in sub-r. (3) of r. 3 of the Hot Re-rolling Steel Mills Annual Capacity Determination Rules, 1997. However, keeping in view r. 5, the annual capacity was fixed at 11961.135 MT. on the basis of actual production of the mills during the financial year 1996-97. At the request of the respondent, the Commissioner, by order dated 27.1.2000 re-determined the annual capacity of the mill at 7328.435 MT, applying the formula as laid down under r. 3(3), but relying on r. 5, he again computed the annual capacity at 11961.135 MT. The appeal filed by the assessee was allowed by the Customs Excise and Gold (Control) Appellate Tribunal holding that r. 5 of the Rules could not

be applied in view of the change in technical parameters of the rolling mills. The Commissioner made an application to the High Court u/s. 35-H of the Central Excise Act, 1944 seeking a direction to the Tribunal to refer the question of law which according to him arose from the order of the Tribunal. The High Court rejected the application.

In the instant appeals filed by the revenue, the question for consideration before the Court was: whether r. 5 of the 1997 Rules would apply in a case where a manufacturer proposes to make some change in the installed machinery or any part thereof and seeks the approval of the Commissioner of Excise in terms of r. 4(2) of the said Rules?

Allowing the appeals, the Court

HELD: 1.1. Rule 5 of the Hot Rerolling Steel Mills Annual Capacity Determination Rules, 1997 will be attracted for determination of the annual capacity of production of the factory when any change in the installed machinery or any part thereof is intimated to the Commissioner of Central Excise in terms of r. 4(2) of the said Rules. [para 23] [952-F-G]

Sawanmal Shibumal Steel Rolling Mills Vs. C.C.E., Chandigarh-I **2001 (127) E.L.T. 46 (Tri.-LB)** *Commr. of Central Excise, Belgaum Vs. Bellary Steel Rolling Mills*, **2009 (245) E.L.T. 114 (Kar) - Cited.**

1.2. It is clear from a bare reading of s.3A of the Central Excise Act, 1944 as inserted by Act 26 of 1997, that the reason which persuaded the Legislature to introduce this provision was attributed to large scale evasion of payment of Excise duty by certain sectors, like induction furnaces, steel re-rolling mills etc., where

evasion of Excise duty on goods produced in such mills was rampant. [para 5] [942-F-G]

1.3. Section 3A was inserted in the Act to enable the Central Government to levy Excise duty on manufacture or production of certain notified goods on the basis of annual capacity of production to be determined by the Commissioner of Central Excise in terms of the Rules to be framed by the Central Government. Section 3A is an exception to s. 3 of the Act – the charging Section and being in the nature of a *non obstante* provision, the provisions contained in the said Section override those of s. 3 of the Act. Rule 3 of 1997 Rules framed in terms of s. 3A(2) of the Act lays down the procedure for determining the annual capacity of production of the factory. Sub-r. (3) of that Rule contains a specific formula for determination of annual capacity of production of hot re-rolled products. This is the only formula whereunder the annual capacity of production of the factory, for the purpose of charging the duty in terms of s. 3A of the Act, is to be determined. [para 18] [949-G-H; 950-A-D]

1.4. Second proviso to sub.s. (2) of s. 3A of the Act contemplates re-determination of annual production in a case when there is alteration or modification in any factor relevant to the production of the specified goods but such re-determination has again to be as per the formula prescribed in r. 3(3) of the 1997 Rules. It is clear that sub-r. (2) of r. 4, which, in effect, permits a manufacturer to make a change in the installed machinery or part thereof which tends to change the value of either of the parameters, referred to in sub-r. (3) of r. 3, on the basis whereof the annual capacity of production had already been determined, would obviously require re-determination of annual capacity of production of the factory/mill, for the purpose of levy of duty. It is plain that in the absence of any other Rule, providing for any

alternative formula or mechanism for re-determination of production capacity of a factory, on furnishing of information to the Commissioner as contemplated in r. 4(2) of the 1997 Rules, such determination has to be in terms of sub-r. (3) of r. 3. That being so, it must logically follow that r. 5 cannot be ignored in relation to a situation arising on account of an intimation under r. 4(2) of the 1997 Rules. Moreover, the language of r. 5 being clear and unambiguous, in the sense that in a case where annual capacity is determined/re-determined by applying the formula prescribed in sub-r. (3) of r. 3, r. 5 springs into action and has to be given full effect to. [para 18] [950-D-H; 951-A-B]

1.5. The principle that a taxing statute should be strictly construed is well settled. It is equally trite that the intention of the Legislature is primarily to be gathered from the words used in the statute. Once it is shown that an assessee falls within the letter of the law, he must be taxed however great the hardship may appear to the judicial mind to be. [para 19] [951-B-C]

Commissioner of Sales Tax, Uttar Pradesh vs. The Modi Sugar Mills Ltd. **(1961) 2 SCR 189;** *Mathuram Agrawal Vs. State of Madhya Pradesh* **(1999)8 SCC 667, referred to.**

Cape Brandy Syndicate Vs. Inland Revenue Commissioners ***1921 (1) KB 64, 71*** **- referred to.**

Commissioner of Customs, Bangalore Vs. ACER India (P) Ltd, **2007(11) SCR 558= (2008) 1 SCC 382 – cited.**

1.6. All the orders impugned in the instant appeals are set aside and those of the Commissioners of Central Excise restored. [para 25] [953-F]

2. It cannot be said that merely because in some cases revenue has not questioned the correctness of an order on the same issue, it would operate as a bar for the

revenue to challenge the order in another case. There can be host of factors, like the amount of revenue involved, divergent views of the Tribunals/High Courts on the issue, public interest etc. which may be a just cause, impelling the revenue to prefer an appeal on the same view point of the Tribunal which had been accepted in the past. However, it is high time when the Central Board of Direct and Indirect Taxes comes out with a uniform policy, laying down strict parameters for the guidance of the field staff for deciding whether or not an appeal in a particular case is to be filed. This Court is constrained to observe that the existing guidelines are followed more in breach, resulting in avoidable allegations of malafides etc. on the part of the officers concerned. [para 24] [953-B-E]

C.K. Gangadharan & Anr. Vs. Commissioner of Income Tax, Cochin **2008 (11) SCR 52 = (2008) 8 SCC 739 – cited.**

Case Law Reference:

2007 (11) SCR 558	**cited**	**Para 13**
2001 (127) E.L.T. 46 (Tri.-LB)	**cited**	**Para 14**
2009 (245) E.L.T. 114 (Kar)	**cited**	**para 14**
2008 (11) SCR 52	**cited**	**Para 15**
1921 (1) KB 64, 71	**referred to**	**Para 20**
(1961) 2 SCR 189	**referred to**	**Para 21**
1999 (4) Suppl. SCR 195	**referred to.**	**Para 22**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3400 of 2003.

From the Judgment & Order dated 17.10.2001 of the High Court of Punjab & Haryana at Chandigarh in C.C.E.S. No. 4 of 2001.

WITH

C.A. Nos. 8342-8344 & 8345 of 2004 & C.A. No. 4992-4993 of 2011.

B. Bhattacharya, ASG, Harish Chander, R. Nanda, Arti Singh, B.K. Prasad, Anil Katiyar, P. Parmeswaran, D.S. Mahra, Balbir Singh, Rajesh Kumar, Rupinder Sinhmar, Deepak Sinhmar, Abhishek Singh Baghel, Sharad Sharma, Rajesh Kumar, Krishnakumar R.S., K.S. Mahadevan, Manjula Gupta for the appearing parties.

The Judgment of the Court was delivered by

D.K. JAIN, J. 1. Leave granted in SLP (C) Nos. 35323-35324 of 2010.

2. This batch of appeals, by grant of leave, arises out of judgements and orders dated 17th October 2001 in C.C.E.S.No.4 of 2001, 21st October, 2003 in C.E.C. 11, 12, 13 of 2003 and C.E.C. No.122 of 2003 passed by the High Court of Punjab & Haryana; 6th November 2009 in Review application No.29356 of 2008 and 8th July 2010 in C.E. Reference application No.113 of 2000 both passed by the High Court of Judicature at Allahabad. By the impugned judgements, in the main reference applications, filed by the Commissioner of Central Excise, under Section 35H of the Central Excise Act, 1944 (for short "the Act"), the questions referred by the Customs, Excise and Gold (Control) Appellate Tribunal, as it then existed, (for short "the Tribunal") have been answered in favour of the assessee and the review applications preferred by the Commissioner against the said judgments have been dismissed.

3. Since all the appeals involve a common question of law, these are being disposed of by this common judgment. However, to appreciate the controversy, the facts emerging from C.A.No.3400 of 2003 are being adverted to. These are as follows :

4. Section 3A of the Act, which has a chequered history of insertions and omissions in the Act, was inserted in the Act for the second time by Act 26 of 1997, with effect from 14th May, 1997, the provision relevant for the purpose of these appeals. The Section has again been omitted by Act 14 of 2001, with effect from 11th May, 2001. Section 3A of the Act enables the Central Government to charge Excise duty on goods on the basis of annual capacity of production of mills etc. in respect of the notified goods.

The relevant part of the Section reads as follows:

"3A. Power of Central Government to charge excise duty on the basis of capacity of production in respect of notified goods.— (1) Notwithstanding anything contained in section 3, where the Central Government, having regard to the nature of the process of manufacture or production of excisable goods of any specified description, the extent of evasion of duty in regard to such goods or such other factors as may be relevant, is of the opinion that it is necessary to safeguard the interest of revenue, specify, by notification in the Official Gazette, such goods as notified goods and there shall be levied and collected duty of excise on such goods in accordance with the provisions of this section.

(2) Where a notification is issued under sub-section (1), the Central Government may, by rules,—

(a) provide the manner for determination of the annual capacity of production of the factory, in which such goods are produced, by an officer not below the rank of Assistant Commissioner of Central Excise and such annual capacity shall be deemed to be the annual production of such goods by such factory; or

(b) (i) specify the factor relevant to the production of

such goods and the quantity that is deemed to be produced by use of a unit of such factor; and

(ii) provide for the determination of the annual capacity of production of the factory in which such goods are produced on the basis of such factor by an officer not below the rank of Assistant Commissioner of Central Excise and such annual capacity of production shall be deemed to be the annual production of such goods by such factory:

Provided that where a factory producing notified goods is in operation during a part of the year only, the annual production thereof shall be calculated on proportionate basis of the annual capacity of production:

Provided further that in a case where the factor relevant to the production is altered or modified at any time during the year, the annual production shall be re-determined on a proportionate basis having regard to such alteration or modification.

……."

5. It is clear from a bare reading of the Section that the reason which persuaded the Legislature to introduce this provision was attributed to large scale evasion of payment of Excise duty by certain sectors. Thus, the insertion of the Section in the Act was with a view to safeguard the interest of revenue in the sectors, like induction furnaces, steel re-rolling mills etc., where evasion of Excise duty on goods produced in such mills was rampant. The provision authorises the Central Government to notify certain goods, for levy and collection of duty of Excise on such goods, in accordance with the provision of the said Section, having regard to the extent of evasion of duty as also other relevant factors. The scheme evolved under this provision, envisages the determination of annual capacity of production of such factory by an officer not below the rank of Assistant

Commissioner of Central Excise in terms of the rules to be framed by the Central Government under sub-section (2) of Section 3A of the Act. The annual capacity of production of the factory is deemed to be the annual production of such goods by such factory, on which an assessee is liable to pay duty. The two provisos to sub-section (2) of Section 3A of the Act, provide for determination/re-determination of annual capacity of production in the event of operation of the factory during a part of the year or alteration or modification in any of the factors relevant to the production of the factory.

6. In exercise of the powers conferred by Section 3A(2) of the Act, by Notification No. 23/97-CE (NT) dated 25th July, 1997, the Central Government framed and notified Hot Re-rolling Steel Mills Annual Capacity Determination Rules, 1997 (for short "the 1997 Rules"), to be effective from 1st August, 1997, for determination of annual capacity of production of a factory producing re-rolled products as contained in the said notification. The Rules prescribed the formulae for determination of the annual capacity of production of a hot re-rolling mill, on the basis of the information to be furnished by the mill to the Commissioner of Central Excise; on the parameters referred to in Rule 3(3) of the 1997 Rules. The rate and the manner of payment of Excise duty under Section 3A of the Act was also indicated in the notification. Subsequently, another Notification No.32/97-CE (NT) was issued on 1st August, 1997 making the said Rules effective from the even date. For the sake of ready reference, Rules 3 and 4, in so far as they are relevant for these appeals, are extracted below:

"3. The annual capacity of production referred to in rule 2 shall be determined in the following manner, namely:-

(1) a hot re-rolling mill shall declare the values of 'd' 'n' 'I' and 'speed of rolling', the parameters referred to in sub-rule (3), to the Commissioner of Central Excise (hereinafter referred to as the

Commissioner) with a copy to the Assistant Commissioner of Central Excise:

(2) on receipt of the information referred to in sub-rule (1), the Commissioner shall take necessary action to verify their correctness and ascertain the correct value of each of the parameters. The Commissioner may, if so desires, consult any technical authority for this purpose;

(3) the annual capacity of production of hot re-rolled products of non-alloy steel in respect of such factory shall be deemed to be as determined by applying the following formula :-

Annual Capacity =1.885 x 10-4 x d x n x i x e x w x Number of utilised hours (in metric tonnes) Where :

d = Nominal diameter of the finishing mill in millimetres

n = Nominal revolutions per minute (RPM) of the drive

i = Reduction ratio of the gear box

w =Weight in Kilogramme per metre of the re-rolled product.

value of 'e' in the formula shall be deemed to be 0.30 in case of low speed mills, and 0.75 in case of high speed mills the value of 'w' factor in the formula for the high speed mills shall be deemed to be 0.45 and for the low speed mills shall be deemed to be as under, -

.....

4. the Commissioner of Central Excise shall, as soon as may be, after determining the total capacity of the hot re-rolling mill installed in the factory as also the annual capacity of production, by an order, intimate to the manufacturer.

Provided that the Commissioner may determine the annual capacity of the hot re-rolling unit on provisional basis pending verification of the declaration furnished by the hot re-rolling mills and pass an order accordingly. Thereafter, the Commissioner may determine the annual capacity, as soon as may be, and pass an order accordingly.

4 (1) The capacity of production for any part of the year, or any change in the total hot re-rolling mill capacity, shall be calculated *pro rata* on the basis of the annual capacity of production determined in the above manner stated in Rule 3.

(2) In case a manufacturer proposes to make any change in installed machinery or any part thereof, which tends to change the value of either of the parameters 'd' 'n' 'e' 'I' and 'speed of rolling' referred to in sub-rule (3) of sub-rule 3, such manufacturer shall intimate about the proposed change to the Commissioner of Central Excise in writing, with a copy to Assistant Commissioner of Central Excise, at least one month in advance of such proposed change, and shall obtain the written approval of the Commissioner before making such change. Thereafter the Commissioner of Central Excise shall determine the date from which the change in the installed capacity shall be deemed to be effective."

7. However, by Notification No. 45/97-CE (NT) dated 30th August, 1997, 1997 Rules were amended with effect from 1st September, 1997. By reason of the said amendment, apart from substituting a fresh sub-rule (3) of Rule 3, prescribing a new formulae to determine the annual capacity of production, not very relevant for the purpose of the present appeals, Rule 5 was inserted after sub-rule (2) of Rule 4, which reads as follows :

"5. In case, the annual capacity determined by the formula in sub-rule (3) of rule 3 in respect of a mill, is less than the

actual production of the mill during the financial year 1996-97, then the annual capacity so determined shall be deemed to be equal to the actual production of the mill during the financial year 1996-97."

8. The respondent-assessee is engaged in the manufacture of hot re-rolled steel products of non-alloy steel in a hot steel rolling mill, classifiable under Chapter 72 of the Central Excise Tariff Act, 1944, for the purpose of levy of Excise duty etc. On 5th January, 1998 the Commissioner, Central Excise, Chandigarh determined the annual capacity of production of the respondent at 7683.753 MT, as per the formula laid down in sub-section (3) of Rule 3 of 1997 Rules. However, keeping in view Rule 5, the annual capacity was finally fixed at 11961.135 MT on the basis of actual production of the mill during the financial year 1996-97.

9. Vide letter dated 13th September, 1999, the respondent requested the Commissioner for re-determination of annual production capacity of their unit in terms of Rule 4(2) of the 1997 Rules on the ground that they have changed some of the parameters of their mill. The request was acceded to and vide order dated 27th January 2000, the Commissioner, applying the formula as laid down under Rule 3(3), determined the annual capacity of the mill at 7328.435 MT but relying on Rule 5, he again computed the annual capacity at 11961.135 MT, being equal to the actual production of the mill during the financial year 1996-97.

10. Aggrieved by the said order of the Commissioner, the respondent filed an appeal before the Tribunal. The Tribunal, vide order dated 6th April, 2000, allowed the appeal and held that Rule 5 of the 1997 Rules cannot be applied in view of change in technical parameters of the rolling mill.

11. Dissatisfied with the said order, the Commissioner made an application to the High Court under Section 35H of the Act, seeking a direction to the Tribunal to refer the question

of law, which according to him, arose from the order of the Tribunal. Vide order dated 17th October, 2001, the High Court rejected the reference petition holding that no question of law arose from the order of the Tribunal. The High Court has held that the provisions of Rule 5 cannot be invoked in a case where the annual capacity of the mill is to be determined in terms of Rule 4(2) of the 1997 Rules on account of change in parameters, observing thus:

> "It is the admitted position that the capacity for the year 1996-97 was fixed on the basis of the parameters adopted by the respondent at the relevant time. Subsequently, the parameters were altered. In view of the change in parameters, it is admitted position that the capacity was considerably reduced. In fact, it has not been disputed that the annual production had come down from 11961.135 Metric Tons to 7328.435 Metric Tons. This having happened, the Revenue could not have claimed excise duty for the capacity which was not in existence. The provisions of Rule 5 cannot be invoked in a case where after determination of the capacity for the year 1996-97, the Unit makes a change in the capacity and the production actually comes down. If such a course were permitted, the result would be grossly unfair."

Additionally, the High Court has also noted that a similar view had been taken by the Tribunal in the case of M/s Awadh Alloys (P) Ltd., since reported in 1999 (112) ELT 719 (Tri.), against the revenue but despite opportunity no information was furnished whether the said decision had been challenged by the revenue or not. We may however, note at this juncture itself that the finding of the High Court to the effect that on account of change in parameters, the annual production had come down from 11961.135 MT to 7328.435 MT is factually incorrect. The actual annual production determined initially as per the formula laid down in Rule 3(3) had worked out to 7638.753 MT, which on change in parameters now worked out at 7328.435 MT i.e. a difference approx. 300 MT only.

12. Hence, the Commissioner has preferred the present appeals against the orders of the High Courts, noted in para 2 (supra).

13. Mr. B. Bhattacharya, learned Additional Solicitor General of India, appearing for the revenue, had strenuously urged that the view taken by the High Court to the effect that once the technical parameters, as stipulated in Rule 3(3) of the 1997 Rules, are altered in terms of Rule 4(2) of the said Rules, resulting in reduction in the production capacity, Rule 5 cannot be invoked, is clearly fallacious. According to the learned counsel, for the purpose of Rule 4(2), the production capacity of the rolling mill has to be determined under the said Rule 3(3) as there is no other rule to take care of such a situation. It was argued that when the production capacity of a factory is to be determined under the said Rule, Rule 5 will automatically come into play. Relying on the clarification issued by the Board vide Circular dated 26th February 1998, learned counsel argued that since reference to previous year's production in Rule 5 of the 1997 Rules is to the actual production of the mill and does not relate to the technical parameters of the machinery, the actual production of the year 1996-97 would be relevant for determining the current year's duty liability under Section 3A of the Act, even when parameters of the machinery are altered. It was thus, asserted that since re-determination of capacity of production under Rule 4(2) has to be done by the formulae prescribed in the said Rule 3(3), the provisions of Rule 5 cannot be disregarded. Commending us to the decision of this Court in *Commissioner of Customs, Bangalore Vs. ACER India (P) Ltd*[1]., learned counsel contended that the Rules relating to determination of capacity of production have to be strictly construed.

14. *Per contra,* learned counsel appearing for the respondents, led by Mr. Balbir Singh, submitted that when there is any change in the parameters of a rolling mill, which are

1. (2008) 1 SCC 382.

different from the rolling mill in the financial year 1996-97, Rule 5 has no application. Highlighting the fact that the decision of a Full Bench of the Tribunal in *Sawanmal Shibumal Steel Rolling Mills Vs. C.C.E., Chandigarh-I*[2] as also the decision of the High Court of Karnataka in *Commr. of Central Excise, Belgaum Vs. Bellary Steel Rolling Mills*,[3] wherein it has been held that when there are alterations in the parameters, referred to in Rule 3(3) of the 1997 Rules, Rule 5 does not apply, learned counsel stressed that the revenue having accepted these decisions on the very same point, it is debarred from taking a contrary stand in these appeals.

15. In rejoinder, Mr. Bhattacharya, cited the decision of this Court in *C.K. Gangadharan & Anr. Vs. Commissioner of Income Tax, Cochin*[4] in support of his submission that the revenue is not precluded from questioning the correctness of the decision of the authorities below in these appeals despite the fact that orders/decision in the afore-mentioned cases have not been challenged.

16. Thus, the short question for consideration is whether Rule 5 of the 1997 Rules will apply in a case where a manufacturer proposes to make some change in the installed machinery or any part thereof and seeks the approval of the Commissioner of Excise in terms of Rule 4(2) of the said Rules?

17. Before addressing the contentions advanced by learned counsel for the parties, it is essential to note at the outset that in all these appeals, there is no challenge to the validity of Rule 5 of the 1997 Rules, inserted vide Notification dated 30th August, 1997 and, therefore, we are only required to interpret it and examine the width of its application.

18. As noted above, Section 3A was inserted in the Act

2. 2001 (127) E.L.T. 46 (Tri.-B).

3. 2009 (245) E.L.T. 114 (Kar).

4. (2008) 8 SCC 739.

to enable the Central Government to levy Excise duty on manufacture or production of certain notified goods on the basis of annual capacity of production to be determined by the Commissioner of Central Excise in terms of the Rules to be framed by the Central Government. Section 3A of the Act is an exception to Section 3 of the Act – the charging Section and being in nature of a *non obstante* provision, the provisions contained in the said Section override those of Section 3 of the Act. Rule 3 of 1997 Rules framed in terms of Section 3A(2) of the Act lays down the procedure for determining the annual capacity of production of the factory. Sub-rule (3) of that Rule contains a specific formula for determination of annual capacity of production of hot rolled products. This is the only formula whereunder the annual capacity of production of the factory, for the purpose of charging duty in terms of Section 3A of the Act, is to be determined. Second proviso to sub-section (2) of Section 3A of the Act contemplates re-determination of annual production in a case when there is alteration or modification in any factor relevant to the production of the specified goods but such re-determination has again to be as per the formula prescribed in Rule 3(3) of the 1997 Rules. It is clear that sub-rule (2) of Rule 4, which, in effect, permits a manufacturer to make a change in the installed machinery or part thereof which tends to change the value of either of the parameters, referred to in sub-rule (3) of Rule 3, on the basis whereof the annual capacity of production had already been determined, would obviously require re-determination of annual capacity of production of the factory/mill, for the purpose of levy of duty. It is plain that in the absence of any other Rule, providing for any alternative formula or mechanism for re-determination of production capacity of a factory, on furnishing of information to the Commissioner as contemplated in Rule 4(2) of the 1997 Rules, such determination has to be in terms of sub-rule (3) of Rule 3. That being so, it must logically follow that Rule 5 cannot be ignored in relation to a situation arising on account of an intimation under Rule 4(2) of the 1997 Rules. Moreover, the language of Rule 5 being clear and unambiguous, in the sense

that in a case where annual capacity is determined/ redetermined by applying the formula prescribed in sub-rule (3) of Rule 3, Rule 5 springs into action and has to be given full effect to.

19. The principle that a taxing statute should be strictly construed is well settled. It is equally trite that the intention of the Legislature is primarily to be gathered from the words used in the statute. Once it is shown that an assessee falls within the letter of the law, he must be taxed however great the hardship may appear to the judicial mind to be.

20. On the principles of interpretation of taxing statutes, the following passage from the opinion of *Late Rowlatt, J*. in *Cape Brandy Syndicate Vs. Inland Revenue Commissioners*[5] has become the *locus classicus* and has been quoted with approval in a number of decisions of this Court:

> "….in a taxing act, one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

21. In *Commissioner of Sales Tax, Uttar Pradesh Vs. The Modi Sugar Mills Ltd.*,[6] J.C. Shah, J. observed thus:

> "In interpreting a taxing statute, equitable considerations are entirely out of place. Nor can taxing statutes be interpreted on any presumptions or assumptions. The court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed: it cannot imply anything which is not expressed; it cannot import provisions in the statutes so as to supply any assumed deficiency."

5. 1921 (1) KB 64, 71.

6. (1961) 2 SCR 189.

22. In *Mathuram Agrawal Vs. State of Madhya Pradesh,*[7] D.P. Mohapatra, J. speaking for the Constitution Bench, stated the law on the point in the following terms:

> "The intention of the legislature in a taxation statute is to be gathered from the language of the provisions particularly where the language is plain and unambiguous. In a taxing Act it is not possible to assume any intention or governing purpose of the statute more than what is stated in the plain language. It is not the economic results sought to be obtained by making the provision which is relevant in interpreting a fiscal statute. Equally impermissible is an interpretation which does not follow from the plain, unambiguous language of the statute. Words cannot be added to or substituted so as to give a meaning to the statute which will serve the spirit and intention of the legislature. The statute should clearly and unambiguously convey the three components of the tax law i.e. the subject of the tax, the person who is liable to pay the tax and the rate at which the tax is to be paid. If there is any ambiguity regarding any of these ingredients in a taxation statute then there is no tax in law. Then it is for the legislature to do the needful in the matter."

23. We do not find any reason to depart from these well settled principles to be applied while interpreting a fiscal statute. Therefore, bearing in mind these principles and the intent and effect of the statutory provisions, analysed above, the conclusion becomes inevitable that Rule 5 of the 1997 Rules will be attracted for determination of the annual capacity of production of the factory when any change in the installed machinery or any part thereof is intimated to the Commissioner of Central Excise in terms of Rule 4(2) of the said Rules.

24. As regards the argument of learned counsel for the respondents that having not assailed the correctness of some

7. (1999) 8 SCC 667.

of the orders passed by the Tribunal and a decision of the High Court of Karnataka, the revenue cannot be permitted to adopt the policy of pick and choose and challenge the orders passed in the cases before us, it would suffice to observe that such a proposition cannot be accepted as an absolute principle of law, although we find some substance in the stated grievance of the assessees before us, because such situations tend to give rise to allegations of malafides etc. Having said so, we are unable to hold that merely because in some cases revenue has not questioned the correctness of an order on the same issue, it would operate as a bar for the revenue to challenge the order in another case. There can be host of factors, like the amount of revenue involved, divergent views of the Tribunals/High Courts on the issue, public interest etc. which may be a just cause, impelling the revenue to prefer an appeal on the same view point of the Tribunal which had been accepted in the past. We, may however, hasten to add that it is high time when the Central Board of Direct and Indirect Taxes comes out with a uniform policy, laying down strict parameters for the guidance of the field staff for deciding whether or not an appeal in a particular case is to be filed. We are constrained to observe that the existing guidelines are followed more in breach, resulting in avoidable allegations of malafides etc.; on the part of the officers concerned.

25. For the foregoing reasons, the orders impugned in these appeals cannot be sustained. All these orders are set aside and that of the Commissioners of Central Excise are restored. The appeals are allowed accordingly with costs, quantified at ‘50,000/- in each set of appeals.

R.P. Appeals allowed.

LAFARGE UMIAM MINING PVT. LTD.
T.N. GODAVARMAN THIRUMULPAD
v.
UNION OF INDIA & ORS.
(I.A. NOS. 1868, 2091, 2225-2227, 2380, 2568 and 2937)
IN
WRIT PETITION (C) No. 202 OF 1995

JULY 6, 2011

[S.H. KAPADIA, CJI, AFTAB ALAM AND K.S. RADHAKRISHNAN, JJ.]

Environmental Law:

Environment and utilization of natural resources – Balancing of equities – HELD: Time has come to apply the constitutional “doctrine of proportionality” to the matters concerning environment as a part of the process of judicial review in contradistinction to merit review – Utilization of the environment and its natural resources has to be in a way that is consistent with principles of sustainable development and intergenerational equity, but balancing of these equities may entail policy choices – In the circumstances, barring exceptions, decisions relating to utilization of natural resources have to be tested on the anvil of the well-recognized principles of judicial review – The court should review the decision-making process to ensure that the decision of MoEF is fair and fully informed, based on the correct principles, and free from any bias or restraint – Once this is ensured, then the doctrine of “margin of appreciation” in favour of the decision-maker would come into play – Judicial Review – Doctrine of proportionality – Doctrine of margin of appreciation – Polluter pays principle – Intergenerational equity.

Mines and minerals – Limestone mining project in East Khasi Hills District, Meghalaya – Environmental clearance

and forest clearance – Mining lease agreement signed with Village Durbar – In the application for environmental clearance it was mentioned that the land in question fell under Karst topography – No objection granted by KHADC –Site clearance granted by MoEF – DFO concerned certified that mining site was not a forest area – Environmental public hearing held – Finally, EIA clearance given by MoEF on 9.8.200 – Subsequently, when it was pointed out that non broken area in the leased mine was forest within the meaning of Forest (Conservation) Act, 1980, ex post facto environmental clearance and forest clearance granted on 19.4.2010 and 22.4.2010, respectively – Validity of – HELD: The word "environment" has different facets – That the land in question falls under Kast topography is borne out by the certificate dated 27.8.1999 issued by KHADC – According to the NEHU Report, the site is located in the area on the outskirts of forest – Requirement of submitting the proposal for forest diversion is exclusively the obligation of the State Government – While granting environmental clearance dated 9.8.2001, there was an express finding that "no diversion of forest land was involved" – Since the area of mining lease did not fall in forest, State Government did not submit any proposal to Central Government u/s 2 of the 1980 Act – It is in view of the existence of 1958 Act that the native people as also the DFO understood the area in the light of the said Act – On facts of the case, it cannot be held that the decision to grant ex post facto clearances stood vitiated on account of non-application of mind or on account of suppression of material facts by the applicant – Similarly, it cannot be held that ex post facto clearances have been granted by MoEF in ignorance of the existence of forests due to mis-declaration – The ex post facto clearance is based on the revised EIA – In the circumstances, EIA Notification of 2006 would not apply - The order of the Court is confined to the instant case only – United Khasi-Jaintia Hills Autonomous District (Management and Control of Forests) Act, 1958 – s.2(6) – Forest (Conservation) Act, 1980 – s.2 – Mines and Minerals

(Regulation and Development) Act, 1957 – s.5(1).

Environment and development – Limstone mining in tribal area – Role of triabals and rural public – HELD: Public participation provides a valuable input in the process of identification of forest – The natives and indigenous people are fully aware and they have knowledge as to what constitutes conservation of forests and development – They equally know the concept of forest degradation – They are equally aware of systematic scientific exploitation of limestone mining without causing of "environment degradation" – However, they do not have the requisite wherewithal to exploit limestone mining in a scientific manner – The word "development" is a relative term – One cannot assume that the triabals are not aware of principles of conservation of forest – In the instant case, limestone mining has been going on for centuries in the area and it is an activity which is intertwined with the culture and the unique land holding and tenure system of the area – On the facts of the case, the MoEF exercised due diligence in the matter of forest diversion.

Environment and sustainable development – Utilization of natural resources – Guidelines to be followed in future cases – The words "environment" and "sustainable development" have various facets – Care for environment is an ongoing process – Identification of an area as forest area is solely based on the Declaration to be filed by the User Agency (project proponent) – The project proponent under the existing dispensation is required to undertake EIA by an expert body/ institution – The MoEF/ State Government acts on the report (Rapid EIA) undertaken by the Institutions who though accredited submit answers according to the Terms of Reference propounded by the project proponent – At times the court is faced with conflicting reports – Similarly, the government is also faced with a fait accompli kind situation which in the ultimate analysis leads to grant of ex post facto clearance – Therefore, guidelines are required to be given so

that fait accompli situations do not recur – Time has come for this Court to declare and it is hereby declared that the National Forest Policy, 1988 which lays down far-reaching principles must necessarily govern the grant of permissions u/s 2 of the Forest (Conservation) Act, 1980 as the same provides the road map to ecological protection and improvement under the Environment (Protection) Act, 1986 – The principles/ guidelines mentioned in the National Forest Policy, 1988 should be read as part of the provisions of the Environment (Protection) Act, 1986 read together with the Forest (Conservation) Act, 1980 – This direction is required to be given because there is no machinery even today for implementation of the National Forest Policy, 1988 read with the Forest (Conservation) Act, 1980 – Further guidelines enumerated – National Forest Policy, 1988 – Environment (Protection) Act, 1986 Forest (Conservation) Act, 1980 – Environment (Protection) Rules, 1986 – r.5(3)(d).

The predecessor-in-interest of the applicant Lafarge Umiam Mining Pvt. Ltd. (LUMPL), namely, LMMPL, made an application on 1.9.1997 under Environment Impact Assessment (EIA) Notification, 1994 for granting environmental clearance for limestone mining project at Nongtrai, East Khasi hills District, Meghalaya. By application dated 23.9.1998 LMMPL applied for Site Clearance. The application stated that the site was not a habitat/corridor for endangered/rare/endemic species; an area of 100 hectares stood acquired by LMMPL on lease basis for mining for which an agreement was signed with Village Durbar; and that the limestone bearing area fell under the Karst topography. LMMPL, obtained "no objection" certificate dated 27.8.1997 issued by the Khasi Hills Autonomous District Council (KHADC), Shillong, a constitutional authority under the Sixth Schedule to the Constitution of India, site clearance was given by MoEF by letter dated 18.6.1999, certificate dated 13.6.2000 of the DFO concerned was issued certifying that the mining site

was not a forest area as per Supreme Court's order dated 12.12.1996 nor did it fall under any of the notified reserved, and the environmental public hearing took place on 3.6.1998. Ultimately, EIA Clearance was given to LMMPL by MoEF on 9.8.2001. Under a transfer deed executed on 28.2.2002, the mining lease was transferred and assigned in favour of the applicant LUMPL and, accordingly, on 30.7.2002, the environmental clearance granted to LMMPL stood transferred to LUMPL (the applicant) by MoEF.

Subsequently, by letter dated 1.6.2006 from the Chief Conservator of Forests (C) addressed to MoEF, it was pointed out that the mining lease area around the developed mine benches stood surrounded by thick natural vegetation cover with sizeable number of tall trees. The said vegetation included trees being cleared for developing the mining benches and for such clearance no permission under the Forest (Conservation) Act, 1980 was taken. LUMPL, irrespective of its claim to NOC issued by the DFO, submitted its application dated 3.5.2007 for forest clearance under the 1980 Act. By letter dated 11.5.2007 the Principal Chief Conservator of Forests, Meghalaya wrote to the State government that the project proponent had broken up an area of about 21.44 Ha; that the topography in the leased mine around the broken up areas was Karst topography; that non-broken up area in the leased mine was forest land falling within the purview of the1980 Act; that the project proponent be allowed to remove the already broken limestone from the site and it may be directed to apply for forest clearance under the1980 Act for the non-broken up part of the leased area. LUMPL filed the instant IA No. 1868 of 2007 seeking directions to MoEF to expeditiously process its application u/s 2 of the 1980 Act.

On 6.9.2007 CEC submitted its report to the Supreme

Court stating that the project proponent should have taken permission under the1980 Act before starting operations in the area and as *ex post facto* approval was sought and since *fait accompli* situation had arisen, there was no option but to recommend the case for grant of permission for the use of forest land for mining lease subject to certain conditions mentioned therein. By interim order dated 5.3.2010 the project proponent was directed to stop all mining activities. On 5.4.2010 a report was submitted by the Regional Chief Conservator of Forests [also known as High Powered Committee (HPC)], stating, *inter alia*, that although the area supported rich flora, the same could be re-forested as a part of reclamation plan prepared and executed in a time bound manner; that the project was positive and beneficial to the residents of the village due to huge amount of cash going to the Village Durbar, reaching the individual household and improving the financial health of the population of the villages concerned. Accordingly, on 19.4.2010 the MoEF granted environmental clearance (with certain additional conditions) which was followed by forest clearance dated 22.4.2010 (ex-post facto clearance) granted by MoEF stipulating further conditions to be complied with by the project proponent.

The contentions of the parties boiled down to the issues: (i) nature of land and (ii) whether *ex post facto* environmental and forest clearances dated 19.4.2010 and 22.4.1010 respectively stood vitiated by alleged suppression by the appellant regarding the nature of the land.

Disposing of the IAs, the Court

HELD:

(a) <u>Legal Position</u>

1.1. Universal human dependence on the use of environmental resources for the most basic needs gave rise to the concept of "sustainable development". Care of the environment is an on-going process. It would depend on the facts of each case whether diversion in a given case should be permitted or not, barring "No Go" areas (whose identification would again depend on undertaking of due diligence exercise). In such cases, the margin of appreciation doctrine would apply. [para 19] [1009-E-H; 1110-A-B]

Narmada Bachao Andolan v. Union of India and Others **2000 (4) Suppl. SCR 94 = (2000) 10 SCC 664 – referred to**

1.2. Since the nature and degree of environmental risk posed by different activities vary, the implementation of environmental rights and duties require proper decision making based on informed reasons about the ends which may ultimately be pursued, as much as about the means for attaining them. Setting the standards of environmental protection involves mediating conflicting visions of what is of value in human life. [para 20] [1010-B-C]

1.3. Time has come to apply the constitutional "*doctrine of proportionality*" to the matters concerning environment as a part of the process of judicial review in contradistinction to merit review. It cannot be gainsaid that utilization of the environment and its natural resources has to be in a way that is consistent with principles of sustainable development and intergenerational equity, but balancing of these equities may entail policy choices. In the circumstances, *barring exceptions*, decisions relating to utilization of natural resources have to be tested on the anvil of the well-recognized principles of judicial review. The court should review the decision-making process to ensure that the

decision of MoEF is fair and fully informed, based on the correct principles, and free from any bias or restraint. Once this is ensured, then the doctrine of "margin of appreciation" in favour of the decision-maker would come into play. [para 30] [1028-C-H]

R v. Chester City Council **(2011) 1 All ER 476 – referred to.**

1.4. Accordingly, the matter is disposed of keeping in mind various facets of the word "environment", the inputs provided by the Village Durbar of Nongtrai (including their understanding of the word "forest" and the balance between environment and economic sustainability), their participation in the decision-making process, the topography and connectivity of the site to Shillong, the letter dated 11.5.2007 of the Principal Chief Conservator of Forests and the report dated 5.4.2010 given by HPC (each one of which refers to economic welfare of the tribals of Village Nongtrai), the polluter pays principle and the intergenerational equity (including the history of limestone mining in the area from 1858) and the prevalent social and customary rights of the natives and tribals. [para 31] [1029-A-D]

(b) Nature of the land

2.1. According to the State of Forest Report, 2001, the North Eastern Hill State of Meghalaya is predominantly tribal with 86% tribal population. The area in question falls under Karst topography; and this fact is also borne out by the certificate dated 27.8.1997 issued by KHADC, Shillong which is a constitutional authority under the Sixth Schedule to the Constitution. According to the NEHU Report of 1997, the site selected for mining has commercially viable limestone deposit. The site was selected after thorough consultation with the village Durbar concerned which is the custodian of the land.

The village Durbar also felt that in the area unscientific limestone quarrying was going on resulting in loss of revenue both to the State as well as the inhabitants of the village, particularly, because the said mining was undertaken by unorganized sectors and, thus, it was decided to enter into the lease with the project proponent so that mining could be done on scientific basis. The site was also selected because of easy accessibility by road and less vegetation clearance stood involved. According to the NEHU Report, the site is located in the area on the outskirts of the forest. [para 21] [1011-B-H; 1012-A-C]

(c) Validity of ex-post facto clearance:

3.1. By an order dated 12.12.1996, a Division Bench of this Court, in *T.N. Godavarman Thirumulpad**, **directed each State Government to constitute within a specific period an Expert Committee to identify areas which are forests irrespective of whether they are so notified, recognized or classified under any law and also identify areas which were earlier forests but stand degraded, denuded or cleared. This order dated 12.12.1996, thus, clarified that every State Government seeking prior approval u/s 2 of the Forest (Conservation) Act, 1980 Act shall first examine the question relating to existence of forests before sending its proposal to the Central Government in terms of the form prescribed under the Forest (Conservation) Rules, 1981 (Rule 4). Thus, the requirement of submitting the proposal for forest diversion under the 1980 Act is exclusively the obligation of the State Government. In the instant case, the project proponent had obtained EIA clearance given by MoEF dated 9.8.2001 which clearance stood transferred to the applicant only on 30.7.2002. While granting environmental clearance dated 9.8.2001 there was an express finding to the effect that "no diversion of forest land was involved". In terms of the order of this Court dated 12.12.1996, an**

Expert Committee was in fact formed by the State of Meghalaya by notification dated 8.1.1997 with the Principal Chief Conservator of Forests as its Chairman. On 10.2.1997, the State of Meghalaya had addressed a specific letter to the Khasi Hills Autonomous District Council, stating that the land in question was reckoned as non-forest land and the Council was asked to clarify whether the area in question under the mining lease fell in the forest as per the records of the Council. The Council by its letter dated 28.4.1997 had informed the State Government that the area in question did not fall in the forest. Apart from the said letter, the Chairperson of the Expert Committee appointed by the State of Meghalaya being the Principal Chief Conservator of Forests also submitted his report in which it was expressly stated that the mining lease granted by the State Government did not fall in the forest. Since the mining lease granted by the State did not fall in the forest, the State Government did not submit any proposal to the Central Government u/s 2 of the 1980 Act as it treated the site in question as falling on the outskirts of the forests. [para 25] [1015-H; 1016-A-H; 1017-A-F]

***T.N. Godavarman Thirumulpad v. Union of India* 2005 (3) Suppl. SCR 552 = (2006) 1 SCC 1 – referred to.**

3.2. It is almost after nine years that there was a change of view on the part of MoEF under which the report of the Expert Committee headed by the Principal Chief Conservator of Forests was given a go-by. Between 1997 and 2007, the view which prevailed was that the project site stood located on the outskirts of the forests. In this connection, it needs to be stated that on 1.6.2006 for the first time the Chief Conservator of Forests (C), came out with the change of view which was ultimately accepted in 2007 by MoEF. The most important fact is that subsequent to the letter dated 1.6.2006,

addressed by the Chief Conservator of Forests (C), the Principal Chief Conservator of Forests agreed with the opinion of the Chief Conservator of Forests (C). This was by letter dated 11.5.2007. However, even according to the Principal Chief Conservator of Forests, who was the Chairperson of the Expert Committee appointed by the State Government, the applicant was not at fault because the certificate indicating absence of forest was given by Khasi Hills Autonomous District Council. In fact the letter dated 11.5.2007 further goes to state that the activities of the applicant will provide employment to a large number of local tribals and rural people and consequently the application for forest clearance made by the applicant without prejudice to their rights and contentions dated 3.5.2007 be considered by MoEF. [para 25] [1017-F-H; 1018-A-D]

3.3. Besides, on 22.4.1998, a notification was issued by the State Pollution Control Board constituting an Environmental Public Hearing Panel to evaluate and assess the documents submitted by M/s. LMMPL. On 3.6.1998, a public hearing did take place. The Headman of Nongtrai was also present. The village Durbar had agreed to the proposed project, for the reason that the limestone was abundantly available in the area but the same remained unutilized by local villagers themselves due to lack of infrastructure. For economic development of the local population, the village Durbar had decided to lease the area to the project proponent. [para 25] [1018-D-H; 1019-A]

3.4. Public participation provides a valuable input in the process of identification of forest. The natives and indigenous people are fully aware and they have knowledge as to what constitutes conservation of forests and development. They equally know the concept of forest degradation. They are equally aware of systematic scientific exploitation of limestone mining without

causing of "environment degradation". However, they do not have the requisite wherewithal to exploit limestone mining in a scientific manner. These natives and indigenous people know how to keep the balance between economic and environment sustainability. In the instant case, this fact is brought out by the Minutes of the meeting held on 3.6.1998. In fact the written submissions filed by the Nongtrai Village Durbar (respondent No. 5) in I.A. No. 1868 of 2007 have specifically averred that the Nongtrai village has about 1300 hectares of community land out of which 900 hectares are limestone bearing land. The manner and method of allocation, use and occupation of the community lands are decided by the Village Durbar. The Village Durbar has granted lease of 100 hectares of community land which is limestone bearing land. [para 25] [1019-C-H; 1020-A-D]

3.5. The word "development" is a relative term. One cannot assume that the tribals are not aware of principles of conservation of forest. Limestone mining has been going on for centuries in the area and it is an activity which is intertwined with the culture and the unique land holding and tenure system of the Nongtrai Village. [para 31] [1029-D-E]

3.6. Further, a detail written submission has been filed on 13.5.2011 by the Nongtrai Village Durbar fully supporting the impugned project. Thus, this is a unique case from North East. This Court is fully satisfied that the natives and the indigenous people of Nongtrai Village are fully conscious of their rights and obligations towards clean environment and economic development. There is ample material on record which bears testimony to the fact of their awareness of ecological concerns which has been taken into account by MoEF. [para 25] [1020-D-F]

3.7. The word "environment" has different facets. Section 2(f) of the United Khasi – Jaintia Hills

Autonomous District (Management and Control of Forests) Act, 1958 defines the expression "forest". It is the trees of a particular girth and breast height and not every tree should be counted while computing whether a particular area is a forest area or not. In fact in the year 2007, a survey of the unbroken area was conducted by the Forest Department of the State of Meghalaya wherein an inventory of the existing trees was prepared based on their nature and girth. The said record confirms that the unbroken area has less than 25 trees per acre having girth of more than 120 cms. It is in view of the existence of the 1958 Act, which is a local legislation, that the native people as also the State officials like the DFO understood the area in the light of the said Act. It is important to note once again that this understanding of the natives and tribals about the Local Act is an important input in the decision making process of granting environmental clearance. It is deeply engrained in the local customary law and usage. It is so understood by the Expert Committee headed by the then Principal Chief Conservator of Forests on the basis of which the State granted the mining lease saying that there was no forest. This certificate was granted by the State in terms of the order of this Court dated 12.12.1996. This understanding also existed in the mind of KHADC when it gave certificates on 28.4.1997, 10.7.1997 and 27.8.1997. In fact this has been the understanding of the Council as is apparent even from its letter dated 18.1.2011 (page 126 of the affidavit dated 9.3.2011 filed by the State of Meghalaya). This view prevailed with the MoEF between 1997 and 2007. [para 25] [1020-G-H; 1021-C-H; 1022-A]

3.8. On facts of the case, it cannot be held that the decision to grant ex post facto clearances stood vitiated on account of non-application of mind or on account of suppression of material facts by the applicant as alleged by SAC. [para 25] [1022-A-B]

4.1. Similarly, it cannot be held that ex post facto clearances have been granted by MoEF in ignorance of the existence of forests due to mis-declaration. Firstly, the ex post facto clearance is based on the revised EIA. In the circumstances, EIA Notification of 2006 would not apply. Secondly, IA preferred by SAC being I.A. No. 2225-2227/08 was preferred only in March, 2008. Thus, during the relevant period of almost a decade, SAC did not object to the said project. I.A. No. 3063 of 2011 preferred by CEC, which has acted only after receiving inputs from respondent No. 5, prima facie throws doubt on the credibility of objections raised by SAC. [para 26] [1022-C-G]

4.2. On the ex post facto clearance, suffice it to state that after Chief Conservator of Forests (C) submitted his report on 1.6.2006, MoEF directed the project proponent to apply for necessary clearances on the basis that there existed a forest in terms of the order of this Court dated 12.12.1996 and the ex post facto clearance has now been granted on that basis permitting diversion of forest by granting Stage-I forest clearance subject to compliance of certain conditions imposed by MoEF and by this Court. [para 26] [1022-G-H; 1023-A-B]

4.3. On the question of non-application of mind by the MoEF, at various stages despite compliances by the project proponent and despite issuance of certificates by various authorities, MoEF sought further clarifications/ information by raising necessary requisitions. A number of queries have been raised from time to time by the MoEF as indicated from the facts. There were four terms of references given to the HPC. According to the report, all conditions imposed with regard to environmental clearance had been substantially complied with by the applicant. The most important aspect is the HPC Report regarding the topography of the area. It states that

though the area can be treated as forest, still it is a hilly uneven undulating area largely covered by "Karstified" limestone. The Report further states that the area can be reforested as a part of the reclamation plan. It further states that the indigenous and native people are satisfied with the credentials of the applicant as the company is providing health care facilities, drinking water facilities, employment for local youth, construction of village roads, employment for school teachers, scholarship programme for children, etc. It also indicates that the issue of mining was thoroughly discussed with the Village Durbar by the members of the HPC who visited the site and that the community was in agreement to allow the applicant to continue mining. [para 26] [1023-A-B; 1024-A-F]

4.4. Keeping in view the steps taken by MoEF, this Court is satisfied that the parameters of intergenerational equity are satisfied and no reasonable person can say that the impugned decision to grant Stage-I forest clearance and revised environmental clearance stood vitiated on account of non-application of mind by MoEF. On the contrary, the facts indicate that the MoEF has been diligent; that, MoEF has taken requisite care and caution to protect the environment; and, in the circumstances, this Court upholds the stage-I forest clearance and the revised environmental clearance granted by MoEF. [para 26] [1024-H; 1025-A-B]

4.5. The order dated 12.4.2010 recites agreed conditions between the parties, imposed by this Court in addition to the conditions laid down by MoEF. These conditions are in terms of judgment of this Court in *T.N. Godavarman Thirumulpad* **with regard to** *commercial exploitability* **which even according to SAC was not considered by MoEF at the time of granting revised environmental clearance on 19.4.2010 or at the time of granting forest clearance on 22.4.2010. This order**

indicates the benefit which will accrue to the natives and residents of the Nongtrai Village. The site covers 100 hectare required for limestone mining. The Village Durbar seeks to exploit it on scientific lines. The minutes of the meeting of the Village Durbar and the submissions filed by the Durbar indicate the exercise of the rights by the tribals and the natives of Nongtrai Village seeking economic development within the parameters of the 1980 Act and the 1986 Act. [para 27-28] [1025-C-E; 1027-G-H]

4.6. However, it is made clear that none of the observations made in this judgment in the context of the nature of the land (the extent of the lands owned by the community and by private persons) shall be taken into account by the competent court in which title dispute is pending. [para 29] [1028-A-B]

4.7. On the facts of the case, the MoEF exercised due diligence in the matter of forest diversion. The instant order is confined to the facts of this case. Accordingly, there is no reason to interfere with the decision of MoEF granting site clearance dated 18.6.1999, EIA clearance dated 9.8.2001 read with revised environmental clearance dated 19.4.2010 and Stage-I forest clearance dated 22.4.2010. [para 31-32] [1029-E-F; G-H]

Part II

Guidelines to be followed in future cases

5.1. The words "environment" and "sustainable development" have various facets. At times in respect of a few of these facets data is not available. Care for environment is an ongoing process Identification of an area as forest area is solely based on the Declaration to be filed by the User Agency (project proponent). The project proponent under the existing dispensation is required to undertake EIA by an expert body/ institution.

The MoEF/ State Government acts on the report (Rapid EIA) undertaken by the Institutions who though accredited submit answers according to the Terms of Reference propounded by the project proponent. At times the court is faced with conflicting reports. Similarly, the government is also faced with a *fait accompli* kind situation which in the ultimate analysis leads to grant of ex facto clearance. Therefore, guidelines are required to be given so that *fait accompli* situations do not recur:

(i) Time has come for this Court to declare and it is hereby declare that the National Forest Policy, 1988 which lays down far-reaching principles must necessarily govern the grant of permissions u/s 2 of the Forest (Conservation) Act, 1980 as the same provides the road map to ecological protection and improvement under the Environment (Protection) Act, 1986. The principles/ guidelines mentioned in the National Forest Policy, 1988 should be read as part of the provisions of the Environment (Protection) Act, 1986 read together with the Forest (Conservation) Act, 1980. This direction is required to be given because there is no machinery even today for implementation of the National Forest Policy, 1988 read with the Forest (Conservation) Act, 1980.

Section 3 of the Environment (Protection) Act, 1986 confers a power coupled with duty and, thus, it is incumbent on the Central Government to appoint an Appropriate Authority, preferably in the form of Regulator, at the State and at the Centre level for ensuring implementation of the National Forest Policy, 1988. The Court is of the view that under s. 3(3) of the Environment (Protection) Act, 1986, the Central Government should appoint a National Regulator for appraising projects, enforcing environmental conditions for approvals and to impose penalties on polluters.

A regulatory mechanism should be put in place and till the time such mechanism is put in place, the MoEF should prepare a Panel of Accredited Institutions from which alone the project proponent should obtain the Rapid EIA and that too on the Terms of Reference to be formulated by the MoEF.

(ii) In all future cases, the User Agency (project proponents) shall comply with the Office Memorandum dated 26.4.2011 issued by the MoEF which requires that all mining projects involving forests and for such non-mining projects which involve more than 40 hectares of forests, the project proponent shall submit the documents which have been enumerated in the said Memorandum.

(iii) If the project proponent makes a claim regarding status of the land being non-forest and if there is any doubt the site shall be inspected by the State Forest Department along with the Regional Office of MoEF to ascertain the status of forests, based on which the certificate in this regard be issued. In all such cases, it would be desirable for the representative of State Forest Department to assist the Expert Appraisal Committee.

(iv) At present, there are six regional offices in the country. This may be expanded to at least ten. At each regional office there may be a Standing Site Inspection Committee which will take up the work of ascertaining the position of the land (namely, whether it is forest land or not). In each Committee there may be one non-official member who is an expert in forestry. If it is found that forest land is involved, then forest clearance will have to be applied for first.

(v) Increase in the number of Regional Offices of the

Ministry from six presently located at Shillong, Bhubaneswar, Lucknow, Chandigarh, Bhopal and Bangalore to at least ten by opening at least four new Regional Offices at the locations to be decided in consultation with the State/UT Governments to facilitate more frequent inspections and in-depth scrutiny and appraisal of the proposals.

(vi) Constitution of Regional Empowered Committee, under the Chairmanship of the Chief Conservator of Forests (Central) concerned and Conservator of Forests (Central) and three non-official members to be selected from the eminent experts in forestry and allied disciplines as its members, at each of the Regional Offices of the MoEF, to facilitate detailed/in-depth scrutiny of the proposals involving diversion of forest area more than 5 hectares and up to 40 hectares and all proposals relating to mining and encroachments up to 40 hectares.

(vii) Creation and regular updating of a GIS based decision support database, tentatively containing *inter-alia* the district-wise details of the location and boundary of: (i) each plot of land that may be defined as forest for the purpose of the Forest (Conservation) Act, 1980; (ii) the core, buffer and eco-sensitive zone of the protected areas constituted as per the provisions of the Wildlife (Protection) Act, 1972; (iii) the important migratory corridors for wildlife; and (iv) the forest land diverted for non-forest purpose in the past in the district. The Survey of India toposheets in digital format, the forest cover maps prepared by the Forest Survey of India in preparation of the successive State of Forest Reports and the conditions stipulated in the approvals accorded under the Forest (Conservations) Act, 1980 for each case of diversion of forest land in the district will also

be part of the proposed decision support database.

(viii) Orders to implement these may, after getting necessary approvals, be issued expeditiously.

(ix) The Office Memorandum dated 26.4.2011 is in continuation of an earlier Office Memorandum dated 31.03.2011.

(x) Besides, Office Memorandum dated 26.04.2011 on Corporate Environmental Responsibility has also been issued by the MoEF. This O.M. lays down the need for PSUs and other Corporate entities to evolve a Corporate Environment Policy of their own to ensure greater compliance with the environmental and forestry clearance granted to them.

(xi) All minutes of proceedings before the Forest Advisory Committee in respect of the Forest (Conservation) Act, 1980 as well as the minutes of proceedings of the Expert Appraisal Committee in respect of the Environment (Protection) Act, 1986 should be regularly uploaded on the Ministry's website even before the final approval/decision of the Ministry for Environment and Forests is obtained. This has been done to ensure public accountability. This also includes environmental clearances given under the EIA Notification of 2006 issued under the Environment (Protection) Act, 1986. Henceforth, in addition to the above, all forest clearances given under the Forest (Conservation) Act, 1980 may now be uploaded on the Ministry's website.

(xii) Completion of the exercise undertaken by each State/UT Govternment in compliance of this Court's order dated 12.12.1996 wherein *inter-alia* each State/ UT Government was directed to constitute an Expert Committee to identify the areas which are "forests"

irrespective of whether they are so notified, recognized or classified under any law, and irrespective of the land of such "forest" and the areas which were earlier "forests" but stand degraded, denuded and cleared, culminating in preparation of Geo-referenced district forest-maps containing the details of the location and boundary of each plot of land that may be defined as "forest" for the purpose of the Forest (Conservation) Act, 1980.

(xiii) Incorporating appropriate safeguards in the Environment Clearance process to eliminate chance of the grant of Environment Clearance to projects involving diversion of forest land by considering such forest land as non-forest, a flow chart depicting, the tentative nature and manner of incorporating the proposed safeguards, to be finalized after consultation with the State/ UT Governments.

(xiv) The public consultation or public hearing as it is commonly known, is a mandatory requirement of the environment clearance process and provides an effective forum for any person aggrieved by any aspect of any project to register and seek redressal of his/her grievances.

(xv) The MoEF will prepare a comprehensive policy for inspection, verification and monitoring and the overall procedure relating to the grant of forest clearances and identification of forests in consultation with the States (given that forests fall under entry 17A of the Concurrent List). [Para 32] [1030-B-H; 1031-A; 1036-A-C]

5.2. These guidelines are to be followed by the Central Government, State Government and the various authorities under the Forest (Conservation) Act, 1980 and

the Environment (Protection) Act, 1986, and implemented in all future cases of environmental and forest clearances till a regulatory mechanism is put in place. These guidelines have been issued in the light of this Court's experience in the last couple of years. On the implementation of these Guidelines, MoEF will file its compliance report within six months. [para 33] [1036-D-F]

Case Law Reference:

2000 (4) Suppl. SCR 94	**referred to**	**para 19**
2005 (3) Suppl. SCR 552	**referred to**	**para 27**
(2011) 1 All ER 476	**referred to**	**para 30**

CIVIL ORIGINAL JURISDICTION : I.A. Nos. 1868, 2091, 2225-2227, 2380, 2568 & 2937

IN

Writ Petition (Civil) No. 202 of 1995 etc.

Under Article 32 of the Constitution of India.

WITH

Transfer Petition (C) No. 277 of 2010.

Goolam E. Vahanvati, AG, Parag P. Tripathi, ASG, Harish N. Salve, U.U. Lalit, Shyam Divan, F.S. Nariman, Dr. A.M. Singhvi, Jayant Bhushan, Krishnan Venugoplan, Siddhartha Chowdhury, A.D.N. Rao, P.K. Manohar, Somiran Sharma, Nishanth Patil, Haris Beeran, Devdatt Kamat, S.N. Terdal, Subhash Sharma, Sanjeev K. Kapoor, Rajat Jariwal Kumar Mihir (for Khaitan & Co.), Anuj Bhandari, Ranjan Mukherjee, S. Bhowmick, S.C. Ghosh, H.S. Thangkhiew, Manish Kumar Bishnoi, P. Nongbri for the appearing parties.

The Judgment of the Court was delivered by

S. H. KAPADIA, CJI.

Facts

1. Lafarge Surma Cement Ltd. ('LSCL' for short) is a company incorporated under the laws of Bangladesh. It has set up a cross-border cement manufacturing project at Chhatak in Bangladesh, which inter-alia has a captive limestone mine of 100Ha located at Phlangkaruh, Nongtrai, East Khasi Hills District in the State of Meghalaya. The mine is leased out in favour of Lafarge Umium Mining Pvt. Ltd. ('LUMPL' for short), which is an incorporated company under the Indian Companies Act, 1956 and which is a wholly owned subsidiary of LSCL. The entire produce of the said mine is used for production of cement at the manufacturing plant at Chhatak, Bangladesh under the agreement/arrangement between Government of India and Government of Bangladesh. There is no other source of limestone for LSCL except for the captive limestone mine situated at Nongtrai, East Khasi Hills District in the State of Meghalaya. The limestone as mined by LUMPL is conveyed from the mine situated at Nongtrai after crushing in a crusher plant. The limestone mined is conveyed by a conveyor belt to LSCL plant in Bangladesh.

2. The National Forest Policy, 1988 stood enunciated pursuant to Resolution No. 13/52-F, dated 12th May 1952 of GOI to be followed in the management of State Forests in India. The said Policy stood enunciated because over the years forests in India had suffered serious depletion due to relentless pressures arising from ever increasing demand for fuel wood, fodder and timber; inadequacy of protection measures; diversion of forest lands to non-forest uses without ensuring compensatory afforestation and essential environmental safeguards; and the tendency to look upon forests as revenue earning resource. Thus, there was a need to review the situation and to evolve, for the future, a strategy of forest conservation including preservation, maintenance, sustainable utilisation,

restoration and enhancement of the natural environment. It is this need which led to the enunciation of National Forest Policy dated 7th December, 1988. The principal aim of the Policy was to ensure environmental stability and maintenance of ecological balance. The derivation of direct economic benefit was to be subordinate to the principal aim of the Policy (See para 2.2). Under essentials of forest management it is stipulated that existing forests and forest lands should be fully protected and their productivity improved. It is further stipulated that forest cover should be increased rapidly on hill slopes, in catchment areas and ocean shores. It is further stipulated that diversion of good and productive agricultural lands to forestry should be discouraged in view of the need for increased food production (See para 3.2). Under the Policy a strategy was prescribed vide para 4. The goal is to have a minimum of one-third of the total land area under forest or tree cover. In the hills and in mountains the aim is to maintain two-third of the area under forest or tree cover in order to prevent erosion and land degradation and to ensure the stability of the fragile eco-system. Under para 4.2.3, village and community lands, which is the common feature in north-east regions, not required for other productive uses, should be taken up for development of tree crop and fodder resources and the revenue generated through such programmes should belong to the panchayats where lands are vested in them and in other cases such revenues should be shared with local communities to provide an incentive to them and accordingly land laws should be so modified wherever necessary so as to facilitate and motivate individuals and institutions to undertake tree farming. Vide para 4.3.1, the Policy lays down that schemes and projects which interfere with forests that cover steep slopes, catchment of rivers, lakes and reservoirs, geologically unstable terrain and such other ecologically sensitive areas should be severely restricted. Tropical rain/moist forests, particularly in areas like Arunachal Pradesh, Kerala, Andaman & Nicobar Islands should be totally safeguarded. No forest should be permitted to be worked without the government having approved the management plan in a prescribed form and in

keeping with the National Forest Policy (See para 4.3.2). Under para 4.3.4.2 the rights and concessions from forests should primarily be for the bonafide use of the communities living within and around forest areas, specially the tribals. The Policy recognizes the fact that the life of tribals and other poor people living within and near forests revolves around forests and therefore the Policy stipulates vide para 4.3.4.3 that the rights and concessions enjoyed by such persons should be fully protected and that their domestic requirements of fuel wood, fodder, minor forest produce and construction timber should be the first charge on the forest produce. Para 4.4 deals with diversion of forest lands for non-forest purposes. Under the said para it is stipulated that forest land or land with tree cover should not be treated merely as a resource readily available to be utilised for various projects, but as a national asset which requires to be properly safeguarded for providing sustained benefits to the community. Diversion of forest land for non-forest purpose therefore should be subject to most careful examination by experts from the stand point of social and environmental costs and benefits. Construction of dams and reservoirs, mining and industrial development should be consistent with the need for conservation of trees and forests. Projects which involve such diversion should at least provide in their investment budget, funds for regeneration/compensatory afforestation. Beneficiaries who are allowed mining and quarrying in forest lands and in lands covered by trees should be required to re-vegetate the area in accordance with forestry practices and, therefore, by para 4.4.2 it is stipulated that no mining lease shall be granted without a proper mine management plan. Under para 4.5 it is stipulated that forest management should take special care for wildlife conservation and consequently forest management plans should include prescriptions for that purpose. Under para 4.6 of the Policy it is stipulated that a primary task of all agencies responsible for forest management shall be to associate the tribals and communities living in such areas in the protection, regeneration and re-development of forests as wells as to provide gainful

employment to people living in and around the forest.

3. On 27.1.1994, in exercise of the powers conferred by Section 3(1) read with clause (v) of sub-Section (2) of Section 3 of the Environment (Protection) Act, 1986 (for short "the 1986 Act") read with Rule 5(3)(d) of Environment (Protection) Rules, 1986 the Central Government issued Environmental Impact Assessment Notification whereby it directs that on and from the date of publication of the said Notification in the official gazette expansion or modernization of any activity or a new project listed in Schedule-I shall not be undertaken in India unless it has been accorded environmental clearance by the Central Government in accordance with the procedure specified in the Notification. Under clause (2)(I) any person who desires to undertake any new project listed in Schedule-I shall submit an application to MoEF, New Delhi in the proforma specified in Schedule-II to be accompanied by a project report which shall include EIA report/environment management plan prepared in accordance with the guidelines issued by MoEF. Under clause 2(II) in case of mining as a site specific project the project authority (project proponent) will intimate the location of the project site to the MoEF while initiating any investigation and survey. The MoEF will convey its decision regarding suitability of the proposed site within a specified period. Thus, site clearance will be granted for a sanctioned capacity and shall be valid for five years for commencing construction, operation or mining. The EIA Report submitted with the application by the project proponent shall be evaluated and assessed by the Impact Assessment Agency, and if deemed necessary, it may consult a Committee of Experts having a composition as specified in Schedule-III. The Impact Assessment Agency (IAA) is MoEF. The Committee of Experts shall have full right of entry and inspection of the site. The IAA shall prepare a set of recommendations based on technical assessment of documents and data, furnished by the project authorities (project proponent), supplemented by data collected during visits to sites which would include interaction with the affected

population and environmental groups, if necessary. The summary of the reports, the recommendations and the conditions, subject to which environmental clearance is given, shall be made available subject to public interest to the concerned parties or environmental groups on request. Comments of the public may be solicited within the specified period by IAA in public hearings arranged for that purpose. The pubic shall be provided access, subject to public interest, to the summary of the EIA report/environment management plan. The clearance granted shall be valid for five years for commencement of the construction or operation of the plant. The monitoring of the implementation of the recommendations and conditions of IAA is also provided for in the said notification vide clause IV.

4. The said notification dated 27.1.1994 stood slightly amended by notification dated 10.4.1997. By the said notification detailed procedure for public hearing has been prescribed. It also prescribes composition of public hearing panels.

5. On 1.9.1997 LMMPL made an application for granting environmental clearance for limestone mining project at Nongtrai, East Khasi Hills District, Meghalaya. The application was made under EIA Notification, 1994. It was made in the form prescribed by the Notification, 1994. 20 copies of Rapid EIA Report (NEHU Report) were also annexed therewith. However, the said proposal dated 1.9.1997 was returned by MoEF vide letter dated 24.10.1997. The reason being that on 10.4.1997, as stated hereinabove, the MoEF had amended the EIA Notification of 1994 making public hearing mandatory for the development projects listed in Schedule-I of the Notification. By reason of the said Notification dated 10.4.1997 the then project proponent (M/s. LMMPL) was asked to seek Site Clearance as well as Project Clearance separately. The Site Clearance proposal was called for through the State level agency dealing with the mines. Accordingly, by application dated 23.9.1998 M/

s. LMMPL applied for Site Clearance for Limestone Mining Project at Nongtrai village, East Khasi Hills District, Meghalaya. This application was made in the prescribed form. The application indicates that there exists an approach/access road to the site that is described as Shillong-Mawsynram-Nongtrai or Shillong-Cherrapunjee-Shella-Nongtrai. The application further states that all villages represent tribal population. The application further indicates that there exists many private limestone quarries in the area. It is further stated in the application that the topography of the area is hilly. Against the column 'Forest Land Involved in the Project' the answer given by the project proponent was "Nil". According to the application the site is not a habitat/corridor for endangered/rare/endemic species. The source of this information was the NEHU Report. According to the said Report, mining of limestone in Khasi Hills was a source of revenue right from 1858. The limestone deposit in Meghalaya is estimated to be 2165 million tonnes. Exploitation of Nongtrai limestone dates back to 1885. Even today, a number of private parties quarry limestone in this area. An area of 100 hectares stood acquired by LMMPL on lease basis for mining. For that an agreement was signed with Village Durbar. The limestone bearing area around Nongtrai and Shella falls under the Karst topography. This area falls on the southern fringe of the Meghalaya plateau. [See Land Use/ Land Cover Map (March 1997) submitted by Mr. F.S. Nariman, Source: IRS-1C LISS-3 MX DATA, Path & Row: 111-054, Date: March 1997] Karst topography is a landscape formed by the dissolution of a layer(s) of soluble bedrock, usually carbonate rock such as limestone. Karst topography is characterized by limestone caverns carved by groundwater. Karst landscapes are formed by the removal of bedrock (composed in most cases of limestone, gypsum or salt). [See Article from Encyclopedia Britannica by William B. White] Alongwith the application, a certificate dated 27.8.1997 was annexed. It was issued by Khasi Hills Autonomous District Council, Shillong which council is the constitutional authority under Sixth Schedule of the Constitution. By the said certificate

the council specifically stated that it had no objection for mining operation in the area at Nongtrai village since the area does not fall within a forest land. This application for site clearance was allowed by MoEF vide letter dated 18.6.1999 addressed to the Project Proponent. Site clearance was, thus, granted under the 1994 Notification as amended on 4.5.1994 and 10.4.1997 subject to strict compliance of terms and conditions mentioned therein. One of the conditions was that the Project Proponent shall obtain environmental clearance for the proposed limestone mine as per the procedure laid down in the 1994 Notification before taking up developmental work at the site. The said clearance was not to be construed as grant of mining permission. No developmental activity relating to the project was to start prior to environmental clearance. Accordingly, on 17.4.2000, LMMPL made an application for environmental clearance to MoEF in the prescribed form to excavate 2.0 million tonnes per annum of limestone and to transport the same to Chhatak in Bangladesh through belt conveyor (7.2 km long within Indian territory). The mining lease area was indicated to be 100 hectare. The description of land was shown as "barren". In the application, it was further stated that there is no notified forest land within 25 kms. from the proposed mine. Along with the application vide Annexure A, copy of No Objection Certificate (NOC) for mining operations at the proposed site dated 27.8.1997 stood annexed. That certificate was issued by Khasi Hills Autonomous District Council, Shillong, which, as stated above, inter alia states that the Council has no objection for mining operations at Nongtrai Village since the area of 100 hectare does not fall within forest land. Similarly, vide letter dated 6.7.1997 issued by Village Durbar, NOC was granted for withdrawal of water for the project. Vide Annexure G to the application, consent to establish the project stood issued by Meghalaya Pollution Control Board. By Annexure H to the application, minutes of Environmental Public Hearing of the project has been annexed. These minutes indicates the presence of Addl. Deputy Commissioner, East Khasi Hills District, various government

officials including nominees of Forest Conservators and Member Secretary of the Pollution Control Board. According to the Headman of Nongtrai Village, limestone is abundantly available in the area; the same has not been utilized by local villagers due to lack of infrastructure; for economic development, the Village Durbar had decided to lease the area; the environmental implications of the project stood discussed; complaint received from Meghalaya Adventures Association was read out which complaint mainly dealt with destruction of caves which stood rebutted by the Headman and, thus, the meeting stood concluded. All this indicates even public participation and grant of NOCs by various competent authorities. Vide Annexure J to the application for environmental clearance, we find approval being granted under Section 5(1) of the Mines and Minerals (Regulation and Development) Act, 1957. Along with the application for environmental clearance M/s. LMMPL also forwarded to MoEF Rapid EIA of Limestone Mine prepared by Environmental Resources Management India Pvt. Ltd. This report describes in detail the topography of the mining site. According to the said report the leased area lies on the western side of Umium river valley. It is approachable from Shillong via Mawsynram and Nongtrai villages by motorable road. It is also accessible from Shillong by road via Cherrapunji. According to the report the site is at the Phalngkaruh which originates from the foot hills of the proposed mine site. According to the said report the site is on uneven terrain with a rugged topography. There are heaps of fractured rocks all over the place. It is a rocky region. The site rejects any possibility of natural growth of forest. It is an area of low botanical and floral diversity. It is an area covered with rocks. The area can be termed as a wasteland.

6. On receipt of the application for environmental clearance, certain queries were raised by MoEF with regard to the scope of the site clearance (the original site clearance was for 0.8 million tonnes whereas subsequently that capacity was revised to 2 million tonnes); that, as per this Court's order

dated 12.12.1996, "forests" has to be understood in terms of the dictionary meaning and, accordingly, a certificate was asked for in that regard from local DFO; the effect due to disposal of waste water through soak pit and whether the existing road width was sufficient to carry on heavy equipments for mining purposes. These were some of the queries/ objections on the basis of which clarification was sought vide letter dated 1.5.2000 by MoEF with regard to environmental clearance under the 1994 notification. As requested by MoEF, the project proponent vide letter dated 11.5.2000 requested the local DFO to issue necessary certificate as called for by MoEF in terms of the order of this Court dated 12.12.1996. Accordingly, on 13.6.2000, the DFO forwarded the certificate to the project proponent in respect of Limestone Mining Project at Nongtrai, East Khasi Hills District, Meghalaya by which it was certified that the mining site was not a forest area as per this Court's Order dated 12.12.1996 and nor did it fall under any of the notified reserved or protected forests. Moreover, the certificate once again reiterated that the site area stood covered with Karst topography which supported only a sporadic growth of a few tree shrubs. Despite such certificate of DFO, MoEF in continuation of their letter dated 1.5.2000 called for additional information inter alia including list of flora and fauna in compliance of Wildlife (Protection) Act, 1972, list of species under the 1972 Act, consent from the State Pollution Control Board for 3000 TPD of limestone, information on ground water potential, information regarding water requirement, etc. Clarifications sought by MoEF vide letters dated 1.5.2000 and 16.6.2000 for environmental clearance were answered by LMMPL vide letter dated 17.8.2000. As per the said reply, the environmental public hearing notice was published in three newspapers; that, earlier the project proposal was for 0.8 million tonnes per annum but later on based on the increased cement plant production capacity in Bangladesh, it stood increased to 2.0 MTPA; that, earlier the lease period was proposed to be 35 years which stood reduced to 30 years; that, the mine site was on Karst topography which neither MoEF nor

the Shella Action Committee ("SAC" for short) denies; that, the equipment to the mine site would be brought through Guwahati – Shillong – Mawsynram route which contains an established route whose width was 7.5 m wide; that, there was no proposal to cut any trees for the purpose; that, no sanctuary/ national park is located within 25 kms. radius from the proposed mine location; that, the mine site is situated in the southern slopes of the Central Plateau of Meghalaya; that, the core area comprising of the mining site consisted of uneven terrain with a rugged Karst topography (see page 484 of Volume III); the minutes of the environmental public hearing dated 3.6.1998 were also annexed; site clearance dated 18.6.1999 granted by MoEF was also annexed; that, a report regarding impact of limestone mining on Nongtrai, Meghalaya on Siltation Process prepared by Center for Study of Man and Environment dated April, 2000 also stood annexed to the clarifications given by LMMPL. We need to comment on that report. Firstly, it indicates that the mining site is located on the southern fringe of the Meghalaya Plateau adjoining the plains of Bangladesh having a rich endowment of high grade limestone. Secondly, it highlights that the site is approachable from Shillong (109 km.) by motorable road via Mawsynram and Nongtrai. Thirdly, it states that on account of dissolution of the limestone, Karst topography has resulted which topography is characterized by caverns and caves which are so prominent that even in 1:50,000 toposheet, they could be plotted. In other words, the karst features are intimately tied up with hydrological situation. Certain recommendations have been made in the report with regard to possible impact of limestone mining on the Phalangkaruh river system. Despite clarification, MoEF once again examined the matter through Expert Committee which held its meeting on 19th and 20th October, 2000 in New Delhi under the aegis of MoEF. In the meeting, the project proponent made a presentation on their proposal for production of limestone at the rate of 30,000 tonnes per annum for five years. Certain queries were raised by the Expert Committee on the basis of which once again further clarification was sought by

MoEF from LMMPL vide letter dated 6.11.2000. According to the query, the area in question supports diversity of plants and animals. It also represents the remnants of the rapidly vanishing humid rainforest. That, the area is a home of endemic insectivorous plants, butterflies; All this, according to MoEF, would require a detailed survey of plants and animals to be carried out with the help of BSI and ZSI offices located in Shillong. Accordingly, the project proponent submitted report on Ecological Status Survey prepared by Centre for Environment and Development; report on Afforestation Reclamation Plan, report on Physiography and Hydrogeology of Fugro Milieu Consult B.V. and report on Catchment Area Treatment Plan, vide letter dated 9.2.2001 addressed to MoEF. One more aspect may be noted. These reports were placed before the Expert Committee once again on 7.3.2001. Even Wild Life Division also gave its report on 1.6.2001. After placement of all these reports, at the end of the day, EIA Clearance was given by MoEF on 9.8.2001 which again contained further conditions which were to operate once the developmental work started. According to the environmental clearance dated 9.8.2001, the total lease area of the mine is 100 hectares; that no diversion of forest land was involved; that the targeted annual production capacity of the mine had to be 2.0 million tonnes and, lastly, certain general conditions were stipulated with regard to steps to be taken during the developmental work. On EIA Clearance being granted by MoEF, LMMPL became desirous of transferring and assigning the lease in favour of LUMPL having its registered office at Shillong on which the State Government granted permission to transfer the mining lease vide order dated 29.8.2001. Accordingly, a transfer deed stood executed on 28.2.2002 in the prescribed form under Rule 37-A of Mineral Concession Rules, 1960. Accordingly, on 30.7.2002, environmental clearance which was earlier granted to LMMPL stood transferred to LUMPL by MoEF.

7. However, vide letter dated 1.6.2006, from Chief

Conservator of Forests (C), Shri Khazan Singh, addressed to MoEF it was pointed out that he had visited Limestone Mining Project of M/s. Lafarge when it was found that project had completed developmental works and opening of mine benches had also been accomplished for 7Ha of the mining lease land. According to the said letter the mining lease area around the developed mine benches stood surrounded by thick natural vegetation cover with sizeable number of tall trees. The said vegetation included trees being cleared for developing the mining benches. That the wood obtained from felling of trees was collected by the lessor who were from Nongtrai Village. According to the said letter, for such clearance no permission was taken under Forest (Conservation) Act, 1980 (for short the '1980 Act'). Further, even the Rapid EIA report submitted by the project proponent described the land as wasteland though the visit of the Chief Conservator found it to be otherwise. Consequently, by the said letter the Chief Conservator of Forests (C) informed the MoEF that the project proponent may be directed to obtain forest clearance under the 1980 Act and not to proceed with the mining activities till such clearance. A copy of the said letter was also sent to the project proponent. By letter dated 11.8.2006, the project proponent replied to the Chief Conservator of Forests (C) stating that it had proceeded with the developmental work on the basis of the certificate given by DFO dated 13.6.2000 under which it was certified that the project area was not a forest area and it did not fall in any of the notified reserved or protected forests. It was further clarified that in the core area there were only a few trees, shrubs growing in some soil trapped in the crevices and only those shrubs and trees which are growing in the area demarcated on the excavation plan have been cut. According to the said letter the 1980 Act was not applicable as there was no diversion of forest land for non-forestry purposes. Accordingly, a letter was addressed by MoEF on 15.11.2006 to M/s. LMMPL. The complaint made by the Chief Conservator of Forests (C) was conveyed to the project proponent. In terms of the said complaint, MoEF directed M/s. LMMPL to obtain forest

clearance under the 1980 Act before taking steps to clear vegetation including trees for developing mining benches. On 14.9.2006, MoEF issued EIA Notification 2006 whereunder concerns of local affected persons were required to be taken into account through public consultation. By letter dated 29.1.2007, M/s. Lafarge took the stand that there is some natural growing vegetation; that only those shrubs which are growing in the excavation plan have been cleared and since there was no diversion of forest land for non-forestry purposes the 1980 Act was not applicable. Vide letter dated 9.4.2007 addressed by the Chief Conservator of Forests (C) to the Secretary, Department of Forest and Environment, Government of Meghalaya as well as to the Khasi Hills Autonomous District Council, it was pointed out that the mining project was undertaken in the virgin and natural forest; that the forest is standing all around the periphery of the broken area; that the mine was operating on forest land without clearance under the 1980 Act; that the area is a natural/virgin forest; that the land belonged to village Durbar of Nongtrai and in the circumstances forest clearance was required to be obtained under the provisions of 1980 Act in terms of the order of the Supreme Court dated 12.12.1996. According to the said letter, there was a clear violation of the 1980 Act. Accordingly, the Chief Conservator of Forests(C) Shri B.N. Jha requested the Government of Meghalaya to stop fresh clearance of vegetation, breaking of land, extension of mining area, removal of felled trees and stoppage of non-forestry activities with immediate effect. A copy of the said letter was also forwarded to MoEF. By letter dated 17.4.2007 addressed by MoEF to Government of Meghalaya a report was asked for indicating justification for continuance of mining by the project proponent within a week failing which MoEF had no option but to direct mine closure. Thereafter response was given by M/s. Lafarge vide letter dated 25.4.2007. However, MoEF, vide letter dated 30.4.2007, directed complete closure of all on going non-forestry activities by M/s. Lafarge in compliance of the directions of the Supreme Court dated 12.12.1996. Suffice it

to state without going into further correspondence that M/s. Lafarge submitted its application for forest clearance under the 1980 Act vide application dated 3.5.2007. The application makes it clear that permission is sought for forest clearance without prejudice to the rights and contentions of the project proponent. After reciting the above facts, M/s. Lafarge submitted that the project was a cross-border project; that it had put in ten years of efforts for obtaining approvals; that had the reservation on the legal status of the land and the use of the mine site as forest land been made clear by Chief Conservator of Forests (C) and had such reservation been conveyed to M/s. Lafarge earlier or even at the time of consideration of the proposal for environmental clearance, they (project proponent) would have sought approval under the 1980 Act before implementing the mining project. It was pointed out that the mining lease area was 100 Ha. At the time of making the application for forest clearance the broken up area was 21.44 Ha. In the said application M/s. Lafarge undertook to bear the cost of raising and maintenance of compensatory afforestation. They also undertook to fulfill all other conditions leviable under the law. By letter dated 11.5.2007 addressed by the Principal Chief Conservator of Forests, Meghalaya to the Government of Meghalaya, it was pointed out that the project proponent had broken up area of about 21.44Ha; that the topography in the leased mine around the broken up areas was Karst topography consisting of limestone surface having natural fissures and crevices; that a sizeable quantity of limestone was lying in and around the broken up area; that the non-broken up area in the leased mine was forest land falling within the purview of the 1980 Act. By the said letter, the Principal Chief Conservator of Forests submitted that the project proponent be allowed to remove the already broken limestone from the site and that the project proponent may be directed to apply for forest clearance under the 1980 Act for the non-broken up part of the leased area. It is at this stage that M/s. Lafarge moved this Court by way of I.A. No. 1868 of 2007 inter alia seeking orders directing MoEF to expeditiously process its application under Section

2 of the 1980 Act within a time bound programme preferably within 60 days. By letter dated 3.7.2007 addressed by M/s. Lafarge to the MoEF (North-East Region), the regional office of the MoEF, was informed that the project proponent had already applied for forest clearance to the MoEF, New Delhi.

8. On 6.9.2007 CEC submitted its report to this Court saying that the project proponent should have taken permission under the 1980 Act before starting operations in the area. According to CEC this was a typical case where ex-post facto approval under the 1980 Act is sought after the mine has been allowed to operate illegally. Since fait accompli situation arose according to CEC there was no option but to recommend the case for grant of permission for the use of forest land for mining lease, conveyor belt system and associated activities subject to certain conditions mentioned therein. By interim order dated 5.2.2010 M/s. Lafarge was directed to stop all mining activities. On 5.4.2010 a report was submitted by Shri B.N. Jha, Regional Chief Conservator of Forests (C) [also known as High Powered Committee (HPC)]. The report was submitted pursuant to the site inspection carried out by a High Level Committee which also had interaction with local population and institutions in the first week of April, 2010. Briefly, it may be stated that the report indicates assessment of the impact of the mining done by the project proponent up to April 2010 on forest, wildlife and surroundings. The report indicates details of the area already broken up. On the impact aspect the report states that the total clearing involves felling of 9345 trees out of which 1200 trees have already been felled. That, although the area supports rich flora, the same can be re-forested as a part of reclamation plan. According to the report, the said impact can be minimized after a thorough study of Bio-Diversity Management Plan as well as Catchment Area Treatment Plan is prepared and executed in a time bound manner. At the same time the report states that the project is positive and beneficial to the residents of Nongtrai village due to huge amount of cash going to village Durbar and reaching the individual household improving the

financial health of the population of two villages, i.e., Nongtrai and Shella. According to the report, interaction took place between the High Powered Committee constituted by MoEF and the locals. That villagers of Shella are not having any problems from M/s. Lafarge and that the people are very satisfied with the mining company which has provided health care facilities, drinking water facilities, employment, schools etc. According to the report, M/s. Lafarge has been contributing for the benefits of the village as well as for all the villagers by way of payment of rent for the use of the community land as well as towards the price of limestone exported to Bangladesh. The figures of such payments are also indicated in the report. Further, the report states that mining is not having any adverse effect on the human life. When the matter came before the Supreme Court on 12.4.2010, the learned Attorney General stated that MoEF will take a final decision under the 1980 Act for the revised environmental clearance for diversion of 116 Ha of forest land subject to certain conditions. Accordingly, on 19.4.2010 the MoEF granted environmental clearance with certain additional conditions. The environmental clearance dated 19.4.2010 was followed by forest clearance dated 22.4.2010 (ex-post facto clearance) granted by MoEF. This letter refers to letter of the State Government dated 19.7.2007 forwarding its proposal for diversion of 116.589 Ha of forest land for Lime Stone Mining in favour of M/s. Lafarge wherein prior approval of Central Government was sought. The said proposal of the State Government was examined by FAC constituted by Central Government under Section 3 of the 1980 Act. Thus, forest clearance was granted by MoEF vide letter dated 22.4.2010 which again stipulated further conditions to be complied with by the project proponent. Accordingly on 26.4.2010 learned AGI submitted before this Court that M/s. Lafarge may be permitted to resume the mining operations subject to compliance of conditions enumerated in the order passed by MoEF on 22.4.2010. However, this Court ordered that before it grants permission to resume the mining operations it was imperative that plans should be drawn up and

relevant reports be placed before this Court based on a comprehensive engineering and biological study including assessment of flora and fauna. A study report was submitted by NEHU on June, 2010 in which it has been stated that the forests in the said area can be categorized into tropical moist-deciduous forest, tropical semi-evergreen forest, savanna, subtropical broadleaved forest, forest gardens, orchards etc. Regarding the core area, the report states that the broken up area (already mined) was 38.089 Ha; that the said area was devoid of any vegetation and could be characterized by limestone floor and benches. However, the vegetation in the rest of the core area (i.e. proposed mining area) had tropical-moist deciduous type of vegetation with variable canopy cover and mostly sparse. It further states that the density of plants is very low due to rocky terrain and low soil content. It further states that only a few trees described in that paragraph are present in the undisturbed core zone. On compliance of various conditions imposed by MoEF including payment of compensatory afforestation, penal compensatory afforestation and NPV with interest as well as the reports submitted by various authorities were placed before the Expert Appraisal Committee on 29.6.2010 and 21.7.2010 pursuant to the directions of the Supreme Court vide order dated 26.4.2010. According to the minutes of Expert Appraisal Committee, the conditions and environmental safeguards stipulated by MoEF while according environmental clearance on 9.8.2001 and 19.4.2010 were comprehensive enough to mitigate any adverse impacts of the project and to protect the environment if implemented effectively. The minutes of the meeting of the Expert Appraisal Committee dated 21.7.2010 also recites that various reports were considered by the Committee. It also recites the fact that the Government of Meghalaya had addressed a letter to MoEF on 12.7.2010 conveying their recommendations for the grant of formal approval under Section 2 of the 1980 Act for diversion of 116.589 Ha of forest land for Lime Stone Mining. On 21.10.2010 M/s. Lafarge submitted a compliance chart of 31 conditions.

Submissions

9. According to the learned Amicus Curiae, it is obvious from all the documents that have come on record including those filed by M/s. Lafarge that permissions under EIA Notification, 1994 (as amended) under Section 3 of the 1986 Act have been obtained without a candid disclosure of the facts. That, even if it is held that in cases of bona fide mis-interpretation of statutory provisions and Rules the project stood commenced without obtaining prior permission as mandated under Section 2 of the 1980 Act, save and except in cases of absolute candor and where the want of such permission is solely and entirely on account of bona fide doubt as to the nature and character of the land and /or statutory regime applicable to such projects, no permission should be granted specially to private projects established only for profit where the project presents a 'fait accompli'. The learned Amicus submitted that over the years we find commencement of projects without obtaining prior permission as mandated under Section 2 of the 1980 Act and, when detected, the project proponent(s) falls back on the plea of 'fait accompli'. According to the learned Amicus, time has, therefore, come for this Court not to regularize such projects which are commenced without obtaining prior permission under the 1980 Act except in cases of absolute candor and where the want of permission is solely and entirely based on account of bona fide doubt as to the nature and character of the land and/ or the statutory regime applicable to such projects. According to the learned Amicus, barring the above exceptions, this Court should direct removal of the project and restoration of the environment wherever it is possible or to take over the project to ensure that all gains from such projects are allowed to be used only for those whose rights have been violated. In support of his above submissions, learned Amicus placed reliance on the report of Chief Conservator of Forests (C) dated 1.6.2006 addressed to the MoEF in which it was stated that the mining lease area around the developed benches has been found surrounded by thick

natural vegetation cover with sizeable number of tall trees; that, the said vegetation including the trees was being cleared for developing the mine benches; that, the wood obtained from felling of trees was being collected by Nongtrai Village Durbar; and that, the said report of the Chief Conservator of Forests (C) dated 1.6.2006 contradicts the Rapid EIA report submitted by the project proponent which describes the land in question as waste land. The learned Amicus also relied upon the second report dated 9.4.2007 again by the Chief Conservator of Forests (C) based on his site visit on 7.4.2007 in which report it has been stated that the mining lease lies in the midst of virgin and natural forest. According to the said report, the said mine in question is operating on forest land without clearance under the 1980 Act. According to the said report, calling the area / site by any other name than a forest would be travesty which could only be assigned to an ulterior motive of obtaining exemption or avoiding taking prior approval of Government of India under the 1980 Act. The learned Amicus also placed reliance on the report dated 11.5.2007 of the Principal Chief Conservator of Forests. In the said report dated 11.5.2007, the Principal Chief Conservator of Forests also agreed with the view of the Chief Conservator of Forests (C) stating that the project proponent should have taken permission under the 1980 Act to start the operation in the area. According to the learned Amicus, though the mine commenced commercial production w.e.f. October, 2006, the said commencement was based on approvals granted by statutory authorities on the assumption that the mining lease area is a non-forest land. In this connection, learned Amicus pointed out that the entire case of the project proponent is based on only one certificate issued by DFO, Khasi Hills Division dated 13.6.2000 in which it has been certified that the mining site for limestone mining project at Nongtrai, East Khasi Hills District, Meghalaya is not a forest area in terms of the order of this Court dated 12.12.1996 and that it does not fall under any notified reserved or protected forests. In the said certificate, it has been further stated that the project site is on Karst topography which supports only a

sporadic growth of a few trees shrubs and creepers. Besides the said certificate dated 13.6.2000, the project proponent also seeks to place reliance on letters dated 28.4.1997 and 27.8.1997 addressed by Khasi Hills Autonomous District Council which took the view that the area is a non-forest land. According to the learned Amicus, it is not open to the project proponent to rely upon the certificate of DFO dated 13.6.2000 as the said certificate was given without any intimation to the higher authorities and that an inquiry has been instituted to determine the circumstances in which the certificate was issued by DFO. Learned Amicus further pointed out that the prospecting licence held by the project proponent was allowed to be converted into a mining licence in 1997 which was after the order of the Supreme Court dated 12.12.1996. That apart, there is a special law in the State of Meghalaya, i.e. The United Khasi-Jaintia Hills Autonomous District (Management and Control of Forests) Act, 1985 under which forest has been defined to mean an area in which there are twenty five trees per acre. Thus, according to the learned Amicus by all these definitions the area in question is a forest. Thus, according to the learned Amicus even if the project proponent ultimately succeeded in getting forest clearance under Section 2 of the 1980 Act on 22.4.2010 since the said project stood established originally in the forest area in a brazen violation of the 1980 Act such a project cannot be allowed to be regularized by grant of permission ex-post facto dated 22.4.2010.

10. Shri Shyam Divan, learned senior counsel appearing on behalf of Shella Action Committee (SAC) while adopting the submissions of the learned Amicus Curiae with regard to the project being illegal, submitted that having regard to para 4.3.1 of the National Forest Policy, 1988, tropical rain/moist forest are required to be totally safeguarded. According to SAC the forest in the region is a tropical moist forest and no forest clearance ought to have been granted because of the ecological significance recognized by the 1988 Policy. According to SAC this fact was known to M/s. Lafarge at all

material times as can be seen from the Rapid EIA Report prepared by NEHU which specifically states that the vegetation at the study site is a mixed moist deciduous forest. Reliance is also placed by the learned counsel on the assessment of floral diversity prepared by NEHU in June, 2010 which indicates that the forest in the study area can be categorized into tropical moist-deciduous forest, tropical semi evergreen forest, savanna, sub-tropical broad leaves forest, forest garden, orchards and riparian forest. According to the said assessment of 2010, the vegetation in the core area is tropical moist-deciduous types whereas the vegetation in the proper zone can be categorized into tropical and sub-tropical types. Thus, according to the learned counsel having regard to the undisputed position emerging from the record the subject area is covered by a tropical moist forest deserving highest degree of ecological protection and therefore this Court should set aside the environmental clearance dated 9.8.2001 given under Section 3 of the 1986 Act by MoEF. In this connection it may be mentioned that SAC has also moved this Court by way of I.A. No. 2937 of 2010 seeking revocation of the environmental clearance dated 9.8.2001. They have also challenged the revised environmental clearance dated 19.04.2010 granted by MoEF as also Stage-I forest clearance dated 22.04.2010 issued by MoEF.

11. According to the learned counsel, M/s. Lafarge was duty bound to make an honest disclosure of all facts when seeking environmental and forest clearances as it is an express requirement under Clause 4 of the EIA notification 1994. That, where a false information, false data, engineered reports are submitted or factual data is concealed, the application is liable to be rejected, and where granted, it is liable to be revoked. According to SAC, M/s. Lafarge had given an express undertaking in its application for environmental clearance dated 17.4.2000 that if any part of the information submitted was found to be false or misleading the project clearance could be revoked at M/s Lafarge's risk and cost.

According to SAC, the region where the mining is taking place and with regard to which permissions were obtained is governed by a specific local Act and Rules framed thereunder, namely, United Khasi Jaintia Hills Autonomous District (Management and Control of Forests) Act, 1958 which Act was enacted by the District Council of the United Khasi Jaintia Hills Autonomous District in exercise of its powers under the Sixth Schedule to the Constitution of India. According to the learned counsel, the 1958 Act classifies forests and regulates forest resource management and use and applying the definition of "forest" under Section 2(f), the region where the mining is taking place is a forest as the said area has not less than 25 trees per acre. Thus, according to the learned counsel for SAC, it ought to be assumed that the officials of M/s. Lafarge had full knowledge of the local law as well as the forest cover and the lay out of the land. From every perspective, M/s. Lafarge could not have commenced the project without a detailed survey of the physical topography of the land and the forest cover. Thus, M/s. Lafarge had knowledge of the forest cover in the region and yet it falsely withheld this information from the concerned authorities including the MoEF. In this connection, learned counsel placed reliance on the NEHU Report of 1997, letter dated 1.6.2006 from the Chief Conservator of Forests (C) to the MoEF, letter dated 9.4.2007 from the Chief Conservator of Forests (C) to the Government of Meghalaya and assessment of floral diversity prepared by NEHU in June, 2010. According to the learned counsel, despite knowledge of the definition of "forest" and the provisions of the 1958 Act, the government officials issued letters containing incorrect information in relation to the forest cover. These letters are the letter dated 28.4.1997 from Khasi Hills Autonomous District Council, letter from the Deputy Commissioner, East Khasi Hills District dated 10.7.1997 enclosing a spot inquiry report which stated that there was no forest on the land proposed to be leased out, letter dated 27.8.1997 from Khasi Hills Autonomous District Council granting NOC on the basis that there was no forest and certificate dated 13.6.2000 issued by DFO, Khasi Hills Division

stating that there was no forest on the land proposed to be leased out. According to the learned counsel, the environmental clearance dated 9.8.2001 issued by MoEF was premised on "No diversion of forest land or displacement of people is involved". According to the learned counsel, the said premise is per se incorrect as there is a tropical moist – deciduous forest in the area being mined. According to the learned counsel, the environmental clearance dated 9.8.2001 was clearly granted on the basis of false representations made by M/s. Lafarge regarding absence of forests; engineered reports projecting the site as "a near wasteland"; and the concealment of factual data available with M/s. Lafarge including the 1997 NEHU Report which showed the subject land as forest land. Thus, according to the learned counsel, the MoEF ought to revoke the environmental clearance dated 9.8.2001 having regard to Para 4 of the EIA Notification 1994 and inasmuch as the MoEF has failed and neglected to revoke the clearance dated 9.8.2001, this Court may quash the said clearance. According to the learned counsel, the environmental clearance dated 9.8.2001 is the parent clearance and, consequently, the revised environmental clearance dated 19.10.2010 (the correct date is 19.4.2010) must automatically fall if the parent clearance is quashed. In any event, the learned counsel submitted that the revised clearance is liable to be set aside since the mandatory procedure of conducting a public consultation had not taken place. According to the learned counsel, a public consultation is mandatory in terms of para 7 of the EIA Notification dated 14.9.2006. Such consultation has not taken place. The public hearing held on 3.6.1998 was without a disclosure of the forest and, hence, there has been no public consultation in accordance with para 7 of the EIA Notification dated 14.9.2006. Thus, according to the learned counsel, the revised environmental clearance dated 19.4.2010 is liable to be quashed on the ground of non-compliance of the mandatory provisions of the EIA Notification of 2006. According to the learned counsel, consequently, the stage-I forest clearance dated 22.4.2010 is also liable to be rejected. It may be noted

that the stage-I forest clearance dated 22.4.2010 has been granted by FAC of MoEF. The learned counsel submits that under National Forest Policy, 1988 tropical rain/ moist forest is required to be totally safeguarded. That, it is a no-go area. According to the learned counsel, since the region where mining is taking place falls within tropical rain/ moist forest, FAC ought not to have given the clearance on 22.4.2010. For the afore-stated reasons, it is the case of SAC that both on account of the nature of the land in question and the conduct of M/s. Lafarge, this Court should dismiss the IA No. 1868 of 2007 filed by M/s. Lafarge and that the IA No. 2937 of 2010 filed by SAC seeking revocation of the parent environmental clearance dated 9.8.2001 and revised environmental clearance dated 19.4.2010 and forest clearance dated 22.4.2010 be allowed.

12. On the nature of the land in question, learned Attorney General submitted that in the EIA Report (NEHU Report), annexed along with the application dated 1.9.1997 for grant of environmental clearance, a description of the vegetation area at the proposed mining site which is distributed in three distinct layers indicated that the third and the lower layer consisted of shrubs and herbs and their poor growth was due to lack of soil. It was also mentioned that the majority of valuable timber trees had already been extracted from the mining site in the past in Meghalaya by the tribals who lived on timber. In para 4.9 of the Report the site was described to be mostly covered with pole sized trees, shrubs and herbs. This EIA Report did not make reference to the Certificate dated 28.4.1997 of the Khasi Hills Autonomous District Council, the Spot Inspection Report dated 10.7.1997 nor the Certificate dated 27.8.1997 issued by the Council all of which referred to absence of forest. According to the learned Attorney General at each stage MoEF had raised queries and requisitions and after a thorough probe MoEF gave ultimately Environment Clearance on 19.4.2010 and 22.4.2010 being the Forest Clearance. In this regard it was pointed out by MoEF vide letter dated 24.10.1997 that the EIA Notification 1994 was amended on 10.4.1997 making public hearing

mandatory for the development projects listed in Schedule-I of the Notification. Consequently, the proposal required two stage clearance, namely, site as well as project clearance. This is the reason why the project proponent made Site Clearance application on 23.9.1998. Before that the project proponent approached the Meghalaya State Pollution Control Board for consent to establish limestone mining project. Similarly, a public hearing notice was given on 27.4.1998. The public hearing was conducted on 3.6.1998. This was followed by Site Clearance Application dated 23.9.1998. All these steps were taken by M/s. LMMPL, the predecessor of M/s. Lafarge. Even before granting of the Site Clearance on 18.6.1999, a letter dated 8.4.1999 was received from M/s. LMMPL sending a certificate dated 20.3.1999 from DFO, Khasi Hills Division, Shillong indicating absence of forest. Thus, at the stage of Site Clearance MoEF had two certificates before it, one dated 27.8.1997 issued by the Executive Committee, Khasi Hills Autonomous District Council and the other being the certificate dated 20.3.1999 issued by DFO, both indicating absence of forest. To the same effect is the main application for Environmental Clearance dated 17.4.2000. One more fact needs to be mentioned. Along with the application for Environmental Clearance dated 17.4.2000, an EIA Report prepared by Environmental Resources Management India Pvt. Ltd. giving a detailed description of the topography of the area was forwarded to MoEF. It was called as Karst Topography. In that Report it was categorically stated that the project area did not fall in the designated forest land; that the terrain at the site was described as Karst Topography which did not allow normal plant growth. Despite clarification, MoEF wrote a letter dated 1.5.2000 to the project proponent seeking further clarification as to whether there existed forest in terms of the Supreme Court order dated 12.12.1996 and if so a certificate to that extent should be obtained from the local DFO. In reply, M/s. LMMPL forwarded a certificate of DFO dated 13.6.2000 which stated that the proposed mining site for limestone mining project at Phalangkaruh, Nongtrai, East Khasi Hills District, Meghalaya

leased out by M/s. LMMPL is not a forest area as per Supreme Court judgment and it does not fall under any of the notified reserves or protected forests. The area is covered with Karst topography and supports only a sporadic growth of a few trees, shrubs and creepers. The proposal of M/s. LMMPL was once again discussed at the meeting of the Expert Committee (Mining) held on 19-20.10.2000. This Committee sought further information and clarification, one of the clarifications sought was a detailed survey of the plant and animals to be carried out with the help of BSI and ZSI officers situated in Shillong. It also sought a video film of the site and other areas. Accordingly, on 9.2.2001 M/s. LMMPL gave the requisite response as desired by MoEF as well as additional information was also provided in respect of a comprehensive survey and Flora and Fauna Report dated January, 2001 of Dr. A.K. Ghosh (Former Director ZSI). The said Report of January, 2001 extensively dealt with tropical semi-evergreen forest at different elevations. This Report of Dr. Ghosh (Centre for Environment and Development) was placed before the Expert Committee on 7.3.2001. The minutes of the meeting indicate that a video film of the site was also shown. The Report indicates the Karst features, extensive flora and fauna survey carried out by the Centre for Environment and Development in conjunction with the Botanical Survey of India and Zoological Survey of India. After elaborate discussion, the Expert Committee recommended Environmental Clearance of the project once again subject to certain conditions. Even after such recommendation, the MoEF once again wrote to the Chief Conservator of Forest, Meghalaya. This was on 19.4.2001 regarding Environmental Clearance. The Chief Conservator of Forest (Wildlife Division) vide letter dated 1.6.2001 gave his comments as per the annexures which was on the basis of Field Verification Report submitted by DFO, Khasi Hills Wildlife Division, Shillong. According to the Chief Conservator of Forest (Wildlife Division) the project area is sloppy, ending in the nearby plains of Bangladesh and covered wholly by degraded forests and grassland vegetation. Further, he stated that there is a motorable road used for traffic and the

forest is farther away up the slope. It was concluded that there was no likelihood of any wildlife presence in the area. Thus, according to the learned Attorney General it is incorrect to say that the EIA clearance dated 9.8.2001 was granted without proper consideration. There has been a detailed consideration at every stage. That, at the time of the submission of the application for Site Clearance dated 23.9.1998 there existed an NOC of the Pollution Control Board, a certificate dated 27.8.1997 issued by East Khasi Hills Autonomous Council and thus it cannot be said that the EIA clearance indicated non-application of mind or that it was liable to be set aside on the ground that the EIA Division of the MoEF did not properly consider the matter. In the circumstances, according to the learned Attorney General, it cannot be said that the Environmental Clearance dated 9.8.2001 came to be issued by MoEF arbitrarily, capriciously or whimsically. At that stage of Environmental Clearance dated 9.8.2001 existence of the forest land was not established. If it had been so established then the project proponent had to obtain forest clearance under the 1980 Act also.

13. At the outset, Shri F.S. Nariman, learned senior counsel appearing on behalf of M/s. Lafarge adopted the submissions made on behalf of MoEF by the learned Attorney General. As regards the nature of the land, the learned counsel invited our attention to the approved mining plan which was submitted by LMMPL to the Regional Controller of Mines, IBM, Calcutta for limestone extraction which plan was duly approved in February, 1998. In this approved mining plan, the project area was described as having Karst topography with the presence of deep caverns, caves and cracks which permit surface water to percolate downwards and circulate underground only to reappear as hills side springs at certain outlets. According to the mining plan, the terrain over the entire area is rocky with very little soil and devoid of hard overburden rocks. The vegetation of the area is seen to be mixed deciduous type. There is no agricultural activity in the area as thin soil cover is

unable to sustain crops. That, even according to the NEHU Report of 1997, the site selected for mining has commercially viable limestone deposit. According to the said report, the land was left unused covered with degraded forests and this was the reason why the Durbar preferred to lease out the site to LMMPL for mining. Other factors responsible for selecting the proposed site were availability of water resource, away from human habitation, closer to the cement plant at Chhatak, easy accessibility by road and minimum damage to the rich biodiversity (see page 19 of the NEHU Report). The learned counsel submitted that Section 2 of the 1980 Act stipulates "prior approval". Thus, prior determination of what constituted forest land is required to be done. This lacuna in the 1980 Act was supplied by the order of this Court dated 12.12.1996 which inter alia provided that every State Government shall first constitute an Expert Committee within one month and based on its recommendations the State Government will identify the land as forest land on the criteria mentioned in the said Order. The learned counsel also invited our attention to Rule 4 of the Forest (Conservation) Rules, 1981 in which it is stipulated that every State Government seeking prior approval under Section 2 of the 1980 Act shall send its proposal to the Central Government in the form appended to the Rules. Thus, according to the learned counsel, under the 1980 Act read with the Rules, the requirement of submission of the proposal for forest diversion under the 1980 Act is exclusively the obligation of the State Government. This was also spelt out in the guidelines issued on 25.10.1992. Later on the Government of India amended the said guidelines in respect of the diversion of forest lands for non-forest purpose under the 1980 Act by letter dated 25.11.1994 and in para 2.4 the concept of "User Agency" was introduced but that concept was made applicable only to cases of renewal of mining leases. However, on 10.1.2003, Rule 4 of the 1981 Rules stood reframed (as Rule 6 of the 2003 Rules) which inter alia provided that every "User Agency" who wants to use any forest land for non-forest purpose shall make its proposal in the specified form appended to the Rules to the

concerned Nodal Officer along with the requisite information before undertaking any non-forest activity on the forest land; after receiving the proposal and if the State Government is satisfied that the proposal required prior approval under Section 2, it had to send the said proposal to the Central Government in the appropriate form within 90 days of the receipt of the proposal from the "User Agency". The threshold limit was kept at 40 hectares. Where the proposal involved forest land of more than 40 hectares, it was to be sent by the State Government to the Government of India with the copy to the Regional Nodal Officer. According to the learned counsel, insofar as M/s. Lafarge was concerned, its predecessor LMMPL was already given environmental clearance on 9.8.2001 and while granting the clearance there was an express finding in the environmental clearance that "*no diversion of forest land was involved*". Thus, it was never stipulated at any time as a condition to the grant of environmental clearance dated 9.8.2001 that permission under the 1980 Act should be obtained. The learned counsel further pointed out that pursuant to the Order of this Court dated 12.12.1996 an Expert Committee was formed by the State of Meghalaya vide notification dated 8.1.1997 with the Principal Chief Conservator of Forests as its Chairman. On 10.2.1997, the State of Meghalaya, on the subject of "Order of the Supreme Court dated 12.12.1996" wrote to the Khasi Hills Autonomous District Council that the land in question was reckoned by the State as non-forest land. The Council was asked to inform/ clarify whether the area in question under the mining lease fell on forest land as per the records of the District Council. By letter dated 28.4.1997, the Council informed the State Government that the area in question did not fall on forest lands. Moreover, pursuant to the Order of this Court dated 12.12.1996, the Chairperson of the Expert Committee appointed by the State of Meghalaya also filed the report of the Expert Committee in which it was expressly stated that the mining lease granted by the State Government did not fall on the forest land. Thus, it was under the above circumstances, having regard to the order of

this Court dated 12.12.1996, that the State Government was not required to and it did not submit any proposal to the Central Government under Section 2 of the 1980 Act read with Rule 4 of the 1981 Rules as it treated the site in question as a non-forest land. This position has not been disputed by MoEF. Thus, according to the learned counsel, there was no obligation on the project proponent or on the State of Meghalaya to move MoEF under Section 2 of the 1980 Act.

14. According to the learned counsel, what has happened in the present case is that almost after 9 years there was a change of view on the part of MoEF, i.e., between 1997 and 2007. Under this change of view of MoEF, the report of the Chairperson of the Expert Committee of the State of Meghalaya which report stood annexed to the affidavit dated 3.5.1997 in this Court to the effect that the mining lease did not fall on forest land was given a go-by and an entirely new stand was taken only on and from 2006-07. One more aspect has been highlighted by the learned counsel for M/s. Lafarge. On 1.6.2006, the Chief Conservator of Forests (C), Shri Khazan Singh stated that he had visited the limestone mining project of M/s. Lafarge on 24.5.2006 when he found that the mining lease area is surrounded by thick natural vegetation cover with sizeable number of tall trees. According to the Chief Conservator of Forests (C), the Rapid EIA Report (ERM India Pvt. Ltd.) submitted by the project proponent describes the land as waste land which was not a fact. Thus, according to the Chief Conservator of Forests (C), the project proponent should be directed to obtain clearance under the 1980 Act and not to expand mining activities till such clearance is obtained. After the said letter dated 1.6.2006, the then Principal Chief Conservator of Forests now stated vide letter dated 11.5.2007 that he too agreed with the opinion of the Chief Conservator of Forests (C), Shri Khazan Singh. However, according to the learned counsel, even the Principal Chief Conservator of Forests stated in his letter dated 11.5.2007 that though M/s. Lafarge had failed to take forest clearance, they were not at

fault because of the certificate of the Council that the site fell in a non-forest area. The letter dated 11.5.2007 further goes on to state that the activities of the company will provide employment to large number of local tribals and rural people and that since the company had applied for forest clearance on 3.5.2007 forest clearance may be considered. Thus, according to the learned counsel, there was no collusion between M/s. Lafarge and the DFO as alleged to get the certificate dated 13.6.2000.

15. On the question of alleged suppression by M/s. Lafarge from MoEF of the NEHU Report 1997, learned counsel submitted that an application was prepared and submitted by M/s. LMMPL for Environmental Clearance to MoEF vide letter dated 1.9.1997; along with the said letter there were several enclosures. One of the enclosures was the NEHU Report, the other was NOC from Khasi Hills Autonomous Council for mining operation in the project area. This letter dated 1.9.1997 was duly acknowledged by MoEF vide its letter dated 24.10.1997. As stated above, in view of the amendment to the Notification of 1994, the project proponent was advised to make a new proposal in two different parts, namely, site clearance and project clearance. Pursuant to the said advice the project proponent preferred Site Clearance Application on 23.9.1998 made to MoEF in which once again the project proponent enclosed maps which were verbatim reproduction of the relevant pages (including maps) in the NEHU Report. MoEF granted Site Clearance on 18.6.1999. Further even the Mining Plan submitted by the project proponent contained a Chapter on Environment Management Plan (EMP) which is a verbatim copy of Chapter 6 of NEHU Report. The said plan was approved by Bureau of Mines. Moreover, in the Sociological and Ecological Impact Assessment Report dated 16.2.1998 prepared by ERM it has been expressly stated that Environmental Impact Assessment was carried out in 1997 and it was submitted to MoEF in September, 1997. To the same effect one finds reference in the Executive Summary of the EIA

of proposed Limestone Mining of 9.4.1998 by ERM. According to the learned counsel the above documents indicate that there was no suppression by the project proponent from MoEF of NEHU Report of 1997 as alleged. One of the points which SAC has argued before us was absence of public hearing as required under EIA Notification of 1994. On this aspect Shri Nariman, learned counsel appearing on behalf of M/s. Lafarge invited our attention to the requisite correspondence. On 22.4.1998 a Notification was issued by Meghalaya State Pollution Control Board of constituting an Environmental Public Hearing Panel to evaluate and assess the documents submitted by the project proponent and to verify the comments, views and suggestions made by the public on the proposed project. This Notification was issued in terms of the EIA Notification of 1994, as amended on 10.4.1997. On 27.4.1998 a public notice was also issued by MPCB informing the general public about the limestone project of M/s. LMMPL. On 5.5.1998 MPCB informed two local newspapers in writing asking them to publish the Khasi translation of the public notice. On 6.5.1998 MPCB wrote to Shella Confederacy asking its Headman to display two sets of executive summary each in Khasi and English. On 13.5.1998 the State PCB wrote to the Director of Information asking him to publish public notice in Shillong Times. On 25.5.1998 the State PCB wrote to the Secretary, Shella village informing him of date and time of public hearing. 31 members attended the public hearing on 3.6.1998. As stated above, the entire proceedings have been recorded in the minutes of the meeting. On 4.9.1998 the Deputy Director, Govt. of India, MoEF forwarded a letter to the State PCB enclosing proceedings of the public hearing conducted for proposed limestone mining project of M/s. LMMPL, Nongtrai. Thus, according to the learned counsel there is no merit in the submission advanced on behalf of SAC that public hearing as per EIA Notification of 1997 did not take place.

16. Shri Nariman, learned counsel appearing on behalf of M/s. Lafarge further submitted that on facts and circumstances

of the present case it is clear that both the project proponent and the MoEF were at all relevant times under the bona fide impression that the project site was not forest land; in fact the consistent view of all authorities, including MoEF, was that the project site (mining lease area) was not located on "forest land". In this connection our attention was invited to the application dated 23.9.1998 made by M/s. LMMPL to MoEF for Site Clearance, the NOC from KHADC dated 27.8.1997 stating that the project area does not fall within a forest land, grant of Site Clearance on 18.6.1999 by MoEF, application for Environmental Clearance dated 17.4.2000, grant of Environmental Clearance on 9.8.2001. All these documents and series of letters exchanged during the relevant time, according to the learned counsel, indicate that both the project proponent and MoEF were at all relevant times under the bona fide impression that the project site (mining lease area) was not located on forest land.

17. Learned counsel further submitted that after stop mining order dated 30.4.2007 and the direction of CCF(C) of even date to obtain Forest Clearance under Section 2 of the 1980 Act, an application was filed by M/s. Lafarge on 3.5.2010 to the State Government under Rule 6 of the Forest Conservation Rules, 2003, as amended in 2004. Accordingly, on 11.5.2007 the Principal Chief Conservator of Forest, Meghalaya wrote to the Government of Meghalaya agreeing with the views of the CCF (C) to the effect that M/s. Lafarge should obtain permission under the 1980 Act. At the same time, as stated above, the PCCF made it clear that no fault lay on the door step of M/s. Lafarge for not seeking Forest Clearance earlier. Accordingly, on 19.6.2007 a formal proposal was made by State Government on 19.6.2007 to MoEF for diversion of 116.589 Ha of forest land for limestone and other ancillary activities in favour of M/s. Lafarge in Khasi Hills Division under Section 2 of the 1980 Act. Thus, all necessary steps were taken, as indicated hereinabove, by M/s. Lafarge which ultimately culminated in the Environmental Clearance by MoEF

dated 19.4.2010 and Forest Clearance dated 22.4.2010. In the circumstances, learned counsel submitted that I.A. 1868/2007 preferred by M/s. Lafarge be allowed.

Issues

18(i) Nature of land;

(ii) Whether ex post facto environmental and forest clearances dated 19.4.2010 and 22.4.2010 respectively stood vitiated by alleged suppression by M/s. Lafarge regarding the nature of the land. In this connection it was contended by learned Amicus and by the learned counsel appearing on behalf of SAC that the EIA clearance under Section 3 of the 1986 Act dated 9.8.2001 (being a parent clearance) was obtained by M/s. Lafarge on the basis of "absence of forest" with full knowledge that the project site was located on forest land.

Findings

(a) Legal Position

19. Universal human dependence on the use of environmental resources for the most basic needs renders it impossible to refrain from altering environment. As a result, environmental conflicts are ineradicable and environmental protection is always a matter of degree, inescapably requiring choices as to the appropriate level of environmental protection and the risks which are to be regulated. This aspect is recognized by the concept of "sustainable development". It is equally well-settled by the decision of this Court in the case of Narmada Bachao Andolan v. Union of India and Others [(2000) 10 SCC 664] that environment has different facets and care of the environment is an on-going process. These concepts rule out the formulation of across-the-board principle as it would depend on the facts of each case whether diversion in a given case should be permitted or not, barring "No Go" areas (whose

identification would again depend on undertaking of due diligence exercise). In such cases, the Margin of Appreciation Doctrine would apply.

20. Making these choices necessitates decisions, not only about how risks should be regulated, how much protection is enough, and whether ends served by environmental protection could be pursued more effectively by diverting resources to other uses. Since the nature and degree of environmental risk posed by different activities varies, the implementation of environmental rights and duties require proper decision making based on informed reasons about the ends which may ultimately be pursued, as much as about the means for attaining them. Setting the standards of environmental protection involves mediating conflicting visions of what is of value in human life.

(b) Nature of the land

21. In the NEHU Report of June, 1997 (Rapid EIA of Proposed Limestone Mining Project at Nongtrai, Meghalaya), a brief history of limestone mining in Khasi Hills of Meghalaya is spelt out. It indicates that mining of limestone in Khasi Hills dates back to July 10, 1763 when an agreement was signed between East India Company and the *Nawab* of Bengal for preparation of *chunam*. Regular trade of limestone from Khasi Hills of Bengal started on and from 1858. Substantial revenue was earned by the British Government from these limestone quarries as rentals, which was Rs. 23,000/- in 1858 and which subsequently stood increased to Rs. 67,000/- in 1878. The first historical account of exploitation of Nongtrai limestone dates back to 1885 when Don Rai of Shella obtained permits from the *Wahadars* (Head of Confederacy) of Shella to quarry limestone in Nongtrai village. There are historical records about continuance of limestone trade between Khasi Hills and Bengal up to 1947. The business declined after partition. Limestone mining and trade slipped into the hands of unorganized sector. According to the NEHU Report of 1997, today a number of private parties quarry limestone using unscientific methods and

export it to counterparts in Bangladesh, often illegally. These private parties sell the product at a very low price. This aspect is also being examined by CEC which has now filed its report in I.A. No. 3063 of 2011. One more aspect needs to be highlighted. According to the State of Forest Report, 2001, the North Eastern Hill State of Meghalaya is predominantly tribal with 86% population being tribal. According to the NEHU Report of 1997, approximately 60 settlements consisting of 50-200 inhabitants each with a total estimate population of 16500 persons exist within 10 km radius of the proposed mining site. Under an agreement dated 29.9.1993 (lease agreement), the village Durbar represented by a Special Committee headed by the Headman as lessor granted lease of the limestone quarry in Nongtrai to M/s. LMMC (the predecessor-in-interest of M/s. LMMPL). Thus, an area of 100 hectares stood acquired on lease basis for mining whose lessor was the village Durbar of Nongtrai. Coming to the topography of the area, one finds that the limestone bearing area around Nongtrai and Shella villages falls under Karst topography. This area falls on the southern fringe of the Meghalaya plateau. Karst topography is characterized by a limestone caverns/ caves. The factum of limestone bearing area around Nongtrai and Shella falling under Karst topography is also borne out by the certificate dated 27.8.1997 issued by KHADC, Shillong. This Council is a constitutional authority under Sixth Schedule of the Constitution. As stated above, the limestone bearing area around Nongtrai and Shella falls on the southern fringe of Meghalaya plateau. The site is approachable from Shillong via Mawsynram and Nongtrai villages by a motorable road. The site is also accessible from Shillong by road via Cherrapunji. This road is wide enough for crushers and heavy machines to be brought from Shillong. The site is on the uneven terrain with a rugged topography. (See Rapid EIA Report submitted by ERM India Pvt. Ltd. dated 6.4.2000). According to the said report, the Karst topography of the area supports sporadic growth of a few tree shrubs. According to the NEHU Report of 1997, the site selected for mining has commercially viable

limestone deposit. The site was selected after thorough consultation with the concerned village Durbar who is the custodian of the land. The land was left unused covered with degraded forests and this was the reason for the Durbar to lease out the said land to the project proponent for mining. The village Durbar also felt that in the area unscientific limestone quarrying was going on resulting in loss of revenue both to the State as well as the inhabitants of the village particularly because the said mining was undertaken by unorganized sectors and, thus, it was decided to enter into the lease with the project proponent so that mining could be done on scientific basis. The site was also selected because of easy accessibility by road and less vegetation clearance stood involved. According to the NEHU Report, the site is located in the area on the outskirts of the forest. (See page 19 of the said Report)

(c) <u>Validity of ex post facto clearance</u>

22. An important argument has been advanced on behalf of SAC that the site clearance dated 18.6.1999 and EIA clearance dated 9.8.2001 were based on misrepresentation by M/s. Lafarge. They proceeded on the basis that there was no forest. That, both the said clearances stood vitiated by suppression of material fact of existence of forest by M/s. Lafarge and as a sequel the subsequent revised environmental clearance dated 19.4.2010 and forest clearance (Stage – I) dated 22.4.2010 stood vitiated. In this connection, it was submitted that having regard to Para 4.3.1 of the National Forest Policy, 1988 tropical rain/ moist forest is required to be totally safeguarded; that, the project is located in a tropical moist forest and no forest clearance ought to have been granted by MoEF because of the special ecological significance recognized by the 1988 policy. According to SAC, the fact that tropical moist forest existed in the area and continues to exist was known to M/s. Lafarge at all material times as can be seen from the NEHU Report of 1997 in which it has been categorically stated that the vegetation at the study

site is a mixed moist deciduous forest composed of deciduous and evergreen tree elements; that, in the same Report it has been further stated that the vegetation of the area is a tropical semi-evergreen forest composed of deciduous and evergreen elements which is further corroborated by the assessment of Floral Diversity prepared by NEHU dated June, 2010 in which it has been stated that the forest in the study area is tropical moist deciduous forest, tropical semi-evergreen forest, savanna, sub-tropical broad leaves forest, forest garden, orchards and riparian forest; that, the vegetation in the unbroken area is tropical moist deciduous type with variable canopy cover mostly sparse. Thus, according to SAC and CEC, the undisputed position emerging from the record that the subject area is covered by a tropical moist forest deserving highest degree of ecological protection ought to have been taken into account by MoEF which was not done at the time of initial clearances dated 18.6.1999 and 9.8.2001. Shri Divan, learned senior counsel appearing for SAC submitted before us that the case in hand essentially deals with the decision making process in relation to the grant of environmental clearance and to test whether the decision making process stood up to judicial review. According to the learned counsel, the following basic points regarding the legal framework must be kept in view: - From the environmental perspective, in relation to a mining project, there are three main sets of permissions that are required to be obtained:

(i) The first set of permissions is at the State level. This set of permissions primarily has to do with pollution. In each State or a group of States, a Pollution Control Board issues consent/ permit. These consents or permits are granted from a pollution perspective. The scope of enquiry is limited to pollution impacts. Obtaining such consents and permits are essential but they are not a substitute for compliance with other environmental laws.

(ii) The second set of permissions, according to the learned counsel, is with regard to environmental clearance. The scope of environmental clearance is wider than a pollution control clearance. The authority granting environmental clearance will look at broader impacts beyond pollution and will examine the effect of the project on the community, forests, wild life, ground water, etc. which are beyond the scope of Pollution Control Board examination. The exercise of granting environmental clearance with regard to a limestone mining project of the present magnitude requires MoEF clearance.

(iii) A clearance for diversion of forest under the 1980 Act which is granted by MoEF on the recommendation of the FAC should logically precede the grant of environmental clearance as the environmental clearance is broader in scope and deals with all aspects, one of which may be forest diversion.

23. Applying the said legal framework to the facts of the present case, the learned counsel appearing for SAC submitted that the MoEF, as the authority which decides on diversion of forests and which grants environmental clearances, is duty bound to examine the diversion application in the context of the 1988 Policy, particularly, where tropical moist forests are sought to be cleared by the project proponent. According to the learned counsel, where MoEF grants environmental clearance in ignorance of the existence of a forest due to mis-declaration, it is duty bound to take severest possible action against the party that made the false declaration for profit. According to the learned counsel, since impact assessment and EIA clearances are processes based on self declarations by the project proponent (s), the decision making by MoEF depends upon honest and cogent material supplied by the project proponent and since the said process is premised on a full and fair

disclosure of relevant facts by the project proponent, in cases where material facts are not disclosed, the MoEF should withdraw both the site as well as the environmental clearances. According to the learned counsel, the most important input in this regard must be received by MoEF in the course of its decision making from the public which is an essential check for a failure to disclose correct facts or to have regard to environmental issues that may have escaped the attention of the project proponent. According to the learned counsel, the requirement of public hearing is, thus, mandatory both under the 1994 Notification and the 2006 Notification. That, the requirement for payment of NPV does not automatically mean that environmental clearance is to be granted.

24. We are in full agreement with the legal framework suggested by the learned counsel for SAC. There is no dispute on that point. The question is confined to the application of the legal framework to the facts of the present case. Can it be said on the above facts that a mis-declaration was wilfully made by M/s. Lafarge or its predecessor (project proponent) while seeking site and environmental clearances? Was there non-application of mind by MoEF in granting such clearances? Was the decision of MoEF based solely on the declarations made by the project proponent(s)?

25. At the outset, one needs to take note of Section 2 of the 1980 Act which stipulates prior approval. That Section refers to restriction on the dereservation of forests or use of forest land for non-forest purpose. It begins with non-obstante clause. It states that "Notwithstanding anything contained in any other law for the time being in a State, no State Government or other authority shall make, except with the prior approval of the Central Government, any order directing that any forest land or any portion thereof may be used for any non-forest purpose". This is how the concept of prior approval by the Central Government comes into picture. Thus, prior determination of what constitutes "forest land" is required to be done. By an

order dated 12.12.1996 by a Division Bench of this Court in Writ Petition (C) No. 202 of 1995 with another in case of *T.N. Godavarman Thirumulpad v. Union of India,* this Court directed each State Government to constitute within a specific period an Expert Committee to identify areas which are forests irrespective of whether they are so notified, recognized or classified under any law and also identify areas which were earlier forests but stand degraded, denuded or cleared. The Committee was to be headed by the Principal Chief Conservator of Forests. This order dated 12.12.1996, thus, clarified that every State Government seeking prior approval under Section 2 of the 1980 Act shall first examine the question relating to existence of forests before sending its proposal to the Central Government in terms of the form prescribed under the Forest (Conservation) Rules, 1981 (see Rule 4). Thus, the requirement of submitting the proposal for forest diversion under the 1980 Act is exclusively the obligation of the State Government. This position was spelt out initially in the guidelines dated 25.10.1992. However, later on, the Government of India amended the guidelines in respect of diversion vide letter dated 25.11.1994 and by the said letter the concept of "User Agency" stood introduced. On 10.1.2003, Rule 4 of the 1981 Rules stood reframed which inter alia provided that every "User Agency" who wants to use any forest land for non-forest purpose shall make its proposal in the specified form appended to the Rules to the concerned Nodal Officer along with the requisite information before undertaking any non-forest activity on the forest land and after receiving the said proposal and if the State Government is satisfied that the proposal required prior approval under Section 2, the State Government had to send the said proposal to the Central Government in the appropriate form within the specified period of 90 days from the receipt of the proposal from the "User Agency". At this stage, it may be noted that the earlier project proponent in the present case was M/s. LMMPL. That project proponent had obtained EIA clearance given by MoEF dated 9.8.2001 which clearance stood transferred to M/s. Lafarge only

on 30.7.2002. While granting environmental clearance dated 9.8.2001 there was an express finding to the effect that "no diversion of forest land was involved". In terms of the order of this Court dated 12.12.1996, an Expert Committee was in fact formed by the State of Meghalaya vide notification dated 8.1.1997 with the Principal Chief Conservator of Forests as its Chairman. On 10.2.1997, the State of Meghalaya had addressed a specific letter to the Khasi Hills Autonomous District Council, which as stated above is a Constitutional Authority, stating that the land in question was reckoned as non-forest land and the Council was asked to clarify whether the area in question under the mining lease fell in the forest as per the records of the Council. The Council by its letter dated 28.4.1997 had informed the State Government that the area in question did not fall in the forest. Apart from the said letter, the Chairperson of the Expert Committee appointed by the State of Meghalaya being the Principal Chief Conservator of Forests also submitted his report in which it was expressly stated that the mining lease granted by the State Government did not fall in the forest. Since the mining lease granted by the State did not fall in the forest, the State Government did not submit any proposal to the Central Government under Section 2 of the 1980 Act as it treated the site in question as falling on the outskirts of the forests. It is almost after nine years that there was a change of view on the part of MoEF under which the report of the Expert Committee headed by the Principal Chief Conservator of Forests was given a go-by. Between 1997 and 2007, the view which prevailed was that the project site stood located on the outskirts of the forests. In this connection, it needs to be stated that on 1.6.2006 for the first time the Chief Conservator of Forests (C), Shri Khazan Singh came out with the change of view which was ultimately accepted in 2007 by MoEF. According to the Chief Conservator of Forests (C), he had visited the limestone mining project of M/s. Lafarge on 24.5.2006 when he found that the mining lease area stood surrounded by thick natural vegetation covered with sizeable number of tall trees and in the circumstances he recommended

that the project proponent should be directed to obtain clearance under the 1980 Act and not to carry on the mining activities till such clearance is obtained. The most important fact is that subsequent to the letter dated 1.6.2006, addressed by the Chief Conservator of Forests (C), Shri Khazan Singh, the Principal Chief Conservator of Forests agreed with the opinion of the Chief Conservator of Forests (C). This was by letter dated 11.5.2007. However, even according to the Principal Chief Conservator of Forests, who was the Chairperson of the Expert Committee appointed by the State Government, M/s. Lafarge was not at fault because the certificate indicating absence of forests was given by Khasi Hills Autonomous District Council. In fact the letter dated 11.5.2007 further goes to state that the activities of M/s. Lafarge will provide employment to a large number of local tribals and rural people and consequently the application for forest clearance made by M/s. Lafarge without prejudice to their rights and contentions dated 3.5.2007 be considered by MoEF. Apart from the above circumstances, on 22.4.1998, a notification was issued by the State Pollution Control Board constituting an Environmental Public Hearing Panel to evaluate and assess the documents submitted by M/s. LMMPL. A public notice was also issued in local newspapers on 25.5.1998. The State Pollution Control Board also sent a letter to the Secretary, Shella Village informing him of the date and time of public hearing and accordingly on 3.6.1998, a public hearing did take place. According to the minutes of the meeting, 31 citizens of Shella Nongtrai, Pyrkan attended the hearing. In the hearing, the purpose, objective, composition and procedure of environmental public hearing was discussed. The Headman of Nongtrai was also present. He gave reasons as to why the village Durbar had agreed to the proposed project. The main reason being that the limestone was abundantly available in the area but the same remained unutilized by local villagers themselves due to lack of infrastructure. That, for economic development of the local population, the village Durbar had decided to lease the area required for the project to M/s.

Lafarge. In the meeting, the economic benefits of the local people from the project proponent were also discussed. The environmental implications were also discussed. The mitigating measures to be adopted by the project proponent were also discussed to maintain the ecology and environmental balance of the area. The objections of certain persons were also noted and discussed. The Durbar came to the conclusion that there was no destruction of any caves. The complainant was not even present during the hearing. Thus, a public hearing did take place on 3.6.1998. One more aspect at this stage needs to be mentioned. Public participation provides a valuable input in the process of identification of forest. Today, amongst the tribals of the North East, there is a growing awareness of the close relationship between poverty and environmental pollution. According to Environmental Law and Policy in India by Shyam Divan and Armin Rosencranz, "many native and indigenous people are fully aware of what constitutes preservation and conservation of biodiversity. Many native and indigenous people have many a times opposed government policies that permit exploitation on traditional lands because such exploitation threatens to undermine the economic and spiritual fabric of their culture, and often results in forced migration and resettlement, the struggle to protect the environment is often a part of the struggle to protect the culture of the native and indigenous people" (see page 591). In our view, the natives and indigenous people are fully aware and they have knowledge as to what constitutes conservation of forests and development. They equally know the concept of forest degradation. They are equally aware of systematic scientific exploitation of limestone mining without causing of "environment degradation". However, they do not have the requisite wherewithal to exploit limestone mining in a scientific manner. These natives and indigenous people know how to keep the balance between economic and environment sustainability. In the present case, the above is brought out by the Minutes of the meeting held on 3.6.1998. In fact the written submissions filed by the Nongtrai Village Durbar (respondent No. 5) in I.A. No. 1868 of 2007 preferred by M/s.

Lafarge have specifically averred that the total area of the land that falls within the jurisdiction of Nongtrai Village is about 2200 hectares; that, the said lands fall in two categories, namely, individual ownership lands, and community lands. The management and control of community lands is completely within the jurisdiction of the community. Such community lands in highlands of Khasi Hills are termed as *Ri Raid* whereas community lands in low-lying areas are termed as *Ri Seng*. Nongtrai village has about 1300 hectares of community land out of which 900 hectares are limestone bearing land. The manner and method of allocation, use and occupation of the community lands are decided by the Village Durbar. The Village Durbar has granted lease of 100 hectares of community land out of 900 hectares which as stated above is limestone bearing land. It is important to note that apart from the minutes of the meeting held on 3.6.1998 which was attended by the Headman of the Nongtrai Village, a detail written submission has been filed on 13.5.2011 by the Nongtrai Village Durbar fully supporting the impugned project. Thus, this is a unique case from North East. We are fully satisfied that the natives and the indigenous people of Nongtrai Village are fully conscious of their rights and obligations towards clean environment and economic development. There is ample material on record which bears testimony to the fact of their awareness of ecological concerns which has been taken into account by MoEF. In the circumstances, it cannot be said that the impugned project should be discarded and that the decision of MoEF granting ex post facto clearances stands vitiated for non-application of mind as alleged by SAC. At this stage one more argument advanced on behalf of SAC needs to be addressed. According to SAC, in this case a decisive factor which clearly shows that there is "forest" on the core area is the statutory definition of forest contained in the United Khasi – Jaintia Hills Autonomous District (Management and Control of Forests) Act, 1958. Section 2(f) defines the expression "forest" and the tree count emerging from the High Powered Committee (HPC) Report which establishes that the area

answers the statutory definition. According to SAC, in terms of the said definition of forest, if there exists more than 25 trees per acre then it is a forest. This argument has no merit. According to Shri Krishnan Venugopal, learned senior counsel appearing on behalf of the Village Durbar of Nongtrai Village (respondent No. 5), SAC has not stated the full facts in this regard. We find merit in this contention. Section 5 of the 1958 Act inter alia provides that no timber or forest produce shall be removed for the purpose of sale, trade and business without prior permission. Section 7 of the said Act deals with restrictions on felling of trees and further provides that no tree below 1.37 metre in girth at the breast level shall be felled. Thus, it is the trees of a particular girth and breast height and not every tree should be counted while computing whether a particular area is a forest area or not. In fact in the year 2007, a survey of the unbroken area was conducted by the Forest Department of the State of Meghalaya wherein an inventory of the existing trees was prepared based on their nature and girth. The said record confirms that the unbroken area has less than 25 trees per acre having girth of more than 120 cms per acre. It is in view of the existence of the 1958 Act, which is a local legislation, that the native people as also the State officials like the DFO understood the area in the light of the said Act. It is important to note once again that this understanding of the natives and tribals about the Local Act is an important input in the decision making process of granting environmental clearance. It is deeply engrained in the local customary law and usage. It is so understood by the Expert Committee headed by the then Principal Chief Conservator of Forests on the basis of which the State granted the mining lease saying that there was no forest. This certificate was granted by the State in terms of the order of this Court dated 12.12.1996. This understanding also existed in the mind of KHADC when it gave certificates on 28.4.1997, 10.7.1997 and 27.8.1997. In fact this has been the understanding of the Council as is apparent even from its letter dated 18.1.2011 (see page 126 of the affidavit dated 9.3.2011 filed by the State of Meghalaya). As stated above, this

view prevailed with the MoEF between 1997 and 2007. The word "environment" has different facets [see para 127 of the judgment of this Court in Narmada Bachao Andolan (supra)]. On the above facts, it is not possible for us to hold that the decision to grant ex post facto clearances stood vitiated on account of non-application of mind or on account of suppression of material facts by M/s. Lafarge as alleged by SAC.

26. Similarly, it is not possible for us to hold on the above facts that ex post facto clearances have been granted by MoEF in ignorance of the existence of forests due to mis-declaration. Two points are required to be highlighted at the outset. Firstly, the ex post facto clearance is based on the revised EIA. In the circumstances, EIA Notification of 2006 would not apply. Secondly, IA preferred by SAC being I.A. No. 2225-2227/08 was preferred only in March, 2008. Thus, during the relevant period of almost a decade, SAC did not object to the said project. In fact an IA is now pending in this Court being IA No. 3063 of 2011 preferred by CEC which indicates that there are 28 active mines out of which 8 are located along the Shella-Cherrapunjee Road which are operating without obtaining approval and in violation of the 1980 Act. Further, the said I.A. alleges that 6 registered quarry owners are under the Shella Wahadarship, East Khasi Hills and that there are 12 individuals involved in mining limestone in the Shella Area during 2008-09. All these aspects require in-depth examination. The locus of SAC is not being doubted. However, the I.A. No. 3063 of 2011 preferred by CEC which has acted only after receiving inputs from the respondent No. 5 prima facie throws doubt on the credibility of objections raised by SAC. However, we do not wish to express any conclusive finding on this aspect at this stage. On the ex post facto clearance, suffice it to state that after Shri Khazan Singh, Chief Conservator of Forests (C) submitted his report on 1.6.2006, MoEF directed the project proponent to apply for necessary clearances on the basis that there existed a forest in terms of the order of this Court dated

12.12.1996 and the ex post facto clearance has now been granted on that basis permitting diversion of forest by granting Stage-I forest clearance subject to compliance of certain conditions imposed by MoEF and by this Court. On the question of non-application of mind by the MoEF, we find that at various stages despite compliances by the project proponent and despite issuance of certificates by various authorities, MoEF sought further clarifications/ information by raising necessary requisitions. To give a few instances in terms of the 1994 EIA Notification, the then project proponent made an application to MoEF for grant of environmental clearance. With that application, the then project proponent submitted the NEHU Report of 1997. However, in the mean time there was an amendment to the EIA Notification of 1994. That amendment took place on 10.4.1997 by which two stage clearances were required to be obtained, namely, site clearance and project clearance. Therefore, immediately MoEF returned the application to the project proponent asking it to submit applications for site clearance as well as for project clearance. Similarly, although the then project proponent had made site clearance application which fulfilled the 1994 Notification (as amended), the MoEF gave site clearance on 18.6.1999 with additional conditions. Similarly, despite the project proponent making application for environmental clearance on 17.4.2000 enclosing Rapid EIA prepared by ERM India Pvt. Ltd. referring to absence of forest, the MoEF asked project proponent to obtain certificate of DFO in terms of the definition of the word "forest" as laid down in the order of this Court dated 12.12.1996. Similarly, despite the certificate given by DFO on 13.6.2000 stating that the proposed mining site is not a forest area, the MoEF sought further details in terms of the connotation of the word "forest" as laid down in the order of this Court dated 12.12.1996. Similarly, from time to time the Expert Committee of MoEF asked for details with regard to flora and fauna, list of species in that area, types of forests existing in that area, etc. Similarly, after receipt of letter from Shri Khazan Singh, the then Chief Conservator of Forests (C) on 1.6.2006,

the MoEF called upon the project proponent to submit an application for forest clearance on the basis that the site was located in the forest. A number of queries have been raised from time to time by the MoEF as indicated from the facts enumerated hereinabove. Even a report from the High Powered Committee (HPC) was called for by MoEF which was submitted on 5.4.2010. There were four terms of references given to the HPC. According to the report, all conditions imposed with regard to environmental clearance had been substantially complied with by M/s. Lafarge. The report also refers to the steps taken by M/s. Lafarge with regard to reforestation. The most important aspect of the HPC Report is regarding the topography of the area. It states that though the area can be treated as forest, still it is a hilly uneven undulating area largely covered by "Karstified" limestone. The Report further states that the area can be reforested as a part of the reclamation plan. It further states that the indigenous and native people are satisfied with the credentials of M/s. Lafarge as the company is providing health care facilities, drinking water facilities, employment for local youth, construction of village roads, employment for school teachers, scholarship programme for children, etc. It also indicates that the issue of mining was thoroughly discussed with the Village Durbar by the members of the HPC who visited the site and that the community was in agreement to allow M/s. Lafarge to continue mining. The report further notes that most of the members of the SAC were not the residents of the locality (Shella Village) and were living in Shillong while occasionally visiting Shella. The report further states that 200 persons participated in a long interaction with the members of HPC. The report further states that in fact the villagers became very upset in the apprehension of M/s. Lafarge not being allowed to mine on their community land. As stated above, even according to the letter dated 11.5.2007, the Principal Chief Conservator of Forests states that though the site falls in the forest as pointed out by Shri Khazan Singh, the Chief Conservator of Forests (C) vide letter dated 1.6.2006, still it is not the fault of M/s. Lafarge. Thus, under the above

circumstances, we are satisfied that the parameters of intergenerational equity are satisfied and no reasonable person can say that the impugned decision to grant Stage – I forest clearance and revised environmental clearance stood vitiated on account of non-application of mind by MoEF. On the contrary, the facts indicate that the MoEF has been diligent. That, MoEF has taken requisite care and caution to protect the environment and in the circumstances, we uphold the stage-I forest clearance and the revised environmental clearance granted by MoEF.

27. Before concluding, we would like to refer to our order dated 12.4.2010 which recites agreed conditions between the parties which conditions are imposed by this Court in addition to the conditions laid down by MoEF. These agreed conditions incorporated in our order dated 12.4.2010 are in terms of our judgment in *T.N. Godavarman Thirumulpad v. Union of India* [(2006) 1 SCC 1] with regard to *commercial exploitability* which even according to SAC was not considered by MoEF at the time of granting revised environmental clearance on 19.4.2010 or at the time of granting forest clearance on 22.4.2010. We reproduce our order dated 12.4.2010, which reads as under:

> "Heard both sides. Learned Attorney General for India stated that the Ministry of Environment & Forests will take a decision under the Forest Conservation Act and shall consider granting permission subject to the following conditions :
>
> 1. The applicant shall deposit a sum of Rs.55 crores towards five times of the normal NPV (as recommended by the CEC) with interest @ 9% per annum from 1st April, 2007, till the date of payment. Such payment shall be made in totality in one instalment within 4 weeks from the date of the order.
>
> 2. An SPV shall be set up under the Chairmanship

> of the Chief Secretary, Meghalaya with the Principal Chief Conservator of Forests, Meghalaya, Tribal Secretary, Meghalaya, Regional Chief Conservator of Forests, MoEF at Shillong and one reputed NGO (to be nominated by the MoEF) as Members. The SPV will be set up within 4 weeks.
>
> 3. The User Agency will deposit with the SPV a sum of Rs.90/- per tonne of the limestone mined from the date on which mining commenced within 4 weeks of the SPV being constituted.
>
> 4. The SPV shall follow the principles and procedure presently applied for utilization of CAMPA money. The account will be audited by the Accountant General, Meghalaya. The money will be kept in interest bearing account with a Nationalized Bank. The Accountant General and the SPV shall file an Annual Report before this Hon'ble Court detailing all the work done by it in relation to the welfare projects mandated upon it including the development of health, education, economy, irrigation and agriculture in the project area of 50 kms. solely for the local community and welfare of Tribals.
>
> 5. The User Agency will comply with all the conditions imposed on it earlier as well as further recommendations made by the Committee constituted by the MoEF under the order dated 30th march, 2010, including, in particular, the following :
>
> (a) It shall prepare a detailed Catchment Area Treatment Plan.
>
> (b) It shall explore the use of surface miner technology.
>
> (c) It shall monitor ambient area quality as per

New National Ambient Air Quality Standards.

(d) It shall take steps to construct a Sewage Treatment Plant and Effluent Treatment Plant.

(e) It shall discontinue any agreement for procuring limestone on the basis of disorganized and unscientific and ecologically unsustainable mining in the area.

(f) It shall prepare a comprehensive forest rehabilitation and conservation plan covering the project as well as the surrounding area.

(g) It shall prepare a comprehensive Biodiversity Management Plan to mitigate the possible impacts of mining on the surrounding forest and wildlife.

(h) It shall maintain a strip of at least 100 meter of forest area on the boundary of mining area as a green belt.

6. The MoEF shall take a final decision under the Forest Conservation Act, 1980 for the revised environmental clearance for diversion of 116 hectares of forest land, taking into consideration all the conditions stipulated hereinabove and it may impose such further conditions as it may deem proper.

List on 26.04.2010 at 2.00 p.m."

28. This order indicates the benefit which will accrue to the natives and residents of the Nongtrai Village. The site covers 100 hectare required for limestone mining. The Village Durbar seeks to exploit it on scientific lines. The minutes of the meeting of the Village Durbar and the submissions filed by the Durbar indicate the exercise of the rights by the tribals and the natives of Nongtrai Village seeking economic development within the parameters of the 1980 Act and the 1986 Act.

29. At the request of the learned counsel for SAC, we wish to state that none of the observations made hereinabove in the context of the nature of the land (the extent of the lands owned by the community and by private persons) shall be taken into account by the competent court in which title dispute is pending today.

(d) Summary

30. Time has come for us to apply the constitutional "doctrine of proportionality" to the matters concerning environment as a part of the process of judicial review in contradistinction to merit review. It cannot be gainsaid that utilization of the environment and its natural resources has to be in a way that is consistent with principles of sustainable development and intergenerational equity, but balancing of these equities may entail policy choices. In the circumstances, barring exceptions, decisions relating to utilization of natural resources have to be tested on the anvil of the well-recognized principles of judicial review. Have all the relevant factors been taken into account? Have any extraneous factors influenced the decision? Is the decision strictly in accordance with the legislative policy underlying the law (if any) that governs the field? Is the decision consistent with the principles of sustainable development in the sense that has the decision-maker taken into account the said principle and, on the basis of relevant considerations, arrived at a balanced decision? Thus, the court should review the decision-making process to ensure that the decision of MoEF is fair and fully informed, based on the correct principles, and free from any bias or restraint. Once this is ensured, then the doctrine of "margin of appreciation" in favour of the decision-maker would come into play. Our above view is further strengthened by the decision of the Court of Appeal in the case of R v. Chester City Council reported

in (2011) 1 All ER 476 (paras 14 to 16).

31. Accordingly, this matter stands disposed of keeping in mind various facets of the word "environment", the inputs provided by the Village Durbar of Nongtrai (including their understanding of the word "forest" and the balance between environment and economic sustainability), their participation in the decision-making process, the topography and connectivity of the site to Shillong, the letter dated 11.5.2007 of the Principal Chief Conservator of Forests and the report of Shri B.N. Jha dated 5.4.2010 (HPC) (each one of which refers to economic welfare of the tribals of Village Nongtrai), the polluter pays principle and the intergenerational equity (including the history of limestone mining in the area from 1858 and the prevalent social and customary rights of the natives and tribals). The word "development" is a relative term. One cannot assume that the tribals are not aware of principles of conservation of forest. In the present case, we are satisfied that limestone mining has been going on for centuries in the area and that it is an activity which is intertwined with the culture and the unique land holding and tenure system of the Nongtrai Village. On the facts of this case, we are satisfied with due diligence exercise undertaken by MoEF in the matter of forest diversion. Thus, our order herein is confined to the facts of this case.

Conclusion

32. Accordingly, we see no reason to interfere with the decision of MoEF granting site clearance dated 18.6.1999, EIA clearance dated 9.8.2001 read with revised environmental clearance dated 19.4.2010 and Stage-I forest clearance dated 22.4.2010. Accordingly, I.A. No. 1868 of 2007 preferred by M/s. Lafarge stands allowed with no order as to costs. Consequently, I.A. No. 2937 of 2010 preferred by SAC is

dismissed. The interim order passed by this Court on 5.2.2010 shall also stand vacated. All other I.As. shall stand disposed of.

Part II

Guidelines to be followed in future cases

(i) As stated in our order hereinabove, the words "environment" and "sustainable development" have various facets. At times in respect of a few of these facets data is not available. Care for environment is an ongoing process. Time has come for this Court to declare and we hereby declare that the National Forest Policy, 1988 which lays down far-reaching principles must necessarily govern the grant of permissions under Section 2 of the Forest (Conservation) Act, 1980 as the same provides the road map to ecological protection and improvement under the Environment (Protection) Act, 1986. The principles/ guidelines mentioned in the National Forest Policy, 1988 should be read as part of the provisions of the Environment (Protection) Act, 1986 read together with the Forest (Conservation) Act, 1980. This direction is required to be given because there is no machinery even today established for implementation of the said National Forest Policy, 1988 read with the Forest (Conservation) Act, 1980. Section 3 of the Environment (Protection) Act, 1986 confers a power coupled with duty and, thus, it is incumbent on the Central Government, as hereinafter indicated, to appoint an Appropriate Authority, preferably in the form of Regulator, at the State and at the Centre level for ensuring implementation of the National Forest Policy, 1988. The difference between a regulator and a court must be kept in mind. The court / tribunal is basically an authority

which reacts to a given situation brought to its notice whereas a regulator is a pro-active body with the power conferred upon it to frame statutory Rules and Regulations. The Regulatory mechanism warrants open discussion, public participation, circulation of the Draft Paper inviting suggestions. The basic objectives of the National Forest Policy, 1988 include positive and pro-active steps to be taken. These include maintenance of environmental stability through preservation, restoration of ecological balance that has been adversely disturbed by serious depletion of forest, conservation of natural heritage of the country by preserving the remaining natural forests with the vast variety of flora and fauna, checking soil erosion and denudation in the catchment areas, checking the extension of sand-dunes, increasing the forest/ tree cover in the country and encouraging efficient utilization of forest produce and maximizing substitution of wood. **Thus, we are of the view that under Section 3(3) of the Environment (Protection) Act, 1986, the Central Government should appoint a National Regulator for appraising projects, enforcing environmental conditions for approvals and to impose penalties on polluters.** There is one more reason for having a regulatory mechanism in place. Identification of an area as forest area is solely based on the Declaration to be filed by the User Agency (project proponent). The project proponent under the existing dispensation is required to undertake EIA by an expert body/ institution. In many cases, the court is not made aware of the terms of reference. In several cases, the court is not made aware of the study area undertaken by the expert body. Consequently, the MoEF/ State Government acts on the report (Rapid EIA) undertaken by the

Institutions who though accredited submit answers according to the Terms of Reference propounded by the project proponent. We do not wish to cast any doubt on the credibility of these Institutions. However, at times the court is faced with conflicting reports. Similarly, the government is also faced with a *fait accompli* kind situation which in the ultimate analysis leads to grant of ex facto clearance. To obviate these difficulties, we are of the view that a regulatory mechanism should be put in place and till the time such mechanism is put in place, the MoEF should prepare a Panel of Accredited Institutions from which alone the project proponent should obtain the Rapid EIA and that too on the Terms of Reference to be formulated by the MoEF.

(ii) In all future cases, the User Agency (project proponents) shall comply with the Office Memorandum dated 26.4.2011 issued by the MoEF which requires that all mining projects involving forests and for such non-mining projects which involve more than 40 hectares of forests, the project proponent shall submit the documents which have been enumerated in the said Memorandum.

(iii) If the project proponent makes a claim regarding status of the land being non-forest and if there is any doubt the site shall be inspected by the State Forest Department along with the Regional Office of MoEF to ascertain the status of forests, based on which the certificate in this regard be issued. In all such cases, it would be desirable for the representative of State Forest Department to assist the Expert Appraisal Committee.

(iv) At present, there are six regional offices in the country. This may be expanded to at least ten. At each regional office there may be a Standing Site

Inspection Committee which will take up the work of ascertaining the position of the land (namely whether it is forest land or not). In each Committee there may be one non-official member who is an expert in forestry. If it is found that forest land is involved, then forest clearance will have to be applied for first.

(v) Increase in the number of Regional Offices of the Ministry from six presently located at Shillong, Bhubaneswar, Lucknow, Chandigarh, Bhopal and Bangalore to at least ten by opening at least four new Regional Offices at the locations to be decided in consultation with the State/UT Governments to facilitate more frequent inspections and in-depth scrutiny and appraisal of the proposals.

(vi) Constitution of Regional Empowered Committee, under the Chairmanship of the concerned Chief Conservator of Forests (Central) and having Conservator of Forests (Central) and three non-official members to be selected from the eminent experts in forestry and allied disciplines as its members, at each of the Regional Offices of the MoEF, to facilitate detailed/in-depth scrutiny of the proposals involving diversion of forest area more than 5 hectares and up to 40 hectares and all proposals relating to mining and encroachments up to 40 hectares.

(vii) Creation and regular updating of a GIS based decision support database, tentatively containing *inter-alia* the district-wise details of the location and boundary of (i) each plot of land that may be defined as forest for the purpose of the Forest (Conservation) Act, 1980; (ii) the core, buffer and eco-sensitive zone of the protected areas constituted as per the provisions of the Wildlife

(Protection) Act, 1972; (iii) the important migratory corridors for wildlife; and (iv) the forest land diverted for non-forest purpose in the past in the district. The Survey of India toposheets in digital format, the forest cover maps prepared by the Forest Survey of India in preparation of the successive State of Forest Reports and the conditions stipulated in the approvals accorded under the Forest (Conservations) Act, 1980 for each case of diversion of forest land in the district will also be part of the proposed decision support database.

(viii) Orders to implement these may, after getting necessary approvals, be issued expeditiously.

(ix) The Office Memorandum dated 26.4.2011 is in continuation of an earlier Office Memorandum dated 31.03.2011. This earlier O.M. clearly delineates the order of priority required to be followed while seeking Environmental Clearance under the Environment Impact Assessment Notification 2006. It provides that in cases where environmental clearance is required for a project on forest land, the forest clearance shall be obtained before the grant of the environment clearance.

(x) In addition to the above, an Office Memorandum dated 26.04.2011 on Corporate Environmental Responsibility has also been issued by the MoEF. This O.M. lays down the need for PSUs and other Corporate entities to evolve a Corporate Environment Policy of their own to ensure greater compliance with the environmental and forestry clearance granted to them.

(xi) All minutes of proceedings before the Forest Advisory Committee in respect of the Forest (Conservation) Act, 1980 as well as the minutes of

proceedings of the Expert Appraisal Committee in respect of the Environment (Protection) Act, 1986 are regularly uploaded on the Ministry's website even before the final approval/decision of the Ministry for Environment and Forests is obtained. This has been done to ensure public accountability. This also includes environmental clearances given under the EIA Notification of 2006 issued under the Environment (Protection) Act, 1986. Henceforth, in addition to the above, all forest clearances given under the Forest (Conservation) Act, 1980 may now be uploaded on the Ministry's website.

(xii) Completion of the exercise undertaken by each State/UT Govt. in compliance of this Court's order dated 12.12.1996 wherein *inter-alia* each State/UT Government was directed to constitute an Expert Committee to identify the areas which are "forests" irrespective of whether they are so notified, recognized or classified under any law, and irrespective of the land of such "forest" and the areas which were earlier "forests" but stand degraded, denuded and cleared, culminating in preparation of Geo-referenced district forest-maps containing the details of the location and boundary of each plot of land that may be defined as "forest" for the purpose of the Forest (Conservation) Act, 1980.

(xiii) Incorporating appropriate safeguards in the Environment Clearance process to eliminate chance of the grant of Environment Clearance to projects involving diversion of forest land by considering such forest land as non-forest, a flow chart depicting, the tentative nature and manner of incorporating the proposed safeguards, to be finalized after consultation with the State/ UT Governments.

(xiv) The public consultation or public hearing as it is commonly known, is a mandatory requirement of the environment clearance process and provides an effective forum for any person aggrieved by any aspect of any project to register and seek redressal of his/her grievances;

(xv) The MoEF will prepare a comprehensive policy for inspection, verification and monitoring and the overall procedure relating to the grant of forest clearances and identification of forests in consultation with the States (given that forests fall under entry 17A of the Concurrent List).

33. Part II of our order gives guidelines to be followed by the Central Government, State Government and the various authorities under the Forest (Conservation) Act, 1980 and the Environment (Protection) Act, 1986. These guidelines are to be implemented in all future cases. These guidelines are required to be given so that *fait accompli* situations do not recur. We have issued these guidelines in the light of our experience in the last couple of years. These guidelines will operate in all future cases of environmental and forest clearances till a regulatory mechanism is put in place. On the implementation of these Guidelines, MoEF will file its compliance report within six months.

R.P. Interalocutary applications disposed of.

JALPAT RAI & ORS.
v.
STATE OF HARYANA
(Criminal Appeal No. 1736 of 2007)

JULY 06, 2011

[AFTAB ALAM AND R.M. LODHA, JJ.]

Penal Code, 1860: s.302 r/w s.149 and s.148 – Fire shots resulting in death of three persons – Conviction of A-2 u/s.302 and s.27 of Arms Act, 1959 and acquittal of the other accused (appellants) by trial court on the ground that the ocular testimony of prosecution witnesses was not reliable and was contradictory to the report of the ballistic expert – High Court held that the evidence of prosecution witnesses was cogent, convincing and truthful and convicted appellants u/s.148 and s.302 r/w s.149 – On appeal, held: Prosecution witnesses were closely related to the three deceased – Their evidence showed their long standing rivalry with accused party – Thus, prosecution witnesses were not only much interested in the prosecution case but they were inimically disposed towards the accused party as well – No other independent witness was examined although the incident occurred in a busy market area – At the place of occurrence, one wrist watch, one belcha and four pair of chappals were also found – There was no explanation at all by the prosecution with regard to these articles – These circumstances instead of lending any corroboration to the evidence of the three key witnesses, rather suggested that they had not come out with the true and complete disclosure of the incident – The evidence of prosecution witnesses was to the effect that there was indiscriminate firing by the accused party at the complainant party – However, at the place of occurrence, only three empties were found – Moreover, at the scene of occurrence, there were no marks of indiscriminate firing – The ballistic

report recorded that the crime bullets and the cartridge cases were fired by the pistol recovered from A-2 only – The testimony of prosecution witnesses about the role of appellants, thus, was not corroborated by medical and ballistic evidence – The deposition of prosecution witnesses suffered from significant improvements and omissions as well – Serious infirmities in the evidence of the eye-witnesses indicated that their evidence was not wholly true and it was unsafe to act on their evidence insofar as complicity of appellants was concerned – Appellants were entitled to benefit of doubt – The order of acquittal passed by trial court in favour of appellants is restored.

Appeal: Special leave petition – Held: Mere dismissal of SLP does not amount to acceptance of correctness of High Court decision – A-2 was convicted by trial court for the offence u/s.302 IPC but High Court altered his conviction from s.302 to s.302 IPC r.w. s.149 IPC and his SLP against that judgment was dismissed summarily – Dismissal of SLP summarily did not mean affirmance of the judgment of the High Court on merits – The order of Supreme Court in A-2's SLP is not an impediment in allowing the appeals of appellants once it is held that prosecution had failed to prove the complicity of the appellants beyond any reasonable doubt – It is incorrect to state that since A-2 had a right of appeal u/s.2 of the 1970 Act, therefore, the order of Supreme Court dismissing the SLP preferred by him was non-est – The case against A-2 stood on a different footing – The ballistic evidence was conclusive against him and there was no doubt about his involvement in the crime – Jjudgment of the High Court as regards the appellants set aside and judgment of acquittal passed in their favour by the trial court is restored – Supreme Court (enlargement of criminal appellate jurisdiction) Act, 1970 – s.2.

Witnesses: Interested witness – Evidentiary value of – Held: The evidence of eye-witnesses, irrespective of their

interestedness, kinship, standing or enmity with the accused, if found credible and of such a caliber as to be regarded as wholly reliable can be sufficient and enough to bring home the guilt of the accused.

The prosecution case was that on the fateful day, PW-1 and another person were sitting in their office. At that time, A-2, A-3, A-4 all sons of A-1 came near their office. They were all armed with firearms. PW-1 suspected their movement as he had previous business rivalry with A-2 and his family. After about 10-15 minutes, A-1 also came their on a motorcycle. He too was carrying firearm. Fearing danger, PW-1 telephoned his brother PW-4 who along with his nephews reached the office of PW-1 in about 10-15 minutes. The complainant party closed the office and while they were leaving for their homes, A-2 fired one shot from behind with a licensed pistol. PW-1 and his nephews ran towards A-2 to catch him but A-2 fired another shot from his pistol that hit 'Ch' on the left side of his chest. A-4 fired a shot from the pistol he was carrying which hit 'S' on the left side of his chest. A-3 and A-1 then started firing shots from their firearms. A-2 and A-4 repeated firing from their firearms. As a result of the shots fired by A-2 and A-4, PW-4 and 'P' received injuries. 'P', 'Ch', 'S' and PW-4 fell on the ground. A-5 gave the sword blow to PW-8. All the accused persons then fled from the spot. The injured were taken to hospital. On way to the hospital, 'Ch' and 'S' succumbed to the injuries and died. 'P' died 4 days after the incident.

The trial court convicted A-2 under Section 302 IPC and Section 27 of Arms Act, 1959. It however acquitted the appellants holding that the ocular testimony of PW-1, PW-4 and PW-8 was not reliable and was contradictory to the report of the ballistic expert. On appeal, the High Court held that the evidence of PW-1, PW-4 and PW-8 in totality was cogent, convincing and truthful. It allowed the

appeal of the State and convicted A1, A-3, A-4, A-5, A-6 under Section 148 and Section 302 r/w Section 149 IPC. A-5 was also convicted under Section 323 IPC.

A-1, A-3 to A-6 were the appellants in the instant appeals filed under Section 2 of the Supreme Court (enlargement of criminal appellate jurisdiction) Act, 1970. A-2 had filed special leave petition against conviction which was dismissed summarily by Supreme Court.

Allowing the appeals, the Court

HELD: 1.1. PW-1 and PW-4 were real brothers. PW-8 and the deceased were nephews of PW-1 and PW-4. The presence of PW-1, PW-4 and PW-8 at the time of incident, did not appear to be doubtful. The trial court's reasoning for doubting the presence of PW-1 at the place of occurrence is not convincing. Being transporter, the presence of PW-1 in his office at about 9.00 p.m. was not unnatural. Absence of any injury on his person would not render his presence doubtful. The presence of PW-4 and PW-8 at the time of incident also cannot be doubted. Both of them suffered injuries. Both, PW-4 and PW-8, were medically examined by PW-6. PW-4 was examined by PW-6 immediately after the incident. PW-8 was examined by PW-6 on the next day. The trial court doubted that the injury suffered by PW-4 was from the firearm but the evidence of the doctor (PW-19) showed that PW-4 received firearm injury in the incident. PW-19 deposed that PW-4 was operated upon for a firearm injury in the abdomen and the firearm was used from a close range. However, the presence of PW-1, PW-4 and PW-8 at the time of incident did not guarantee truthfulness. [Para 37] [1062-G-H; 1063-A-D]

1.2. The evidence of PW-1, PW-4 and PW-8 that PW-1 had a long standing rivalry with A-1 in connection with Truck Owners' Union. Their rivalry had led to many

criminal cases being filed against each other. PW-1 was prosecuted earlier for causing injuries to A-1 and others. About 20 days prior to the incident, an FIR was registered against PW-1 and his partner under Sections 323, 506, 148 and 454 IPC. In that incident, A-2 was an eye-witness. Two days later, PW-1 reported to the police against A-2, A-3, A-4 and A-5 by way of counter case but police did not take any action. A complaint was then lodged by PW-1 party against A-2, A-3, A-4 and A-5 in the Court of Additional Chief Judicial Magistrate. PW-1, PW-4 and PW-8 were, therefore, not only much interested in the prosecution case but they were inimically disposed towards the accused party as well. The deep rooted enmity and serious disputes between PW-1 on the one hand and A-1 and his sons on the other and their unflinching interest in the prosecution case necessitated consideration of the evidence of PW-1, PW-4 and PW-8 with care and caution. To find out intrinsic worth of these witnesses, it is appropriate to test their trustworthiness and credibility in light of the collateral and surrounding circumstances as well as the probabilities and in conjunction with all other facts brought out on record. There cannot be a rule of universal application that if the eye-witnesses to the incident are interested in prosecution case and/or are disposed inimically towards the accused persons, there should be corroboration to their evidence. The evidence of eye-witnesses, irrespective of their interestedness, kinship, standing or enmity with the accused, if found credible and of such a caliber as to be regarded as wholly reliable could be sufficient and enough to bring home the guilt of the accused. But it is reality in life, albeit unfortunate and sad, that human failing tends to exaggerate, over-implicate and distort the true version against the person/s with whom there is rivalry, hostility and enmity. Cases are not unknown where entire family is roped in due to enmity and simmering feelings although one or only few

members of that family may be involved in the crime. In the circumstances of the instant case, to obviate any chance of false implication due to enmity of the complainant party with the accused party and the interestedness of PW-1, PW-4 and PW-8 in the prosecution case, it is prudent to look for corroboration of their evidence by medical/ballistic evidence and seek adequate assurance from the collateral and surrounding circumstances before acting on their testimony. The lack of corroboration from medical and ballistic evidence and the circumstances brought out on record may ultimately persuade that in fact their evidence cannot be safely acted upon. [Paras 38, 39] [1063-F-H; 1064-A-H; 1065-A]

1.3. Besides PW-1, PW-4 and PW-8, who were closely related to the three deceased, no other independent witness was examined although the incident occurred in a busy market area. The place of occurrence was visited by the sub-inspector PW-20 in the same night after the incident. He found three two-wheelers and one Maruti car with broken glasses. The owners of these vehicles were not examined. At the place of occurrence, one wrist watch, one belcha and four pair of chappals were also found. There was no explanation at all by the prosecution with regard to these articles. Nothing came on record whether four pair of chappals belonged to the accused party or the complainant party or some other persons and whether wrist watch that was found at site was worn by one of the accused or one of the members of the complainant party or somebody else was not known. Then, the mystery remained about belcha that was found at site. These circumstances instead of lending any corroboration to the evidence of those three key witnesses, rather suggested that they have not come out with the true and complete disclosure of the incident. The evidence of PW-1, PW-4 and PW-8 was to the effect that there was indiscriminate firing by the accused party at the

complainant party. Four members of the accused party – A-1, A-2, A-3 and A-4 were armed with firearms. According to these witnesses, all of them fired shots from the firearms they were carrying. The first shot was fired by A-2 from the pistol he was carrying (although in the FIR it is recorded that A-2 was armed with revolver but this inconsistency is not very material). That shot did not hit anyone. A-2 then again fired shot that hit 'Ch'. A-4 fired a shot with pistol that hit Sunil. A-3 and A-1 fired shots from their guns and A-2 and A-4 also fired shots from the pistols causing injuries to 'P' and PW-4. However, at the place of occurrence, only three empties were found. Had the firing taken place in the manner deposed by PW-1, PW-4 and PW-8, obviously there should have been more empties at the place of occurrence. It is conjectural to assume, as was done by High Court, that the Investigating Officer was not able to recover more than three empties because the occurrence took place in 'chowk' and by the time he reached at the site, a lot of traffic must have passed there. Moreover, at the scene of occurrence, there were no marks of indiscriminate firing. [Paras 40, 41] [1065-B-H; 1066-A-C]

2. The medical evidence was clear and specific that the three deceased received one firearm injury each. The blackening and singeing injuries leave no manner of doubt that shots were fired at the deceased persons from a very close range. As a matter of fact, medical evidence is categorical to that effect. However, the ocular account given by PW-1, PW-4 and PW-8 did not indicate that. The ballistic report recorded unambiguously and unequivocally that the crime bullets and the cartridge cases were fired by the pistol stated to have been recovered from A-2 and no other firearm. The cartridge cases and the crime bullets have positively matched to 7.65 mm pistol no. 109033-2002. This pistol was licensed pistol of A-2 and was recovered from him in dismantled

condition with parts separated in three pieces. The ballistic evidence was clearly in conflict with the evidence of PW-1, PW-4 and PW-8 and shattered their evidence completely *vis-à-vis* the appellants. The testimony of PW-1, PW-4 and PW-8 about the role of appellants, thus, was not corroborated by medical and ballistic evidence. Their evidence also did not get support from the collateral circumstances that came on record. [Paras 42, 43] [1066-D-H; 1067-B]

3.1. The deposition of PW-1, PW-4 and PW-8 suffered from significant improvements and omissions as well. PW-1 deposed that he did not tell the police that A-3 had fired from his .12 bore licensed gun, A-1 had fired from .22 rifle of A-2 and A-4 had fired from .32 licensed pistol of A-3 but when he was confronted with portion A to A of his statement (Ex. DA) before police, it was found that it was so recorded. He testified that he had stated in his statement to the police that A-5 had caused injuries to PW-8 but when confronted with that statement, it was found that it was not so stated. PW-4 deposed that he had told the police that A-4 had fired at A-3 from his revolver but when confronted with that statement, it transpired that it was not so stated. He also deposed that he had told the police that A-5 had given a sword blow to PW-8 on his temple but when he was confronted with that statement, it was found that it was not so stated. PW-8 deposed that he had stated before the police that the shots fired by A-3 and A-1 from their guns did not hit anyone but when confronted with that statement, it transpired that he had not so stated. As regards arrival of A-5 at the place of occurrence, the evidence of PW-1 and PW-8 was not consistent. PW-1 has deposed that A-5 was also present with the other accused when the incident started; he was armed with sword and caused injuries with the sword to PW-8. PW-8, on the other hand, stated that A-5 descended on the scene of occurrence

after firing had started. [Paras 44, 45] [1067-C-H; 1068-A]

3.2. Serious infirmities in the evidence of the eye-witnesses (PW-1, PW-4 and PW-8) indicated that their evidence at any rate was not wholly true and it was unsafe to act on their evidence insofar as complicity of A-1, A-3, A-4, A-5 and A-6 is concerned. Brushing the impact of these infirmities aside , the High Court erroneously treated the evidence of PW-1, PW-4 and PW-8 cogent, convincing and truthful. All in all, the evidence of PW-1, PW-4 and PW-8 lacked in credibility and was not of sterling worth to prove the involvement of A-1, A-3, A-4, A-5 and A-6 in the crime beyond any reasonable doubt. As regards A-6, as a matter of fact, it was conceded by the counsel for the State that there was no reliable evidence to prove his involvement in the crime. The appellants were entitled to benefit of doubt. [Para 46] [1068-B-D]

4. Incidentally, two sons of A-1 were also shown as assailants in the FIR. In the investigation, their presence was not established; they were not charge-sheeted. PW-1, PW-4 and PW-8, however, in their deposition before the Court made an attempt to implicate them. Based on their deposition, the public prosecutor made an application under Section 319 of Cr.P.C. for summoning those two sons of A-1 but that application was eventually withdrawn. This by itself has not much bearing in the case. What it shows is that there has been attempt by PW-1, PW-4 and PW-8 right from the inception to rope in A-1 and all his sons in the incident irrespective of whether all of them were involved in the crime or not. [Para 47] [1068-E-G]

5. A-2 was convicted by the trial court for the offence under Section 302 IPC but the High Court altered his conviction from Section 302 to Section 302 IPC read with Section 149 IPC and his special leave petition (SLP)

against that judgment was dismissed summarily. The dismissal of SLP summarily did not mean affirmance of the judgment of the High Court on merits. Mere dismissal of SLP does not amount to acceptance of correctness of the High Court decision. The order of this Court in A-2's SLP is not an impediment in allowing these two appeals once it is held that prosecution has failed to prove the complicity of the appellants beyond any reasonable doubt. It is incorrect to state that the SLP preferred by A-2 was non-est since he had a right of appeal under Section 2 of the Supreme Court (enlargement of criminal appellate jurisdiction) Act, 1970 and, therefore, the order of this Court dismissing the SLP preferred by A-2 is also a non-est. The case against A-2 stands on a different footing. The ballistic evidence is conclusive against him and leaves no manner of doubt about his involvement in the crime. The judgment of the High Court as regards the appellants is set aside. The judgment of acquittal passed in their favour by the trial court is restored. [Paras 48-50] [1068-H; 1069-A-F]

Ghurey Lal v. State of Uttar Pradesh **(2008) 10 SCC 450: 2008 (11) SCR 499;** *Mahtab Singh and Anr.* v. *State of Uttar Pradesh* **(2009) 13 SCC 670: 2009 (5) SCR 848;** *Balakrushna Swain* v. *State of Orissa* **(1971) 3 SCC 192;** *Balak Ram* v. *State of U.P.* **(1975) 3 SCC 219: 1975 (1) SCR 753;** *Vijaybhai Bhanabhai Patel* v. *Navnitbhai Nathubhai Patel & Ors*. **(2004) 10 SCC 583;** *Darshan Singh v. State of Punjab & Anr.* **(2010) 2 SCC 333: 2010 (1) SCR 642;** *Khima Vikamshi and others* v. *State of Gujarat* **(2003) 9 SCC 420;** *Balwan Singh* v. *State of Haryana* **(2005) 11 SCC 245;** *Brijpal Singh* v. *State of M.P.* **(2003) 11 SCC 219;** *Mahendra Pratap Singh* v. *State of Uttar Pradesh.* **(2009) 11 SCC 334: 2009 (2) SCR 1033;** *U.P.* v. *Moti Ram and others* **(1990) 4 SCC 389: 1990 (2) SCR 939;** *Deepak Kumar* v. *Ravi Virmani & Anr.* **(2002) 2 SCC 737: 2002 (1) SCR 786;** *Asif Mamu* v. *State of Madhya Pradesh.* **(2008) 15 SCC 405;** *Harbans*

Singh v. *State of Uttar Pradesh and others* **(1982) 2 SCC 101: 1982 (3) SCR 235;** *A.R. Antulay* v. *R.S. Nayak and another* **(1988) 2 SCC 602: 1988 (1) Suppl. SCR 1;** *Raja Ram and Ors.* v. *State of M.P.* **(1994) 2 SCC 568: 1994 (2) SCR 114;** *Akhil Ali Jehangir Ali Sayyed* v. *State of Maharashtra* **(2003) 2 SCC 708;** *Shingara Singh* v. *State of Haryana & another* **(2003) 12 SCC 758 – referred to.**

Case Law Reference:

2008 (11) SCR 499	**referred to**	**Para 25, 29**
2009 (5) SCR 848	**referred to**	**Para 25**
(1971) 3 SCC 192	**referred to**	**Para 28**
1975 (1) SCR 753	**referred to**	**Para 28**
(2004) 10 SCC 583	**referred to**	**Para 28**
2010 (1) SCR 642	**referred to**	**Para 28, 29**
(2003) 9 SCC 420	**referred to**	**Para 30**
(2005) 11 SCC 245	**referred to**	**Para 30**
(2003) 11 SCC 219	**referred to**	**Para 30**
2009 (2) SCR 1033	**referred to**	**Para 30**
1990 (2) SCR 939	**referred to**	**Para 30**
2002 (1) SCR 786	**referred to**	**Para 30**
(2008) 15 SCC 405	**referred to**	**Para 30**
1982 (3) SCR 235	**referred to**	**Para 31**
1988 (1) Suppl. SCR 1	**referred to**	**Para 31**
1994 (2) SCR 114	**referred to**	**Para 31**
(2003) 2 SCC 708	**referred to**	**Para 31**
(2003) 12 SCC 758	**referred to**	**Para 31**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1736 of 2007.

From the Judgment & Order dated 20.9.2006 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 95-DBA.

WITH

Criminal Appeal No. 1306 of 2006.

Sushil Kumar, Sanjay Jain, Vinay Arora, Aditya Kumar, Anmol Thakral, Arun Bhardwaj, S.S. Shamshery (for Dr. Kailash Chand) for the Appellants.

June Chaudhari, Harikesh Singh, Tarjit Singh (for Kamal Mohan Gupta) for the Respondent.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. On October 2, 2002 two persons – Sunil and Chand – were shot dead and three persons – Pawan, Rohtas and Rakesh – got injured in the town of Jind (Haryana). One of the injured, Pawan died after three days. In connection with that incident, six persons—Jalpat Rai (A-1), Shyam Sunder (A-2), Satish Kumar (A-3), Purshotam (A-4), Harinder alias Kala (A-5) and Pawan (A-6) — were tried by the Additional Sessions Judge, Jind for the offences punishable under Section 148, Section 302 read with Section 149, Section 307 read with Section 149 and Section 323 read with Section 149 IPC. Four of them were also charged for the offence punishable under Section 27 of the Arms Act, 1959. The trial court vide its judgment dated November 20, 2004 convicted A-2 under Section 302 IPC and sentenced him to suffer life imprisonment and imposed a fine of Rs.25000/- with default stipulation. A-2 was also convicted for the offence under Section 27 of the Arms Act, 1959 and sentenced to undergo imprisonment for a term of one year with a fine of Rs.1000/- with default stipulation. The trial court acquitted A-1, A-3, A-4, A-5 and A-6 of all the charges.

2. Against the judgment of the trial court, two criminal appeals and one criminal revision came to be filed before the High Court of Punjab and Haryana. The State preferred appeal being Criminal Appeal No. 95-DBA of 2006 aggrieved by the acquittal of A-1, A-3, A-4, A-5 and A-6. The complainant party filed a criminal revision being Criminal Revision No. 578 of 2005 against the acquittal of the five accused and for enhancement of sentence. A-2 preferred criminal appeal being Criminal Appeal No. 42-DB of 2005 against his conviction.

3. The High Court heard all the three matters together and by a common judgment dated September 20, 2006; allowed the appeal of the State and convicted A-1, A-3, A-4, A-5 and A-6 under Section 148 and Section 302 read with Section 149 IPC. A-5 was also convicted under Section 323 IPC. All these five accused have been sentenced to undergo imprisonment for life. A fine of Rs. 10,000/- with default stipulation was also imposed on them. Insofar as A-2 is concerned, the High Court modified his conviction from Section 302 to Section 302 read with Section 149 IPC while maintaining the sentence awarded to him by the trial court. In light of the judgment in the appeal preferred by the State, the criminal revision preferred by the complainant party was dismissed.

4. A-1, A-3, A-4, A-5 and A-6 are the appellants in the two appeals before us filed under Section 2 of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 (for short, '1970 Act'). A-2 filed special leave petition against his conviction which came to be dismissed by this Court summarily.

5. The prosecution case in regard to the incident leading to the triple murder is this: On October 2, 2002 at about 9.00 p.m., Sewa Singh (PW-1) and one Subhash Gaba were sitting in their office (Nav Bharat Transport Company) situate at Phuara Bazar, Jind. At that time, A-2, A-3 and A-4, all sons of A-1, passed in front of their office and went towards Chamber Dharamshala. They were armed with firearms. PW-1 suspected

their movement as he had long standing truck owners' union rivalry with A-2 and his family. PW-1 came out of his office and saw that A-2 was talking with someone on mobile phone. After about 10/15 minutes, A-1 came there on a motorcycle. He, too, carried firearm with him and was accompanied by a boy. Sensing some danger from A-1, A-2, A-3 and A-4, PW-1 telephoned his brother Rohtas (PW-4) who along with his nephews Chand, Sunil, Pawan, Arun and Rakesh (PW-8) reached the office of PW-1 in about 10/15 minutes. PW-1 told his brother (PW-4) that A-1 and his sons had gathered nearby and might commit some mischief. On the advise of PW-4, the office was closed and PW-1, PW-4, their nephews and Subhash Gaba left for their homes. Hardly had they started that A-2 fired one shot from behind with a licensed pistol which he was carrying. PW-1 and his nephews ran towards A-2 to catch him but A-2 fired another shot from his pistol that hit Chand on the left side of his chest. A-4 fired a shot from the pistol he was carrying which hit Sunil on the left side of his chest. A-3 and A-1 then started firing shots from their guns. A-2 and A-4 repeated firing from their firearms. As a result of the shots fired by A-2 and A-4, PW-4 and Pawan received injuries. Pawan, Chand, Sunil and PW-4 fell on the ground. A-5 who was armed with sword gave the sword blow to PW-8. All the accused persons then fled from the spot.

6. After the firing, few persons gathered at the place of occurrence and took the injured persons—Chand, Sunil, Pawan and PW-4 to the General Hospital, Jind for treatment. On way to the hospital, Chand and Sunil succumbed to the injuries and died. Pawan and PW-4 were referred to PGI, Rohtak for further treatment. PW-1 had also informed the Control Room of the incident.

7. At about 11.30 p.m., the doctor on duty at General Hospital, Jind sent two rukkas (Ex. PP and Ex. PQ) to the Police Station City, Jind informing them that Sunil and Chand were brought dead while Pawan and PW-4 were brought injured. On

receipt of the two rukkas, Haricharan (PW-20) who was Sub-Inspector left the Police Station for General Hospital, Jind along with two constables. At the main gate of the General Hospital, PW-20 met PW-1 who gave his statement which was reduced into writing. Based on the statement of PW-1, the first information report was registered in the midnight at 12.30 a.m. (October 3, 2002) under Sections 302/307/148/149 IPC and the Arms Act.

8. PW-20 commenced investigation and visited the place of occurrence. The office of Nav Bharat Transport Company is adjacent to the Chamber Dharamshala situate in the busy market area which has shops, offices and hospitals. The Chamber Dharamshala has seven shops, four on the one side and three on the other. At the place of occurrence, PW-20 recovered one belcha, one sword, four pair of chappals, one Maruti car, one scooter, two Hero Honda motorcycles (one of which was without registration number), one wrist watch and three empties of used .32 calibre bullets. PW-20 also conducted inquest on the dead bodies of Chand and Sunil on October 3, 2002 before they were handed over for autopsy.

9. Dr. Kuldeep Singh Rana (PW-5), Medical Officer, General Hospital, Jind conducted the post-mortem examination on the dead body of Sunil on October 3, 2002 at 9.00 a.m. In the post-mortem report, he recorded as follows :

> "There is a penetrating entry wound 0.75 cm in diameter over the left side of chest, 2.5 cm below and slightly lateral to the left nipple. Margins are inverted, tattooing around the wound present in about 3-4 mm. surrounding the wound. Corresponding part of shirt torned.
>
> On dissection find that the bullet has followed the path starting with anterior chest wall, traversing the left anterior pleura, middle lob of left lung which was lacerated, then passing through the left ventricle of heart and coming out through the right ventricle posteriori and bullet found

> stucked in the muscles just lateral to sixth thoracic vertebrae of left side.
>
> 1.5 liter of dark clotted blood found in the mediastinal and pleural cavity."

In the opinion of PW-5, the cause of death of Sunil was due to shock and haemorrhage because of firearm injuries to vital organs. He opined that the injuries were ante mortem and sufficient to cause death in normal course of nature.

10. On the same day at about 9.30 a.m., PW-5 conducted post-mortem examination on the dead body of Chand. He found the following injury on the dead body of Chand:

> "There is a penetrating wound 0.75 cm in diameter on the left mid axillary line between 7/ 8 inter-costal space. Margins are inverted tattooing in 3-4 mm. area surrounding the wound.
>
> On dissection, path traversed by the bullet is as lateral of left chest wall to lateral left pleural cavity and left lung which is highly lacerated, then to right pleural cavity and right lung which was lacerated, then bullet found stucked in muscle of right lateral wall of chest at level of 7/ 8 inter-costal space or posterior border of axillary space."

In the opinion of PW-5, the cause of death of Chand was due to shock and haemorrhage because of firearm injury to vital organs.

11. Pawan was medically examined by Dr. Rajesh Gandhi (PW-6) on October 2, 2002 at about 10 p.m. as soon as he was brought to the General Hospital, Jind. On the person of Pawan, PW-6 found the following injury:

> "Deep penetrating wound on anterior surface of chest; 2cm medial to left nipple and 1 cm below nipple. Margins were inverted. Singeing is present……"

He advised X-ray and Surgeon's opinion.

12. PW-6 also examined PW-4 on October 2, 2002 at about 10.15 p.m. and found the following injury on his person:

"Deep penetrating wound is present on the Abdomen in the centre, 3 cm above the symphysis pubis. Margins are inverted. Blackening is present. Size : 1 x .5 c.m……"

13. PW-6 examined PW-8 on October 3, 2002 at about 3.40 p.m. and the following injury was found on his person.

"Lacerated wound on the right side of skull 6 cm above ear margin, placed vertically, size : 2 x 1 x muscle deep…….".

14. On October 5, 2002, the investigation of the case was entrusted to Inspector Wazir Singh (PW-23). He conducted further investigation. PW-23 sought to record the statements of PW-4 and injured Pawan but both were not fit to give statements. Pawan succumbed to injuries on October 6, 2002 and his statement could not be recorded.

15. The post-mortem examination on the dead body of Pawan was conducted by Dr. R.K. Nandal (PW-9) on October 6, 2002. At the time of post-mortem examination, he found the following injuries on the body of Pawan:

"1. A wound on front of Abdomen stitched with 16 stitches.

2. An oval punctured wound of size 1 x .75 cm. Blackening present : 5 cm lateral to mid sternum and 3 cm medio inferior to left nipple.

3. The bullet was directed downwards and inward piercing the structure left lung diaphragm and stomach and thereby lodged with anterior chest wall at the level of T 11 vertebra.

4. Two stitched wounds in the stomach.

5. Two stitched wounds on left side of chest and left iliac region for draining.

6. Haemo thorax and Haemo peritoneum present."

In his opinion, the cause of death of Pawan was firearm injury which had caused haemo peritoneum and haemo thorax thereby leading to shock.

16. The statement of PW-4 was recorded by PW-23 on October 8, 2002.

17. PW-23 arrested A-1 on October 14, 2002 while A-2 and A-3 were arrested on October 26, 2002. Based on the disclosure statement of A-2, PW-23 recovered one licensed pistol of .32 bore and one licensed rifle of .22 bore. In pursuance of the disclosure statement of A-3, one licensed pistol of .32 bore and one rifle of .12 bore were recovered by PW-23.

18. The bullets recovered from the dead bodies, the empties of bullets picked up by PW-20 from the place of occurrence, the firearms seized pursuant to disclosure statements and the clothes of dead persons were sent for forensic/ballistic examination by PW-23 on November 14, 2002 to the Forensic Science Laboratory Haryana, Madhuban (Karnal).

19. On completion of investigation, the challan was submitted against A-1, A-2, A-3, A-4, A-5 and A-6 in the Court of Chief Judicial Magistrate, Jind who, by his order dated January 7, 2003, committed them for trial by the Court of Sessions, Jind.

20. The Sessions Judge, Jind framed the charges against the six accused persons (A-1, A-2, A-3, A-4, A-5 and A-6) on April 18, 2003 as follows :

"That on 2.10.2002 at about 10 p.m., in the area of City Jind, you all the accused were members of an unlawful assembly, and did, in prosecution of the common object of such assembly, and at that time you were armed with deadly weapons and thereby committed an offence of rioting punishable under- Section 148 of the Indian Penal Code and within the cognizance of this court.

That, secondly, on the aforesaid date, time and place, you all the accused in prosecution of common object of such unlawful assembly, did commit murder by intentionally causing the death of Chand Singh, Sunil Kumar and Pawan Kumar, residents of Subhash Nagar, Jind, and thereby committed an offence punishable under Section 302 IPC read with Section 149 IPC and within the cognizance of this court.

That, thirdly, on the aforesaid date, time and place and in prosecution of common object of such unlawful assembly, you all the accused caused injuries to Rohtas with such intention or knowledge and under such circumstances that if by that act, you had caused the death of said Rohtas, you would have been guilty of murder and thereby committed an offence punishable under Section 307 IPC read with section 149 IPC and within the cognizance of this court.

That, fourthly, you accused Harender alias Kala, in prosecution of common object of your co-accused, namely, Jalpat Rai, Sham Sunder, Purshotam, Satish Kumar and Pawan Kumar, caused injuries to Subhash Gaba and Rakesh PWs and thereby you accused Harender alias Kala committed an offence punishable under-Section 323 IPC while the remaining accused, namely, Jalpat Rai, Sham Sunder, Purshotam, Satish Kumar and Pawan Kumar committed an offence punishable under Section 323 IPC read with section 149 IPC and within the cognizance of this court.

That, lastly, you accused Sham Sunder and Purshotam, on 2.10.2002, in the area of City Jind, used your respective licenced revolvers for unlawful purpose i.e. for committing the murder of Chand Singh, Sunil and Pawan Kumar and also for causing injuries to Rohtas complainant with the intention to commit his murder while you accused Jalpat Rai and Satish, on the aforesaid date, time and place, used your respective licenced guns for unlawful purpose i.e. for committing the murder of Chand Singh, Sunil and Pawan Kumar and also for causing gun shot injuries to Rohtas complainant with the intention to commit his murder and thereby you accused Sham Sunder, Purshotam, Jalpat Rai and Satish Kumar committed an offence punishable under Section 27 of the Indian Arms Act and within the cognizance of this court."

21. The prosecution in support of its case examined 23 witnesses in all . Three of these witnesses, PW-1, PW-4 and PW-8 were tendered as eye-witnesses to the occurrence. Inter-alia, Inquest Reports, Post-mortem Reports, Forensic Science Laboratory Examination Reports, Site Plans [rough plan prepared by IO and the other by draftsman) were got exhibited.

22. The statement of the accused persons was recorded under Section 313, Cr.P.C. The accused persons denied their involvement in the crime and stated that they have been falsely implicated.

23. The trial court, as indicated above, acquitted the present appellants and convicted A-2 under Section 302 IPC and Section 27 of Arms Act, 1959. The trial court, inter alia, held that the ocular testimony of PW-1, PW-4 and PW-8 was not reliable. It does not get corroborated from the medical evidence and their version is contradictory to the report of the ballistic expert. We intend to refer to the trial court's view about their evidence a little later.

24. The opinion of the High Court differed with that of the

trial court. The High Court held that the evidence of PW-1, PW-4 and PW-8 in totality was cogent, convincing and truthful.

25. Mr. Sushil Kumar, learned senior counsel representing A-1, A-3, A-4 and A-5 vehemently assailed the judgment of the High Court. He argued that the acquittal of the appellants by the trial court was based on proper appreciation of the entire evidence on record. The view taken by the trial court was a reasonable and possible view on consideration of the evidence in totality which the High Court ought not to have disturbed. He relied upon few decisions in this regard, particularly, *Ghurey Lal v. State of Uttar Pradesh*[1] and *Mahtab Singh and Anr.* v. *State of Uttar Pradesh*[2].

26. Learned senior counsel, while relying upon the decision in *Mahtab Singh*[2], also submitted that the first information report (FIR) was not only delayed but was also a suspect and doubtful document. Mr. Sushil Kumar submitted that PW-1 was not an eye-witness and pointed out various discrepancies in the testimony of PW-1 to buttress his argument that PW-1 was not present at the time of incident.

27. As regards the evidence of PW-4, learned senior counsel submitted that he had not disclosed anything to the doctor in the hospital. According to him, PW-4 did not suffer any injury in the incident. He contended that although PW-4 deposed that he was injured by a gunshot but he did not have a single pellet in his body; his clothes had no perforation. Learned senior counsel submitted that his statement was recorded on October 8, 2002 for the first time as, according to him, he was unconscious upto that date but the medical record showed otherwise.

28. Mr. Sushil Kumar, learned senior counsel was also critical about the deposition of PW-8. He submitted that PW-8 was an introduced witness. His presence is not stated in the

1. (2008) 10 SCC 450.
2. (2009) 13 SCC 670.

FIR. PW-8 does not get himself medically examined at Jind on the day of incident or at Rohtak but goes to a private doctor and tells him that he suffered injuries because he fell accidentally. He, thus, submitted that the evidence of PW-1, PW-4 and PW-8 was not reliable and trustworthy. In support of his submission, he cited *Balakrushna Swain* v. *State of Orissa*[3], *Balak Ram* v. *State of U.P.*[4], *Vijaybhai Bhanabhai Patel* v. *Navnitbhai Nathubhai Patel & Ors*.[5] and *Darshan Singh v. State of Punjab & Anr.*[6].

29. Learned senior counsel strenuously urged that the circumstantial evidence on record clearly disproves the prosecution case. No blood was found on the spot and there was absence of blo od on the clothes of the person who is said to have carried the injured. The ballistic evidence completely rules out complicity of the appellants. He relied upon the decisions of this Court in the cases of *Khima Vikamshi and others* v. *State of Gujarat*[7], *Balwan Singh* v. *State of Haryana*[8], *Brijpal Singh* v. *State of M.P.*[9], *Ghurey Lal*[1], *Mahendra Pratap Singh* v. *State of Uttar Pradesh*[10]. and *Darshan Singh*[6].

30. Learned senior counsel for the appellants also submitted that number of deaths does not matter in appreciation of evidence. According to him, the High Court was unnecessarily influenced by the fact that three murders in the same family had taken place resulting in erroneous appreciation of the evidence. In this regard, he cited *State of U.P.* v. *Moti Ram and others*[11], *Deepak Kumar* v. *Ravi Virmani*

3. (1971) 3 SCC 192.
4. (1975) 3 SCC 219.
5. (2004) 10 SCC 583.
6. (2010) 2 SCC 333.
7. (2003) 9 SCC 420.
8. (2005) 11 SCC 245.
9. (2003) 11 SCC 219.
10. (2009) 11 SCC 334.
11. (1990) 4 SCC 389.

& Anr[12]*. and Asif Mamu* v. *State of Madhya Pradesh*[13]*.*

31. It was also contended by Mr. Sushil Kumar that in the event of conviction of the appellants being set aside, A-2 may also be granted same relief although his SLP has been dismissed. He would contend that SLP filed by A-2 was non-est since he had a right of appeal under Section 2 of the 1970 Act and, therefore, the order of this Court dismissing his SLP is also non-est. In support of his contention, he referred to few decisions of this Court, namely, *Harbans Singh* v. *State of Uttar Pradesh and others*[14]*, A.R. Antulay* v. *R.S. Nayak and another*[15], *Raja Ram and Ors.* v. *State of M.P.*[16], *Deepak Kumar*[12], *Akhil Ali Jehangir Ali Sayyed* v. *State of Maharashtra*[17] and *Shingara Singh* v. *State of Haryana & another*[18].

32. Mr. Arun Bhardwaj, learned counsel for A-6 contended that A-6 has been falsely implicated in the incident. He referred to the evidence of PW-1 and submitted that not a word is stated by him about the involvement of A-6. He argued that the prosecution evidence does not establish the complicity of A-6 at all and the High Court was in error in reversing the judgment of acquittal as regards him.

33. Ms. June Chaudhari, learned senior counsel for the State opposed the submissions of the learned senior counsel and the learned counsel for the appellants with equal vehemence. She stoutly defended the judgment of the High Court and submitted that from the entire evidence let in by prosecution and considered by the High Court, it is apparent that the view taken by the High Court is the only possible view

12. (2002) 2 SCC 737.
13. (2008) 15 SCC 405.
14. (1982) 2 SCC 101.
15. (1988) 2 SCC 602.
16. (1994) 2 SCC 568.
17. (2003) 2 SCC 708.
18. (2003) 12 SCC 758.

and the High Court was fully justified in reversing the judgment of the trial court. She submitted that Section 149 IPC was integral part of the charge and the prosecution evidence establishes the unlawful assembly of which A-1, A-3, A-4 and A-5 were members along with A-2 and the three murders were committed in pursuance of its common object. She submitted that all the members of the unlawful assembly were armed with deadly weapons and their conviction by the High Court does not suffer from any legal or factual infirmity.

34. That Chand, Sunil and Pawan died homicidal death is neither in doubt nor in issue. The question that arises for our consideration is whether the High Court was justified in interfering with the order of acquittal passed in favour of the appellants by the trial court. Obviously, if the complicity of the appellants (A-1, A-3, A-4, A-5 and A-6) with the crime is established beyond any reasonable doubt, the view of the High Court would not call for any interference.

35. The two courts – High Court and the trial court — have divergence of opinion with regard to the evidence of eye witnesses. The trial court rejected the evidence of PW-1, PW-4 and PW-8 for the following reasons :

> "It is evident from a careful perusal of the evidence led by the prosecution that there is chequered history of unending hostility between the complainant party and the accused in connection with the affairs of the Truck Union. They are all transporters by profession. It seems that there was a brawl between accused Shyam Sunder and some members of the complainant party on that fateful evening. The medical evidence reveals that there was flame effect, blackening and tattooing at the entry wounds on all the three bodies meaning thereby that the shots had been fired from point-blank range. The recovery of the articles like Belcha and Sword at the spot goes to show that accused Shyam Sunder may have found himself in imminent danger and he resorted to firing from his licensed pistol thereby

claiming the lives of the three youngmen. Accused Shyam Sunder has not pleaded the right of private defence of person and property but he has pleaded false implication at the hands of the sworn enemies of the family. The circumstances of the case also do not warrant the extension of such concession to him. He had not suffered any serious injury in the incident and the claim for use of force in defence of person and property has to be completely excluded in this case. P.W. Rohtas did not suffer a firearm injury in the incident. Similarly, P.W. Rakesh had allegedly offered himself for medico legal examination to a private medical practitioner and he had told him that he had suffered the injuries in an accidental fall. It is also evident that complainant Sewa Singh may not have at all witnessed the occurrence but he offered to lodge the First Information Report after due deliberations and consultations. A story was concocted with intent to implicate all the male members of the family of accused Jalpat Rai. A last minute efforts was made to rope in his other two sons namely, Vinod and Sushil by moving an application under Section 319 of the Criminal Procedure Code which was eventually withdrawn by the learned Public Prosecutor on prevalence of better counsel upon him. All the three alleged eye witnesses have rendered highly contradictory versions and their evidence does not receive corroboration from the medical evidence and the ballistic expert's report. It shall be absolutely absurd to say that multiple firearms were used in the incident. All the three deaths were caused by the use of .32 bore licensed pistol (Exp. 22) owned by accused Shyam Sunder and this court has very valid reasons to believe that he had pressed the trigger each time. Let it be made absolutely clear here that it is not the case of the prosecution that the licensed firearm of accused Shyam Sunder had been taken away from him by any other accused or that it had been used for gunning down the three victims. It is the case of the prosecution that accused Shyam Sunder had triggered off

the incident by firing a shot from his pistol even as the complainant and his companions were walking away from him. It is also the case of the prosecution that the complainant and his companions turned about and rushed to nab accused Shyam Sunder but he fired a shot at Chand which hit him in the left flank and killed him. The same weapon was used for causing firearm injuries to deceased Sunil and deceased Pawan. Therefore, there should be no manner of doubt about the direct involvement of accused Shyam Sunder in the commission of the alleged crime."

36. On the other hand, the High Court was not convinced with the reasoning of the trial court and found the evidence of PW-1, PW-4 and PW-8 cogent, convincing and truthful. The High Court with regard to their evidence observed thus :

"…….The learned trial Court has misread and misinterpreted the evidence of the eye-witnesses and the doctors as already discussed above. Occurrence in this case had taken place on 2.10.2002 at 10 p.m. Statement of Sewa Singh PW-1 was recorded on 3.10.2002 at 12.30 a.m. and F.I.R. Ex. PV was recorded on 3.10.2002 at 12.50 a.m. The special report reached the safe hands of C.J.M., Jind on 3.10.2002 at 2.30 a.m. The name of the accused, the weapon of offence, the injuries inflicted, the name of the witnesses are given in detail in the F.I.R. This in fact, goes a long way in proving the case of the prosecution. The complainant party did not get any time to consult and confabulate with each other as to who to falsely implicate. The F.I.R. is prompt and gets corroboration from the other evidence on record."

37. PW-1 and PW-4 are real brothers. PW-8 and the deceased are nephews of PW-1 and PW-4. The presence of PW-1, PW-4 and PW-8 at the time of incident, does not appear to us to be doubtful. The trial court has doubted the presence of PW-1 at the place of occurrence but we find it difficult to

accept the reasoning of the trial court in this regard. Being transporter, the presence of PW-1 in his office at about 9.00 p.m. was not unnatural. It was his good luck that he did not receive any injury in the incident. We do not think that absence of any injury on his person renders his presence doubtful. The presence of PW-4 and PW-8 at the time of incident also cannot be doubted. Both of them suffered injuries. Both, PW-4 and PW-8, were medically examined by PW-6. PW-4 was examined by PW-6 immediately after the incident at about 10.15 p.m. on October 2, 2002. PW-8 was examined by PW-6 on the next day, i.e. October 3, 2002 in the afternoon. The trial court doubted that the injury suffered by PW-4 was from the firearm but the evidence of Dr. Paryesh Gupta (PW-19) leaves no manner of doubt that PW-4 received firearm injury in the incident. PW-19 deposed that PW-4 was operated upon for a firearm injury in the abdomen on October 3, 2002 in the emergency O.T. and the firearm was used from a close range. However, the presence of PW-1, PW-4 and PW-8 at the time of incident does not guarantee truthfulness. The question is whether their testimony is trustworthy and reliable insofar as complicity of the appellants with the crime is concerned or they have tried to involve the innocent along with the guilty.

38. Broadly, the evidence of PW-1, PW-4 and PW-8 has been indicated by us while narrating the prosecution case and by reason therefor, we need not reiterate the same except the salient features emerging therefrom. PW-1 had a long standing rivalry with A-1 in connection with Truck Owners' Union. Their rivalry has led to many criminal cases being filed against each other. PW-1 was prosecuted earlier for causing injuries to A-1 and others. On September 12, 2002, i.e., about 20 days prior to the date of present incident, an FIR was registered against PW-1 and his partner under Sections 323, 506, 148 and 454 IPC at Police Station City, Jind for causing injuries to one Shambir. In that incident, A-2 was an eye- witness. Two days later, on September 14, 2002, PW-1 reported to the police against A-2, A-3, A-4 and A-5 by way of counter case but

police did not take any action. A complaint was then lodged by PW-1 party against A-2, A-3, A-4 and A-5 in the Court of Additional Chief Judicial Magistrate, Jind.

39. PW-1, PW-4 and PW-8 are not only much interested in the prosecution case but they are inimically disposed towards the accused party as well. The deep rooted enmity and serious disputes between PW-1 on the one hand and A-1 and his sons on the other and their unflinching interest in the prosecution case necessitate that the evidence of PW-1, PW-4 and PW-8 is considered with care and caution. To find out intrinsic worth of these witnesses, it is appropriate to test their trustworthiness and credibility in light of the collateral and surrounding circumstances as well as the probabilities and in conjunction with all other facts brought out on record. There cannot be a rule of universal application that if the eye-witnesses to the incident are interested in prosecution case and/or are disposed inimically towards the accused persons, there should be corroboration to their evidence. The evidence of eye-witnesses, irrespective of their interestedness, kinship, standing or enmity with the accused, if found credible and of such a caliber as to be regarded as wholly reliable could be sufficient and enough to bring home the guilt of the accused. But it is reality in life, albeit unfortunate and sad, that human failing tends to exaggerate, over-implicate and distort the true version against the person/s with whom there is rivalry, hostility and enmity. Cases are not unknown where entire family is roped in due to enmity and simmering feelings although one or only few members of that family may be involved in the crime. In the circumstances of the present case, to obviate any chance of false implication due to enmity of the complainant party with the accused party and the interestedness of PW-1, PW-4 and PW-8 in the prosecution case, it is prudent to look for corroboration of their evidence by medical/ballistic evidence and seek adequate assurance from the collateral and surrounding circumstances before acting on their testimony. The lack of corroboration from medical and ballistic evidence and the

circumstances brought out on record may ultimately persuade that in fact their evidence cannot be safely acted upon.

40. Besides PW-1, PW-4 and PW-8, who are closely related to the three deceased, no other independent witness has been examined although the incident occurred in a busy market area. The place of occurrence was visited by PW-20 in the same night after the incident. He found three two-wheelers one bearing no. HR—31—A/5071, the second bearing no. RJ—13—M/7744 and the third without number lying there. One Maruti car bearing no. HR—20—D/8840 with broken glasses was also parked there. The owners of these vehicles have not been examined. At the place of occurrence, one HMT Quartz wrist watch with black strap, one belcha and four pair of chappals were also found. There is no explanation at all by the prosecution with regard to these articles. Nothing has come on record whether four pair of chappals belonged to the accused party or the complainant party or some other persons. Whether HMT Quartz wrist watch that was found at site was worn by one of the accused or one of the members of the complainant party or somebody else is not known. Then, the mystery remains about belcha that was found at site. These circumstances instead of lending any corroboration to the evidence of those three key witnesses, rather suggest that they have not come out with the true and complete disclosure of the incident.

41. If the evidence of PW-1, PW-4 and PW-8 is to be believed then there was indiscriminate firing by the accused party at the complainant party. PW-1 has said so in so many words. Four members of the accused party – A-1, A-2, A-3 and A-4 – were armed with firearms. According to these witnesses, all of them fired shots from the firearms they were carrying. The first shot was fired by A-2 from the pistol he was carrying (although in the FIR it is recorded that A-2 was armed with revolver but this inconsistency is not very material). That shot did not hit anyone. A-2 then again fired shot that hit Chand. A-

4 fired a shot with pistol that hit Sunil. A-3 and A-1 fired shots from their guns and A-2 and A-4 also fired shots from the pistols causing injuries to Pawan and PW-4. However, at the place of occurrence, only three empties were found. Had the firing taken place in the manner deposed by PW-1, PW-4 and PW-8, obviously there should have been more empties at the place of occurrence. It is conjectural to assume, as has been done by High Court, that the Investigating Officer was not able to recover more than three empties because the occurrence took place in 'chowk' and by the time he reached at the site, a lot of traffic must have passed there. Moreover, at the scene of occurrence, there were no marks of indiscriminate firing.

42. The medical evidence is clear and specific that the three deceased—Chand, Sunil and Pawan received one firearm injury each. The blackening and singeing injuries leave no manner of doubt that shots were fired at the deceased persons from a very close range. As a matter of fact, medical evidence is categorical to that effect. However, the ocular account given by PW-1, PW-4 and PW-8 does not indicate that.

43. The ballistic report records unambiguously and unequivocally that the crime bullets (BC/1 to BC/3) and the cartridge cases (C/1 to C/3) were fired by the pistol stated to have been recovered from A-2 and no other firearm. The cartridge cases and the crime bullets have positively matched to 7.65 mm pistol no. 109033-2002. This pistol is licensed pistol of A-2 and was recovered from him in dismantled condition with parts separated in three pieces. The Forensic Science Laboratory marked the above pistol 'W/2' for the identification purposes. Based on the examination carried out in the Laboratory, the result of analysis is recorded as under:

> "7.65 mm cartridge cases and bullets marked C/1 to C/3 and BC/1 to BC/3 respectively had been fired from 7.65 mm pistol marked W/2 and not from any other firearm even

of the same make and calibre because every firearm has got its own individual characteristic marks".

The ballistic evidence is clearly in conflict with the evidence of PW-1, PW-4 and PW-8 and shatters their evidence completely *vis-à-vis* the appellants. The testimony of PW-1, PW-4 and PW-8 about the role of appellants, thus, is not corroborated by medical and ballistic evidence. Their evidence also does not get support from the collateral circumstances that have come on record.

44. The deposition of PW-1, PW-4 and PW-8 suffers from significant improvements and omissions as well. PW-1 deposed that he did not tell the police that Satish had fired from his .12 bore licensed gun, Jalpat had fired from .22 rifle of Shyam Sunder and Purshotam had fired from .32 licensed pistol of Satish but when he was confronted with portion A to A of his statement (Ex. DA) before police, it was found that it was so recorded. He testified that he had stated in his statement to the police that A-5 had caused injuries to PW-8 but when confronted with that statement, it was found that it was not so stated. PW-4 deposed that he had told the police that A-4 had fired at Sunil from his revolver but when confronted with that statement, it transpired that it was not so stated. He also deposed that he had told the police that A-5 had given a sword blow to PW-8 on his temple but when he was confronted with that statement, it was found that it was not so stated. PW-8 deposed that he had stated before the police that the shots fired by A-3 and A-1 from their guns did not hit anyone but when confronted with that statement, it transpired that he has not so stated.

45. As regards arrival of A-5 at the place of occurrence, the evidence of PW-1 and PW-8 is not consistent. PW-1 has deposed that A-5 was also present with the other accused when the incident started; he was armed with sword and caused injuries with the sword to PW-8. PW-8, on the other hand, has

stated that A-5 descended on the scene of occurrence after firing had started.

46. We have indicated broadly some of the more serious infirmities in the evidence of the eye-witnesses (PW-1, PW-4 and PW-8) in order to indicate that their evidence at any rate is not wholly true and it is unsafe to act on their evidence insofar as complicity of A-1, A-3, A-4, A-5 and A-6 is concerned. Brushing the impact of these infirmities aside , the High Court erroneously treated the evidence of PW-1, PW-4 and PW-8 cogent, convincing and truthful. All in all, the evidence of PW-1, PW-4 and PW-8 lacks in credibility and is not of sterling worth to prove the involvement of A-1, A-3, A-4, A-5 and A-6 in the crime beyond any reasonable doubt. As regards A-6, as a matter of fact, it was conceded by the learned senior counsel for the State that there was no reliable evidence to prove his involvement in the crime. The appellants, in our opinion, are entitled to benefit of doubt.

47. Incidentally, Vinod and Sushil (sons of A-1) were also shown as assailants in the FIR. In the investigation, their presence was not established; they were not charge-sheeted. PW-1, PW-4 and PW-8, however, in their deposition before the Court made an attempt to implicate them. Based on their deposition, the public prosecutor made an application under Section 319 of Cr.P.C. for summoning those two sons of A-1 but that application was eventually withdrawn. This by itself has not much bearing in the case. What it shows is that there has been attempt by PW-1, PW-4 and PW-8 right from the inception to rope in A-1 and all his sons in the incident irrespective of whether all of them were involved in the crime or not.

48. We are not oblivious of the fact that A-2 was convicted by the trial court for the offence under Section 302 IPC but the High Court has altered his conviction from Section 302 to Section 302 IPC read with Section 149 IPC and his special leave petition (SLP) against that judgment has been dismissed

summarily. The dismissal of SLP summarily does not mean affirmance of the judgment of the High Court on merits. It has been repeatedly held by this Court that mere dismissal of SLP does not amount to acceptance of correctness of the High Court decision. The order of this Court in A-2's SLP is not an impediment in allowing these two appeals once it is held that prosecution has failed to prove the complicity of the appellants beyond any reasonable doubt.

49. We are not impressed by the argument of Mr. Sushil Kumar, learned senior counsel, that the SLP preferred by A-2 was non-est since he had a right of appeal under Section 2 of the 1970 Act and, therefore, the order of this Court dismissing the SLP preferred by A-2 is also a non-est. The judgments cited by learned Senior Counsel in support of his submission that in the event of appellants' conviction being set aside, A-2 is also entitled to the same relief although his SLP has been dismissed have no application to the facts of the present case. The case against A-2 stands on a different footing. The ballistic evidence is conclusive against him and leaves no manner of doubt about his involvement in the crime. We need not say any further in this regard as SLP preferred by A-2 against his conviction has already been dismissed.

50. In view of the above discussion, these two appeals are allowed and the judgment of the High Court as regards the present appellants is set aside. The judgment of acquittal passed in their favour by the trial court is restored. The appellants Jalpat Rai and Pawan are already on bail and accordingly their bail bonds are discharged. The other appellants, Satish Kumar, Purshotam and Harinder alias Kala be released forthwith, if not required in any other case.

D.G. Appeals allowed.

NOOR SK. BHAIKAN

v.

STATE OF MAHARASHTRA & ORS.

(Civil Appeal No.103 of 2002)

JULY 7, 2011

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

RESETTLEMENT ACT, 1965:

Allotment of agricultural land to landowner whose land had been acquired under Land Acquisition Act—Mistake in marking boundaries of land, and possession of wrong agricultural land handed over to allottee—Order of revenue authorities to allot alternative land—Held: The right of the allottee was to seek agricultural land under the provisions of the Re-Settlement Act and in so far as the right was protected, the allottee could not ask for a particular land—The grant of relief in relation to the alternate land cannot be faulted with inasmuch as if there was a mistake committed by the Revenue Authorities which was subsequently corrected, no advantage can be claimed by the allottee in that regard – The land which was not subject matter of the acquisition could not be treated as the land having been offered to the allottee validly and in accordance with law –The High Court has passed multifold directions in relation to granting of alternate land and conducting of an enquiry by the competent authority as well – Thus, the directions sufficiently take care of the interest of the allottee – As far as the claim of compensation by the allottee with regard to improvement made on the land is concerned, again it is for the Government to decide as per its policy—Land Acquisition Act, 1894.

The appellant was allotted and handed over possession of 1.61 hectares of land in Survey Nos. 78/2 (81 'are') and 182/2 (81 'are') by order dated 25.8.1982

pursuant to the certificate dated 3.8.1982 issued to him being a project affected person, as his house and agricultural lands had been acquired in terms of the Notification u/s 4 of the Land acquisition Act, 1897 in respect of which the award was made on 16.7.1979.

Later, on an application filed by respondent No.5 before the Collector pointing out that the land which was handed over to the appellant on 25.8.1982 was in fact from survey No. 78/1 and not from Survey No. 78/2 and the said land was not even the subject matter of the acquisition, the Collector directed an inquiry. Consequently, it was found that while handing over possession of 81 'ares' of land purportedly out of Survey No. 78/2, the Circle Inspector had committed an error in marking the boundaries, and possession of wrong agricultural land was handed over to the appellant on 23.8.1982. The Collector, therefore, by order dated 28.9.1987 directed that the area allotted to the appellant as per original order dated 23.8.1982 needed a change. Accordingly, the Tehsildar issued an order to the Circle Inspector on 5.10.1987 to take corrective steps. The appellant challenged the order in a writ petition before the High Court, which though did not accept the claim of the appellant, but while finally disposing of the writ petition directed the State Authorities *inter alia* to allot the alternative land in Survey No. 23/1 to the appellant. The order was challenged by the appellant in the instant appeal

Dismissing the appeal, the Court

HELD: 1.1. The right of the appellant was to seek agricultural land under the provisions of the Re-Settlement Act, 1965 and in so far as that right was protected, the appellant could not ask for a particular land. Some distance between the offered land and the

land which was in dispute has rightly not been considered to be a sufficient ground for requiring the Court to grant the relief prayed for. The grant of relief in relation to the alternate land cannot be faulted with inasmuch as if there was a mistake committed by the Revenue Authorities which was subsequently corrected, no advantage can be claimed by the appellant in that regard, particularly when the mistake was in relation to a root controversy. The land which was not subject matter of the acquisition could not be treated as the land having been offered to the appellant validly and in accordance with law. [para 5] [1078-C-F]

1.2. The High Court has passed multifold directions in relation to granting of alternate land and conducting of an enquiry by the competent authority as well. Thus, the directions sufficiently take care of the interest of the appellant. The judgment of the High Court is well-reasoned and even grants the appropriate relief to the appellant. The operative part of the judgment, not only gives appropriate relief to the appellant but also takes care of the correction of errors and enquiry into the relevant issues by the authorities concerned. There is hardly any scope for this Court to interfere with the findings recorded by the High Court. [para 5-6] [1078-G-H; 1079-A]

1.3. As far as the claim of compensation placed by the appellant with regard to the improvement made on the land is concerned, again it has been left for the Government to decide as per its policy. It is significant to note that for all this period, the appellant has been reaping benefits from the land to the exclusion of others. [para 6] [1079-A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 103 of 2002.

From the Judgment & Order dated 16.8.2001 of the High Court of Judicature of Bombay, Bench at Aurangabad in Writ Petition No. 1587 of 1987.

Shakil Ahmed Syed, Taiyab Khan, Firasat Ali for the Appellant.

Asha G. Nair, Himanshu Munshi for the Respondents.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. The present appeal is directed against the judgment dated 16th August, 2001 passed by the High Court of Judicature of Bombay Bench at Aurangabad, declining the reliefs prayed for by the appellant, however, still issuing certain directions. The appellant had approached the High Court with the averment that his property, i.e. a house at Pimpalwadi, Taluka Paithan and agricultural land in Survey No. 170 was acquired for Jaikwadi Project and he thus became a project affected person. The concerned authorities had issued a certificate dated 3rd August, 1982 to him in this regard. After issuance of the notification under Section 4 of the Land Acquisition Act, a declaration under Section 6 of the Act was published on 16th January, 1975 and the award was made on 16th July, 1979. Pursuant to the certificate issued in favour of the appellant, he was allotted 1.61 hectares of land from two different survey nos., namely, 78/2 (81 are) and 182/2 (81 are) as per the order dated 23rd August, 1982. Possession of this land was handed over to him. The appellant deposited the occupancy price and even the mutation was effected in his name. However, in the meanwhile, the respondent no.5, namely Sow. Shantabai Ramesh Savele filed a regular suit in the Civil Court for a declaration in relation to the land in question. This suit was dismissed by the trial court and so was the appeal against the said judgment and decree dated 25th October, 1985. During the pendency of the appeal before the High Court, the said respondent filed another suit in the Court at Ambad with an application for injunction, which was also dismissed.

While approaching the Collector, the landlady namely, Sow. Shantabai Ramesh Savele respondent no.5 submitted an application pointing out that the land which was handed over to the appellant herein on 25th August, 1982 was in fact survey no. 78/1 and not from survey no.78/2. That land was not even the subject matter of the acquisition which culminated into the Award dated 16th July, 1979. The Collector, therefore, directed an enquiry and based on the said enquiry report, passed an order dated 28th February, 1986 directing the Tehsildar, Ambad to take suitable action so as to put the original owner in possession of the subject agricultural land. The Tehsildar issued a notice for handing over the possession and for taking proceedings in furtherance thereto. The Collector subsequently verified the representation made by the landlady and found that while handing over possession of 81 ares of land purportedly out of survey no. 78/2, the Circle Inspector had committed an error in marking the boundaries and possession of wrong agricultural land was handed over to the appellant on 23rd August, 1982. The Collector being satisfied about the mistake committed by the Circle Inspector, by his order dated 28th September, 1987 ordered that the area allotted to the appellant as per the original order dated 23rd August, 1982 needed a change. The Tehsildar, in furtherance thereto, issued an order to the Circle Inspector on 5th October, 1987 to take corrective steps. The appellant herein approached the High Court challenging the notices and he averred that remained in possession of the land and even an interim order was passed in his favour in the said petition.

Before the High Court, the stand of the respondents was that at the time of handing over the possession to the appellant, a mistake was committed by the Circle Inspector and he did not mark the boundaries properly which called for the corrective proceedings and this mistake was pointed out by the Collector on 6th February, 1986 on an application by respondent no.5. However, the appellant in the rejoinder maintained his averments and the High Court while rejecting the contentions

raised on behalf of the appellant also rejected the arguments in equity that the appellant had acted as per the allotment order and he has been put in possession of the land in question by the Revenue authorities and now his position could not be altered and he could not be deprived of the agricultural land on which he has invested a good amount of funds for developing the same. Finally, the Court noticed that the appellant was put into possession of the land and he had enjoyed the fruits thereof. Thus, the plea of investment would not enhance the value of the submissions made on behalf of the appellant inasmuch as he could not continue to claim possession of the land which was not the subject matter of the acquisition itself. The claim of the appellant had not been accepted by the Court but still it gave alternative relief to the appellant. It will be appropriate for us to refer to the relevant paragraphs of the judgment finally disposing of the writ petition:

> "In the result, the Writ Petition is dismissed. Interim order is vacated. We direct the respondents Nos. 1 to 4 to take appropriate steps to allot the alternative land in Survey No. 23/1 of village mahakala in Ambad taluka to the petitioner. However, before the petitioner is put in possession of the alternative land, he shall hand over vacant and peaceful possession of the subject land, except the land on which Madarsa/Mosque is located. The respondent No.5 has agreed before us that she shall not in any manner cause any disturbance to the Madarsa/Mosque and this undertaking would be binding on her successors as well.
>
> We clarify that the allotment order and possession of the alternative land would be done first in favour of the petitioner and he shall submit of two weeks from today, to the effect that he shall hand over the possession of the subject land i.e. land in Survey Nos. 78/1 to the respondent no.5 as soon as the standing sugar cane crop is harvested or in any case before 31.12,2001 whichever is earlier.

> In view of the fact that the respondent No.5 has received compensation almost 20 years ago, we do not find any case to grant any other compensation for the part of the land on which Madarsa/Mosque is located and the boundaries of this land will be demarcated by Talathi of Ambad within the period of two weeks from today and in presence of the petitioner, respondent No.5 and the Member of the Village Panchayat concerned.
>
> At this stage, Sh. Kadar, learned counsel for the petitioner prayed for compensation for construction of house and irrigation facilities etc. We are not inclined to consider the same and it would be appropriate that the State government decides this issue in keeping with the policy that may be in vogue as at present.
>
> We are also satisfied that this is a fit case where an enquiry is required to be directed. We accordingly direct the Collector, Jalna to conduct an enquiry as to how the petitioner came to be allotted the land which was not subject matter of the acquisition proceedings and fix the responsibility on the officer/s concerned. Needless to mention, the collector shall proceed against such officer/s who are found guilty in the enquiry findings, as per the provisions of the Maharashtra Civil Services (Discipline and Appeal) Rules. We also clarify that our order will not come in the way of the collector to enquire into the issue of allotment of excess land to the petitioner and his family members pursuant to the project affected certificate dated 3.8.1982 and take appropriate steps as may be permissible in law.
>
> Rule discharged with no orders as to costs."

It appears that during the pendency of the present appeal, respondent no.5, died on 12th December, 2003. An application being IA No. 1/2004, was filed for bringing the legal representatives of the deceased-respondent no.5 on record. IA

No. 2/2004 was also filed for condonation of delay in filing the application for substitution of the legal representatives of the said deceased-respondent no.5. No reply has been filed till date and in any case, there is no opposition to these applications before us. Consequently, both these applications are allowed, subject to just exceptions. The delay in filing the application for substitution of the legal representatives is condoned and the representatives of the deceased-respondent no.5 as stated in paragraph 3 of the application are permitted to be brought on record. Liberty to file amended memo of parties is granted.

Another application was also filed being IA No. 4/2004 for placing on record a copy of the judgment passed by the Joint Civil Judge (Senior Division) at Jalna in RCS No. 332/2001 entitled *Rambhau S/o Narayan Rokde* v. *State of Maharashtra and Anr*. All that has been averred in this application is that the said suit has been decided by the Court on 16th April, 2002 and has a bearing on the issues involved in the present matter. Nothing has been averred as to how this judgment has any bearing on any of the issues involved in the present case as none of the parties to the present appeal are parties to that suit, except the State. It is in no way clear that the subject matter of that suit is the subject matter of the present appeal. In any case, the judgment was pronounced on 16th April, 2002 while the present application appears to have been filed in 2008. No steps were taken to bring this judgment on record of this Court for all that period. The counsel appearing for the applicant has not been able to show us the relevancy of that document to the present case. In fact, even in the application there is no averment as to the relevancy and necessity of the document to be brought on record by way of additional evidence in the present case and for it to be read in evidence. Thus, we do not consider it appropriate and in the interest of justice to allow this application. Consequently, the same is dismissed. However, we make it clear that the parties concerned will be at liberty to take steps against that judgment and decree as may be permissible to them in accordance with law.

Reverting back to the merits of the present case, the High Court did not accept the contentions raised on behalf of the appellant in regard to the reduction of the land in question. However, the Court granted relief to the appellant in relation to an alternative site. There is hardly any scope for this Court to interfere with the findings recorded by the High Court. While referring to the proposals which were made by the respondents during the pendency of the case, the High Court had concluded that the offer did not vest the appellant with any indefeasible right to enforce those options. The offers were made so as to find out what would be the best applicable to the facts and circumstances of the case and it could not be construed that they were absolute in nature. The right of the appellant was to seek agricultural land under the provisions of the Re-Settlement Act, 1965 and in so far as that right was protected, the appellant could not ask for a particular land. Some distance between the offered land and the land which was in dispute has rightly not been considered to be a sufficient ground for requiring the Court to grant the relief prayed for in its terms. The grant of relief in relation to the alternate land cannot be faulted with inasmuch as if there was a mistake committed by the Revenue Authorities which was subsequently corrected, no advantage can be claimed by the petitioner in that regard, particularly when the mistake was in relation to a root controversy. The land which was not subject matter of the acquisition could not be treated as the land having been offered to the appellant validly and in accordance with law.

The High Court has passed multifold directions in relation to granting of alternate land and conducting of an enquiry by the competent authority as well. Thus, the directions sufficiently take care of the interest of the appellant. The judgment of the High Court is well-reasoned and even grants the appropriate relief to the appellant. In fact, we fail to understand the necessity for the appellant to file the present appeal. The operative part of the judgment, which we have afore-reproduced, not only gives appropriate relief to the appellant but also takes care of

the correction of errors and enquiry into the relevant issues by the concerned authorities. As far as the claim of compensation placed by the appellant is concerned, again it has been left for the Government to decide as per its policy. One fact which cannot be lost sight of by this Court is that for all this period, the appellant has been reaping benefits from the land to the exclusion of others.

In view of the fact that none of the counsel appearing for the parties could confirm whether the directions issued by the Court have been implemented in their entirety or not, and if so, what is the stage of such implementation. In these circumstances, while dismissing the present appeal as being without any merit, we issue specific directions to the respondents and all authorities concerned that the action in furtherance to the directions issued by the High Court, if not already completed, should be completed as expeditiously as possible and the compliance thereto reported to the High Court without any further delay.

The appeal is dismissed, however, without any order as to costs.

R.P. Appeal dismissed.

OM PRAKASH

v.

STATE OF HARYANA

(Criminal Appeal No. 421 of 2007)

JULY 7, 2011

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

Penal Code, 1860:

s.376(2)(g) – Gang rape – Allegation that accused-J kidnapped prosecutrix at knife point and brought her to the house of the appellant – Accused-J talked secretly with the appellant whereafter appellant provided space and cot to the accused-J – Appellant slept in the same room near the door to guard against the entry of any other person as well as to prevent the prosecutrix from going out – Thereafter accused-J raped prosecutrix – Prosecutrix cried for help but appellant did not come to her rescue – Conviction of accused-J and appellant u/s.376(2)(g) – Challenged by appellant – Held: There was no doubt that accused raped the prosecutrix – In the entire episode, no role was attributed to the appellant – There was no prior plan or meeting of minds between the appellant and accused-J to either kidnap or to rape the prosecutrix – Intention to kidnap and commit rape was, therefore, the intention of accused-J alone – Collective reading of the evidence showed that the role of the appellant was limited to wrongfully confining the prosecutrix and not rendering help when asked for – The prosecution did not produce any evidence either directly or at least by circumstantial evidence to show that the factum of kidnapping as well as intent to commit a rape was known to the appellant – Conviction of appellant u/s.376(2)(g) set aside – However, his conviction u/s.368 is maintained.

s.376(2)(g) – Essential ingredients – Held: Where a

woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of s.376(2)(g) – Act of gang rape has to be in furtherance of their common intention before the deeming fiction of law can be enforced against the accused – It may not be necessary for the prosecution to adduce evidence of a completed act of rape by each one of the accused – The provision embodies a principle of joint liability and the essence of that liability is existence of common intention – Common intention pre-supposes prior concert as there must be meeting of minds, which may be determined from the conduct of the offenders which is revealed during the course of action.

***FIR**: Rape of young girl – Delay in lodging FIR – Effect on prosecution case – Held: A young girl who underwent the trauma of rape is likely to be reluctant in describing those events to anybody including her family members – In the instant case, the moment she told her parents, the report was lodged with the police without any delay – Since reasonable explanation was rendered by the prosecution, delay would not prove fatal to the case of the prosecution.*

***Evidence**: Contradictions in the statements of the prosecution witnesses – Held: Every small discrepancy or minor contradiction which may erupt in the statements of a witness because of lapse of time, keeping in view the educational and other background of the witness, cannot be treated as fatal to the case of the prosecution – The court must examine the statement in its entirety, correct perspective and in light of the attendant circumstances brought on record by the prosecution.*

According to the prosecution, on 2th January, 1994, when the prosecutrix aged about 14 years went out of the house to throw rubbish, accused-J caught hold of her and at knife point took her away on a cycle across a

distance of 15-20 Km. to the house of the appellant at Gulab Nagar. Accused-J talked secretly with the appellant to arrange space and a cot. Thereafter accused-J had intercourse with the prosecutrix twice after threatening her on knife point. The appellant did not come to her rescue when she cried for help. He slept in the same room near the door to guard against the entry of any other person as well as to prevent the prosecutrix from going out. The next day accused-J dropped her at the house of her brother-in-law (PW-7). PW-7 came to the house of the prosecutrix the next day and informed PW-6, the father of the prosecutrix that on previous day, accused-J had taken the prosecutrix and in the morning dropped her back at his house. PW-6 brought back the prosecutrix. She did not tell anything to PW-6 at that time, however, after 2-3 days, she narrated the entire incident. PW-6 lodged the report on 6th January, 1994. The trial court convicted accused-J under Sections 363, 366, 376(2)(g), IPC and the appellant under Sections 368 and 376(2)(g), IPC. The High Court affirmed the same. Against the order of the High Court, the appellant alone filed the instant appeal.

Disposing of the appeal, the Court

HELD: 1. The prosecutrix clearly stated that the appellant did not directly or indirectly participate in the act of rape. It was not stated by the prosecutrix that she either overheard or was even certain as to what both of them discussed within that short duration. Statement of PW6 was primarily based upon what was narrated to him by the prosecutrix so was the statement of PW7. They had no personal knowledge about the event and role, if any, played by the appellant. The entire material evidence related to the medical evidence of accused-J for performing the sexual intercourse and that of the prosecutrix that she was subjected to sexual intercourse.

It was in no way even suggestive of the role, if any, which was played by the appellant. There was no doubt that accused-J raped the prosecutrix. As far as the appellant was concerned, according to the prosecutrix, he did not come to her help when she tried out to him and thus the appellant wrongly ensured her confinement in the room where accused-J subjected her to the assault of rape. In this entire episode no role was attributed to the appellant. Even according to PW7, accused-J alone came to drop her at his place. [Para 6] [1089-D-H; 1090-A]

2. There was some delay in lodging the FIR but that delay was well explained. A young girl who underwent the trauma of rape was likely to be reluctant in describing those events to anybody including her family members. The moment she told her parents, the report was lodged with the police without any delay. Once a reasonable explanation is rendered by the prosecution then mere delay in lodging of a first information report would not necessarily prove fatal to the case of the prosecution. [Para 8] [1091-C-D]

3. The appellant could not bring to notice any material contradictions in the statements of the prosecution witnesses. Every small discrepancy or minor contradiction which may erupt in the statements of a witness because of lapse of time, keeping in view the educational and other background of the witness, cannot be treated as fatal to the case of the prosecution. The court must examine the statement in its entirety, correct perspective and in light of the attendant circumstances brought on record by the prosecution. The High Court in its judgment did not discuss whether the ingredients of Section 376(2)(g) of the IPC are satisfied in the instant case. [Paras 9, 10] [1091-C-F]

4. A plain reading of Section 376(2)(g) with Explanation 1 thereto showes that where a woman is

raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of Section 376(2)(g) of the IPC. In other words, the act of gang rape has to be in furtherance of their common intention before the deeming fiction of law can be enforced against the accused. It may not be necessary for the prosecution to adduce evidence of a completed act of rape by each one of the accused. The provision embodies a principle of joint liability and the essence of that liability is existence of common intention. The common intention pre-supposes prior concert as there must be meeting of minds, which may be determined from the conduct of the offenders which is revealed during the course of action. [Para 11] [1093-C-H; 1094-A]

Ashok Kumar v. State of Haryana **(2003) 2 SCC 143;** *Bhupinder Sharma v. State of Himachal Pradesh* **(2003) 8 SCC 551: 2003 (4) Suppl. SCR 792;** *Pardeep Kumar v. Union Administration, Chandigarh* **(2006) 10 SCC 608: 2006 (4) Suppl. SCR 594;** *Priya Patel v. State of M.P.* **(2006) 6 SCC 263: 2006 (3) Suppl. SCR 456 – relied on.**

5. In the case in hand, the prosecutrix was not gang-raped. The intention to kidnap and commit rape or subject her to sexual assault was the intention of accused-J alone. There was no prior plan or meeting of minds between the appellant and accused-J to either kidnap or to rape the prosecutrix. A collective reading of the evidence would show that the role of the appellant was limited to wrongfully confining the prosecutrix and not rendering help when asked for. However, it would have been an entirely different situation if the prosecutrix had stated in her statement that the appellant was told by accused-J about her alleged kidnapping and his intention to rape her, during the short conversation that they are

stated to have had before entering the room. It is clear from her statement that she did not even claim that she overheard the conversation. As per the evidence of the prosecution, the room where the prosecutrix was raped belonged to the uncle of the appellant who had died. Except the statement of DW1, no other defence was led by the appellant to prove that he was innocent or was falsely implicated. Though DW1 made a vague statement that on the date of occurrence, no girl had come to that room, that statement cannot be said to be truthful and it did not inspire confidence. Thus, it was not possible for the Court to draw an adverse inference against the appellant when the prosecution was not able to lead any definite evidence in that regard. There is no evidence that there was a common concert or common intention or meeting of minds prior to commission of the offence between the two accused. The judgment of the trial court convicting the accused under Section 376(2)(g) of the IPC is set aside and he is acquitted of the said charge. However, his conviction under Section 368 of the IPC and the sentence awarded by the High Court is maintained. [Paras 13, 17] [1096-B-G; 1097-E-G; 1098-B-D]

Smt. Saroj Kumari v. The State of U.P. **(1973) 3 SCC 669 – relied on.**

Case Law Reference:

(2003) 2 SCC 143	**relied on**	**Para 11**
2003 (4) Suppl. SCR 792	**relied on**	**Para 11**
2006 (4) Suppl. SCR 594	**relied on**	**Paras 12, 13**
2006 (3) Suppl. SCR 456	**relied on**	**Para 12**
(1973) 3 SCC 669	**relied on**	**Para 15**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 421 of 2007.

From the Judgment & Order dated 9.8.2005 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 119-SB of 1996.

Suresh Chandra Tripathy for the Appellant.

Rajeev Gaur Naseem, Kamal Mohan Gupta for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR J. 1. The two accused Om Prakash (hereinafter referred as `the appellant') and Jai Prakash were committed to the Court of Additional Sessions Judge at Jagadhri vide order dated 30th September, 1994 to face trial in the case of Jai Prakash under Sections 363, 366 and 376(2)(g) of the Indian Penal Code, 1860 (in short the `IPC') and in the case of appellant under Sections 368 and 376(2)(g) IPC. Both these accused pleaded not guilty to the charge and faced trial. The prosecution - examined as many as nine witnesses to bring home the guilt of the accused in response to the questions posed by the Court disclosing incriminating evidence against the accused under Section 313 of the Code of Criminal Procedure, 1973 (in short the 'Code'). The appellant denied the incident and stated that he had never known either Jai Prakash or the prosecutrix. Jai Prakash took the stand that he used to visit the house of one Bhagwan Dass and there was enmity between Bhagwan Dass and the father of the prosecutrix. Fufa of the prosecutrix, Jeet Ram, was posted at the Yamuna Nagar police station and because of personal animosity, he has been falsely implicated. The trial court vide a detailed judgment dated 30th January, 1996 recorded a finding that all the essential ingredients constituting offence for which the accused were charged were fully proved and subsequently convicted both the accused of the said offences. After hearing them on the quantum of sentence and noticing the antecedents and the family background of the accused, the trial

court took a lenient view and sentenced Jai Prakash to undergo rigorous imprisonment for five years under Section 363 of the IPC and to pay a fine of Rs.250/- and in default of payment of fine, to undergo further rigorous imprisonment for four months. The Court also convicted him under Section 376 (2)(g) IPC with a sentence of rigorous imprisonment for ten years and fine of Rs.500/- and in default of payment of fine to undergo further rigorous imprisonment for six months. However, the Court awarded sentence of five years rigorous imprisonment to appellant under Section 368 IPC and a fine of Rs.250/- and in default of payment of fine to further undergo rigorous imprisonment for four months and/or for the offence under Section 376(2)(g) of the IPC awarded him R.I. for seven years and fine of Rs.500/- and to further undergo, in the event of default of payment of fine, four months R.I. Dissatisfied with the judgment of the trial court, Jai Prakash and the appellant preferred separate appeals before the High Court of Punjab and Haryana at Chandigarh. The same were dismissed and the judgment of conviction and order of sentence as awarded by the trial court, was upheld by the High Court vide its well reasoned judgment dated 9th August, 2005. Against this judgment of the High Court, the appellant alone has filed the present appeal.

2. Learned counsel appearing for the appellant, while challenging the judgment of the High Court before this Court, has contended that there was an inordinate delay in lodging the FIR, the appellant had been falsely implicated in the case and he had no role to play whatsoever either in the alleged kidnapping of the prosecutrix or in raping her. According to him, even if the entire evidence is read in its correct perspective, the appellant would be entitled to the benefit of doubt and consequent acquittal. It is also contended that the basic ingredients of Section 376 (2)(g) IPC are not satisfied in the present case.

3. In order to examine the merit of these contentions, it will be important for us to notice the case of the prosecution in brief.

4. Complainant Ram Pal (PW-6) is a resident of House No. 115 in Vijay Colony and is a labourer in paper mill, Yamunanagar. He has five daughters and one son aged about three years. On the evening of 2nd January, 1994, one of his daughters the prosecutrix, aged about 14 years, went out of the house to throw rubbish but she did not return. The complainant searched for her but she could not be traced. On 3rd January, 1994, his son-in-law Bali Ram (PW-7) came from Village Topra and told him that Jai Prakash had taken the prosecutrix on his cycle the previous night and then dropped her to Bali Ram's House that morning. After receiving this information he brought his daughter from the village Topra; she did not tell anything to the complainant at that time but after 2-3 days, she narrated the entire incident. She informed that she had been taken away by Jai Prakash accused at knife point and he raped her in the house of the appellant in his presence. Ram Pal (PW6), father of the prosecutrix lodged the report with the police on 6th January, 1994. Thereafter, as already noticed, Jai Prakash and the appellant were tried by the court of competent jurisdiction and convicted. In terms of the statement of the prosecutrix, Jai Prakash, accused threatened to kill her if she did not accompany him. She was taken on his cycle to Gulab Nagar after crossing the railway line. He took her to the house of the appellant and talked secretly with him to arrange space and a cot. Both the accused slept in the same room in which she was raped. It has also come in evidence that Jai Prakash had intercourse with her twice after threatening her with a knife and the appellant did not come to her rescue despite her cries for help. The appellant slept in that very room near the door to guard against entry of any other person as well as to prevent her from going out. Jai Prakash threatened to kill the prosecutrix with his knife if she raised alarm and at about 3-4 A.M., Jai Prakash-accused took her away to village Topra on cycle and left her at the house of her brother in law namely Bali Ram.

5. Dr. V.K. Sharma (PW8) had stated before the Court that he had examined Jai Prakash on 17th January, 1994 and in

his opinion, he was capable of performing intercourse and this fact is proved by his report (Ex.PG).

6. Dr. Neeru Ohri (PW2) had medically examined the prosecutrix on 6th January, 1994 and had opined that the girl had been subjected to coitus. Besides medical experts and the investigating officer, there are three material witnesses-the prosecutrix (PW5), Ram Pal (PW6) and Bali Ram (PW7). All these witnesses have stated what they were told by the prosecutrix. Thus, the basic foundation for either acquittal or holding the accused guilty primarily depends upon the statement of these witnesses. According to her, the appellant met Jai Prakash after he had taken her away at a knife point to Gulab Nagar and there they had talked for some time and then the appellant had provided a cot and space to Jai Prakash. It is not the statement of the prosecutrix that she either over heard or was even certain as to what both of them discussed within that short duration. She has clearly stated that the appellant did not directly or indirectly participate in the act of rape. We are not concerned with the offence committed by Jai Prakash in the present appeal. Statement of PW6 is primarily based upon what was narrated to him by the prosecutrix so is the statement of PW7. They have no personal knowledge about the event and role, if any, played by the appellant. The entire material evidence would relate to the medical evidence of Jai Prakash for performing the sexual intercourse and that of the prosecutrix that she was subjected to sexual inter course. It is in no way even suggestive of the role, if any, which has been played by the appellant. There can hardly be any doubt that Jai Prakash raped the prosecutrix. As far as the appellant is concerned, according to the prosecutrix, he did not come to her help when she tried out to him and thus the appellant wrongly ensured her confinement in the room where Jai Prakash subjected her to the assault of rape. To put in a nutshell the prosecutrix was threatened at knife point and taken away on the pillion rider on a cycle across a distance of 15 to 20 km, raped and then dropped to her brother in law-Bali Ram's house

the next morning. In this entire episode no role is attributed to the appellant. Even according to Bali Ram (PW7), Jai Prakash alone came to drop her at his place. In the words of the prosecutrix " I asked Om Parkash accused to some (sic) to my help but he did not pay any heed. Om Parkash accused has slept in that very room. So that he may guard the entry of any other persons and so may guard my going out...."

7. This is the precise role, in the words of the prosecutrix, which is attributable to the appellant. Even if we take the statement of the prosecutrix as gospel truth, nothing more can be attributed to the appellant. Of course, Gandhi Prasad (DW1), the defence witness stated that he had been a tenant in Moti Ram's house in Gulab Nagar since five years. His room was situated towards the eastern side of the house and Moti Ram and his family were residing in the opposite room. Moti Ram had since died. The appellant was stated to be the nephew of Moti Ram but neither the owner of the house nor a tenant. The appellant was married, he denied that any girl ever came to those premises. The statement of DW1 does not really advance the case of the defence but the effect of the matter remains that the appellant was stated to be neither the owner nor tenant of the premises in question. Be that as it may, DW1's statement cannot be given greater weightage than the statement of the prosecutrix. It is not even the statement of DW 1 that he was there on that particular day. He has only stated that in January, 1994, he was in his room which obviously does not inspire confidence as it cannot be inferred that he was staying in the room the entire month, day in and day out. His statement was that no girl came to those premises on 2nd January, 1994. He does not even say that for the entire day and night of 2nd January, 1994, he was present in the house. For the above reasons and even otherwise, DW1 appears to be an interested witness being a friend of the appellant as he is staying in the same premises and would be interested in protecting the appellant.

8. There is some delay in lodging the FIR but that delay has been well explained. A young girl who has undergone the trauma of rape is likely to be reluctant in describing those events to any body including her family members. The moment she told her parents, the report was lodged with the police without any delay. Once a reasonable explanation is rendered by the prosecution then mere delay in lodging of a first information report would not necessarily prove fatal to the case of the prosecution.

9. The learned counsel appearing for the appellant has hardly been able to bring to our notice any material contradictions in the statements of the prosecution witnesses. Every small discrepancy or minor contradiction which may erupt in the statements of a witness because of lapse of time, keeping in view the educational and other background of the witness, cannot be treated as fatal to the case of the prosecution. The court must examine the statement in its entirety, correct perspective and in light of the attendant circumstances brought on record by the prosecution.

10. The High Court in its judgment has not discussed whether the ingredients of Section 376(2)(g) of the IPC are satisfied in the present case. It will be useful to refer the provisions of Section 376(2) of the IPC at this stage which read as under:

"376(1) xxx xxx

(2) Whoever,-

(a) being a police officer commits rape-

(i) within the limits of the police station to which he is appointed; or

(ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or

(iii) on a woman in his custody or in the custody of a police officer subordinate to him; or

(b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or

(c) being on the management or on the staff of a jail, remand - home or other place of custody established by or under any law for the time being in force or of a women' s or children' s institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or

(d) being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or

(e) commits rape on a woman knowing her to be pregnant; or

(f) commits rape on a woman when she is under twelve years of age; or

(g) commits gang rape, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine: Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years

Explanation 1. Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section.

Explanation 2.- "women's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or a widows' home or by any other name, which is established and maintained for the reception and care of women or children.

Explanation 3.-" hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation."

11. A plain reading of Section 376(2)(g) with Explanation I thereto shows that where a woman is raped by one or more of a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of Section 376 (2)(g) of the IPC. In other words, the act of gang rape has to be in furtherance of their common intention before the deeming fiction of law can be enforced against the accused. This Court in the case of *Ashok Kumar v. State of Haryana,* (2003) 2 SCC -143 had occasion to dwell on Explanation 1 to Section 376(2) (g), IPC while examining whether the appellant Ashok Kumar could be convicted under the same because at the crucial time, he happened to be in the house of the co-accused Anil Kumar in whose case the judgment of conviction under Section 376(2)(g) had attained finality. The Court observed that the prosecution must adduce evidence to show that more than one accused has acted in concert and in such an event, if rape had been committed by even one of the accused all will be guilty irrespective of the fact that she has not been raped by all of them. Therefore, it may not be necessary for the prosecution to adduce evidence of a completed act of rape by each one of the accused. The provision embodies a principle of joint liability and the essence of that liability is existence of common intention. That common intention pre-supposes prior concert as there must be meeting of minds, which may be determined from the conduct of the offenders which is revealed during the course

of action. After examining the circumstances relied upon by the prosecution to indicate concert, the Court in *Ashok Kumar* (supra) concluded that mere presence of the appellant could not establish that he had shared a common intention with the co-accused to rape the prosecutrix. A similar view was taken in the case of *Bhupinder Sharma v. State of Himachal Pradesh* [(2003) 8 SCC 551] in which the court held as under:

"14. In cases of gang rape the proof of completed act of rape by each accused on the victim is not required. The statutory intention in introducing Explanation 1 in relation to Section 376(2)(g) appears to have been done with a view to effectively deal with the growing menace of gang rape. In such circumstances, it is not necessary that the prosecution should adduce clinching proof of a completed act of rape by each one of the accused on the victim or on each one of the victims where there are more than one in order to find the accused guilty of gang rape and convict them under Section 376 IPC."

12. Another Bench of this Court in the case of *Pardeep Kumar v. Union Administration, Chandigarh,* [(2006) 10 SCC 608] after noticing the judgment of this Court in the case of *Ashok Kumar* (supra), *Bhupinder Sharma* (supra) and *Priya Patel v. State of M.P.* [(2006) 6 SCC 263], while elaborating the ingredients of the offence under Section 376(2)(g) of the I.P.C. stated the law as follows:

"10. To bring the offence of rape within the purview of Section 376(2)(g) IPC, read with Explanation 1 to this section, it is necessary for the prosecution to prove:

(i) that more than one person had acted in concert with the common intention to commit rape on the victim;

(ii) that more that one accused had acted in concert in commission of crime of rape with pre-arranged plan, prior meeting of mind and with element of participation in

action. Common intention would be action in concert in pre-arranged plan or a plan formed suddenly at the time of commission of offence which is reflected by the element of participation in action or by the proof of the fact of inaction when the action would be necessary. The prosecution would be required to prove pre-meeting of minds of the accused persons prior to commission of offence of rape by substantial evidence or by circumstantial evidence; and

(iii) that in furtherance of such common intention one or more persons of the group actually committed offence of rape on victim or victims. Prosecution is not required to prove actual commission of rape by each and every accused forming group.

11. On proof of common intention of the group of persons which would be of more than one, to commit the offence of rape, actual act of rape by even one individual forming group, would fasten the guilt on other members of the group, although he or they have not committed rape on the victim or victims.

12. It is settled law that the common intention or the intention of the individual concerned in furtherance of the common intention could be proved either from direct evidence or by inference from the acts or attending circumstances of the case and conduct of the parties. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances."

13. It must be noticed that in the case of *Pardeep Kumar* (supra), the Court stated the above principles but acquitted the accused. According to the statement of the prosecutrix in that case, the accused had reached the premises after commission of the offence, though he had consumed liquor with the persons

who had actually raped the prosecutrix. The Court came to the conclusion that there was no common intention or prior concert to commit the offence of gang rape as mere presence would not be sufficient to find the appellant guilty by taking aid of Explanation I. The present case is slightly similar to the case of *Pardeep Kumar* (supra), of course, it is not in any way identical on facts. In the case in hand, the prosecutrix had not been gang-raped, as alleged by the prosecution, and she had travelled all the way, i.e. nearly 15-20 kms on a cycle. Thus, the intention to kidnap and commit rape or subject her to sexual assault was the intention of Jai Prakash alone. There was no prior plan or meeting of minds between the appellant and the Jai Prakash to either kidnap or to rape the prosecutrix. As per the statement of the prosecutrix, the appellant had provided a room to both Jai Prakash and the prosecutrix and remained there to see that she does not go out or that nobody comes in. The crucial question in this entire sequence of events is whether Jai Prakash told the appellant that he had kidnapped the prosecutrix or that the prosecutrix was known to him and had accompanied him of her own accord. There is no direct evidence in this regard. A collective reading of the evidence would show that the role of the appellant is limited to wrongfully confining the prosecutrix and not rendering help when asked for.

14. However, it would have been an entirely different situation if the prosecutrix had stated in her statement that the appellant had been told by Jai Prakash about her alleged kidnapping and his intention to rape her, during the short conversation that they are stated to have had before entering the room. It is clear from her statement that she does not even claim that she overheard the conversation. Thus, it may not be possible for the Court to draw an adverse inference against the appellant when the prosecution has not been able to lead any definite evidence in that regard.

15. In the case of *Smt. Saroj Kumari v. The State of U.P.*

[(1973) 3 SCC 669], this Court while explaining the constituents of an offence under Section 368 of the IPC clearly held that when the person in question has been kidnapped, the accused knew that the said person had been kidnapped and the accused having such knowledge, wrongfully conceals or confines the person concerned then the ingredients of Section 368 of the IPC are said to be satisfied. The prosecution evidence and particularly the statement of the prosecutrix shows that the act of kidnapping with the intention to rape and actual commission of rape of the prosecutrix were completed by Jai Prakash himself. The appellant had rendered the help of providing a room but there is nothing on the record, including the statement of the prosecutrix, to show that she overheard Jai Prakash telling the appellant that he had kidnapped her and/or that the appellant had any knowledge of the fact that she had been kidnapped. The possibility of the appellant being informed by the Jai Prakash that she had come of her own will and had travelled a long distance of 15-20 km without protest does not appear to be unreasonable. As noticed, according to the prosecutrix, it was under threat but the prosecution was expected to produce evidence to show that the factum of kidnapping as well as intent to commit a rape was known to the appellant either directly or at least by circumstantial evidence. As per the evidence of the prosecution, the room where the prosecutrix was raped belonged to one Sh. Moti Ram, the uncle of the appellant who had died. Except the statement of DW1, no other defence had been led by the appellant to prove that he is innocent or has been falsely implicated. Though DW1 had made a vague statement that on the date of occurrence, no girl had come to that room, that statement cannot be said to be truthful and it does not inspire confidence.

16. Even in the cases where the statement of prosecutrix is accepted as truthful, it is expected of the prosecution to show some basic evidence of common intention or concert prior to commission of the offence. In the present case, it is an

undisputed fact that Jai Prakash alone at the knife point had taken away the prosecutrix across a distance of more than 15 km and it is only after he reached Gulab Nagar that he met the appellant. Except providing a space and cot and helping the accused in wrongfully detaining the prosecutrix, no further act or common intention is attributable. There is no evidence that there was a common concert or common intention or meeting of minds prior to commission of the offence between the two accused.

17. For the reasons afore-recorded, we partially accept the present appeal. The judgment of the trial court convicting the accused under Section 376(2)(g) of the IPC is set aside and he is acquitted of the said charge. However, his conviction under Section 368 of the IPC and the sentence awarded by the High Court is maintained. Therefore, the accused shall undergo rigorous imprisonment for five years with fine of Rs. 5000/-, in default of payment of fine to undergo rigorous imprisonment for four months.

The appeal is accordingly disposed of.

D.G. Appeal disposed of.

STATE OF RAJASTHAN TH. SECY.HOME DEPT.
v.
ABDUL MANNAN & ANR.
(Criminal Appeal No. 29 of 2008)

JULY 07, 2011

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

Penal Code, 1860:

ss. 302/149,148, 324/149 and 449 – Communal violence – Prosecution case that out of the mob of 50 to 60 persons, 8 to 10 persons armed with weapons forcibly entered the house of complainant and inflicted injuries to two victims and the complainant – Victims succumbed to their injuries in the hospital – Three eye-witnesses to the incident – Complainant, an injured witness – Trial court convicted and sentenced accused 'AM', 'A' and 'AZ' under Sections 302/149, 148, 324/149 and 449 – However, the High Court acquitted the accused – On appeal held: There was establishment of a complete chain of events and clear identification of the persons assailing the deceased – Medical evidence corroborates the ocular evidence – Cumulative effect of the ocular evidence and documentary evidence shows that the prosecution has been able to establish its case beyond reasonable doubt – Some discrepancies or some variation in minor details of the incident are immaterial – It is established that more than five person constituted an unlawful assembly and in furtherance to their common object and intent, assaulted and caused injuries to vital parts of the bodies of the deceased, ultimately resulting in their death – High Court did not appropriately appreciate the material witness – Thus, the order of acquittal passed by the High Court is perverse and is set aside, and that of the trial court restored.

s. 149 – Common Object – Inference of – When – Explained.

Code of Criminal Procedure, 1973 – s. 378 – Appeal against acquittal – Scope of interference by Supreme Court – General principles – Explained – On facts, order of acquittal cannot be sustained since it is based on some contradiction in the statements of the witnesses while completely ignoring the entire case of the prosecution particularly when prosecution has been able to prove its case beyond reasonable doubt.

According to the prosecution on the fateful day, out of the mob of 50-60 persons, 8 to 10 persons forcibly entered the house of complainant. These persons were armed with knife, pharsi, sword and lathies. They inflicted injuries to 'GN', 'HN' and the complainant. 'GN' and 'HN' were taken to the hospital and they succumbed to the injuries. PW-5 'KL', PW-7 'BA' and PW-4 'MM' witnessed the occurrence. FIR was registered. Investigation was carried out. The prosecution examined seven witnesses including three eye-witnesses. The trial court acquitted 'H' and 'M' and other two. However, convicted 'AM', 'A' and 'AZ' under Sections 302/149, 148, 324/149 and 449 IPC and sentenced them accordingly. The High Court acquitted all the accused. Therefore, the appellant-State filed the instant appeals.

Allowing the appeals, the Court

HELD: 1. The instant case is a fit case for interference in the judgment of acquittal recorded by the High Court. The judgment of the High Court is set aside and that of the trial court is restored. The finding of guilt and the quantum of punishment awarded by the trial court is concurred with. [Para 23] [1128-C]

2.1. Against an order of acquittal, an appeal by the

State is maintainable to this Court only with the leave of the Court. On the contrary, if the judgment of acquittal passed by the trial court is set aside by the High Court, and the accused is sentenced to death, or life imprisonment, or imprisonment of more than 10 years, then the right of appeal of the accused is treated as an absolute right subject to the provisions of Articles 134 (1) (a) and 134 (1) (b) of the Constitution of India and Section 379 of the Code of Criminal Procedure, 1973. In light of this, it is obvious that appeal against acquittal is considered on slightly different parameters compared to an ordinary appeal preferred to this Court. When an accused is acquitted of a criminal charge, a right vests in him to be a free citizen and this Court is very cautious in taking away that right. The presumption of innocence of the accused is further strengthened by the fact of acquittal of the accused under our criminal jurisprudence. The courts have held that if two views are possible on the evidence adduced in the case, then the one favourable to the accused, may be adopted by the Court. However, this principle must be applied keeping in view the facts and circumstances of a case and the thumb rule is whether the prosecution has proved its case beyond reasonable doubt. If the prosecution has succeeded in discharging its onus, and the error in appreciation of evidence is apparent on the face of the record then the Court can interfere in the judgment of acquittal to ensure that the ends of justice are met. This is the linchpin around which the administration of criminal justice revolves. It is a settled principle of criminal jurisprudence that the burden of proof lies on the prosecution and it has to prove a charge beyond reasonable doubt. The presumption of innocence and the right to fair trail are twin safeguards available to the accused under our criminal justice system but once the prosecution has proved its case and the evidence led by the prosecution, in conjunction with the chain of events as are stated to

have occurred, if, points irresistibly to the conclusion that accused is guilty then the Court can interfere even with the judgment of acquittal. The judgment of acquittal might be based upon misappreciation of evidence or apparent violation of settled canons of criminal jurisprudence. [Para 9] [1114-C-H; 1115-A-C]

2.2. Emphasizing that expressions like 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc are not intended to curtail the extensive powers of an appellate court in an appeal against acquittal, the court stated that such phraseologies are more in the nature of 'flourishes of language' to emphasize the reluctance of an appellate court to interfere with the acquittal. Thus, where it is possible to take only one view i.e. the prosecution evidence points to the guilt of the accused and the judgment is on the face of it perverse, then the Court may interfere with an order of acquittal. [Para 12] [1118-A-C]

State of Madhya Pradesh v. Bacchudas **(2007) 9 SCC 135: 2007 (1)SCR 671;** *State of Kerala and Anr. v. C.P. Rao* decided by S.C. **on16.05.2011;** *Sanwat Singh and Ors. v. State of Rajasthan* **AIR 1961 SC 715;** *Suman Sood v. State of Rajasthan* **(2007) 5 SCC 634: 2007 (6) SCR 499;** *Chandrappa v.* State of Karnataka **(2007) 4 SCC 415: 2007 (2) SCR 630 – referred to.**

3.1. Three eye-witnesses PWs.4, 5 and 7 were found to be truthful and reliable witnesses by the trial court whereas those very witnesses were held to be untrustworthy witnesses by the High Court. Though the High Court made a reference to the injuries inflicted upon the body of the deceased as detailed by PW2-doctor in his report, there is no discussion in his statement, in regard to nature of injuries inflicted and the weapon used for inflicting such injuries. There is also no discussion in

the judgment of the High Court on the comparative evaluation of medical evidence, ocular evidence and the documentary evidence produced by the prosecution on record. These are certainly material evidence which have either been completely ignored, or not appropriately appreciated by the High Court which renders the judgment of the High Court perverse, and provides strong reasons for this Court to interfere with the judgment of acquittal. Thus, the order of acquittal can hardly be sustained where it is based just on some contradiction in the statements while completely ignoring the entire case of the prosecution particularly when the prosecution has been able to prove its case beyond reasonable doubt. [Para 13] [1118-D-H; 1119-A-B]

3.2. PW2, who was posted as SMO at medical centre, had conducted the postmortem on the body of both the deceased persons. The injuries on the body of the deceased 'HN' aged 70 years and 'GN' aged 72 years were recorded by PW2 in his report. [Para 13] [1119-B-C]

3.3. PW 6-Investigating Officer was the SHO of police Station. According to him, he was busy in maintaining law and order situation when he received the information that assailants had entered the house of one 'GN' and had beaten those inside; and that the latter had been taken to the hospital. PW7, complainant who is the most material witness of the prosecution, had made the report to PW6. He is the injured witness. He stated that a mob of 50-60 persons had come towards that area shouting, "*Maro! Maro*!". He went inside his house and closed the door but in a short while stones were thrown at the house. Some members of the mob started pushing the door and eventually broke the door and PW7 ran away for safety. 'A', 'M' 'H', and J' came inside and some other persons who he could not identify started assaulting 'GN' and 'H' with lathi and *pharsi* which he witnessed from his room. According to PW7, the injuries were caused on the head. He came out of his room and tried to save them, and in the process, he also suffered injuries. In the meantime, the police siren blew and upon hearing the same, these persons ran away. The witness correctly identified 'AZ' and 'A' in court and stated that these persons had caused injuries to the deceased. PW 7 referred to the place of occurrence, preparation of site plan and medical report by the doctor, he admitted his signature on all these documents. It appears from the record that during recording of statement of PW 7, the public prosecutor sought permission to declare the witness hostile. Without declaring him hostile, the Court had permitted him to be cross-examined by the public prosecutor. This related to the fact that after hearing part of Exh. P-9, the witness stated that after identifying the accused, he had stated the name of the accused as 'AM' to the police. He then stated that 'AM' was also there, however he could not identify him definitely. At that stage, he was declared hostile. Cross examination of this witness by the public prosecutor as well as by the defence counsel did not have an adverse impact on the main case of the prosecution. In his cross examination, he said that he had forgotten and therefore, he had stated that he did not go to the police station for lodging the report. In fact he wrote the report in his own hand. According to him, the persons who had assaulted him were the same persons who had assaulted his father and uncle. He also tried to wriggle out of his earlier statement that he could identify the accused. It needs to be noticed that his statement, which was recorded in the Court was completely in consonance with the case of the prosecution but when he appeared in the Court for further cross-examination, he tried to wriggle out of his main statement. Thus, it is not very difficult to understand the variation in his statement resulting in the further cross examination. This entire evidence has to be read along with the statement of the Investigating Officer.

Establishment of a complete chain of events and clear identification of the persons assailing the deceased lead to the irresistible conclusion that the prosecution has been able to bring home the guilt of the accused. Undoubtedly, emphasis on the second half of the statement of PW7 cannot completely demolish the case of the prosecution which otherwise stands proved by the statements of PW4, PW5, PW6 and PW2. [Para 16] [1122-A-H; 1123-A-E]

3.4. The strain on PW 7 due to the incident cannot be ruled out inasmuch as he had lost his father, uncle and was himself injured. All the basic facts that supported the case of the prosecution were stated by him when the case was adjourned for further cross-examination when he made a statement at variance with his earlier statement in Court as well as his statement recorded under Section 161 Cr.P.C. Exh. P2 was not a document written by the police but was written in his own hand and duly signed by him which he admitted even in his statement in court. The statements made by PW 7 fully aids the case of the prosecution and his statement was recorded on the adjourned date before the trial court which is at variance cannot be treated as gospel truth. In fact the bare reading of the statement clearly shows this fact. Even if the statement of PW7 is excluded from consideration, then identity of the accused is still fully established by the statements of PW3, PW4, PW5 and PW6. There is no reason, whatsoever advanced, as to why PW4 and PW5 (neighbours of the deceased) who are otherwise independent witnesses, and the doctor would involve the accused falsely. There is no animosity between the parties, and in fact according to these witnesses, they knew the accused particularly 'AZ', 'A' and 'AM' for quite some time. There is no reason for the court to hold that PWs 4 and 5 are not trustworthy. Their statements describe the occurrence in its proper course

and are compelling evidence of the same. It is not appropriate to discard their statements as not inspiring confidence. The statement of these witnesses must be appreciated in the proper perspective. It was an incident involving a mob but only few persons had entered the house of the deceased, out of which 7 to 8 persons could be identified including the three accused as having inflicted injuries on the body of the deceased and were duly identified by the prosecution witnesses. The injury on the head duly finds corroboration from the statement of the doctor. It is not a case where the medical evidence does not support or corroborate the ocular evidence. Some discrepancies or some variations in minor details of the incident would not demolish the case of the prosecution unless it affects the core of the prosecution case. Unless the discrepancy in the statement of witness or the entire statement of the witness is such that it erodes the credibility of the witness himself, it may not be appropriate for the court to completely discard such evidence. The core of the prosecution case is that when the mob came, PWs 4 and 5 ran to their houses, locked their doors, went to the roof of the houses which were adjacent to the house of the deceased and watched some members of the mob, of whom they could identify a few, assault the deceased. This statement clearly shows the trustworthiness of these witnesses as they have stated that there were some other persons whom they could not identify. However, both these witnesses and complainant clearly identified the persons who had entered and assaulted the deceased persons. Though PW 7 fully supported the case of the prosecution that he was also assaulted by these persons, he did speak in a different voice the next day before the court. Thus, the cumulative effect of the ocular evidence and documentary evidence is that the prosecution has been able to establish its case beyond reasonable doubt. [Paras 17 and 18] [1123-F-H; 1124-A-H; 1125-A-C]

3.5. In the instant case, out of the mob of 50-60 persons only 7 to 10 persons had broken the door of the house and some of them had climbed the wall to enter the house of the deceased. These persons had raised the slogan '*maro! maro*!' and thereafter, had inflicted the injuries upon the body of the deceased. The common intention could even develop at the spur of the moment when the three accused, as duly identified, were actively inflicting injuries on the body of the deceased. They, therefore, not only caused injuries to the vital body parts of the deceased, including head injury, but kept on inflicting injuries even after the deceased had fallen to the ground. The efforts of the complainant to save them were in vain and he himself suffered certain injuries. Thus, it has been established that more than five persons constituted an unlawful assembly and in furtherance to their common object and intent, assaulted and caused injuries to vital parts of the bodies of the deceased, ultimately resulting in their death. Therefore, there is no merit in the contention of the accused that there was no common object to commit murder and the trial court applied the law correctly. [Para 20] [1127-A-E]

Shivalingappa Kallayanappa v. *State of Karnataka* **(1994) Supp 3 SCC 235 – distinguished.**

State of U.P. v. *Mohd. Ikram and Ors.* **decided by S.C. on 13th June, 2011 – referred to.**

3.6. Section 149 consists of two parts; the first deals with the commission of an offence by any member of an unlawful assembly in prosecution of the common object of that assembly; the second part deals with commission of an offence by any member of an unlawful assembly in a situation where other members of that assembly know the likelihood of the offence being committed in prosecution of that object. In either case, every member

of that assembly is guilty of the same offence, which other members have committed in prosecution of the common object. The final point is the common object. In the instant case, accused have inflicted the injuries after raising slogan and have commonly participated in committing offence which resulted in the death of the deceased. [Paras 21 and 22] [1127-F-H; 1128-A-B]

Lokeman Shah v. *State of W.B.* **(2001) 5 SCC 235: 2001 (2) SCR 1095 – referred to.**

Case Law Reference:

2007 (1) SCR 671	**Referred to.**	**Para 10**
AIR 1961 SC 715	**Referred to.**	**Para 11**
2007 (6) SCR 499	**Referred to.**	**Para 12**
2007 (2) SCR 630	**Referred to.**	**Para 12**
(1994) Supp 3 SCC 235	**Distinguished.**	**Para 20**
2001 (2) SCR 1095	**Referred to.**	**Para 22**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 29 of 2008.

From the Judgment & Order dated 15.3.2005 of the High Court of Rajasthan at Jaipur Bench, Jaipur, in D.B. Crl. Appeal No. 573 of 1999.

Jasbir Singh, Malik, V. Sushant, Ram Naresh Yadav, Milind Kumar for the Appellant.

Syed Ahmad Saud, Shuaib Ud Din, Shakil Ahmed Syed, Ch. Shamsuddin Khan, Rameshwar Prasad Goyal for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR J. 1. These appeals are directed against the judgment of the High Court of Rajasthan, Bench at Jaipur dated 15th March, 2005 in a case of communal violence. The trial court vide its judgment dated 7th September, 1999 returned a finding that charge against three accused namely Abdul Mannan, Afzal and Abdul Zabbar under Sections 302/149, 148, 324/149 and 449 of the Indian Penal Code (for short 'IPC') was fully established beyond reasonable doubt and sentenced them as follows:

(a) For committing an offence under Section 302/149 IPC, all three accused were awarded rigorous imprisonment for life along with fine of Rs.5,000/- each and in default of payment of fine to suffer six months' simple imprisonment.

(b) Under Section 148 IPC, all the three accused were awarded one year's rigorous imprisonment.

(c) Under Section 324/149 IPC, all the accused were awarded one year's rigorous imprisonment each and

(d) Lastly, under Section 449 IPC, they were awarded three years' of rigorous imprisonment each along with fine of Rs.1,000/- each, in default of payment of fine, to undergo simple imprisonment for three months.

2. Aggrieved by the judgment of the trial court, all the three accused preferred an appeal before the High Court, raising various issues in relation to the appreciation of evidence, false implications, contradiction in statements of witnesses and that no evidence had been led against them. On these premises, they prayed for setting aside of the judgment of the trial court and claimed acquittal. The High Court vide its judgment dated 15th March, 2005, acquitted all the accused and passed the following order:

"9. That takes us to the evidence of the eye witnesses examined at the trial. Coming to the testimony of Mahesh (PW-4) we notice that in his examination in chief he deposed that a mob of around 70 persons of muslim (sic) attacked the house of Govind Narayan, but he could identify only Mehboob, Hanif and Zabbar. He however, could not identify Afzal and Mannan. In his cross-examination Mahesh stated that he did not narrate the incident to anybody for 5-7 days. He did not go to jail or other place for the purpose of identification of accused Kanhaiya Lal (PW5) deposed that mob of 60-70 persons belonging to Muslim community entered the house of Govind Narayan. He could identify Afzal, Kadir, Islam, Bada Bhaiya, two brother of Noor Tractorwala, Zabbar Tractorwala, Mannan, Hanif and Mehboob. In the cross examination he however stated that he did not narrat the names of these persons to police. Satya Narayan (PW-7) in his deposition stated that a mob of 60 persons attacked the house. Afzal, Motal, Lakhara, Hanif, Mehboob, Zabbar Ahmad Tractorwala were the members of the mob. He could not say as to who inflicted the injury on his person. This witness was declared hostile by the prosecution. He could not identify Abdul Mannan in the court. Having closely scrutinized the evidence of Mahes, Kanhaiya Lal and Satya Narayan we are of the opinion that element of consistency is missing from their testimony. A through and scrupulous examination of the facts and circumstances of the case leads to an irresistible and inexplicable conclusion that the prosecution has not established the charge leveled against all the three accused by producing cogent, reliable and trustworthy evidence. Testimony of Mahesh (PW-4), Kanhaiya Lal (PW5) and Satya Narayan (PW7) is ambulatory and vacillating and it is not safe to reply upon. Variations, infirmities, additions, and embellishments in the evidence of these witnesses are of such nature that could undermine the substratum of the prosecution case. The prosecution could only able to establish that an unruly mob of Muslims

attacked the house of deceased but could not prove beyond reasonable doubt that the three appellants were the members of unruly mob and they inflicted injuries. On examination of testimony of these three witnesses Mahesh (PW4), Kanhaiya Lal (PW5) and Satya Narayan (PW-7) from the point of view of trustworthiness we find it untruthful. Learned trial judge in our opinion did not properly appreciate the prosecution the evidence and committed illegality in convicting and sentencing the appellants.

10. For these reasons we allow the instant appeals and set aside the judgment dated September 7, 1999 of the learned Special Judge Shri G.C. Sharma, Communal Riots and Man Singh Murder Case, Jaipur in Sessions Case No.1/1997. We acquit the appellants Abdul Zabbar, Afzal and Abdul Mannan of the charges under Sections 148, 302/149, 324/149 and 449 IPC. The appellants Abdul is on bail, he need not surrender and his bail bonds stand discharged. The appellants Abdul Zabbar and Afzal, who are in jail, shall be set at liberty forthwith, if not required to be detained in any other case."

3. State of Rajasthan aggrieved by the said judgment of acquittal, preferred the present appeal before this Court.

4. Let us briefly examine the case of the prosecution. As per the submission of the State, this Court should set aside the judgment of acquittal and punish the accused in accordance with law.

5. Satyanarain Baheti made a report to the S.H.O., Police Station, Malpura in front of the hospital at Malpura on 9th December, 1992 to the effect that, at about 11.15 a.m. that morning the complainant had been standing outside his house in Bahetiyon-ke-Mohalle in Ward No.6 of Kasba Malpura. Hearing the noise of the stampede and uproar, he entered his house and closed the door. After a while a crowd came from the side of Hathai and started pelting stones at his house. Two

or three persons came inside the house after breaking the bolt of the door. Satyanarain ran to stop them but those persons started beating him. Thereafter, 8-10 persons including Afzal son of Mota, Mahboob son of Jumma, two brothers of tractorwala, Syyed Jabbar Ahmad tractorwala, Abdul Manjan son of Jabbar, Hanif son of Iqbal and Qadir Islam came inside by climbing the back wall. These persons were duly armed with knife, *pharsi*, sword and lathies. They gave two or three blows with swords on the head of Govind Narain father of Satyanarain. The remaining persons also inflicted injuries on the head of Govind Narian. Hari Narain, k*akaji* of Satyanarain, was also standing there and these persons also inflicted injuries with sword and *pharsi* on his head. Govind Narain fell down, even then these persons did not stop inflicting injuries on his arms and shoulders with lathies. Besides Kanhaiya Lal Baheti, Babulal Aggarwal and Mahesh Mukar Kacholiya had also witnessed the occurrence. These persons, who had witnessed the occurrence, along with the complainant, brought Govind Narain and Hari Narain to hospital at Malpura. At the hospital, doctor after examining them declared both of them dead. Resultantly, FIR was registered on 9th December, 1992 at about 12.45 p.m. The case was investigated. On completion of the investigation, the charge-sheet was filed before the court of competent jurisdiction. The case was committed only with regard to two accused namely Hanif and Mehboob. Vide its judgment dated 12th August, 1997, the trial court acquitted both the accused persons. The case in relation to other accused was then committed to the trial court. Two other accused, namely, Firoze and Anwar were discharged by the court vide judgment dated 21st March, 1998. Thus, the subject matter of the judgment of the trial court dated 7th September, 1999 relates only to the three accused namely Abdul Zabbar, Afzal and Abdul Mannan.

6. The prosecution had examined seven witnesses including three eye-witnesses (namely, PW7 and complainant Satyanarain, PW4 Mahesh and PW5 Kanhiyalal) as well as

PW2 medical examiner Dr. Chandra Prakash, and the investigating officer, PW3 Shri Rajendra Ojha. The incriminating evidence against the accused was put to the accused while recording their statement under Section 313 of the Cr.P.C. The plea taken by the accused was that these witnesses are deposing falsely, and have implicated them in commission of the crime at the instance of the police. Abdul Mannan took the plea of false implication, and claimed that he was in a school at a distance of 18 km away from the Malpura. Accused Afzal also took the plea of false implication, and stated that there were two or three persons by the name of Afzal Lakhara and he had not been present at the place of occurrence. Similar stand was taken by Zabbar.

7. The learned trial court discussed the prosecution evidence as well as the defence at great length. While holding the statements of above eye-witnesses trustworthy and finding the witnesses led by the defence as not credible, the court held as under:

> "In the opinion of the court, the evidence of witnesses Ramnarain and Nathu Lal does not inspire confidence. When this court could not ignore the evidence of witnesses – Mahesh, Kanhaiyalal and Satyanarain in any manner, which is the reliable evidence of eye-witnesses to the occurrence, under such circumstances, the evidence of witnesses – Ramnarain, Nathu Lal, Satya Narain and Ratan Singh does not inspire confidence of the court that at the time of occurrence, at the three accused persons were not present at the place of occurrence, rather they were present at the place told by the defence witnesses. Such type of defence evidence, appears to be absolutely fabricated, because such type of evidence can be prepared easily."

8. The trial court had specifically recorded the finding that the prosecution has been able to establish its case that the role of the accused in inflicting injuries upon the body of the

deceased persons had fully been established and therefore, they were liable to be punished in accordance with law. However, the High Court while upsetting the said finding noticed that PW4, PW5 and PW7 were untruthful witnesses and that the trial court had not properly appreciated the prosecution evidence, and therefore, committed an illegality in convicting and sentencing the accused.

9. As is evident from the above recorded findings, the judgment of conviction was converted to a judgment of acquittal by the High Court. Thus, the first and foremost question that we need to consider is, in what circumstances this Court should interfere with the judgment of acquittal. Against an order of acquittal, an appeal by the State is maintainable to this Court only with the leave of the Court. On the contrary, if the judgment of acquittal passed by the trial court is set aside by the High Court, and the accused is sentenced to death, or life imprisonment, or imprisonment of more than 10 years, then the right of appeal of the accused is treated as an absolute right subject to the provisions of Articles 134 91) (a) and 134 (1) (b) of the Constitution of India and Section 379 of the Code of Criminal Procedure, 1973. In light of this, it is obvious that appeal against acquittal is considered on slightly different parameters compared to an ordinary appeal preferred to this Court. When an accused is acquitted of a criminal charge, a right vests in him to be a free citizen and this Court is very cautious in taking away that right. The presumption of innocence of the accused is further strengthened by the fact of acquittal of the accused under our criminal jurisprudence. The courts have held that if two views are possible on the evidence adduced in the case, then the one favourable to the accused, may be adopted by the Court. However, this principle must be applied keeping in view the facts and circumstances of a case and the thumb rule is whether the prosecution has proved its case beyond reasonable doubt. If the prosecution has succeeded in discharging its onus, and the error in appreciation of evidence is apparent on the face of the record then the Court

can interfere in the judgment of acquittal to ensure that the ends of justice are met. This is the linchpin around which the administration of criminal justice revolves. It is a settled principle of criminal jurisprudence that the burden of proof lies on the prosecution and it has to prove a charge beyond reasonable doubt. The presumption of innocence and the right to fair trail are twin safeguards available to the accused under our criminal justice system but once the prosecution has proved its case and the evidence led by the prosecution, in conjunction with the chain of events as are stated to have occurred, if, points irresistibly to the conclusion that accused is guilty then the Court can interfere even with the judgment of acquittal. The judgment of acquittal might be based upon misappreciation of evidence or apparent violation of settled canons of criminal jurisprudence.

10. We may now refer to some judgments of this Court on this issue. In *State of Madhya Pradesh* v. *Bacchudas* [(2007) 9 SCC 135], the Court was concerned with a case where the accused had been found guilty of an offence punishable under Section 304 (Part II) read with Section 34 IPC by the trial court; but had been acquitted by the High Court of Madhya Pradesh. The appeal was dismissed by this Court, stating that the Supreme Court's interference was called for only when there were substantial and compelling reasons for doing so. After referring to earlier judgments, this Court held as under:

> **"9.**There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his 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 the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to reappreciate the evidence where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused really committed any offence or not. (See *Bhagwan Singh* v. *State of M.P.[(2003) 3 SCC 21]* The principle to be followed by the appellate court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable and relevant and convincing materials have been unjustifiably eliminated in the process, it is a compelling reason for interference.
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> These aspects were highlighted by this Court in *Shivaji Sahabrao Bobade v. State of Maharashtra, Ramesh Babulal Doshi v. State of Gujarat, Jaswant Singh v. State of Haryana, Raj Kishore Jha v. State of Bihar, State of Punjab v. Karnail Singh, State of Punjab v. Phola Singh, Suchand Pal v. Phani Pal and Sachchey Lal Tiwari v. State of U.P.*
>
> 10. When the conclusions of the High Court in the background of the evidence on record are tested on the touchstone of the principles set out above, the inevitable conclusion is that the High Court's judgment does not suffer from any infirmity to warrant interference.

11. In a very recent judgment, a Bench of this Court in Criminal Appeal No. 1098 of 2006 titled *State of Kerala and Anr.* v. *C.P. Rao* decided on 16.05.2011, discussed the scope of interference by this Court in an order of acquittal and while reiterating the view of a three Judge Bench of this Court in the

case of *Sanwat Singh & Ors. v. State of Rajasthan* [AIR 1961 SC 715], the Court held as under:

> "14. In coming to its conclusion, we are reminded of the well settled principle that when the court has to exercise its discretion in an appeal arising against an order of acquittal, the Court must remember that the innocence of the accused is further re-established by the judgment of acquittal rendered by the High Court. Against such decision of the High Court, the scope of interference by this Court in order of acquittal has been very succinctly laid down by a Three-Judge bench of this Court in the case of *Sanwat Singh and Ors. v. State of Rajasthan* [1961 (3) SCR 120]. At page 129, Justice Subba Rao (as His Lordship then was) culled out the principles as follows:
>
> The foregoing discussion yields the following results: (1) an appellate court has full power to review the evidence upon which the order of acquittal is founded; (2) the principles laid down in Sheo Swarup's case [1934 L.R. 61 I.A. 398] afford a correct guide for the appellate court's approach to a case in disposing of such an appeal; and (3) the different phraseology used in the judgments of this Court, such as (i) "substantial and compelling reasons", (ii) "good and sufficiently cogent reasons", and (iii) "strong reasons" are not intended to curtail the undoubted power of an appellate court in an appeal against acquittal to review the entire evidence and to come to its own conclusion; but in doing so it should not only consider every matter on record having a bearing on the questions of fact and the reasons given by the court below in support of its order of acquittal in its arriving at a conclusion on those facts, but should also express those reasons in its judgment, which lead it to hold that the acquittal was not justified."

12. Reference can also be usefully made to the judgment of this Court in the case of *Suman Sood v. State of Rajasthan*,

[(2007) 5 SCC 634] where this Court reiterated with approval the principles stated by the Court in earlier cases, particularly, *Chandrappa v. State of Karnataka*, [(2007) 4 SCC 415]. Emphasizing that expressions like 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc are not intended to curtail the extensive powers of an appellate court in an appeal against acquittal, the court stated that such phraseologies are more in the nature of 'flourishes of language' to emphasize the reluctance of an appellate court to interfere with the acquittal. Thus, where it is possible to take only one view i.e. the prosecution evidence points to the guilt of the accused and the judgment is on the face of it perverse, then the Court may interfere with an order of acquittal.

13. In light of the above stated principles, we revert to the facts of the present case. As already noticed, three eye witnesses PWs.4, 5 and 7 were found to be truthful and reliable witnesses by the trial court whereas those very witnesses were held to be untrustworthy witnesses by the High Court. We shall shortly proceed to discuss the statements of these three witnesses in some detail, as it is necessary for us to practically re-appreciate the entire evidence in view of the serious conflict, on findings of fact, in the two judgments under consideration in the present appeal. One must notice another very significant error in the judgment of the High Court. Though the High Court has made a reference to the injuries inflicted upon the body of the deceased as detailed by Dr. Chandra Prakash (PW2) in his report, there is no discussion of his statement, in regard to nature of injuries inflicted and the weapon used for inflicting such injuries. There is also no discussion in the judgment of the High Court on the comparative evaluation of medical evidence, ocular evidence and the documentary evidence produced by the prosecution on record. These are certainly material evidence which have either been completely ignored, or not appropriately appreciated by the High Court. This renders the judgment of the High Court perverse, and provides strong

reasons for this Court to interfere with the judgment of acquittal. In our considered view, the order of acquittal can hardly be sustained where it is based just on some contradiction in the statements of the while completely ignoring the entire case of the prosecution particularly when the prosecution has been able to prove its case beyond reasonable doubt. Dr. Chandra Prakash (PW2), who on 9th December, 1992 was posted as SMO at medical centre, Malpura had conducted the postmortem on the body of both the deceased persons. The injuries on the body of the deceased Hari Narain, aged 70 years, were recorded by this witness in his report (Ex.P4) which reads as under:

> "I. Lacerated wound in size 3 inch x 2/10 inch till penetrating up to the bones on the left side of the head which was up to parietal region. This injury was having depressed fracture. The blood was oozing out from the wound.
>
> II. Lacerated wound in the size 3.5 inch x 2/10 inch penetrating up to the bones. In this injury also there was depressed fracture on the right parietal region of the (sic). The blood was oozing out from this injury also. And the brain matter was coming out.
>
> III. Incised wound in the size of 3 inch x 2/10 into ½ inch on the upper arm behind the shoulder and the blood was oozing out from it.
>
> On the dead body aforesaid external injuries were found. In my opinion the death of Hari Narayan was cause (sic) due to Neutrogena (sic) shock that is injury of the brain caused by injury Nos.1 and 2.
>
> All the aforesaid injuries were of before death. The injury Nos. 1 and 2 on the head of Hari Narayan were in general nature sufficient to cause the death. The death of Hari Narayan was caused within 2 to 3 hours of (sic) the postmortem. I prepared the postmortem report which is

> exhibit P-4 which is in my hand writing and it is signed. It bears my signature from A to B and I have entered the cause of death at C to D.
>
> On the same date in the day time at 1.30 P.M. I conducted the post mortem on the dead body of Govind Mahajan son of Lachh Raj age 72 years, resident of Malpura and found following injuries on the dead body which were caused before death:
>
> 1. A wound of cut in size 4 inch x 2/10 inch x penetrating up to bone and even up to the brain. And the brain Metter (sic) was coming out this injury was on the center of the head from where the blood was oozing. Both the edges of the wound were sharp.
> 2. Lacerated wound in size of 3 inch x ¼ inch deep up to the bones on the center with depressed fracture. And obtuse injury all around right eyes (sic).
> 3. The blood was coming out from the right ear.
>
> In my opinion the death of Govind was caused due to Neutrogena (sic) shock which was caused by injury no.1 and due to hemorrhage which was caused by injury no.2. All the 3 injuries were caused before the death and in general nature were sufficient to cause the death of Govind. The death of Govind was caused within 2 to 3 hours from (sic) conducting the post mortem I have prepared the post mortem report which is exhibit and is verified. It bears my signature at A to B and I have entered the cause of death at C to D."

14. Mahesh (PW 4) in his statement in Court had stated that he saw a mob of persons belonging to the Muslim community approaching when he was standing outside his house. Some of them held swords in their hands, some of them

lathies and some held *pharsi* and once they reached the house of Govind Narain, they forcibly opened the door. He went onto the roof of Premchand Mehru's house, from where he could see that some persons were pushing the door of Gopal Narain's house. He identified the persons who jumped inside the house, as Mahboob, Haneef and Abdul Zabbar. Even in the Court, he rightly identified one person Abdul Zabbar. This witness stated the he knew Zabbar even prior to the occurrence. He had also taken Kanhaiya Lal, who was injured, to the hospital. He had seen the accused persons at the place of incidence. He was subjected to lengthy cross examination. In his cross examination, he gave a few vague answers like he does not remember whether he had discussed the identity of the accused persons with Satyanarain, whether 4, 5 or 50 police officers were present at the funeral etc.

15. Corroborating the statement of PW4, Kanhaiya Lal (PW5) stated that after seeing the mob, he shut the door of his house called the Malpura police station and climbed to the roof. He could see persons climbing the roof of Govind Narain's house and he could recognize Afzal Kadir Islam, Bada Bahaiya, two brothers of tractorwala namely Jabbar tractorwala and Mannan, Hanif and Mahboob. According to him these persons went inside the house of Govind Narain and created nuisance. This witness, according to the trial court, rightly identified the persons named by him. This witness also stated that he knew these persons even before the incident. All the three accused were identified by the witness in Court. Later on, when the police came and the persons from the mob fled away, he went to the house of Govind Narain, the door was broken and he noticed that both Govind Narain and Hari Narain were lying in a pool of blood and were unconscious. Satyanarain had sustained injuries. Thereafter he took all of them to the hospital where two deceased persons were declared 'brought dead'. In his cross examination also nothing material was brought out by the defence. He did admit that he could not identify all the persons, who had come there.

16. PW 6-Radhey Shyam is the Investigating Officer and was the SHO of police Station, Malpura. According to him, he was busy in maintaining law and order situation when he received the information that assailants had entered the house of one Govind Narain Waheti and had beaten those inside; and that the latter had been taken to the hospital. Satyanarain (PW7), who is the most material witness of the prosecution, had made the report (Ex.P7) to PW6. He is the injured witness. He stated that a mob of 50-60 persons had come towards that area shouting, "*Maro! Maro*!". He went inside his house and closed the door but in a short while stones were thrown at the house. Some members of the mob started pushing the door and eventually broke the door and PW7 ran away for safety. Afzal Mota Lakhara, Mahboob, Hanif tractorwala, Jabbar Ahmad Tractorwala came inside and some other persons who he could not identify started assaulting Govind Narain and Hari Narain with lathi and *pharsi* which he witnessed from his room. According to PW7, the injuries were caused on the head. He came out of his room and tried to save them, and in the process, he also suffered injuries. In the meantime, the police siren blew and upon hearing the same, these persons ran away. The witness correctly identified Zabbar and Afzal in Court and stated that these persons had caused injuries to the deceased. This witness referred to the place of occurrence, preparation of site plan and medical report by the doctor, he admitted his signature on all these documents including Exh. P-8. It appears from the record that during recording of statement of this witness, the public prosecutor sought permission to declare the witness hostile. Without declaring him hostile, the Court had permitted him to be cross-examined by the public prosecutor. This related to the fact that after hearing portion C to D, part of Exh. P-9, the witness has stated that after identifying the accused, he had stated the name of the accused as Abdul Mannan to the police. He then stated that Abdul was also there, however he could not identify him definitely. At that stage, this witness was declared hostile. Cross examination of these witnesses by the public prosecutor as well as by the defence counsel did not have an

adverse impact on the main case of the prosecution. In his cross examination, he said that he had forgotten and therefore he had stated that he did not go to the police station for lodging the report. In fact he wrote the report in his own hand (Exh.P7). According to him, the persons who had assaulted him were the same persons who had assaulted his father and uncle. He also tried to wriggle out of his earlier statement that he could identify the accused. It needs to be noticed that his statement, which was recorded in the Court on 17th March, 1999, was completely in consonance with the case of the prosecution but when he appeared in the Court for further cross-examination on 18th March, 1999, he tried to wriggle out of his main statement. Thus, it is not very difficult to understand the variation in his statement resulting in the further cross examination. This entire evidence has to be read along with the statement of the Investigating Officer (PW6). Establishment of a complete chain of events and clear identification of the persons assailing the deceased lead to the irresistible conclusion that the prosecution has been able to bring home the guilt of the accused. Undoubtedly, emphasis on the second half of the statement of PW7 cannot completely demolish the case of the prosecution which otherwise stands proved by the statements of PW4, PW5, PW6 and PW2.

17. The strain on the witness due to the incident cannot be ruled out inasmuch as he had lost his father, uncle and was himself injured. All the basic facts that supported the case of the prosecution were stated by him on 17th March, 1999 when the case was adjourned for further cross-examination on 18th March, 1999 when he made a statement at variance with his earlier statement in Court as well as his statement recorded under Section 161 of the Cr.P.C. Another fact which the Court cannot lose sight of is that Exh. P2 was not a document written by the police but was written in his own hand and duly signed by him which he admitted even in his statement in Court.

18. Satyanarain (PW 7) has also made statements which fully aid the case of the prosecution and his statement recorded

on the adjourned date before the trial court i.e. 18th March, 1999 which is at variance cannot be treated as gospel truth. In fact the bare reading of the statement clearly shows this fact. Even if we exclude the statement of PW7 from consideration, then identity of the accused is still fully established by the statements of PW3, PW4, PW5 and PW6. There is no reason, whatsoever advanced, as to why PW4 and PW5 (neighbours of the deceased) who are otherwise independent witnesses, and the doctor would involve the accused falsely. There is no animosity between the parties, and in fact according to these witnesses, they knew the accused particularly Abdul Zabbar, Afzal and Mannan for quite some time. There is no reason for the Court to hold that PWs 4 and 5 are not trustworthy. Their statements describe the occurrence in its proper course and are compelling evidence of the same. We do not find it appropriate to discard their statements as not inspiring confidence. The statement of these witnesses must be appreciated in the proper perspective. It was an incident involving a mob but only few persons had entered the house of the deceased, out of which 7 to 8 persons could be identified including the three accused as having inflicted injuries on the body of the deceased and were duly identified by the prosecution witnesses. The injury on the head duly finds corroboration from the statement of the Doctor i.e. Ex.P4. It is not a case where the medical evidence does not support or corroborate the ocular evidence. Some discrepancies or some variations in minor details of the incident would not demolish the case of the prosecution unless it affects the core of the prosecution case. Unless the discrepancy in the statement of witness or the entire statement of the witness is such that it erodes the credibility of the witness himself, it may not be appropriate for the Court to completely discard such evidence. The core of the prosecution case is that when the mob came, PWs 4 and 5 ran to their houses, locked their doors, went to the roof of the houses which were adjacent to the house of the deceased and watched some members of the mob, of whom they could identify a few, assault the deceased. This statement

clearly shows the trustworthiness of these witnesses as they have stated that there were some other persons whom they could not identify. However both these witnesses and complainant Satyanarain clearly identified the persons who had entered and assaulted the deceased persons. Though Satyanarain (PW 7) fully supported the case of the prosecution that he was also assaulted by these persons, he did speak in a different voice the next day before the Court. In our considered opinion the cumulative effect of the ocular evidence and documentary evidence is that the prosecution has been able to establish its case beyond reasonable doubt.

19. We may also refer to a very recent judgment of this Court, given by us in Crl. Appeal Nos. 1693-1994/2005, *State of U.P.* v. *Mohd. Ikram & Ors.* decided on 13th June, 2011 where by upsetting the judgment of acquittal passed by the High Court, this Court held as under:

> "15.....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.
>
> 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."

20. Learned counsel for the accused had placed reliance upon the judgment of this Court in *Shivalingappa Kallayanappa* v. *State of Karnataka* [1994 Supp 3 SCC 235] to contend that there was no common object to commit murder. The appellants cannot derive much advantage from the judgment of this Court in that case: First, the facts of that case are entirely different from those of the case in hand. In that case, it was established by the prosecution that A-1 to A-5 formed an unlawful assembly wherein A1 and A2 were armed with axes and A3, A4 and A5 with sticks in order to assault the two deceased persons amongst others. While A3 did not participate, A4 and A5 only dealt blows on legs and arms with their sticks but A1 and A2 dealt blows to the head with the butt end of their axes which proved to be fatal. Convicting A1 and A2 under S. 302/149, IPC and A3-5 under S. 326/149, the

Court held that taking all the circumstances of the case into consideration, the common object can be held to be to cause grievous hurt only and not to commit murder. However, in the present case, common object to commit murder has been fully proved. Second, the case of the prosecution is not that the entire mob had entered the house of the deceased. Out of the mob of 50-60 persons only 7 to 10 persons had broken the door of the house and some of them had climbed the wall to enter the house of the deceased. These persons had raised the slogan '*maro! maro*!' and thereafter had inflicted the injuries upon the body of the deceased. The common intention could even develop at the spur of the moment when the three accused, as duly identified, were actively inflicting injuries on the body of the deceased. They, therefore, not only caused injuries to the vital body parts of the deceased, including head injury, but kept on inflicting injuries even after the deceased had fallen to the ground. The efforts of Satyanarain to save them were in vain and he himself suffered certain injuries. Thus, in the present case, it has been established that more than five persons constituted an unlawful assembly and in furtherance to their common object and intent, assaulted and caused injuries to vital parts of the bodies of the deceased, ultimately resulting in their death. We, therefore, have no hesitation in holding that there is no merit in this contention of the accused and the trial Court applied the law correctly.

21. Section 149 consists of two parts; the first deals with the commission of an offence by any member of an unlawful assembly in prosecution of the common object of that assembly; the second part deals with commission of an offence by any member of an unlawful assembly in a situation where other members of that assembly know the likelihood of the offence being committed in prosecution of that object. In either case, every member of that assembly is guilty of the same offence, which other members have committed in prosecution of the common object.

22. The final point is the common object. The case of *Lokeman Shah* v. *State of W.B.* [(2001)5 SCC 235] on this point would further substantiate the case of the State and diminish the worth of the defence. Accused have inflicted the injuries after raising slogan and have commonly participated in committing offence which resulted in the death of the deceased.

23. For the reasons afore-recorded, we find the present case a fit case for interference in the judgment of acquittal recorded by the High Court. Consequently, the appeals of the State are allowed, the judgment of the High Court is set aside and that of the trial court is restored. We concur with the finding of guilt and the quantum of punishment awarded by the trial court.

24. The bail bonds of the accused, if any who are on bail, are cancelled. They are directed to surrender within four weeks from today failing which the Chief Judicial Magistrate, District Tonk, Rajasthan shall ensure to take them into custody and they shall undergo the remaining part of their sentence in terms of the judgment of conviction and punishment awarded by the trial court.

25. A copy of the judgment be sent to the concerned CJM for information and action.

N.J. Appeals allowed.

STATE OF DELHI
v.
RAM AVTAR @ RAMA
(Criminal Appeal No. 1101 of 2004)

JULY 7, 2011

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

Narcotic Drugs and Psychotropic Substance Act, 1985:

s.50 – Search and seizure – Safeguards provided u/s.50 – Obligation of the searching officer to inform the person to be searched about his right to be taken to the nearest Gazetted Officer or a Magistrate – Held: The accused has right to be informed of the choice available to him as regards his search – The duty is cast upon the searching officer to make the accused aware of existence of such a right – Failure to provide such option in accordance with the provisions of the Act, render the recovery of contraband /illicit substance illegal – After amendment of s.50 and insertion of sub-section 5, the mandate of s.50(2) has not been nullified, and the obligation upon the searching officer to inform the person to be searched of his rights still remained – Obviously, the legislative intent is that compliance with these provisions is imperative and not merely substantial compliance – While discharging the onus of s.50, the prosecution has to establish that information regarding the existence of such a right had been given to the suspect – Notice to the accused that a Gazetted Officer or a Magistrate could be arranged for taking his search, if he so required could not be treated as communicating to him about rights available to him under law.

s.21 – Conviction under – Essential ingredients – Held: For conviction u/s.21, the possession of the illicit article is a sine qua non –Contraband article should be recovered in accordance with the provisions of s.50 of the Act, otherwise,

the recovery itself shall stand vitiated in law – Illegal recovery cannot be the foundation of conviction u/s.21 of the Act.

Criminal jurisprudence: Theory of 'substantial compliance' – Held: It is a settled canon of criminal jurisprudence that when a safeguard or a right is provided, favouring the accused, compliance thereto should be strictly construed – The theory of 'substantial compliance' would not be applicable to situations where the punishment provided is very harsh and is likely to cause serious prejudices against the suspect – The safeguard cannot be treated as a formality, but it must be construed in its proper perspective, compliance thereof must be ensured – Narcotic Drugs and Psychotropic Substance Act, 1985 – Interpretation of statutes.

The prosecution case was that on 18th January 1998, a secret informer informed the Assistant Sub Inspector (PW-8) that a person by the name 'R' (appellant) was carrying contraband substance. The police party left for the spot and apprehended the appellant. A police officer in the raiding party requested few persons, who were passing by, to join the raid but they declined to do so on some ground or the other. The police officer served notice Ex.PW6/A in writing under Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 upon the appellant but he declined to be searched either in presence of a Gazetted Officer or a Magistrate. On search, three packets were recovered from his pocket which after test were found to be heroin. The trial court convicted the appellant under Section 21 of the Act. The High Court held that the expression 'duly' used in Section 50 of the Act connoted not 'substantial' but 'exact and definite compliance' and since the notice served on the appellant was not in conformity with the provisions of Section 50 of the Act, he deserved acquittal. The instant appeal was filed challenging the order of the High Court.

Dismissing the appeal, the Court

HELD: 1. In terms of the provisions of Section 50 of the Narcotic Drugs and Psychotropic Substance Act, 1985, in force at the relevant time, i.e. the provisions as it was, prior to amendments made by Amending Act 9 of 2001 w.e.f. 2.10.2001, the respondent had a right to be informed of the choice available to him and making him aware of the existence of such a right was an obligation on the part of the searching officer. This duty cast upon the officer was imperative and failure to provide such an option, in accordance with the provisions of the Act, would render the recovery of the contraband or illicit substance illegal. Satisfaction of the requirements in terms of Section 50 of the Act is *sine qua non* prior to prosecution for possession of an unlawful narcotic substance. After the amendment to Section 50 of the Act and the insertion of sub-section 5, the mandate of Section 50(2) of the Act has not been nullified, and the obligation upon the searching officer to inform the person searched of his rights still remained. In other words, offering the option to the person to be searched before a Gazetted Officer or a Magistrate as contemplated under the provisions of this Act, should be unambiguous and definite and the searching officer should inform the suspect of his statutory safeguards. [Para 18, 19] [1145-E-G]

State of Punjab v. Baldev Singh **(1999) 6 SCC 172: 1999 (3) SCR 977;** *Vijaysinh Chandubha Jadeja v. State of Gujarat* **(2007) 1 SCC 433 – relied on.**

2. It is a settled canon of criminal jurisprudence that when a safeguard or a right is provided, favouring the accused, compliance thereto should be strictly construed. The theory of 'substantial compliance' would not be applicable to situations where the punishment provided is very harsh and is likely to cause serious

prejudices against the suspect. The safeguard cannot be treated as a formality, but it must be construed in its proper perspective, compliance thereof must be ensured. The law has provided a right to the accused, and makes it obligatory upon the officer concerned to make the suspect aware of such right. The language of the provision is plain and simple and has to be applied on its plain reading as it relates to penal consequences. Section 50 of the Act states the conditions under which the search of a person shall be conducted. The significance of this right is clear from the language of Section 50(2) of the Act, where the officers have been given the power to detain the person until he is brought before a Gazetted Officer or Magistrate as referred to in sub-section (1) of Section 50 of the Act. Obviously, the legislative intent is that compliance with these provisions is imperative and not merely substantial compliance. If the officer has prior information of the raid, he is expected to be prepared for carrying out his duties of investigation in accordance with the provisions of Section 50 of the Act. While discharging the onus of Section 50 of the Act, the prosecution has to establish that information regarding the existence of such a right had been given to the suspect. If such information is incomplete and ambiguous, then it cannot be construed to satisfy the requirements of Section 50 of the Act. Non-compliance of the provisions of Section 50 of the Act would cause prejudice to the accused, and, therefore, amount to the denial of a fair trial. For conviction under Section 21 of the Act, the possession of the illicit article is a *sine qua non*. Such contraband article should be recovered in accordance with the provisions of Section 50 of the Act, otherwise, the recovery itself shall stand vitiated in law. Whether the provisions of Section 50 of the Act were complied with or not, would normally be a matter to be determined on the basis of the evidence produced by the prosecution. An illegal search cannot entitle the

prosecution to raise a presumption of validity of evidence under Section 50 of the Act. [Para 22] [1147-B-G]

3. By Ex.PW-6/A, the appellant was informed that a Gazetted Officer or a Magistrate could be arranged for taking his search, if he so required. This intimation could not be treated as communicating to the appellant that he had a right under law, to be searched before the said authorities. The bare language of Ex.PW-6/A showed that the accused was not made aware of his right that he could be searched in the presence of Gazetted Officer or a Magistrate and that he could exercise such choice. The writing did not reflect this most essential requirement of Section 50 of the Act. Once the recovery itself is found to be illegal, being in violation to the provisions of Section 50 of the Act, it cannot, on the basis of the statement of the police officers, or even independent witnesses, form the foundation for conviction of the accused under Section 21 of the Act. If recovery is held to be illegal, that means the accused did not actually possess the illicit article or contraband and that no such illicit article was recovered from the possession of the accused such as to enable such conviction of a contraband article. 'Unlawful possession' of the contraband, under the Act, is a factor that has to be established by the prosecution beyond any reasonable doubt. [Paras 21 to 24] [1146-G-H; 1147-H; 1148-A-D, F; 1149-E-F]

4. Once the recovery itself is made in an illegal manner, its character cannot be changed, so as to be admissible, on the strength of statement of witnesses. What cannot be done directly cannot be permitted to be done indirectly. If Ex.PW-6/A was not in conformity with the provisions of Section 50 of the Act, then there was patent violation of the provisions. Firstly, in the instant case, there was no public witness to Ex.PW-6/A; and the recovery thereof; secondly, even the evidence of all the witnesses, who were police officers, did not improve the

case of the prosecution. The defect in Ex.PW-6/A was incurable and incapable of being construed as compliance with the requirements of Section 50 of the Act on the strength of ocular statement. [Para 25] [1149-G-H; 1150-A-B]

5. An illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused, though any other material recovered during that search may be relied upon by the prosecution in other proceedings, against the accused, notwithstanding the recovery of that material during an illegal search. An illegal recovery cannot take the colour of a lawful possession even on the basis of oral evidence. But if any other material which is recovered is a subject matter in some co-lateral or independent proceeding, the same could be proved in accordance with law even with the aid of such recovery. But in no event the illegal recovery can be the foundation of a successful conviction under the provisions of Section 21 of the Act. [Para 28] [1151-A-D]

State of Punjab v. Balbir Singh **(1994) 3 SCC 299: 1994 (2) SCR 208;***Ali Mustaffa Abdul Rahman Moosa v. State of Kerala* **(1994) 6 SCC 569: 1994 (4) Suppl. SCR 52;** *Saiyad Mohd. Saiyad Umar Saiyad v. State of Gujarat* **(1995) 3 SCC 510;** *Ahmed v. State of Gujarat* **(2000) 7 SCC 477: 2000 (2) Suppl. SCR 642;** *K. Mohanan v. State of Kerala* **(2010) 10 SCC 222;** *Joseph Fernandez v. State of Goa* **(2000) 1 SCC 707;** *Prabha Shankar Dubey v. State of Madhya Pradesh* **(2004) 2 SCC 56: 2003 (6) Suppl. SCR 444;** *Krishna Kanwar v. State of Rajasthan* **(2004) 2 SCC 608: 2004 (1) SCR 1101;** *Manohar Lal v. State of Rajasthan* **(1996) 11 SCC 391;** *Karnail Singh v. State of Haryana* **(2009) 8 SCC 539;** *Union of India v. Satrohan* **(2008) 8 SCC 313;** *Vijaysinh Chandubha Jadeja v. State of Gujarat* **(2011) 1 SCC 609;** *Pooran Mal v.*

Director of Inspection **(1974) 1 SCC 345 – referred to.**

Case Law Reference:

1994 (2) SCR 208	**referred to**	**Para 6**
1994 (4) Suppl. SCR 52	**referred to**	**Para 7**
(1995) 3 SCC 510	**referred to**	**Para 8**
1999 (3) SCR 977	**relied on**	**Para 9, 10, 11, 12, 17**
2000 (2) Suppl. SCR 642	**referred to**	**Para10, 14**
2010 (11) SCR 1033	**referred to**	**Para11**
(2000) 1 SCC 707	**referred to**	**Para 12, 21**
2003 (6) Suppl. SCR 444	**referred to**	**Para 12,**
2004 (1) SCR 1101	**referred to**	**Para 12**
1996 (1) SCR 837	**referred to**	**Para 12,13**
2009 (11) SCR 470	**referred to**	**Para 12**
2008 (10) SCR 888	**referred to**	**Para14**
2010 (13) SCR 255	**referred to**	**Para14**
(2007) 1 SCC 433	**referred to**	**Para 15, 16, 17**
1974 (2) SCR 704	**relied on**	**Para 24**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1101 of 2004.

From the Judgment & Order dated 18.12.2002 of the High Court of Delhi at New Delhi in Crl. Appeal No. 405 of 1999.

P.K. Dey, Sadhana Sandhu, Anil Katiyar, D.S. Mahra for the Appellant.

Pawan Kumar Bahl (for Sudha Gupta) for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR J. 1. Ingenuity of counsel sometimes results in formulation propositions, which appear at the first flush to be legally sound and relatable to recognized cannons of criminal jurisprudence. When examined in greater depth, their rationale is nothing but illusory; and the argument is without substance. One such argument has been advanced in the present case by the learned counsel appearing for the appellant who contends that 'even where the provisions of Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'the Act') have not been complied with the recovery can otherwise be proved without solely relying upon the personal search of the accused'. According to the learned counsel, the courts are required to take into consideration evidence of recovery of illicit material independently of the factum of personal search of the accused as stated by other witnesses as such evidence would be admissible and can form the basis for conviction of an accused in accordance with law.

2. Before we notice the judgments which have been referred to on behalf of the State, it will be necessary for us to refer to the facts giving rise to the present appeal. On 18th January, 1998 at about 8.15 a.m., a secret informer met Assistant Sub Inspector (ASI) - Dasrath Singh (who was examined as PW8) and informed him that a person by the name of Ram Avtar @ Rama resident of House No. 71/144, Prem Nagar, Choti Subzi Mandi, Janakpuri would be going to his house on a two wheeler scooter No. DL 4SL 2996 and if the said person was searched and raid was conducted, smack could be recovered from him. This information was passed on by ASI-Dasrath Singh, to the Station House Officer (SHO) M.C. Sharma (who was examined as PW4), on telephone, who in turn directed R.P. Mehta, Assistant Commissioner of Police (Narcotics Bureau) ACP(NB) to conduct the raid immediately. The secret information was recorded in the DD at Sl. No.3. In furtherance to this at around 8.30 A.M., ASI Dasrath Singh along with Sub Inspector (SI) Sahab Singh, Head Constable

Narsingh, Constable Manoj Kumar, Lady Constable Nirmla and the informer left for the spot in a Government vehicle. The vehicle was parked in a hideout at some distance. At around 9.30 a.m. Ram Avtar was apprehended based on pointing out by the informer while he was coming on a two wheeler scooter from the side of the main road, Tilak Nagar near his house. It is the case of the prosecution that a police officer in the raiding party had requested some persons, who were passing by, to join the raid but they declined to do so on some ground or the other. The police officer then served a notice Ex. PW6/A in writing, under Section 50 of the Act upon the appellant but he declined to be searched either in presence of a Gazetted Officer or a Magistrate. On search, three polythene packets were recovered from left side pocket of his shirt. On opening the packets, it was found to contain powder of light brown colour, suspected to be smack. This recovered powder was mixed together. The total weight of the recovered powder was 16 grams, out of which 5 grams were separated as sample. Both the sample and the remaining powder were converted into two parcels and sealed with the seal of DS which were the initials of PW8. CFSL Form was filled and seal of DS also affixed thereon. Parcels were seized vide memo Ex. PW-2/8. PW8 sent the parcels, CFSL Form and copy of rukka, Ex.PW-5/8 through Constable Manoj Kumar to Station House Officer (PW4) for recording an FIR under Section 21 of the Act. The samples, rukka etc. are now produced in carbon copy as Ex.PW-5/A. Sample parcels were sent to CFSL, Chandigarh and as per their report, the sample gave positive test for diacetylmorphine (heroin). Resultantly, Ram Avtar was taken into custody, and charge-sheet for committing an offence under Section 21 of the Act was filed against him.

3. As many as eight witnesses were examined by the prosecution to bring home the guilt against the accused. In his statement under Section 313 of the Cr.P.C., the plea taken by the accused was that on the day of occurrence his house was searched without a valid warrant and as nothing was recovered

therefrom, he demanded a "no recovery certificate". He claims that the police misbehaved and that he was taken to the Police Station, Narcotic Branch on the pretext of issuing such "no recovery certificate". He claims to have been falsely implicated in this case. The accused had taken a specific objection, with regard to non-compliance with the provisions of Section 50 of the Act, and had laid down this defense before the Trial Court. The Trial Court was of the opinion that the prosecution has been able to prove the case beyond any reasonable doubt and therefore, convicted the accused and sentenced him to undergo rigorous imprisonment of ten years and pay a fine of Rs.1,00,000/-; in default thereof, further undergo one year of rigorous imprisonment.

4. An appeal was preferred by the accused challenging the conviction and order of sentence dated 19th July, 1999. The High Court after taking note of the notice that was alleged to have been issued to the accused under Section 50 of the Act, Ex.PW-6/A, returned a finding in accordance with settled principles of law, that the notice provided to the accused was not in conformity with the provisions of Section 50 of the Act. Resultantly, there was no compliance with the provisions of Section 50 of the Act in the eyes of law and therefore, the accused was acquitted of the charge. The State of Delhi feeling aggrieved by the order of the High Court filed the present appeal.

5. We have already noticed that the High Court primarily discussed only one issue, i.e. whether there was compliance with the provisions of Section 50 of the Act or not; and had answered this in the negative, against the State. The primary submission raised in the present appeal also relates to the interpretation of the provisions of Section 50 of the Act. In order to examine the merit of the contention raised on behalf of the appellant, at the outset, it will be appropriate for us to refer to the precedents on the issue of the principles applicable to Section 50 of the Act.

6. One of the earliest and significant judgments of this Court, on the issue before us is the case of *State of Punjab v. Balbir Singh*, [(1994) 3 SCC 299] where the Court considered an important question i.e., whether failure by the empowered or authorized officer to comply with the conditions laid down in Section 50 of the Act while conducting the search, affects the prosecution case. In para 16 of the said judgment, after referring to the words *"if the person to be searched so desires",* the Court came to the conclusion that a valuable right has been given to the person, to be searched in the presence of the Gazetted Officer or Magistrate if he so desires. Such a search would impart much more authenticity and creditworthiness to the proceedings, while equally providing an important safeguard to the accused. It was also held that to afford this opportunity to the person to be searched, such person must be fully aware of his right under Section 50 of the Act and that can be achieved only by the authorized officer explicitly informing him of the same. The statutory language is clear, and the provisions implicitly make it obligatory on the authorized officer to inform the person to be searched of this right. Recording its conclusion in para 25 of the judgment, the Court clearly held that non-compliance with Section 50 of the Act, which is mandatory, would affect the prosecution case and vitiate the trial. It also noticed that after being so informed, whether such person opted for exercising his right or not would be a question of fact, which obviously is to be determined on the facts of each case.

7. This view was followed by another Bench of this Court in the case of *Ali Mustaffa Abdul Rahman Moosa v. State of Kerala*, [(1994) 6 SCC 569], wherein the Court stated that the searching officer was obliged to inform the person to be searched of his rights. Further, the contraband seized in an illegal manner could hardly be relied on, to the advantage of the prosecution. Unlawful possession of the contraband is the *sine qua non* for conviction under the NDPS Act, and that factor has to be established beyond any reasonable doubt. The Court further indicated that articles recovered may be used for other

purposes, but cannot be made a ground for a valid conviction under this Act.

8. In the case of *Saiyad Mohd. Saiyad Umar Saiyad v. State of Gujarat*, [(1995) 3 SCC 510], the Court followed the principles stated in *Balbir Singh's* case (supra) and also clarified that the prosecution must prove that the accused was not only made aware of his right but also that the accused did not choose to be searched before a Gazetted Officer or a Magistrate.

9. Then the matter was examined by a Constitution Bench of this Court, in the case of *State of Punjab v. Baldev Singh* [(1999) 6 SCC 172], where the Court, after detailed discussion on various cases, including the cases referred by us above, recorded its conclusion in para 57 of the judgment . The relevant portions of this conclusion are as under:

> **"57.** On the basis of the reasoning and discussion above, the following conclusions arise:
>
> (*1*) That when an empowered officer or a duly authorised officer acting on prior information is about to *search a person*, it is *imperative* for him to *inform* the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.
>
> XXX XXX XXX
>
> (*4*) That there is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by

the higher authorities seriously inviting action against the official concerned so that the laxity on the part of the investigating authority is curbed. In every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of the judicial process may come under a cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for the law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards provided by Section 50 at the trial, would render the trial unfair.

XXX XXX XXX

(*6*) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but hold that failure to inform the person concerned of his right as emanating from sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law."

10. Still in the case of *Ahmed v. State of Gujarat*, [(2000) 7 SCC 477), a Bench of this Court followed the above cases including *Baldev Singh's* case (supra) and held that even where search is made by empowered officer who may be a Gazetted Officer, it remains obligatory for the prosecution to inform the person to be searched about his right to be taken to the nearest Gazetted Officer or Magistrate before search. In this case, the Court also noticed at sub-para (e) at page 482 of the judgment that the provisions of Section 50 of the Act,

which afford minimum safeguard to the accused, provide that when a search is about to be made of a person under Section 41 or Section 42 or Section 43 of the Act, and if the person so requires, then the said person has to be taken to the nearest Gazetted Officer of any department mentioned in Section 42 of the Act or to the nearest Magistrate.

11. In the case of *K. Mohanan v. State of Kerala*, [(2010) 10 SCC 222] another Bench of this Court while following *Baldev Singh's* case (supra) stated in unambiguous terms that merely asking the accused whether he wished to be searched before a Gazetted Officer or a Magistrate, without informing him that he enjoyed a right under law in this behalf, would not satisfy the requirements of Section 50 of the Act.

12. We may also notice here that some precedents hold that though a right of the person to be searched existed under Section 50 of the Act, these provisions are capable of substantial compliance and compliance in absolute terms is not a requirement under law. Reference in this regard can be made to *Joseph Fernandez v. State of Goa*, [(2000) 1 SCC 707], *Prabha Shankar Dubey v. State of Madhya Pradesh*, [(2004) 2 SCC 56], *Krishna Kanwar v. State of Rajasthan*, [(2004) 2 SCC 608, *Manohar Lal v. State of Rajasthan*, [(1996) 11 SCC 391], *Karnail Singh v. State of Haryana*, [(2009) 8 SCC 539]. In the case of *Prabha Shankar Dubey* (supra), this Court while referring to *Baldev Singh's* case (supra) took the view that Section 50 of the Act in reality provides additional safeguards which are not elsewhere provided by the statute. As the stress is on the adoption of reasonable, fair and just procedure, no specific words are necessary to be used to convey the existence of this right. The notice served, in that case, upon the person to be searched was as follows: 'By way of this notice you are informed that we have received information that you are illegally carrying opium with you, therefore, we are required to search your scooter and you for this purpose. You would like to give me search or you would like to be searched by any

gazetted officer or by a Magistrate?' Keeping the afore-referred language in mind, the Court applied the principle of substantial compliance, and held that the plea of non-compliance with the requirements of Section 50 of the Act was without merit on the facts of that case. The Court held as under:

> **"12.** The use of the expression "substantial compliance" was made in the background that the searching officer had Section 50 in mind and it was unaided by the interpretation placed on it by the Constitution Bench in *Baldev Singh case*. A line or a word in a judgment cannot be read in isolation or as if interpreting a statutory provision, to impute a different meaning to the observations.
>
> **13.** Above being the position, we find no substance in the plea that there was non-compliance with the requirements of Section 50 of the Act."

13. Similarly, in *Manohar Lal's* case (supra) the option provided to the accused, not to go to a Magistrate if so desired, was considered to imply requirement of mere substantial compliance; and that strict compliance was not necessary.

14. In the case of *Union of India v. Satrohan*, [(2008) 8 SCC 313] though the Court was not directly concerned with the interpretation of the provisions of Section 50 of the Act, the Court held that Section 42(2) of the Act was mandatory. It also held that search under Section 41(1) of the Act would not attract compliance to the provisions of Section 50 of the Act. To that extent this judgment was taking a view different from that taken by the equi-Bench in *Ahmed's* case (supra). This question to some extent has been dealt with by the Constitution Bench in the case of *Vijaysinh Chandubha Jadeja v. State of Gujarat* [(2011) 1 SCC 609] (hereinafter referred to as '*Vijaysinh Chandubha Jadeja*'). As this question does not arise for consideration before us in the present case, we do not consider it necessary to deliberate on this aspect in any further detail.

15. In the case of *Vijaysinh Chandubha Jadeja v. State of Gujarat*, [(2007) 1 SCC 433], a three Judge Bench of this Court had taken the view that the accused must be informed of his right to be searched in presence of a Magistrate and/or a Gazetted Officer, but in light of some of the judgments we have mentioned above, a reference to the larger bench was made, resulting.

16. Accordingly, a Constitution Bench was constituted and in the case of *Vijaysinh Chandubha Jadeja* (supra) of this Court, referring to the language of Section 50 of the Act, and after discussing the above-mentioned judgments of this Court, took the view that there was a right given to the person to be searched, which he may exercise at his option. The Bench further held that substantial compliance is not applicable to Section 50 of the Act as its requirements were imperative. The Court, however, refrained from specifically deciding whether the provisions were directory or mandatory. It will be useful to refer the relevant parts of the Constitution Bench in *Vijaysinh Chandubha Jadeja* (supra). In para 23, the Court said 'In the above background, we shall now advert to the controversy at hand. For this purpose, it would be necessary to recapitulate the conclusions, arrived at by the Constitution Bench in *Baldev Singh case'***.** After further referring to the conclusions arrived at by the Constitution Bench in *Baldev Singh's* case (supra) (which have been referred by us in para 9 of this judgment) and reiterating the same the Constitution Bench in *Vijaysinh Chandubha Jadeja* (supra) this case concluded as under:

> **"31.** We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said section in *Joseph Fernandez* and *Prabha Shankar Dubey* is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in *Baldev Singh case*. Needless to add that the question whether or not the procedure prescribed

has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf."

17. Analysis of the above judgments clearly show that the scope of the provisions of Section 50 of the Act are no more *res integra* and stand concluded by the above judgments particularly the Constitution Bench judgments of this Court in the cases of *Baldev Singh* (supra) and *Vijaysinh Chandubha Jadeja* (supra).

18. In the present case, we are concerned with the provisions of Section 50 of the Act as it was, prior to amendments made by Amending Act 9 of 2001 w.e.f. 2.10.2001. In terms of the provisions, in force at the relevant time, the petitioner had a right to be informed of the choice available to him; making him aware of the existence of such a right was an obligation on the part of the searching officer. This duty cast upon the officer is imperative and failure to provide such an option, in accordance with the provisions of the Act, would render the recovery of the contraband or illicit substance illegal. Satisfaction of the requirements in terms of Section 50 of the Act is *sine qua non* prior to prosecution for possession of an unlawful narcotic substance.

19. In fact, the Constitution Bench in the case of *Vijaysinh Chandubha Jadeja* (supra), in para 25, has even taken a view that after the amendment to Section 50 of the Act and the insertion of sub-section 5, the mandate of Section 50(2) of the Act has not been nullified, and the obligation upon the searching officer to inform the person searched of his rights still remains. In other words, offering the option to take the person to be searched before a Gazetted Officer or a Magistrate as contemplated under the provisions of this Act, should be unambiguous and definite and should inform the suspect of his statutory safeguards.

20. Having stated the principles of law applicable to such

cases, now we revert back to the facts of the case at hand. There is no dispute that the concerned officer had prior intimation, that the accused was carrying smack, and the same could be recovered if a raid was conducted. It is also undisputed that the police party consisting of ASI - Dasrath Singh, Head Constable- Narsingh, Constable - Manoj Kumar and lady constable-Nirmla had gone in a Government vehicle to conduct the raid. The vehicle was parked and the accused, who was coming on a scooter, had been stopped. He was informed of and a notice in writing was given to him of, the suspicions of the police, that he was carrying smack. They wanted to search him and, therefore, informed him of the option available to him in terms of Section 50 of the Act. The option was given to the accused and has been proved as Ex. PW-6/A, which is in vernacular. The High Court in the judgment under appeal has referred to it and we would prefer to reproduce the same, which reads as under :

"Musami Ram Avtar urf Rama S/o late Sh. Mangat Ram R/o 71/144, Prem Nagar, Choti Subzi Mandi, Janakpuri, Delhi, apko is notice ke tehat suchit kiya jata hai ki hamare pas itla hai ki apko kabje me smack hai aur apki talashi amal mein laye jati hai. Agar ap chahen to apki talashi ke liye kisi Gazetted officer ya Magistrate ka probandh kiya ja sakta hai."

21. The High Court while relying upon the judgment of this Court in the case of *Baldev Singh* (supra) and rejecting the theory of substantial compliance, which had been suggested in the case of *Joseph Fernandez* (supra), found that the intimation did not satisfy the provisions of Section 50 of the Act. The Court reasoned that the expression 'duly' used in Section 50 of the Act connotes not 'substantial' but 'exact and definite compliance'. Vide Ex.PW-6/A, the appellant was informed that a Gazetted Officer or a Magistrate could be arranged for taking his search, if he so required. This intimation could not be treated as communicating to the appellant that he

had a right under law, to be searched before the said authorities. As the recovery itself was illegal, the conviction and sentence has to be set aside.

22. It is a settled canon of criminal jurisprudence that when a safeguard or a right is provided, favouring the accused, compliance thereto should be strictly construed. As already held by the Constitution Bench in the case of *Vijaysinh Chandubha Jadeja* (supra), the theory of 'substantial compliance' would not be applicable to such situations, particularly where the punishment provided is very harsh and is likely to cause serious prejudices against the suspect. The safeguard cannot be treated as a formality, but it must be construed in its proper perspective, compliance thereof must be ensured. The law has provided a right to the accused, and makes it obligatory upon the officer concerned to make the suspect aware of such right. The officer had prior information of the raid; thus, he was expected to be prepared for carrying out his duties of investigation in accordance with the provisions of Section 50 of the Act. While discharging the onus of Section 50 of the Act, the prosecution has to establish that information regarding the existence of such a right had been given to the suspect. If such information is incomplete and ambiguous, then it cannot be construed to satisfy the requirements of Section 50 of the Act**.** Non-compliance of the provisions of Section 50 of the Act would cause prejudice to the accused, and, therefore, amount to the denial of a fair trial. To secure a conviction under Section 21 of the Act, the possession of the illicit article is a *sine qua non*. Such contraband article should be recovered in accordance with the provisions of Section 50 of the Act, otherwise, the recovery itself shall stand vitiated in law. Whether the provisions of Section 50 of the Act were complied with or not, would normally be a matter to be determined on the basis of the evidence produced by the prosecution. An illegal search cannot entitle the prosecution to raise a presumption of validity of evidence under Section 50 of the Act. As is obvious from the bare language of Ex.PW-6/A, the accused was not made

aware of his right, that he could be searched in the presence of Gazetted Officer or a Magistrate, and that he could exercise such choice. The writing does not reflect this most essential requirement of Section 50 of the Act. Thus, we have no hesitation in holding that the judgment of the High Court does not suffer from any infirmity.

23. Now, we come to discuss the argument raised on behalf of the State, that in the present case, generally and as a proposition of law, even if there is apparent default in compliance with the provisions of Section 50 of the Act, a person may still be convicted if the recovery of the contraband can be proved by statements of independent witnesses or other responsible officers, in whose presence the recovery is effected. To us, this argument appears to be based upon not only a misconstruction of the provisions of Section 50 of the Act but also on the mis-conception of the principles applicable to criminal jurisprudence. Once the recovery itself is found to be illegal, being in violation to the provisions of Section 50 of the Act, it cannot, on the basis of the statement of the police officers, or even independent witnesses, form the foundation for conviction of the accused under Section 21 of the Act. Once the recovery is held to be illegal, that means the accused did not actually possess the illicit article or contraband and that no such illicit article was recovered from the possession of the accused such as to enable such conviction of a contraband article.

24. We are also unable to appreciate how the provisions of Section 50 of the Act can be read to support such a contention. The language of the provision is plain and simple and has to be applied on its plain reading as it relates to penal consequences. Section 50 of the Act states the conditions under which the search of a person shall be conducted. The significance of this right is clear from the language of Section 50(2) of the Act, where the officers have been given the power to detain the person until he is brought before a Gazetted

Officer or Magistrate as referred to in sub-section (1) of Section 50 of the Act. Obviously, the legislative intent is that compliance with these provisions is imperative and not merely substantial compliance. Even in the case of *Ali Mustaffa Abdul Rahman Moosa* (supra), this Court clearly stated that contraband seized as a result of search made in contravention to Section 50 of the Act, cannot be used to fasten the liability of unlawful possession of contraband on the person from whom the contraband had allegedly been seized in an illegal manner. 'Unlawful possession' of the contraband is the *sine qua non* for conviction under the Act. In the case of *Ali Mustaffa Abdul Rahman Moosa* (supra), this Court had considered the observation made by a Bench of this Court, in an earlier judgment, in the case of *Pooran Mal v. Director of Inspection* [(1974) 1 SCC 345] which had stated that the evidence collected as a result of illegal search or seizure could be used as evidence in proceedings against the party under the Income Tax Act. The Court, while examining this principle, clearly held that even this judgment cannot be interpreted to lay down that contraband seized as a result of illegal search or seizure can be used to fasten the liability of unlawful possession of the contraband on the person from whom the contraband had allegedly been seized in an illegal manner. 'Unlawful possession' of the contraband, under the Act, is a factor that has to be established by the prosecution beyond any reasonable doubt. Indeed, the seized contraband is evidence, but in the absence of proof of possession of the same, an accused cannot be held guilty under the Act.

25. What the learned counsel for the appellant has argued is exactly to the contrary. According to him, even if the recovery was in violation of Section 50 of the Act, the accused should be held guilty of unlawful possession of contraband, on the basis of the statement of the witnesses. Once the recovery itself is made in an illegal manner, its character cannot be changed, so as to be admissible, on the strength of statement of witnesses. What cannot be done directly cannot be permitted

to be done indirectly. If Ex.PW-6/A is not in conformity with the provisions of Section 50 of the Act, then there is patent violation of the provisions. Firstly, in the present case, there is no public witness to Ex.PW-6/A; and the recovery thereof; secondly, even the evidence of all the witnesses, who are police officers, does not improve the case of the prosecution. The defect in Ex.PW-6/A is incurable and incapable of being construed as compliance with the requirements of Section 50 of the Act on the strength of ocular statement.

26. The Constitution Bench, in the case of *Vijaysinh Chandubha Jadeja* (supra) had spelt out the effects of failure to comply with the mandatory provisions of Section 50 of the Act, being (A) cause of prejudice to the suspect accused; (B) rendering recovery of illicit article suspect and thereby, vitiating the conviction, if the same is recorded only on the basis of recovery of illicit article from the person of the accused during such search.

27. The learned counsel for the appellant relied on the use of the words 'only on the basis of the recovery' used in para 29 of that judgment, to contend that if there is other supporting evidence of recovery, the conviction cannot be set aside. This submission is nothing but based upon a misreading of the judgment; not only of para 29 but the judgment in its entirety. What the Constitution Bench has stated is that where the recovery is from the person of the suspect, and that recovery is found to be illegal, the conviction must be set aside as the principles applicable to personal recovery are somewhat different from recovery of contraband from a vehicle or a house.

28. In para 29 of the judgment itself, the Bench has held that 'we have no hesitation in holding that in so far as the obligation of the authorized officer under sub-section(1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires strict compliance.' In fact the contention raised by the appellant has, in specific terms, been rejected by the Constitution Bench in clause 7 of para 23 of the judgment. The

Court clearly held that an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused, though any other material recovered during that search may be relied upon by the prosecution in other proceedings, against the accused, notwithstanding the recovery of that material during an illegal search. The proposition of law having been so clearly stated, we are afraid that no argument to the contrary may be entertained. What needs to be understood is that an illegal recovery cannot take the colour of a lawful possession even on the basis of oral evidence. But if any other material which is recovered is a subject matter in some co-lateral or independent proceeding, the same could be proved in accordance with law even with the aid of such recovery. But in no event the illegal recovery can be the foundation of a successful conviction under the provisions of Section 21 of the Act.

29. For the reasons afore recorded, we do not find any merit in the present appeal. The same stands dismissed without any order as to costs.

D.G. Appeal dismissed.

NAND KISHORE
v.
STATE OF MADHYA PRADESH
(Criminal Appeal No. 437 of 2005)

JULY 07, 2011

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

Penal Code, 1860 – s. 302/34 – Conviction under – Quarrel between parties over recovery of dues by victim from co-accused – Co-accused caught hold of victim and main accused stabbed him whereas appellant-accused pelted stones at victim resulting in the death of the victim – Conviction of three accused u/s. 302/34 and sentenced to life imprisonment by courts below – Appeal before Supreme Court dismissed as regards the main accused and co-accused – Conviction of appellant – Challenge to – Held: As regards the appellant, there is definite documentary, ocular and medical evidence, and statement of defence witness to repel the plea of the appellant that he had been falsely implicated – Knife was recovered in furtherance to the disclosure statement made by main accused and injuries on the body of the victim were inflicted by the knife – Discrepancies between the statements of the alleged eye witnesses as well as the medical evidence does not affect the prosecution case – All the three accused had a common intention in the commission of brutal crime – Thus, prosecution has been able to establish the charge beyond reasonable doubt – Conviction of appellant u/s. 302/34 upheld.

s. 34 – Common intention – Application of s. 34 – General principles – Explained.

According to the prosecution, the victim had to recover some amount from 'M'. When the victim went to recover the said amount from 'M', a quarrel took place and

'M' along with 'D' and appellant-'N' killed the victim. PW-1, complainant witnessed that M had held the arms of the victim and 'D' was stabbing him with knife and 'N' was pelting stones at him. The victim later succumbed to his injuries. Investigation was carried out. A knife was recovered on the disclosure of 'D' and bricks and clothes of the deceased were also recovered. The Sessions Judge convicted 'D' for an offence under Section 302 IPC while 'M'and the appellant-'N' were convicted for an offence under Section 302/34 and each of them were awarded life sentence with fine. The High Court upheld the order. Therefore, the accused filed Special Leave Petition before the Supreme Court. This Court dismissed the SLP filed by 'M' and 'D'. Therefore, the appellant filed the instant appeal.

Dismissing the appeal, the Court

HELD: 1. On facts, all the three accused had a common intention in commission of the said brutal crime. Each one of them participated though the vital blows were given by 'D'. But for 'M' catching hold of arms of the deceased probably the death could have been avoided. The appellant showed no mercy and continued pelting stones on the deceased even when he collapsed to the ground. The prosecution has been able to establish the charge beyond reasonable doubt. [Para 16] [1168-E-G]

2.1. PW1, complainant had clearly stated that 'D' had inflicted the injuries upon the body of the deceased with a knife. According to Investigating officer-PW8 and PW2, the said knife was recovered by Panchnama of recovery. However, PW1 did not specifically state in the court that the knife was recovered by going to the house of the accused. There is some element of difference between these statements but it in no way amounts to a material contradiction or discrepancy which has caused any prejudice to the accused. PW1 in his examination stated

that after arrest of 'D', the police had questioned him and he had told them about the knife which was recovered. However, he stated that he does not remember the exact place from where the recovery was made due to lapse of time. However, with certainty he stated that a panchnama was prepared and it was signed. In his cross examination he categorically stated that the knife was recovered before him when he was called in Kotwali and he had seen that knife in kotwali and the knife had been recovered before the statement of 'D' was recorded'. This evidence of the witness has to be read in conjunction with the statement of PW8 and PW 2. Upon such reading recovery of the knife from the house of the accused is established. The doctor referred to various injuries on the body of the deceased including abrasions and small cuts which could have been a result of pelting of stones by the appellant upon the deceased even after he had fallen on the ground. [Para 9] [1162-D-H; 1163-A-B]

2.2. The evidentiary value of a statement should normally be appreciated in its correct perspective, attendant circumstances and the context in which the statement was made. As far as the alleged discrepancy with regard to recovery of knife is concerned, it is not possible for the court to attach undue importance to this aspect. The court has to form an 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. The knife was recovered in furtherance to the disclosure statement made by 'D'. The recovery memo which was duly proved in accordance with law, according to the medical evidence given by PW5, and the statement of the investigating officer, PW8, clearly show that knife was recovered from the house of 'D' and the injuries on the body of the deceased were inflicted by the knife. Thus, these alleged discrepancies can hardly be of any advantage to the accused. [Para 9] [1163-C-H; 1164-A-B]

State Represented by Inspector of Police v. Saravanan and Anr. **(2008) 17 SCC 587: 2008 (14) SCR 405;** *Arumugam v. State* **(2008) 15 SCC 590: 2008 (14) SCR 309;** *Mahendra Pratap Singh v. State of Uttar Pradesh* **(2009) 11 SCC 334: 2009 (2) SCR 1033 – relied on.**

2.3. Witness 'R' was given up as the prosecution felt that he would be hostile to the case of the prosecution but 'S' himself was examined by the accused as its own witness. Once 'S' was examined as witness of the defence, the objection taken by the appellant that the court should draw adverse inference from non-examination of these witnesses loses its legal content. DW1, though appeared as witness for the defence, supported the case of the prosecution resulting in his being declared as a hostile witness by the counsel appearing for the accused. Therefore, the statement of DW1 could be and has rightly been relied upon by the Sessions Judge while convicting the accused of the offence. The statement of DW1 has fully corroborated the statement of PW1. He stated that there were nearly 20 to 30 houses in that Mohalla and denied the suggestion made to him by the defence counsel that he had not seen

anything on the fateful day and was not witness to the occurrence. He also, specifically, denied the suggestion that he was related to the family of the deceased. In his cross-examination, he clearly stated that 'M' had caught hold of both the hands of the deceased and 'D' had given blows on the chest of the deceased by a knife and 'N' had pelted stones on the deceased. He also stated that he had taken the deceased to the hospital along with PW1. Confronted with this evidence, the appellant can hardly even attempt to argue that there is no definite evidence on record to prove the commission of the offence by the appellant. There is definite documentary, ocular and medical evidence and more definitely statement of defence witness itself to repel the plea of the appellant that he has been falsely implicated in the case. [Para 10] [1164-C-H; 1165-A]

3.1. The three ingredients of Section 34 IPC are that the criminal act is done by several persons; that such act is done in furtherance of the common intention of all; and that each of such persons is liable for that act in the same manner as if it were done by him alone would guide the court in determining whether an accused is liable to be convicted with the aid of Section 34. While first two are the acts which are attributable and have to be proved as actions of the accused, the third is the consequence. Once criminal act and common intentions are proved, then by fiction of law, criminal liability of having done that act by each person individually would arise. The criminal act, according to Section 34 IPC must be done by several persons. The emphasis in this part of the Section is on the word 'done'. It only flows from this that before a person can be convicted by following the provisions of Section 34, that person must have done something along with other persons. Some individual participation in the commission of the criminal act would be the requirement. Every individual member of the entire group charged with the aid of Section 34 must, therefore, be a participant in

the joint act which is the result of their combined activity. Under Section 34, every individual offender is associated with the criminal act which constitutes the offence both physically as well as mentally, i.e., he is a participant not only in what has been described as a common act but also what is termed as the common intention and, therefore, in both these respects his individual role is put into serious jeopardy although this individual role might be a part of a common scheme in which others have also joined him and played a role that is similar or different. But referring to the common intention, it needs to be clarified that the courts must keep in mind the fine distinction between 'common intention' on the one hand and 'mens rea' as understood in criminal jurisprudence on the other. Common intention is not alike or identical to mens rea. The latter may be co-incidental with or collateral to the former but they are distinct and different. [Para 11] [1165-B-H; 1166-A-E]

3.2. Section 34 also deals with constructive criminal liability. It provides that where a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it was done by him alone. If the common intention leads to the commission of the criminal offence charged, each one of the persons sharing the common intention is constructively liable for the criminal act done by one of them. [Para 12] [1166-F-G]

Brathi alias Sukhdev Singh v. State of Punjab **(1991) 1 SCC 519: 1990 (2) Suppl. SCR 503 – referred to.**

3.3. While dealing with such cases, the common intention or state of mind and the physical act, both may be arrived at the spot and essentially may not be the result of any pre-determined plan to commit such an offence. This will always depend on the facts and circumstances of the case, like in the instant case the

deceased, all alone and unarmed went to demand money from 'M' but 'M', 'D' and the appellant got together outside their house and as is evident from the statement of the witnesses, they not only became aggressive but also committed a crime and went to the extent of stabbing him over and over again at most vital parts of the body puncturing both the heart and the lung as well as pelting stones at him even when he fell on the ground. But for their participation and a clear frame of mind to kill the deceased, 'D' probably would not have been able to kill the deceased. The role attributable to each one of them, thus, clearly demonstrates common intention and common participation to achieve the object of killing the deceased. In other words, the criminal act was done with the common intention to kill the deceased 'M'. The trial court rightly noticed that all the accused persons coming together in the night time and giving such serious blows and injuries with active participation shows a common intention to murder the deceased. Thus, the conclusions arrived at by the trial court and the High Court would not call for any interference. [Para 13] [1166-H; 1167-A-E]

Shivalingappa Kallayanappa and Ors. v. State of Karnataka **1994Supp. (3) SCC 235;** *Jai Bhagwan and Ors. v. State of Haryana* **(1999) 3 SCC 102 – referred to.**

Case Law Reference:

2008 (14) SCR 405	**Relied on.**	**Para 9**
2008 (14) SCR 309	**Relied on.**	**Para 9**
2009 (2) SCR 1033	**Relied on.**	**Para 9**
1990 (2) Suppl. SCR 503	**Referred to.**	**Para 15**
1994 Supp. (3) SCC 235	**Referred to.**	**Para 14**
(1999) 3 SCC 102	**Referred to.**	**Para 15**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 437 of 2005.

From the Judgment & Order dated 26.8.2004 of the High Court of Judicature of Madhya Pradesh, Jabalpur, bench at Gwalior in Criminal Appeal No. 21 of 1999.

T.N. Singh for the Appellant.

Vikas Bansal (for Vibha Datta Makhija) for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. The present appeal is directed against the judgment of the High Court of Judicature of Madhya Pradesh at Jabalpur dated 26th August, 2004 affirming the judgment of the Sessions Judge, Datia, Madhya Pradesh dated 30th December, 1998 convicting all the three accused (appellants/petitioners herein) for an offence under Section 302 read with Section 34 of the Indian Penal Code (IPC) awarding life sentence to each one of them with a fine of Rs.2,000/- each in default thereto to undergo rigorous imprisonment for three years.

2. We must notice that vide order dated 28th May, 2005, the Special Leave Petition in respect of Petitioner Nos.2 and 3, namely, Mahesh Dhimar and Dinesh Dhimar had already been dismissed. Thus, we have to consider the present appeal only in respect of Appellant No.1, namely, Nand Kishore.

3. The learned counsel appearing on behalf of appellant No.1, while impugning the judgment under appeal contended that :

A. the prosecution has not been able to prove its case beyond reasonable doubt. In fact, there is no direct evidence to sustain the conviction of the accused. It is further argued that on the contrary, there are serious contradictions between the statements of the alleged eye-witnesses as well as the medical evidence. The accused, thus, was entitled to benefit of doubt and consequent acquittal.

B. In any case, the appellant could not have been convicted at all for an offence under Section 302 read with Section 34 IPC as he had no common intention with other accused. It is further submitted that he shared neither participated in the commission of the crime nor was he carrying any weapon. On the cumulative reading of the evidence, the ingredients of Section 34 IPC are not satisfied and, therefore, conviction of the appellant is vitiated in law.

4. In order to examine the merit or otherwise of these contentions, it would be useful for us to refer to the necessary facts giving rise to the present appeal.

The incident took place on 18th June, 1997 in the night at about 9-9.30 p.m. at Christian Ka Pura, Bangar Ki Haveli. Some young boys of the vicinity informed the complainant, Brij Kishore Bidua, who was later examined as PW1 that a quarrel has taken place between Mahavir, the deceased, and Mahesh Dhimar near the house of Mahesh Dhimar. Upon receiving this information, Brij Kishore, along with Sunil Badhaulia, went running to the Christian Ka Pura where they saw that Mahesh Dhimar was holding both the arms of Mahavir and Dinesh Dhimar was stabbing him with knife in the chest on the left side and Nand Kishore was also pelting stones at him. After receiving these injuries, Mahavir collapsed to the ground. As per the witnesses even after Mahavir fell, Nand Kishore kept pelting stones on him and then they ran away from the site. Brij Kishore and Sunil carried Mahavir to the hospital on their scooter where the doctor examined him and declared him brought dead. It is the case of the prosecution that Mahavir had some dues to recover from Mahesh Dhimar and to recover that money, Mahavir had gone to Mahesh Dhimar but the fight occurred and without any resistance from Mahavir, all the three accused killed him in the manner afore-referred.

At about 10 p.m. the same day Brij Kishore, the brother of the deceased Mahavir, lodged a report in the Police Station

at Kotwali Datia where a criminal case No.175/97 under Section 302 read with Section 34 IPC was registered. This was investigated by the Investigating Officer who, during investigation, prepared or caused to be prepared post mortem report, site plan, recovered a knife on the disclosure of Dinesh, recovered bricks, took sample of soil soaked in blood and clothes of the deceased. These things were sent to the forensic science laboratory for examination. After completing the investigation, challan was filed against all the accused persons. They were tried by the Court of competent jurisdiction. The Sessions Judge, Datia, by a detailed and well reasoned judgment dated 30th December, 1998, convicted accused Dinesh for an offence under Section 302 IPC while the other two accused, namely, Nand Kishore and Mahesh Dhimar were convicted for an offence under Section 302 read with Section 34 IPC and sentenced them as aforestated. This judgment was unsuccessfully assailed by the accused before the High Court which dismissed the appeal declining to interfere either with the judgment of conviction or the order of sentence.

5. Dissatisfied from the concurrent judgments of the courts, the accused has filed the present appeal.

6. The statements of PW1, Brij Kishore, Dr. P.K. Srivastava, PW5 and PW8, Narendra Singh, (Investigating Officer) have to be examined in some detail.

7. PW1 is the eye-witness to the occurrence and while fully supporting the case of the prosecution, he stated that Mahesh Dhimar's house was about 100 ft. away from the place of occurrence. He narrated the above facts and stated that Rajendra and Sunil had also reached the spot following him and they had witnessed the occurrence. They took the deceased to the hospital where he was declared brought dead. This witness did not refer to any animosity between the deceased and the accused. PW8 has referred to the entire investigation, various recovery memos as well as registration of the FIR (Exhibit P1). Statement of PW1 is corroborated with the report of Exhibit P1.

8. Dr. P.K. Srivastava, PW5, stated that on 19th June, 1997 at around 7.00 O'clock in the morning, he had examined the dead body of the deceased and there were incised wounds on his body on the left side of the chest, right thigh, in the heart in left lung and 11-12 other lacerated scratches and internal wounds etc. According to him, injury on the heart caused death and the deceased had died round about 10-14 hours before the post mortem examination.

9. There are two main discrepancies which have been highlighted on behalf of the appellant to claim the benefit of doubt. Firstly, that according to the doctor, there were nearly 16 wounds on the body of the deceased, while the eye-witnesses have referred to just two blows by accused Dinesh Dhimar on the left side of the deceased; and secondly that the injuries were stated to have only been caused by a sharp weapon. Brij Kishore (PW1) had clearly stated that Dinesh had inflicted the injuries upon the body of the deceased with a knife. According to Investigating officer (PW8) and Munna Lal (PW2), the said knife was recovered by Panchnama of recovery (Ex. P-6). However, PW1 did not specifically state in the Court that the knife was recovered by going to the house of the accused. There is some element of difference between these statements but it in no way amounts to a material contradiction or discrepancy which has caused any prejudice to the accused. These so-called discrepancies can easily be explained and have been dealt with in the judgment under appeal appropriately. In his examination in which PW1 has stated that after arrest of Dinesh, the police had questioned him and he had told them about the knife which was recovered. However, he stated that he does not remember the exact place from where the recovery was made due to lapse of time. He, however, with certainty states that a *panchnama* was prepared and it was signed. In his cross examination he categorically stated "the knife was recovered before me when I was called in Kotwali by Vermaji and I had seen that knife in kotwali and the knife had been recovered before the statement of Dinesh was recorded'. This evidence of the witness has to be read in

conjunction with the statement of PW8 and PW 2. Upon such reading recovery of the knife from the house of the accused is established. Further, the doctor has referred to various injuries on the body of the deceased including abrasions and small cuts which could have been a result of pelting of stones by Nand Kishore upon the deceased even after he had fallen on the ground. While rejecting the contention with respect to the second alleged discrepancy, it must be borne in mind that the Court has to examine the statement of a witness as a whole. The Court may not be in a correct position to arrive at any final conclusion while only reading or relying upon a sentence in the statement of a witness that too by reading it out of context. The evidentiary value of a statement should normally be appreciated in its correct perspective, attendant circumstances and the context in which the statement was made. As far as the alleged discrepancy with regard to recovery of knife is concerned, it is not possible for the Court to attach undue importance to this aspect. The court has to form an 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.* [(2008) 17 SCC 587], *Arumugam v. State* [(2008) 15 SCC 590] and *Mahendra Pratap Singh v. State of Uttar Pradesh* [(2009) 11 SCC 334]. The knife was recovered in furtherance to the disclosure statement made by Dinesh Dhimar. The recovery memo which

was duly proved in accordance with law, according to the medical evidence given by PW5, and the statement of the investigating officer, PW8, clearly show that knife was recovered from the house of Dinesh Dhimar and the injuries on the body of the deceased were inflicted by the knife. Thus, these alleged discrepancies can hardly be of any advantage to the accused.

10. Another very significant aspect of this case is that the prosecution had not examined Rajendra and Sunil as prosecution witnesses and this issue was raised on behalf of the defence that the Court should draw adverse inference from non-examination of these witnesses. Witness Rajendra was given up as the prosecution felt that he would be hostile to the case of the prosecution but Sunil himself was examined by the accused as its own witness. Once Sunil was examined as witness of the defence, the objection taken by the appellant loses its legal content. DW1, though appeared as witness for the defence, supported the case of the prosecution resulting in his being declared as a hostile witness by the counsel appearing for the accused. Therefore, the statement of DW1 could be and has rightly been relied upon by the learned Sessions Judge while convicting the accused of the offence. The statement of DW1 has fully corroborated the statement of PW1. He stated that there were nearly 20 to 30 houses in that *Mohalla* and denied the suggestion made to him by the defence counsel that he had not seen anything on the fateful day and was not witness to the occurrence. He also, specifically, denied the suggestion that he was related to the family of the deceased. In his cross-examination, he has clearly stated that Mahesh Dhimar had caught hold of both the hands of the deceased and Dinesh Dhimar had given blows on the chest of the deceased by a knife and Nand Kishore had pelted stones on the deceased. Lastly, he also stated that he had taken the deceased to the hospital along with PW1. Confronted with this evidence, the appellant can hardly even attempt to argue that there is no definite evidence on record to prove the

commission of the offence by the appellant. There is definite documentary, ocular and medical evidence and more definitely statement of defence witness itself to repel the plea of the appellant that he has been falsely implicated in the case.

11. Now, we would examine whether the conviction of the appellant under Section 302 with the aid of Section 34 by the courts is sustainable in law or not. For the application of Section 34 IPC, it is difficult to state any hard and fast rule which can be applied universally to all cases. It will always depend upon the facts and circumstances of the given case whether the persons involved in the commission of the crime with a common intention can be held guilty of the main offence committed by them together. Provisions of Section 34 IPC come to the aid of law while dealing with cases of criminal offence committed by a group of persons with common intention. Section 34 reads as under :

> "34. Acts done by several persons in furtherance of common intention.—When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

A bare reading of this section shows that the section could be dissected as follows :

(a) Criminal act is done by several persons;

(b) Such act is done in furtherance of the common intention of all; and

(c) Each of such persons is liable for that Act in the same manner as if it were done by him alone.

In other words, these three ingredients would guide the court is determining whether an accused is liable to be convicted with the aid of Section 34. While first two are the acts which are attributable and have to be proved as actions of the accused, the third is the consequence. Once criminal act and common intentions are proved, then by fiction of law, criminal

liability of having done that act by each person individually would arise. The criminal act, according to Section 34 IPC must be done by several persons. The emphasis in this part of the section is on the word 'done'. It only flows from this that before a person can be convicted by following the provisions of Section 34, that person must have done something along with other persons. Some individual participation in the commission of the criminal act would be the requirement. Every individual member of the entire group charged with the aid of Section 34 must, therefore, be a participant in the joint act which is the result of their combined activity. Under Section 34, every individual offender is associated with the criminal act which constitutes the offence both physically as well as mentally, i.e., he is a participant not only in what has been described as a common act but also what is termed as the common intention and, therefore, in both these respects his individual role is put into serious jeopardy although this individual role might be a part of a common scheme in which others have also joined him and played a role that is similar or different. But referring to the common intention, it needs to be clarified that the courts must keep in mind the fine distinction between 'common intention' on the one hand and '*mens rea*' as understood in criminal jurisprudence on the other. Common intention is not alike or identical to *mens rea*. The latter may be co-incidental with or collateral to the former but they are distinct and different.

12. Section 34 also deals with constructive criminal liability. It provides that where a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it was done by him alone. If the common intention leads to the commission of the criminal offence charged, each one of the persons sharing the common intention is constructively liable for the criminal act done by one of them. **{**Refer to *Brathi alias Sukhdev Singh v. State of Punjab* [(1991) 1 SCC 519]}.

13. Another aspect which the Court has to keep in mind while dealing with such cases is that the common intention or

state of mind and the physical act, both may be arrived at the spot and essentially may not be the result of any pre-determined plan to commit such an offence. This will always depend on the facts and circumstances of the case, like in the present case Mahavir, all alone and unarmed went to demand money from Mahesh but Mahesh, Dinesh and Nand Kishore got together outside their house and as is evident from the statement of the witnesses, they not only became aggressive but also committed a crime and went to the extent of stabbing him over and over again at most vital parts of the body puncturing both the heart and the lung as well as pelting stones at him even when he fell on the ground. But for their participation and a clear frame of mind to kill the deceased, Dinesh probably would not have been able to kill Mahavir. The role attributable to each one of them, thus, clearly demonstrates common intention and common participation to achieve the object of killing the deceased. In other words, the criminal act was done with the common intention to kill the deceased Mahavir. The trial court has rightly noticed in its judgment that all the accused persons coming together in the night time and giving such serious blows and injuries with active participation shows a common intention to murder the deceased. In these circumstances, the conclusions arrived at by the trial Court and the High Court would not call for any interference.

14. The learned counsel appearing for the appellant had relied upon the judgment of this Court in the case of *Shivalingappa Kallayanappa & Ors. v. State of Karnataka* [1994 Supp. (3) SCC 235] to contend that they could not be charged or convicted for an offence under Section 302 with the aid of Section 34 IPC. The said judgment has rightly been distinguished by the High Court in the judgment under appeal. In that case, the Supreme Court had considered the role of each individual and recorded a finding that there was no common object on the part of the accused to commit murder. In that case, the court was primarily concerned with the common object falling within the ambit of Section 149, IPC. In

fact, Section 34 IPC has not even been referred to in the afore-referred judgment of this Court.

15. Another case to which attention of this Court was invited is *Jai Bhagwan & Ors. v. State of Haryana* [(1999) 3 SCC 102]. In that case also, the Court had discussed the scope of Section 34 IPC and held that common intention and participation of the accused in commission of the offence are the ingredients which should be satisfied before a person could be convicted with the aid of Section 34 IPC. The Court held as under:

> "**10.** To apply Section 34 IPC apart from the fact that there should be two or more accused, two factors must be established: (*i*) common intention and (*ii*) participation of the accused in the commission of an offence. If a common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability but if participation of the accused in the crime is proved and a common intention is absent, Section 34 cannot be invoked. In every case, it is not possible to have direct evidence of a common intention. It has to be inferred from the facts and circumstances of each case."

16. The facts of the present case examined in light of the above principles do not leave any doubt in our minds that all the three accused had a common intention in commission of this brutal crime. Each one of them participated though the vital blows were given by Dinesh Dhimar. But for Mahesh catching hold of arms of the deceased probably the death could have been avoided. Nand Kishore showed no mercy and continued pelting stones on the deceased even when he collapsed to the ground. The prosecution has been able to establish the charge beyond reasonable doubt.

17. The judgments of the courts below do not suffer from any legal infirmity or appreciation of evidence. While finding no merit in the appeal, we dismiss the same.

D.G. Appeal dismissed.