MAN SINGH

v.

STATE OF U.P.

(Criminal Appeal No. 1441 of 2011)

JULY 19, 2011

[HARJIT SINGH BEDI AND GYAN SUDHA MISRA, JJ.]

Uttar Pradesh Excise Act, 1910: s.60(2) – Conviction under – Appellant arrested and half bottle of illicit liquor alongwith implement for manufacturing liquor seized from him – Courts below convicted him u/s.62 and sentenced him to undergo one year's rigorous imprisonment alongwith fine – On appeal, held: Contention of appellant that large number of incriminating circumstances were introduced by the prosecution but the statement of the appellant recorded u/s.313 Cr.P.C. was completely perfunctory is not acceptable at this belated stage – Incident occurred in 1979 and the appellant had faced trial and other liquor proceedings for almost 32 years and that too for being in possession of only half a bottle of liquor – Appellant has already undergone 5½ months of sentence – In the interest of justice, order of courts below set aside and he is ordered to be acquitted.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1441 of 2011.

From the Judgment & Order dated 30.11.2010 of the High Court of Judicature at Allahabad, Uttar Pradesh n Crl. Revision Petition No. 2203 of 1983.

Ravi Kumar Tomar for the Appellant.

Ratnakar Dash, Shekhar Raj Sharma, Anuvrat Sharma for the Respondent.

The following order of the Court was delivered

O R D E R

1. Delay condoned.

2. Leave granted.

3. We have heard the learned counsel for the parties.

4. The appellant was arrested on the 11th August, 1979 at about 9:15a.m. and half a bottle of illicit liquor along with lahan and other implements for manufacturing liquor were seized from him. On the completion of the investigation, he was brought to trial for an offence punishable under Section 60(2) of the U.P. Excise Act, 1910. The trial court relying on the evidence of the members of the police party and the Excise Inspector convicted him under the aforesaid provision and sentenced him to undergo one year's rigorous imprisonment and to payment of fine as well. This conviction and sentence has been confirmed by the first appellate court as well as the Revisional Court vide judgments dated 22nd October, 1983 and 30th November, 2010 respectively. The matter is before us in this background.

5. During the course of arguments, the learned counsel for the appellant has raised primarily one submission before us. He has pointed out that though a large number of incriminating circumstances had been introduced by the prosecution during the course of the evidence but the statement of the appellant recorded under Section 313 of the Code of Criminal Procedure was completely perfunctory and did not satisfy the tests laid down by this Court in a string of cases and in this view of the matter grave prejudice had been suffered by the appellant as all incriminating circumstances had not been put to him. It has been submitted that this flaw in the trial required that he should be acquitted of the offence charged.

6. We have considered the argument and find merit in it. Section 313 postulates that all incriminating circumstances

must be put to an accused so that he is in a position to explain the circumstances against him. We reproduce the statement in extenso herein below:

"Q1 You have heard the statement of accused which are against you what you have to say?

Ans. They are deposing in enmity.

Q2 Will you lead the defence evidence?

Ans. No.

Q3 Is there anything else you want to say?

Ans. I was sitting at the shop of Brijbhan at Shishgarh Town and I was apprehended by the police persons during the crime week."

7. Faced with an obvious difficulty, Mr. Ratnakar Dash, the learned Senior Counsel for the State of U.P. has submitted that in this view of the matter, the trial court should be asked to record the statement under Section 313 of the Code of Criminal Procedure yet again so that any lacunae that has crept in can be filled up. We are not willing to accept this submission at this belated stage. The incident occurred way back in the year 1979 and the appellant has been facing trial or other legal proceedings for almost 32 years now and that too for being in possession of only half a bottle of liquor. We are also told that he has undergone five months and 15 days of the sentence that had been imposed on him. We find that the ends of justice require that this appeal should be allowed. We, accordingly, set aside the orders of the courts below. The appellant is ordered to be acquitted. He is said to be in custody. He shall be released forthwith if not wanted in connection with any other case.

D.G. Appeal allowed.

FIDA HUSSAIN & ORS.
v.
MORADABAD DEVELOPMENT AUTHORITY & ANR.
(Civil Appeal No. 5448 of 2006)

JULY 19, 2011

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

Land Acquisition Act, 1894:

ss. 4 and 11 – Acquisition of land in two villages – Award by Land Acquisition Officer upheld by High Court and finally by Supreme Court in Gafar's case – Appeals by some other land owners of both the villages for enhancement of compensation – HELD: The question of adequacy of compensation for the lands acquired in these two villages under the same notifications has been gone into by Supreme Court in the case of Gafar wherein the Court after meticulously examining all the legal contentions canvassed by the parties to the lis, took the view that the evidences relied upon by the reference court while enhancing the compensation were not reliable, and, therefore, the High Court was justified in setting aside the order passed by the reference court and restoring the award passed by the LAO – The judgment in Gafar's case does not require reconsideration – Therefore, it would not be proper for the Court to take a different view, on the ground that what was considered in Gafar's case was on a different fact situation – Res judicata – Precedent.

Recovery of differential compensation amount from land owners – Amount of compensation enhanced by reference court – High Court restoring the award of Land Acquisition Officer – Supreme Court upholding the order of High Court – Plea that the amount paid by way of compensation pursuant to judgment of reference court be not recovered – HELD: The land acquisition in question is of two decades old, and it is

plausible that the landowners have utilized the compensation amount paid for one purpose or the other – In the peculiar facts and circumstances of the case and in the interest of justice, it is clarified that the respondents are restrained from recovering the amounts paid as compensation or enforcing security offered while withdrawing the compensation amount pursuant to order passed by the reference court.

Constitution of India, 1950:

Article 141 – Law declared by Supreme Court – Binding effect of – Land acquisition – Compensation awarded by Land Acquisition Officer upheld by Supreme Court in Gafar's case – Appeals by other land owners of the same villages whose lands were acquired under the same notifications whereunder the land were acquired of claimants in Gafar's case – HELD: Only the principles of law that emanate from a judgment of Supreme Court, which have aided in reaching a conclusion of the problem, are binding precedents within the meaning of Article 141 – However, if the question of law before the Court is the same as in the previous case, the judgment of the Court in the former is binding in the latter, for the reason that the question of law before the Court is already settled – Thus, if the Court determines a certain issue for a certain set of facts, then, that issue stands determined for any other matter on the same set of facts – Precedent.

Natural justice:

Opportunity of hearing – In some of the appeals before the High Court, award of Land Acquisition Officer was upheld – Decision of High Court upheld by Supreme Court in Gafar's case – Subsequent appeals by other claimants on the grounds that in some cases their counsel were not heard while in some others applications for substitution of L.Rs. of deceased appellants were not considered before the High Court – HELD: On perusal of the appeal paper books of the instant appeals, it is evident that in some of the appeals the

presence of the counsel before the High Court is recorded – It is settled position that the Court speaks through its order and whatever stated therein has to be read as correct – Therefore, it cannot be said that counsel were not heard in all the matters against which the appeals are filed – As regards applications for substitution, the Court would have remitted the matter back to the High Court to give an opportunity of hearing to the legal representatives concerned and decide the appeals on merits – That, however, would only be a formality because having regard to the law laid down by the Court in Gafar's case, the High Court is bound to follow that decision, since the notification for acquiring the lands in respect of the villages are the same.

Notification u/s 4 read with s. 17 of the Land Acquisition Act, 1894 dated 20.09.1990 was issued in respect of the lands of Harthala village. The Land Acquisition Officer awarded compensation by the award dated 18.09.1993 assessing the market value of the acquired lands at Rs. 80 per sq. meter. The reference court enhanced the compensation by assessing the market value of the lands to Rs. 270 per sq. meter. In respect of lands of village Mukkabpur, pursuant to the Notification u/s 4 published on 20.08.1992, the LAO fixed the compensation at the rate of Rs.92.59 per sq. meter. The reference court enhanced the compensation to Rs. 350 per sq. meter. The appeals filed by the State having been allowed by the High Court, the land owners filed the instant appeals.

Dismissing the appeals, the Court

HELD: 1. In the instant appeals, the challenge is for the compensation assessed for the lands notified and acquired under the notifications pertaining to the two villages. The question of adequacy of compensation for the lands acquired in these two villages under the same

notifications has been gone into by this Court in the case of *Gafar wherein this Court after meticulously examining all the legal contentions canvassed by the parties to the lis, took the view that the evidences relied upon by the reference court while enhancing the compensation were not reliable and, therefore, the High Court was justified in setting aside the order passed by the reference court and restoring the award passed by the LAO. This Court also held that it could not be said that the High Court had adopted an erroneous approach or employed the wrong principles in regard to the claim for enhancement of compensation, or that, it has so erred as to warrant interference under Article 136 of the Constitution of India. A review petition filed by the appellants therein was also dismissed by this Court. The judgment in *Gafar's* case does not require reconsideration by this Court. Therefore, it would not be proper for this Court to take a different view, on the ground that what was considered by this Court was on a different fact situation. It has been held by this Court in the case of *B.M. Lakhani* that a decision of this Court is binding when the same question is raised again before this Court, and reconsideration cannot be pleaded on the ground that relevant provisions, etc., were not considered by the Court in the former case. [para 6,9, 10 and 14] [298-G-H; 299-A; 301-B-C; 303-B-E]**

Gafar and Ors. v. Moradabad Development Authority* **2007 (9) SCR 32 = (2007) 7 SCC 614; *and B.M. Lakhani v. Municipal Committee*, **(1970) 2 SCC 267 – relied on.**

2.1 With regard to the contention that the decision of the Court in the case of *Gafar* did not operate as *res judicata* for the present batch of cases, the principles of *res judicata* would apply only when the lis was inter-partes and had attained finality of the issues involved. The said principle will, however, have no application *inter alia* in a case where the Judgment and/or order had been

passed by a Court having no jurisdiction thereof and/or involving a pure question of law. The principle of *res judicata* will, therefore, have no application in the facts of the instant case. [para 15] [303-F-G]

2.2 As regards the plea that the judgment in the case of *Gafar* did not operate as a precedent for the present batch of cases as no point of law was decided, it is now well settled that a decision of this Court based on specific facts does not operate as a precedent for future cases. Only the principles of law that emanate from a judgment of Supreme Court, which have aided in reaching a conclusion of the problem, are binding precedents within the meaning of Article 141. However, if the question of law before the Court is the same as in the previous case, the judgment of the Court in the former is binding in the latter, for the reason that the question of law before the Court is already settled. Thus, if the Court determines a certain issue for a certain set of facts, then, that issue stands determined for any other matter on the same set of facts. [para 20] [309-C-E]

Shenoy & Co. v. CTO, **1985 (3) SCR 659 = (1985) 2 SCC 512,;** *Director of Settlements, A.P. v. M.R. Apparao,* **2002 (2) SCR 661 = (2002) 4 SCC 638,;** *Union of India v. Krishan Lal Arneja*, **2004 (1) Suppl. SCR 801 = (2004) 8 SCC 453 – relied on.**

3.1 So far as the plea of not affording of an opportunity of hearing because of non-listing of some appeals, disposal of some appeals in absence of the counsel for the appellants who had sent illness slips and in some others, substitution applications being pending, it is pertinent to note in the factual matrix of the case, the issue of adequacy of compensation for the acquisition of land, in the two villages, is now settled by this Court in the case of *Gafar*. The decision of co-equal Bench is

binding on this Court. Judicial decorum and certainty of law require a Division Bench to follow the decision of another Division Bench and of a larger Bench. [para 21-22] [309-F-H; 310-A-C]

Union of India vs. Raghubir Singh **(1989) 178 ITR 548 – relied on.**

3.2 However, on perusal of the appeal paper books of the thirty appeals before this Court, it is evident that in some of the appeals the presence of the learned counsel is recorded. It is settled position that the Court speaks through its order and whatever stated therein has to be read as correct. Therefore, it cannot be said that counsel were not heard in all the matters against which the appeals are filed. [para 26] [311-E-H]

3.3 Having regard to the submissions urged on behalf of the appellants in so far as not considering the applications for substitution of the L.Rs. of deceased appellants, this Court would have remitted the matter back to the High Court to give an opportunity of hearing to the legal representatives of some of the deceased appellants and decide the appeals on merits. That, however, would only be a formality because having regard to the law laid down by this Court in *Gafar's* case, the High Court is bound to follow that decision, since the notification for acquiring the lands in respect of the villages are the same. [para 27] [312-A-C]

4. As regards the prayer for a direction that the amounts paid by way of compensation pursuant to the judgment of the reference court need not be recovered and the securities furnished by some of the appellants need not be enforced, it is significant to note that the land acquisition in question is of two decades old, and it is plausible that the landowners have utilized the compensation amount paid for one purpose or the other.

In the peculiar facts and circumstances of the case and in the interest of justice, it is clarified that the respondents are restrained from recovering the amounts paid as compensation or enforcing security offered while withdrawing the compensation amount pursuant to order passed by the reference court. [para 28] [312-D-F]

Case Law Reference:

2007 (9) SCR 32	**relied on**	**paar 6**
(1970) 2 SCC 267	**relied on**	**para 14**
1985 (3) SCR 659	**relied on**	**para 17**
2002 (2) SCR 661	**relied on**	**para 18**
2004 (1) Suppl. SCR 801	**relied on**	**para 19**
(1989) 178 ITR 548	**relied on**	**para 22**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5448 of 2006.

From the Judgment & Order dated 05.03.2004 of the High Court of Judicature at Allahabad in First Appeal No. 538 of 1998.

WITH

C.A. Nos. 5382, 5387, 5388, 5389, 5391, 5394, 5395, 5397, 5412, 5421, 5428, 5429, 5432. 5436, 5444, 5445, 5446, 5455, 5457, 5499, 5501, 5502, 5504, 5506, 5507, 5508, 5511, 5533 & 5452 of 2006.

M.L. Varma, Rudreshwar Singh, Raju Sultana, Kaushik Poddar, Gopal Jha, Satya Mitra, Jitendra Mohan Sharma for the Appellants.

M.P. Shorawala, Jyoti Saxena, Shashi Kiran, Ajay K. Agrawal, T. Mahipal for the Respondents.

The Judgment of the Court was delivered by

H.L. DATTU, J. 1. This batch of appeals is directed against the separate orders passed by the High Court of Allahabad in Regular First Appeals filed by land owners for enhancement of compensation awarded by the Reference Court for the lands acquired under the Land Acquisition Act, 1894, [hereinafter referred to as 'the Act'] in the villages of Harthala and Mukkarrabpur. There are in all 30 appeals before us, out of which, 23 are in relation to the village of Harthala and 7 in relation to the village of Mukkarrabpur.

2. In view of the orders we propose to pass in all these appeals, we deem it unnecessary to state the facts giving rise to the present appeals in greater details and a brief reference thereto would suffice to appreciate the controversy.

3. *Lands in Village of Harthala*:- There are twenty three appeals relating to this village. Under Section 4 read with Section 17 of the Act, Notification dated 20.09.1990 was issued and published by the State Government for the acquisition of the lands of the appellants. Subsequently, a declaration dated 10.06.1991 was published in the Gazette, under Section 6 of the Act. The lands acquired were taken physical possession by the State Government. In accordance with Section 11 of the Act, the Land Acquisition Officer [hereinafter referred to as 'the LAO'] assessed the market value of the acquired lands at Rs. 80 per sq. meter vide order dated 18.09.1993 as compensation. Dissatisfied with the award of the LAO, the land owners filed objections, inter-alia claiming that the market value of the acquired lands is Rs. 1000 per sq. meter, due to the proximity of the lands to the city of Moradabad. After scrutinizing the evidence on record, the Reference Court had come to the conclusion that the market value of the nearby land was Rs. 550 per sq. meter, however, taking into consideration the location and potentiality of the lands and also proximity of the lands from the city of Moradabad and other relevant factors, enhanced the

compensation awarded to Rs. 270 per sq. meter. The State preferred appeals against the enhancement so made by the Reference Court and the High Court has allowed the same in the light of the judgment of the Court in First Appeal No. 247 of 1997 dated 05.03.2004.

4. *Lands in village of Mukkarabbpur*:- Seven of the present appeals relate to the village of Mukkarabbpur. A Notification for acquisition of the lands under the Act was issued and published on 20.08.1992. In pursuance of the Notification, the State took possession of the said lands on 06.05.1997 by paying 80% of the estimated compensation at the rate of Rs. 150 per sq. meter. However, vide order dated 29.08.1997, the LAO fixed the compensation at the rate of Rs. 92.59 per sq. meter. Aggrieved by the same, the appellants moved the Reference Court and produced evidence in support of their claim that the prevailing rates of land in that village and its roundabouts were much higher. After giving due consideration to the claim made and the evidence on record, the Reference Court enhanced the compensation to Rs. 350 per sq. meter. The respondents preferred appeals to the High Court, and the same came to be allowed, reviving the award passed by the LAO.

5. Shri. M.L. Varma, learned senior counsel, appears for the appellants, and Shri. M.P. Shorawala, learned counsel, holds the brief for the respondents.

6. At the outset, it is relevant to note that the question of adequacy of compensation for the lands acquired in these two villages under the same notification has been gone into by this Court in the case of *Gafar and Ors. v. Moradabad Development Authority*, (2007) 7 SCC 614. In that case, this Court made a detailed enquiry into the method of valuation adopted by the LAO and the enhancement of compensation by the Reference Court. This Court took the view that the evidence relied upon by the Reference Court while enhancing the compensation were not reliable, and, therefore, the High

Court was justified in setting aside the order passed by the Reference Court and restoring the award passed by the LAO.

7. In Gafar's case for the lands acquired in the village of Harthala under Notification dated 13.09.1991, after a detailed consideration of the compensation awarded by the LAO, this Court held:

> "15. We find that the Awarding Officer had taken note of a sale deed, which was at a time proximate to the date of notifications in these cases and it related to a piece of land, though a small extent, which was not distant from the acquired lands, to borrow the language of the Awarding Officer. We are inclined to see some force in the stand adopted by the High Court that the Awarding Officer himself had been generous in his award. Since he has adopted such a rate, the question is whether this Court should interfere with the decision of the High Court restoring that Award or award any further compensation.
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> 16. The scope of interference by this Court was delineated by the decision in Kanta Prasad Singh v. State of Bihar wherein this Court held that there was an element of guess work inherent in most cases involving determination of the market value of the acquired land. If the judgment of the High Court revealed that it had taken into consideration the relevant factors prescribed by the Act, in appeal under Article 133 of the Constitution of India, assessment of market value thus made should not be disturbed by the Supreme Court. For the purpose of deciding whether we should interfere, we have taken note of the position adopted by the Awarding Officer, the stand adopted by the Reference Court and the relevant aspects discussed by the High Court. On such appreciation of the facts and circumstances of the case as a whole, we are of the view that the sum of Rs. 80 per square meter awarded as compensation in these cases is just compensation paid to the land owners. Once we have thus found the compensation to be just, there arises no occasion for this Court to interfere with the decision of the High Court restoring the award of the Land Acquisition Officer.
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> 17. In view of our conclusion as above, all the appeals relating to Harthala have only to be dismissed."

8. In respect to the lands acquired in village of Mukkarabbpur, this Court, in *Gafar's case*, held:

> "18. In respect of the lands at Mukkarrabpur, the claim for enhancement was allowed by the Reference Court in spite of the finding that the evidence of P.Ws. 1 and 2 adduced on behalf of the claimants was unreliable. It also found that the two sale deeds relied on by the claimant in support of the claim for enhancement were also not comparable or reliable in the light of the evidence of the claimant himself and that it has not been shown that the lands involved therein were comparable to the lands acquired. In spite of it, the Reference Court granted an enhancement only based on its award in L.A.R. No. 134 of 1988 and on that basis the award was made at Rs. 192/- per square meter. Obviously, the award in L.A.R. No. 134 of 1988 was set aside by the High Court. Hence, the award of the Reference Court in the case on hand became untenable. Once no reliance could be placed on that award to enhance the compensation, it is clear that even on the finding of the Reference Court, no claim for enhancement has been made out by the claimants. In that situation, the High Court was fully justified in setting aside the award of the Reference Court and in restoring the award of the Land Acquisition Officer.
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> 19. We may incidentally notice that the lands were agricultural lands being used for cultivation and even the method of valuing it on the basis of price per square meter does not appear to be justified. All the same, the award has adopted that method and the State cannot go back

on it. In the absence of any acceptable legal evidence to support the claim for enhancement, no grounds are made out for interference with the decision of the High Court in the appeals relating to village Mukkarrabpur."

9. This Court also held that it could not be said that the High Court had adopted an erroneous approach or employed the wrong principles in regard to the claim for enhancement of compensation, or that, it has so erred as to warrant interference under Article 136 of the Constitution of India.

10. A review petition filed by the appellants therein was also dismissed by this Court.

11. Shri. M.L. Varma, learned senior counsel, submits that the findings and the conclusions in the judgment of this Court in the case of *Gafar* are flawed for the reason that the exemplars relied on for deciding the compensation was for inundated land, and hence, the same could not reflect the true value of the land. He further submits that relevant sale deeds were not taken into consideration by the Court while concluding that the Reference Court had erred in enhancing the compensation and that the High Court was correct in setting aside the same. The learned senior counsel also submits that this Court should have remanded the matters to the High Court in the case of *Gafar,* as the High Court, being the first appellate Court, was required to give a reasoned judgment while allowing appeals against the order of the Reference Court enhancing the compensation. In the alternative, Shri. Varma contends that the decision in *Gafar*'s case does not operate as a binding precedent on the present set of appeals, since this Court has not decided any legal issue. It is also stated that the decision does not operate as a *res judicata*, as the parties were different. It is further argued that out of the thirty appeals that are listed before us, in the seven appeals relating to the acquisition of lands in the village of Mukkarrbpur, the matters were not shown on the cause list on the day they were disposed of. He further states that in some other cases (six appeals), the

learned counsel appearing for the respondents before the High Court (appellants before us) had submitted an "illness slip" and had not appeared on the day, the matters were disposed of. Shri. Varma further contends that in as many as seventeen appeals before us, the Development Authority had filed applications for substitution to bring on record the legal representatives of the deceased land owners and without considering and deciding the applications, the High Court could not have passed the impugned orders. Despite all these procedural infirmities, the High Court could not have allowed the Regular First Appeals filed by the State, is the contention of learned senior counsel Shri Varma.

12. Pursuant to the direction issued by this Court, an affidavit has been filed by Shri. V.P. Rai, learned counsel, who had appeared before the High Court, in support of factual assertion made by Sri Varma. Learned counsel in his affidavit has stated that seven appeals before the High Court (listed as C.A. No. 5502/2006, C.A. No. 5499/2006, C.A. No. 5501/2006, C.A. No. 5404/2006, C.A. No. 5507/2006, C.A. No. 5508/2006 and 5511/2006 before us, all relating to the village of Mukkarrabpur) were not shown on the cause list of the High Court on the day they were disposed of, and hence, he had no knowledge about the hearing of the appeals. Shri. Rai, has further stated, that as many six appeals (listed as C.A. No. 5448/2006, C.A. No. 5391/2006, C.A. No. 5397/2006, C.A. No. 5445/2006, C.A. No. 5452/2006 and C.A. No. 5455/2006 before us) in which he was appearing, were disposed of on the day, he had submitted an "illness slip" due to his ill health.

13. Per contra, Shri. M.P. Shorawala, learned counsel, has argued that there is no legal or factual infirmity in the judgment of this Court in the case of *Gafar*. He submits that this Court has already dealt with the merits of the matter at length in the case of *Gafar* and the same need not be gone into, once over, again by this Court. With regard to the point of non-listing of cases, the learned counsel contends that the cause lists are prepared under the authority of Hon'ble the Chief Justice of the

High Court, and it was not the practice of the Court to send the files of matters that were not listed, to the Court Hall, let alone hear them and dispose them of.

14. Having carefully considered the submissions of the learned senior counsel Shri Varma, we are of the view that the judgment in *Gafar's* case does not require reconsideration by this Court. In *Gafar*'s case, this Court had meticulously examined all the legal contentions canvassed by the parties to the lis and had come to the conclusion that the High Court has not committed any error which warrants interference. In the present appeals, the challenge is for the compensation assessed for the lands notified and acquired under the same notification pertaining to the same villages. Therefore, it would not be proper for us to take a different view, on the ground that what was considered by this Court was on a different fact situation. This view of ours is fortified by the Judgment of this Court in the case of *B.M. Lakhani v. Municipal Committee*, (1970) 2 SCC 267, wherein it is held that a decision of this Court is binding when the same question is raised again before this Court, and reconsideration cannot be pleaded on the ground that relevant provisions, etc., were not considered by the Court in the former case.

15. With regard to the contention that the decision of the Court in the case of *Gafar* did not operate as *res judicata* for the present batch of cases, we are of the view that the principles of Resjudicata would apply only when the lis was inter-parties and had attained finality of the issues involved. The said Principles will, however, have no application interalia in a case where the Judgment and/or order had been passed by a Court having no jurisdiction thereof and/or involving a pure question of law. The principle of Resjudicata will, therefore, have no application in the facts of the present case.

16. To examine the other limb of the contention of the learned senior counsel that the judgment in the case of *Gafar* did not operate as a precedent for the present batch of cases,

as no point of law was decided, this issue requires to be considered in the light of the judicial pronouncement of this Court.

17. In the case of *Shenoy & Co. v. CTO*, (1985) 2 SCC 512, a number of writ petitions were allowed by the High Court. However, the State chose to file appeal only in one case, which came to be allowed by this Court in the said case. In this fact situation, this Court took the view that the decision of this Court was binding on all the writ petitioners before the High Court, even though they were not respondents in the appeal before this Court. It was held:

> "22. Though a large number of writ petitions were filed challenging the Act, all those writ petitions were grouped together, heard together and were disposed of by the High Court by a common judgment. No petitioner advanced any contention peculiar or individual to his petition, not common to others. To be precise, the dispute in the cause or controversy between the State and each petitioner had no personal or individual element in it or anything personal or peculiar to each petitioner. The challenge to the constitutional validity of 1979 Act proceeded on identical grounds common to all petitioners. This challenge was accepted by the High Court by a common judgment and it was this common judgment that was the subject-matter of appeal before this Court in Hansa Corporation case. When the Supreme Court repelled the challenge and held the Act constitutionally valid, it in terms disposed of not the appeal in Hansa Corporation case alone, but petitions in which the High Court issued mandamus on the non-existent ground that the 1979 Act was constitutionally invalid. It is, therefore, idle to contend that the law laid down by this Court in that judgment would bind only the Hansa Corporation and not the other petitioners against whom the State of Karnataka had not filed any appeal. To do so is to ignore the binding nature of a judgment of this Court

under Article 141 of the Constitution. Article 141 reads as follows:

> "The law declared by the Supreme Court shall be binding on all courts within the territory of India. A mere reading of this article brings into sharp focus its expanse and its all pervasive nature. In cases like this, where numerous petitions are disposed of by a common judgment and only one appeal is filed, the parties to the common judgment could very well have and should have intervened and could have requested the Court to hear them also. They cannot be heard to say that the decision was taken by this Court behind their back or profess ignorance of the fact that an appeal had been filed by the State against the common judgment. We would like to observe that, in the fitness of things, it would be desirable that the State Government also took out publication in such cases to alert parties bound by the judgment, of the fact that an appeal had been preferred before this Court by them. We do not find fault with the State for having filed only one appeal. It is, of course, an economising procedure."

23. The judgment in Hansa Corporation case rendered by one of us (Desai, J.) concludes as follows:

> "As we are not able to uphold the contentions which found favour with the High Court in striking down the impugned Act and the notification issued thereunder and as we find no merit in other contentions canvassed on behalf of the respondent for sustaining the judgment of the High Court, this appeal must succeed. Accordingly, this appeal is allowed and the judgment of the High Court is quashed and set aside and the petition filed by the respondent in the High Court is dismissed with costs throughout."

To contend that this conclusion applies only to the party before this Court is to destroy the efficacy and integrity of the judgment and to make the mandate of Article 141 illusory. But setting aside the common judgment of the High Court, the mandamus issued by the High Court is rendered ineffective not only in one case but in all cases.

24. A writ or an order in the nature of mandamus has always been understood to mean a command issuing from the Court, competent to do the same, to a public servant amongst others, to perform a duty attaching to the office, failure to perform which leads to the initiation of action. In this case, the petitioners-appellants assert that the mandamus in their case was issued by the High Court commanding the authority to desist or forbear from enforcing the provisions of an Act which was not validly enacted. In other words, a writ of mandamus was predicated upon the view that the High Court took that the 1979 Act was constitutionally invalid. Consequently the Court directed the authorities under the said Act to forbear from enforcing the provisions of the Act qua the petitioners. The Act was subsequently declared constitutionally valid by this Court. The Act, therefore, was under an eclipse, for a short duration; but with the declaration of the law by this Court, the temporary shadow cast on it by the mandamus disappeared and the Act revived with its full vigour, the constitutional invalidity held by the High Court having been removed by the judgment of this Court. If the law so declared invalid is held constitutionally valid, effective and binding by the Supreme Court, the mandamus forbearing the authorities from enforcing its provisions would become ineffective and the authorities cannot be compelled to perform a negative duty. The declaration of the law is binding on everyone and it is therefore, futile to contend that the mandamus would survive in favour of those parties against whom appeals were not filed.

25. The fallacy of the argument can be better illustrated

by looking at the submissions made from a slightly different angle. Assume for argument's sake that the mandamus in favour of the appellants survived notwithstanding the judgment of this Court. How do they enforce the mandamus? The normal procedure is to move the Court in contempt when the parties against whom mandamus is issued disrespect it. Supposing contempt petitions are filed and notices are issued to the State. The State's answer to the Court will be: "Can I be punished for disrespecting the mandamus, when the law of the land has been laid down by the Supreme Court against the mandamus issued, which law is equally binding on me and on you?" Which Court can punish a party for contempt under these circumstances? The answer can be only in the negative because the mandamus issued by the High Court becomes ineffective and unenforceable when the basis on which it was issued falls, by the declaration by the Supreme Court, of the validity of 1979 Act.

26. In view of this conclusion of ours, we do not think it necessary to refer to the other arguments raised before the High Court and which the learned counsel for the appellants attempted to raise before us also. The appeals can be disposed of on this short point stated above. The judgment of this Court in Hansa Corporation case is binding on all concerned whether they were parties to the judgment or not. We would like to make it clear that there is no inconsistency in the finding of this Court in Joginder Singh case and Makhanlal Waza case. The ratio is the same and the appellants cannot take advantage of certain observations made by this Court in Joginder Singh case for the reasons indicated above."

18. In the case of *Director of Settlements, A.P. v. M.R. Apparao,* (2002) 4 SCC 638, this Court held:

"7. So far as the first question is concerned, Article 141

of the Constitution unequivocally indicates that the law declared by the Supreme Court shall be binding on all courts within the territory of India. The aforesaid Article empowers the Supreme Court to declare the law. It is, therefore, an essential function of the Court to interpret a legislation. The statements of the Court on matters other than law like facts may have no binding force as the facts of two cases may not be similar. But what is binding is the ratio of the decision and not any finding of facts. It is the principle found out upon a reading of a judgment as a whole, in the light of the questions before the Court that forms the ratio and not any particular word or sentence… A judgment of the Court has to be read in the context of questions which arose for consideration in the case in which the judgment was delivered. … The law which will be binding under Article 141 would, therefore, extend to all observations of points raised and decided by the Court in a given case…"

19. The position was made clear by the decision of this Court in the case of *Union of India v. Krishan Lal Arneja*, (2004) 8 SCC 453. In this case, 14 properties were notified for acquisition under the provisions of the Land Acquisition Act, 1898. Only two persons, namely Banwari Lal & Sons and Shakuntala Gupta, had previously challenged the validity of the acquisition by filing writ petitions before the High Court and having the cases decided in their favour finally by this Court. This Court held that the decisions in the earlier cases were a binding precedent for this subsequent appeal that was preferred by the Union of India. This Court held:

"12.…The decision in Banwari Lal and Shakuntala Gupta of this Court in relation to the same notification may not be binding on the principle of res judicata. The argument, however, cannot be accepted that those decisions are not binding being "property-specific" in those cases. In our considered opinion, the decisions are binding as precedents on the question of validity of the notification,

which invokes urgency clause under Section 17 of the Act. We find ourselves in full agreement with the ratio of the decisions in those cases that urgency clause, on the facts and circumstances, which are similar to the present cases, could not have been invoked. The two decisions are, therefore, binding as precedents of this Court. We are not able to find any distinction or difference as to the ground of urgency in regard to the properties covered by these appeals."

20. It is now well settled that a decision of this Court based on specific facts does not operate as a precedent for future cases. Only the principles of law that emanate from a judgment of this Court, which have aided in reaching a conclusion of the problem, are binding precedents within the meaning of Article 141. However, if the question of law before the Court is same as in the previous case, the judgment of the Court in the former is binding in the latter, for the reason that the question of law before the Court is already settled. In other words, if the Court determines a certain issue for a certain set of facts, then, that issue stands determined for any other matter on the same set of facts.

21. The other reasons given by Shri. M.L. Varma, learned senior counsel, for contending that the case of *Gafar* does not apply as a precedent in other cases are threefold: (a) that seven of the present appeals relating to Mukkarrabpur were not heard due to non-listing; (b) in six matters relating to Harthala, the matters were disposed of in the absence of the counsel, who was absent due to his ill health and submission of "illness slip"; and (c) in some of the cases, the applications for substitution was pending before the High Court, and these matters could not be disposed of by allowing the appeal against the dead persons. We are not impressed by these contentions.

22. In the factual matrix of the present case, the adequacy of compensation for the acquisition of land, in the aforesaid villages, was the issue before this Court in the case of *Gafar*

and in these appeals also. The issue is now settled by this Court in the case of Gafar and Ors. (supra). The decision of co-equal Bench is binding on this Court. We may usefully note the decision of this Court in the case of *Union of India vs. Raghubir Singh* (1989) 178 ITR 548. The Court observed that the pronouncement of law by a Division Bench of this Court is binding on a subsequent Division Bench of the same or a smaller number of Judges and in order that such decision be binding, it is not necessary that it should be a decision rendered by the Full Court or a Constitution Bench of this Court. Judicial decorum and certainty of law require a Division Bench to follow the decision of another Division Bench and of a larger Bench and, even if, the reasons to be stated, a different view was necessitated, the matter should be only referred to Hon'ble The Chief Justice for referring the question to a larger Bench.

23. The learned senior counsel emphasizes the fact that the present appellants were not heard when the appeals were decided by the High Court, due to non-listing or disposal of the matters when their counsel had submitted "illness slip" and was not present in Court. He further states that in several cases, the appellants had died, and the applications for substitution of legal heirs were filed by the Development Authority, which were pending in all but in one case. In the one case [presently numbered as C.A. No. 5421/2006], Shri. Varma states that the application was dismissed by the Court. He contends that the rules of natural justice of providing a fair hearing have not been followed. He states that it would be in the interest of justice to remand the matters back to the High Court to decide the appeals on merits, keeping in view the parameters while disposing of the first appeals by the High Court. Shri. Shorawala, learned counsel for the respondent, does not seriously dispute the issue of non-listing raised by the appellants, except stating that the cause list was published under the authority of Hon'ble the Chief Justice of the High Court, and it was not the practice of any Court to dispose of a matter without it being listed.

24. We have considered the contention canvassed by Shri. Varma, learned senior counsel and the affidavit filed by Shri. V.P. Rai in this regard. It is possible that due to the same nature of the matters, the learned Division Bench sitting in appeal may have considered it proper to dispose of the matters though they were not listed on the said day or the advocate for the appellants was not present. This issue is raised only in thirteen appeals filed before us. With regard to seventeen appeals, the appellants have contended that the substitution of legal heirs had not happened, and that the matter had abated.

25. It is in C.A. No. 5421 of 2006, in which the appellants have contended that the application for substitution was rejected, and by that order, the appeal had abated. We have perused the appeal paper books, and do not find any ground taken in this regard. Even the order dated 7/1/2004, by which the application for substitution was supposedly rejected by the High Court, has not been annexed. In the light of this, we are not inclined to accept the argument that the appeal had abated.

26. On perusal of the appeal paper books of the thirty appeals before us, we find that in some of the appeals [namely C.A. Nos. 5429/2006 and 5457/2006], the presence of the learned counsel is recorded Though some of the appellants before us may not have been heard by the High Court due to non-listing of the matter or disposal in the absence of the advocate, it is clear from the impugned orders enclosed in some of the appeal paper books that the learned counsel for some of the appellants have been heard. It is settled position that the Court speaks through its order and whatever stated therein has to be read as correct and, therefore, we will go by what is recorded in the impugned judgment, rather than what the counsel have stated at the time of hearing of these appeals. In this view of the matter, we are not inclined to accept that the learned counsel were not heard in all the matters against which appeals are filed.

27. Having regard to the submissions urged on behalf of the appellants in so far as not considering the application for substitution of the L.Rs. of deceased appellants, we would have remitted the matter back to the High Court to give an opportunity to the appellants herein, who are the legal representatives of some of the deceased appellants to afford an opportunity of hearing and decide the appeals on merits. That, however, would only be a formality because having regard to the law laid down by this Court in Gafar's case, the High Court is bound to follow that decision, since the notification for acquiring the lands in respect of the villages are one and the same.

28. The learned senior counsel may be, as a last salvo, submits that in the event, we are not inclined to grant any of the reliefs that he has asked for, then we may direct that the amounts paid by way of compensation pursuant to the judgment of the Reference Court need not be recovered and the securities furnished by some of the appellants need not be enforced. This prayer is contested by the learned counsel for the respondents. This request of Shri. Varma appears to be reasonable. The land acquisition in question is of two decades old, and it is plausible that the landowners have utilized the compensation amount paid for one purpose or the other. In such circumstances, we are not inclined to put an extra burden of repayment on them. Therefore, while dismissing the appeals, we clarify that in the peculiar facts and circumstances of the case and in the interest of justice, we restrain the respondents from recovering the amounts paid as compensation or enforcing security offered while withdrawing the compensation amount pursuant to order passed by the Reference Court.

29. In light of the above, the appeals are dismissed with the rider as indicated by us at paragraph 28 of the judgment. Costs are made easy.

R.P. Appeals dismissed.

G. SRINIVAS RAO
v.
UNION OF INDIA & ORS.
(Civil Appeal No. 1911 of 2006)

JULY 19, 2011

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

Service Law:

Indian Police Service (Cadre) Rules, 1954:

rr. 3 and 5 read with clause (2) of Para 3 of Letter dated 31.5.1985 – Cadre allocation – Claim of a general category candidate that allocation of the OBC candidate, who was much below him in merit list, to Andhra Pradesh Cadre was unjust and instead he should have been allocated to the Andhra Pradesh Cadre and not to Manipur-Tripura Joint Cadre – HELD: It is reiterated that the roster system ensures equitable treatment to both the general candidates and reserved candidates and, thereore, the roster system cannot be by-passed on some ground or the other which may result in unfair treatment to either general candidates or reserved candidates in violation of their right to equality under Articles 14 and 16(1) of the Constitution – Nonetheless, in the instant case, the claimant was allocated to the Manipur-Tripura Cadre on 27.07.1999 and was intimated about such allocation by letter dated 02.10.1999 – Instead of challenging the allocations made in 1999 at the earliest, he filed the O.A. before the Tribunal only in 2001 by which time the 36 candidates including the OBC candidate concerned, who had been selected and appointed to the IPS on the basis of Civil Services Examination, 1998 and had been allocated to different cadres, had already joined their respective cadres and undertaken training in their respective States, and any

order of the Tribunal or the Court granting relief to the claimant will disturb the allocation of several members of the IPS – High Court was right in taking a view that no relief can be granted to the claimant on the ground of delay on his part in moving the Tribunal – Constitution of India, 1950 – Articles 14 and 16(1) – Delay/Laches – Central Government letter dated 31.5.1985 – Para 3(2).

The appellant, a general category candidate, who secured 95th rank in the Civil Services Examination, 1998 conducted by the Union Public Service Commission, was appointed to the IPS and was allocated to the Manipur-Tripura Joint Cadre on 27.10.1999. Respondent No.4, an OBC candidate, who secured 133rd rank in the said Examination, was appointed to the IPS and was allocated to the Andhra Pradesh Cadre on 27.07.1999. The appellant filed an O.A. before the Central Administrative Tribunal in 2001, contending that instead of respondent no.4 he should have been allocated to the Andhra Pradesh Cadre and that the allocation of respondent no.4 to the Andhra Pradesh Cadre was bad in law, unjust and unsustainable. Union of India, in its additional affidavit, stated that a total number of 36 vacancies in the IPS were to be filled up on the basis of the Civil Services Examination, 1998 out of which 21 vacancies were to be filled up by general candidates, 10 vacancies were to be filled up by OBC candidates and 5 by SC/ST candidates. However, as per allocation, the total number of vacancies for general candidates worked out to be 23 instead of 21 and total number of vacancies for OBC candidates worked out to be 8 instead of 10 and, therefore, 2 vacancies for general candidates had to be converted to 2 vacancies for OBC candidates. It was further stated that as the relevant data for the last five years in respect of OBC candidates was not available on

28.05.1999 when the entire exercise of allocation was completed and approved by the competent authority, the earlier advice of the Department of Personnel and Training was followed and two general vacancies from the first two States in the alphabetical order, one from the Andhra Pradesh Cadre and one from the Assam-Meghalaya Joint Cadre, were converted to OBC vacancies and the result was that respondent no.4 was allocated to the OBC vacancy of Andhra Pradesh Cadre. The Tribunal dismissed the application of the appellant. His writ petition was also dismissed by the High Court.

Dismissing the appeal, the Court

HELD: 1.1. Rule 3 of the IPS (Cadre) Rules, 1954 provides that each State and a group of States will have a State cadre or Joint Cadre respectively of the IPS; and Rule 5 provides that the Central Government in consultation with the State Government or State Governments concerned has the power to make allocation of IPS officers to various cadres. In Para 3 of the letter dated 31.05.1985 the broad principles which are to be followed for allocation on the basis of roster system have been indicated by the Central Government. [para 7] [323-D-F]

1.2. It has not been shown as to how data for 5 years in respect of allocation of OBC candidates was relevant for making the allocation when Clause (2) of Para 3 of the letter dated 31.05.1985 required that a roster in each cadre with vacancies for insider, outsider, general and reserved candidates not exceeding prescribed percentage was required to be maintained and allocations of candidates selected in the All India Services were to be made in these vacancies earmarked for insider, outsider, general candidates or reserved

candidates. As has been held by this Court in *Rajiv Yadav's case, **the roster system ensures equitable treatment to both the general candidates and reserved candidates and hence the roster system cannot be by-passed on some ground or the other which may result in unfair treatment to either general candidates or reserved candidates in violation of their right to equality under Articles 14 and 16(1) of the Constitution. [para 9] [325-H; 326-A-C]**

***Union of India* v. *Rajiv Yadav, IAS and Others* 1994 (2) Suppl. SCR 30 = (1994) 6 SCC 38 - relied on.**

1.3. Nonetheless, the appellant was allocated to the Manipur-Tripura Cadre on 27.07.1999 and was intimated about such allocation by letter dated 02.10.1999. Instead of challenging the allocations made in 1999 at the earliest, the appellant filed the O.A. before the Tribunal only in 2001 by which time the 36 candidates including respondent no.4, who had been selected and appointed to the IPS on the basis of Civil Services Examination, 1998 and had been allocated to different cadres, had already joined their respective cadres and undertaken training in their respective States; and any order of the Tribunal or the Court granting relief to the appellant will disturb the allocation of several members of the IPS. The High Court was right in taking a view that no relief can be granted to the appellant on the ground of delay on his part in moving the Tribunal. [para 10-11] [326-D-H; 327-A-B]

R. K. Sabharwal and Others v. State of Punjab and Others **1995 (2) SCR 35 = (1995) 2 SCC 745;** and *M. Nagaraj* v. *Union of India* **2006 (7) Suppl. SCR 336 = (2006) 8 SCC 212 - cited.**

Case Law Reference:

1995 (2) SCR 35	**cited**	**para 4**

2006 (7) Suppl. SCR 336 cited para 4

1994 (2) Suppl. SCR 30 relied on para 9

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1911 of 2006.

From the Judgment & Order dated 03.02.2005 of the High Court of Andhra Pradesh at Hyderabad in W.P. No. 8072 of 2004.

G. Ramakrishna Prasad for the Appellant.

Ugra Shankar Prasad, Sushma Suri, G.N. Reddy for the Respondents.

The Judgment of the Court was delivered by

A. K. PATNAIK, J. 1. This is an appeal by special leave under Article 136 of the Constitution against the order dated 03.02.2005 of the Division Bench of the Andhra Pradesh High Court dismissing Writ Petition No.8072 of 2004 filed by the appellant.

2. The facts very briefly are that the appellant, a general candidate not belonging to any reserved category, took the Civil Services Examination, 1998 conducted by the Union Public Service Commission and he secured 95th rank and was appointed to the IPS and was allocated to the Manipur-Tripura Joint Cadre on 27.10.1999. Respondent No.4, who as an OBC candidate, also took the Civil Services Examination, 1998 and secured 133rd rank and was appointed to the IPS and was allocated to the Andhra Pradesh Cadre on 27.07.1999. The appellant filed O.A. No.155 of 2001 before the Central Administrative Tribunal, Hyderabad Bench, contending that instead of respondent no.4 he should have been allocated to the Andhra Pradesh Cadre and that the allocation of respondent no.4 to the Andhra Pradesh Cadre was bad in law, unjust and

unsustainable. The appellant prayed for a direction from the Tribunal to the respondent no.1 to allocate him to the Andhra Pradesh Cadre. The Tribunal, however, did not find any irregularity in the roster system followed by the respondent no.1 in making the allocations and by order dated 25.07.2001 dismissed the O.A. The appellant challenged the order dated 25.07.2001 of the Tribunal before the High Court under Article 226 of the Constitution in Writ Petition No.17902 of 2002 and contended that though there was in the year 1999 a vacancy for a general candidate in the Andhra Pradesh Cadre to which the appellant could be allocated, this was converted to a vacancy for OBC candidate and the respondent no.4 was allocated to this vacancy in the Andhra Pradesh Cadre. The appellant also contended before the High Court that this vacancy for a general candidate was converted to a vacancy for OBC candidate on the ground that relevant data for five years in respect of OBC was not available though actually such data was available. Since this aspect of the matter had not been considered by the Tribunal, the High Court allowed the Writ Petition, set aside the order of the Tribunal and remanded the case to the Tribunal for fresh consideration.

3. After the case was remanded to the Tribunal, the respondent no.1 filed a petition before the Tribunal seeking leave to file an additional affidavit and pursuant to leave granted by the Tribunal, the respondent no.1 filed an additional affidavit. In this additional affidavit, the respondent no.1 stated that a total number of 36 vacancies in the IPS were to be filled up on the basis of the Civil Services Examination, 1998 and out of total number of 36 vacancies, 21 vacancies were to be filled up by general candidates, 10 vacancies were to be filled up by OBC candidates and 5 vacancies were to be filled up by SC/ST candidates in accordance with the reservation provisions and the roster points and in May 1999, the vacancies were distributed category-wise in the following manner:-

S.L	Cadre	Total vacancies	27%OBC rounded off		22.5 %SC/ ST rounded off		Gene-ral
1.	Andhra Pradesh	1	.27	0	.225	0	1
2.	Assam Meghalaya	1	.27	0	.225	0	1
3.	Bihar	1	.27	0	.225	0	1
4.	Gujarat	3	.81	1	.675	1	1
5.	Haryana	1	.27	0	.225	0	1
6.	Himachal Pradesh	1	.27	0	.225	0	1
7.	J & K	3	.81	1	.675	1	1
8.	Karnataka	3	.81	1	.675	1	1
9.	Kerala	2	.54	1	.450	0	1
10.	Madhya Pradesh	1	.27	0	.225	0	1
11.	Maharashtra	1	.27	0	.225	0	1
12.	Manipur Tripura	4	1.08	1	.900	1	2
13.	Nagaland	2	.54	1	.450	0	1
14.	Orissa	2	.54	1	.450	0	1
15.	Punjab	1	.27	0	.225	0	1
16.	Rajasthan	4	1.08	1	.900	1	2
17.	Sikkim	1	.27	0	.225	0	1
18.	Tamil Nadu	1	.27	0	.225	0	1
19.	AGMU	1	.27	0	.225	0	1
20.	Uttar Pradesh	1	.27	0	.225	0	1
21.	West Bengal	1	.27	0	.225	0	1
	Total	**36**		**8**		**5**	**23**

Respondent no.1 further stated in the additional affidavit that since as per the distribution made in the aforesaid table, the total number of vacancies for general candidates worked out to be 23 instead of 21 and total number of vacancies for OBC candidates worked out to be 8 instead of 10, 2 vacancies for general candidates had to be converted to 2 vacancies for OBC candidates. The respondent no.1 has also stated in the

additional affidavit that as the relevant data for the last five years in respect of OBC candidates was not available with the respondent on 28.05.1999 when the entire exercise of allocation was completed and approved by the competent authority and the data for four years, i.e. from the Civil Services Examinations, 1994 to Civil Services Examinations, 1995, was available, the earlier advice of the Department of Personnel and Training in Annexure R-1 to the additional affidavit of the respondent no.1 was followed and two general vacancies from the first two States in the alphabetical order, one from the Andhra Pradesh Cadre and one from the Assam-Meghalaya Joint Cadre, were converted to OBC vacancies and the result was that respondent no.4 was allocated to the OBC vacancy of Andhra Pradesh Cadre. The Tribunal in its order dated 09.01.2004 accepted this explanation of the respondent no.1 and rejected the argument of the appellant that the respondent no.1 had arbitrarily taken a lower ranking candidate in preference to high ranking general candidate while making the allocation to the Andhra Pradesh Cadre. Aggrieved, the appellant filed Writ Petition No.8072 of 2004 before the Andhra Pradesh High Court and contended that despite availability of data pertaining to OBC candidates for five years, the respondent no.1 did not consider the same while making the allocation. In the impugned order, however, the High Court held that this apprehension of the appellant was factually without any basis and did not find any fault with the order of the Tribunal. In the impugned order, the High Court also took the view that the appellant was required to implead all the candidates of his batch of IPS, as respondents in the O.A. as well as in the Writ Petition but had not done so and thus relief could not be granted to the appellant. The High Court further held in the impugned order that the allocation of the appellant to the Manipur-Tripura Joint Cadre was intimated to him by a letter dated 21.10.1999, but he filed the O.A. in 2001 and by the time the impugned order was passed, the officers would have

undergone attachment training and a wholesale or extensive review of the cadre allocation at a belated stage would not be conducive to public interest.

4. Mr. Ranjit Kumar, learned counsel for the appellant, submitted that this Court has held in *R. K. Sabharwal and Others v. State of Punjab and Others* [(1995) 2 SCC 745] that the prescribed percentage of reservation of posts for backward classes cannot be varied or changed. He submitted that in *M. Nagaraj v. Union of India* [(2006) 8 SCC 212] a Constitution Bench of this Court has further observed that the reservation provision should not lead to excessiveness so as to breach the ceiling limit of the reserved quota. He submitted that the Secretary, Government of India, Ministry of Personnel & Training Administrative Reforms and Public Grievances, has in his letter dated 31.05.1985 (hereinafter referred to as 'the letter dated 31.05.1985) laid down the broad principles of allocation on the basis of roster system which are to be followed while making allocation of officers appointed to All India Services and a reading of these principles of allocation would show that the vacancies are to be reserved in various cadres according to prescribed percentage and, therefore, the prescribed percentage of reservation including that of OBC cannot be exceeded. He submitted that in *Union of India v. Rajiv Yadav, IAS and Others* [(1994) 6 SCC 38] this Court, after examining the principles of cadre allocation in the letter dated 31.05.1985, held that the "Roster System" ensures equitable treatment to both the general candidates and the reserved categories. He referred to the Chart annexed as Annexure P/19 to show that the percentage of OBC candidates allocated to the Andhra Pradesh Cadre from Civil Services Examination 1994 to 1998 was as high as 33% which was far in excess of the 27% reservation in favour of OBC. He vehemently argued that the Chart in Annexure P/19 further shows that in various other State cadres the total percentage of OBC candidates allocated from

the Civil Services Examinations of 1994 to 1998 was less than 27% and, therefore, the respondent no.1 should not have converted the vacancy for general candidate in Andhra Pradesh Cadre to a vacancy for OBC candidate. According to Mr. Ranjit Kumar, since there is breach of the principles of allocation and the roster system as laid down in the letter dated 31.05.1985 and the allocation of respondent no.4 to the Andhra Pradesh Cadre was in excess of the 27% quota for OBC, this is a fit case in which this Court should quash the allocation of the respondent no.4 and instead direct respondent no.1 to allocate the appellant to the Andhra Pradesh Cadre.

5. Mr. Mohan Parasaran, learned Additional Solicitor General, on the other hand, submitted that the impugned order of the Tribunal should not be disturbed as it contains good reasons for not interfereing in the allocation of the officers of the 1999 batch of IPS. He submitted that while distributing the vacancies in an All India Service, the Central Government has to consider plurality of choices and allocating two OBC vacancies to the cadres of States which were first two in the alphabetical order is one of the choices open to the Central Government when relevant data for the last five years in respect of the OBC candidates was not available when the exercise of allocation was completed and approved by the competent authority. He submitted that the decision of this Court in *R. K. Sabharwal and Others v. State of Punjab and Others* (supra), cited by Mr. Ranjit Kumar, relates to maintenance of roster for the purpose of reservation of posts and may have relevance for the appointment to the IPS but has no relevance to allocation of members of the All India Service to different cadres after their appointment.

6. Mr. Neeraj Kumar Jain, learned counsel appearing for respondent no.4, contended that the equitable distribution of vacancies for general candidates and reserved candidates is

required to be ensured by the letter dated 31.05.1985 over a period of time and not every time the allocation is made to a cadre and thus the contention of the appellant that the allocation of the respondent no.4 to the Andhra Pradesh Cadre has not ensured such equitable distribution is not correct. He further submitted that in any case the allocations of respondent no.4 to the Andhra Pradesh Cadre and the appellant to the Manipur-Tripura Cadre were made as far back as in the year 1999 and the appellant filed the O.A. after two years in 2001 and that too after he accepted the allocation and the High Court rightly held that the allocation made in the year 1999 could not be disturbed by a challenge to the allocations in 2001. He finally submitted that respondent no.4 has been working in the Andhra Pradesh Cadre since 1999 and should not be disturbed at this stage by this Court.

7. We have considered the submissions of the learned counsel for the parties and we find that Rule 3 of the IPS (Cadre) Rules, 1954 provides that each State and a group of States will have a State cadre or Joint Cadre respectively of the IPS and Rule 5 of the Cadre Rules provides that the Central Government in consultation with the State Government or State Governments concerned has the power to make allocation of IPS officers to various cadres. We further find that in Para 3 of the letter dated 31.05.1985 the broad principles which are to be followed for allocation on the basis of roster system have been indicated by the Central Government. Clauses (2) of Para 3, on which Mr. Ranjit Kumar placed reliance, is extracted hereinbelow:-

> "(2) The vacancies for Scheduled Castes and Scheduled Tribes will be reserved in the various cadres according to the prescribed percentage. For purpose of this reservation, Scheduled Castes and Scheduled Tribes will be grouped together and the percentage will be added. Distribution of reserved vacancies in each cadre between 'outsiders' and 'insiders' will be done in the ratio 2:1. This ratio will be operationalised by following a cycle 'outsider, 'insider', 'outsider' as is done in the case of general candidates."

It will be clear from Clause (2) of Para 3 of the letter dated 31.05.1985 that the vacancies for Scheduled Castes and Scheduled Tribes are to be reserved in the various cadres according to the prescribed percentage and distribution of reserved vacancies in each cadre between outsiders and insiders are to be done in the ratio of 2:1 and this ratio is to be operationalised by following a cycle outsider, insider, outsider as is done in the cases of general candidates. What is, therefore, contemplated by Clause (2) of Para 3 of the letter dated 31.05.1985 is that a roster for each cadre, with vacancies earmarked for outsider and insider and for general candidates and reserved candidates is maintained and allocations of outsider, insider, general and reserved candidates are made to these earmarked vacancies. It will be further clear from Clause (2) of Para 3 that the vacancies for the reserved categories are not to exceed the prescribed percentage for the reserved category 'in the various cadres'.

8. The case of the respondent no.1 in the additional affidavit filed before the Tribunal was that in accordance with the reservation provisions and the roster points as explained by this Court in *R. K. Sabharwal and Others v. State of Punjab and Others* (supra), 36 candidates were selected to the IPS, out of whom 21 were general candidates, 10 were OBC candidates and 5 were SC/ST candidates. These 36 candidates were to be allocated to the different State and Joint Cadres and were initially proposed to be distributed in May, 1999 in the manner given in the Chart in Para 3 of this judgment, but the authorities found that by distribution of vacancies, only 8 out of 10 selected OBC candidates could be

accommodated in the different cadres and 23 instead of 21 selected general candidates would get accommodated in the different cadres. It was, therefore, necessary for the competent authority to increase 2 vacancies to adjust 2 more OBC candidates and reduce 2 vacancies proposed for general candidates so that ultimately the 10 OBC candidates could be allocated to 10 vacancies in different cadres and 21 general candidates could be allocated to 21 vacancies in different cadres. The competent authority accordingly diverted two vacancies for general candidates, one from the Andhra Pradesh Cadre and one from the Assam-Meghalaya Joint Cadre, to vacancies for accommodating two more OBC candidates selected for appointment. The reason for choosing the Andhra Pradesh Cadre and the Assam-Meghalaya Joint Cadre for converting two vacancies for general candidates to vacancies for OBC candidates is that when the allocation was finalized by the competent authority on 28.05.1999, relevant data in respect of OBC candidates was available only for four years, i.e. from Civil Services Examination, 1994 to Civil Services Examination, 1997, but was not available for the fifth year because allocation for the fifth year on the basis of Civil Services Examination, 1998 was yet to be notified and ultimately got notified in October, 1999. Respondent No.1 has further explained in his additional affidavit filed before the Tribunal that the Andhra Pradesh Cadre and the Assam-Meghalaya Joint Cadre were chosen for diversion of the two vacancies for accommodating two OBC candidates in accordance with an earlier advice of the Department of Personnel and Training annexed to the affidavit is Annexure R-1 to follow the alphabetical order while choosing the States for decrease or increase in OBC vacancies in the absence of data for 5 years in relation to OBC allocation.

9. We fail to appreciate how data for 5 years in respect of allocation of OBC candidates was relevant for making the allocation when Clause (2) of Para 3 of the letter dated

31.05.1985 required that a roster in each cadre with vacancies for insider, outsider, general and reserved candidates not exceeding prescribed percentage was required to be maintained and allocations of candidates selected in the All India Services were to be made in these vacancies earmarked for insider, outsider, general candidates or reserved candidates. As has been held by this Court in *Union of India v. Rajiv Yadav, IAS and Others* (supra), the roster system ensures equitable treatment to both the general candidates and reserved candidates and hence the roster system cannot be by-passed on some ground or the other which may result in unfair treatment to either general candidates or reserved candidates in violation of their right to equality under Articles 14 and 16(1) of the Constitution.

10. Nonetheless, we find that the appellant was allocated to the Manipur-Tripura Cadre on 27.07.1999 and was intimated about such allocation by letter dated 02.10.1999. Instead of challenging the allocations made in 1999 at the earliest, the appellant filed the O.A. before the Tribunal only in 2001 by which time the 36 candidates including the respondent no.4, who had been selected and appointed to the IPS on the basis of Civil Services Examination, 1998 and had been allocated to different cadres, had already joined their respective cadres and undertaken training in their respective States. The High Court thus held in the impugned order that the wholesale or extensive review of the cadre allocation at a belated stage was not conducive to public interest. For granting relief to the appellant, the Tribunal or the Court will have to direct the respondent No.1 to undertake afresh the exercise of allocation in accordance with the roster system as provided in the letter dated 31.05.1985 and allocate the 36 officers of the IPS appointed on the basis of the Civil Services Examinations, 1998 and such an exercise will disturb the allocation of several members of the IPS.

11. In our considered opinion, therefore, the High Court was right in taking a view that no relief can be granted to the appellant on the ground of delay on the part of the appellant in moving the Tribunal. The appeal is therefore dismissed. No order as to costs.

R.P. Appeal dismissed.

ANIL SACHAR & ANR.
v.
M/S SHREE NATH SPINNERS P. LTD. & ORS. ETC.
(Criminal Appeals Nos. 1413-1414 of 2011)

*JULY 19, 2011 AND AUGUST 17, 2011

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

Negotiable Instruments Act, 1881:

ss. 138 and 139 – Presumption in favour of holder of cheque – Cheques issued by one of the two sister concerns for dues towards the goods supplied to the other of the said concerns – Dishonour of cheques – Complaints – Acquittal of accused on the ground that goods had been supplied to one company while cheques were issued by the other and there was no liability of the company issuing the cheques – HELD: The complainants had established before the trial court that there was an understanding among the complainants and the accused that in consideration of supply of goods to one company, the other was to make the payment – This understanding was on account of the fact that both the companies were sister concerns and their Directors were common – In the circumstances, it has been proved that in consideration of supply of goods to one sister concern, the other had made the payment – The trial court ought to have considered provisions of s.139 of the Act, which make it clear that there is a presumption with regard to consideration when a cheque has been issued by the drawer of the cheque – Of course, the presumption referred to in s.139 is rebuttable – In the instant case, no effort was made for rebuttal of the presumption and, therefore, the presumption must go in favour of the holder of the cheques – Accused held guilty of the offence punishable u/s 138 – On the date of hearing the

*. Conviction recorded on 19.7.2011 and sentences passed on. 17.8.2011.

accused on question of sentence, the records indicated that one of the accused had died – Therefore, appeal as regards him stands abated – In the circumstances, imposition of a fine of Rs.10,00,000/- on the other accused payable to the complainants as compensation would meet the ends of justice – Ordered accordingly – Code of Criminal Procedure, 1973 – s.235(2).

The appellants filed complaints against the respondents for offences punishable u/s 138 of the Negotiable Instruments Act, 1881 for dishonour of cheques issued by respondent no. 3, as Director of M/s 'ATO' Ltd. towards the dues of M/S 'SNS' P. Ltd. It was the case of the complainants that both M/s SNS P. Ltd. and M/s ATO Ltd. were sister concerns with common directors and respondent no. 3 who signed the cheques as Director of M/s 'ATO' Ltd. was also the director of M/s 'SNS' P. Ltd. One of the accused died pending trial. The trial court acquitted the accused holding that the goods had been supplied by the complainants to M/s 'SNS' P Ltd., but cheques had been issued by M/s 'ATO' Ltd. and not by 'SNS' P. Ltd. and as M/s 'SNS' P. Ltd. and M/s 'ATO' Ltd. were two distinct entities, there was no liability of M/s 'ATO" Ltd. and, therefore, dishonour of the cheques in question would not make the signatory of the cheques from the account of M/s 'ATO' Ltd. liable under the provisions of the Act. The appeals having been dismissed by the High Court, the complainants filed the instant appeals.

Recording the conviction, the Court

HELD: 1.1. The complainants had established before the trial court that there was an understanding among the complainants and the accused that in consideration of supply of goods to M/s. 'SNS' P. Ltd., M/s. 'ATO' Ltd. was to make the payment. This understanding was on account of the fact that both the companies were sister

concerns and their Directors were common. In the circumstances, it has been proved that in consideration of supply of goods to M/s. 'SNS' P. Ltd., M/s. 'ATO' Ltd. had made the payment. These facts are very well reflected in the statement made in the complaints and in the evidence by the complainants which have not been controverted. The trial court, therefore, was not right when it came to the conclusion that there was no reason for M/s. 'ATO' Ltd. to give the cheques to the complainants. [para 14] [336-F-H; 337-A-B]

Indowind Energy Ltd. v. Wescare (India) Ltd. and Anr. **2010 (5) SCR 284 = 2010 (5) SCC 306;** and *Rahul Builders* v. *Arihant Fertilizers & Chemicals and Anr.* **2007 (11) SCR 951 =2008(2) SCC 321 – relied on**

1.2 The trial court materially erred while coming to a conclusion that in criminal law no presumption can be raised with regard to consideration as no goods had been supplied by the complainants to M/s. 'ATO' Ltd. The trial court ought to have considered provisions of s.139 of the Act, which makes it clear that there is a presumption with regard to consideration when a cheque has been paid by the drawer of the cheque. In the instant case, M/s. 'ATO' Ltd. paid the cheque which had been duly signed by one of its Directors. The said person is also a Director in M/s. 'SNS' P. Ltd. and both are sister concerns having common Directors. Extracts of books of accounts had been produced before the trial court so as to show that both the companies were having several transactions and they used to pay on behalf of each other to other parties or their creditors. This fact strengthens the presumption to the effect that M/s. 'ATO' Ltd. had paid the cheques to the complainants, which had been signed by the Director, in consideration of goods supplies to M/s 'SNS' P. Ltd. [paras 15 and 16] [337-E-H; 338-A-B]

1.3 It is true that a limited company is a separate legal

entity and its directors are different legal persons. However, in view of the provisions of s. 139 of the Act and the understanding which had been arrived at among the complainants and the accused, one can safely come to a conclusion that the cheques signed by respondent no. 3 had been given by M/s. 'ATO' Ltd. to the complainants in discharge of a debt or a liability, which had been incurred by M/s 'SNS' P. Ltd. [para 17] [338-E-F]

ICDS Ltd. v. Beena Shabeer and Anr. **2002 (1) Suppl. SCR 488 = 2002(6) SCC 426;** *K.K. Ahuja v.V.K. Vora and Anr.* **2009(10) SCC 48;** *and K.N. Beena v. Muniyappan and Anr.* **2001 (4) Suppl. SCR 374 = 2001(8) SCC 458 – relied on.**

1.4 Looking to the facts of the case and law on the subject, this Court is of the view that all the four cheques referred to in both the complaints are presumed to have been given for consideration. The presumption u/s 139 of the Act has not been rebutted by the accused and, therefore, the trial court wrongly acquitted the accused by taking a view that there was no consideration for which the cheques were given by respondent no. 3 to the complainants. The said incorrect view was wrongly confirmed by the High Court. Thus, the accused especially ought to have been held guilty. Therefore, the accused in both the cases, are held guilty and convicted of the offence punishable u/s 138 of the Act. The order of acquittal is set aside. [para 19-21] [340-A-E]

2.1 While hearing the accused on the question of sentence, as provided by s. 235(2) of the Code of Criminal Procedure, 1973 the records revealed that the accused-respondent no. 3 has died. Therefore, the appeal as against him stands abated. [para 1 of order] [340-G-H]

2.2 Apart from the company, there is yet one more Director of the Company accused in the case, i.e.

respondent no. 4. The Court heard the counsel appearing for the parties on the question of sentence. Considering the provisions of s.138 of the Act, imposition of fine of Rs. 10,00,000/- on the accused and payable to the complainants as compensation would meet the ends of justice. The drafts amounting to Rs. 10,00,000/-, payable to the appellants/complainants, have been handed over to their counsel. [para 2-4 of order] [341-A-D]

Case Law Reference:

2002 (1) Suppl. SCR 488	**relied on**	**para 10**
2009(10) SCC 48	**relied on**	**para 10**
2001 (4) Suppl. SCR 374	**relied on**	**para 10**
2010 (5) SCR 284	**relied on**	**para 12**
2007 (11) SCR 951	**relied on**	**para 12**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1413-1414 of 2011.

From the Judgment & Order dated 16.12.2008 of the High Court of Punjab & Haryana at Chandigarh in Crl. Appeal No. 379-MA & 381-MA of 2007.

Nidesh Gupta, Tarun Gupta, S. Janani for the Appellants.

Manoj Swarup, Ankit Swarup, Ashok Anand, Shivendra Swaroop, Ajay Kumar, Devurat, Harish Pandey for the Respondents.

The Judgment of the Court was delivered by

ANIL R. DAVE, J. 1. Leave granted.

2. Being aggrieved by the common Judgment delivered in Criminal Appeal Nos.379-MA of 2007 and 381-MA of 2007 dated 16th December, 2008 by the High Court of Punjab and

Haryana at Chandigarh, the original complainants have filed these appeals. By virtue of the aforestated judgment and order, the High Court has confirmed the Orders dated 4th May, 2007 passed in Criminal Complaint Nos. 46 and 99 of 1999 by the Judicial Magistrate, First Class, Ludhiana whereby the accused in the aforestated complaints had been acquitted of the charges levelled against them.

3. The facts leading to the present litigation in a nut shell are as under:

4. On 23rd February, 1999, Respondent no.4 - Munish Jain, a Director of M/s. A.T. Overseas Ltd. had given in all four cheques for different amounts to Anil Sachar, partner of M/s. Rati Woolen Mills who are appellant Nos. 1 and 2 respectively. According to the case of the complainants, the said cheques were given to M/s. Rati Woolen Mills, of which appellant no.1 is a partner, in consideration of supply of goods to M/s. Shree Nath Spinners Pvt. Ltd.

5. The aforestated cheques, which had been given by Munish Jain as Director of M/s. A.T. Overseas Ltd., had not been honoured and due to dishonour of the said cheques, the complainant, namely, Anil Sachar, as a partner of M/s. Rati Woolen Mills had issued notice as required under the provisions of Section 138 of the Negotiable Instruments Act (hereinafter referred to as 'the Act'). In spite of the said notice, the complainant was not paid the amount covered under the aforestated cheques and, therefore, complaints had been filed against the present respondents.

6. The case of the present respondents before the trial court as well as before the High Court was that the dispute was of a civil nature and with an oblique motive it was given a colour of criminal litigation. The said reply had been given especially in view of the fact that the complaint had also been filed making out a case against the accused under the provisions of Sections 406 & 420 of the Indian Penal Code.

7. The case of the complainants was that M/s. A.T. Overseas Ltd. is a sister concern of M/s. Shree Nath Spinners Pvt. Ltd. and the aforestated cheques were given by Munish Jain towards dues of M/s. Shree Nath Spinners Pvt. Ltd. as a Director of M/s. A.T. Overseas Ltd. After considering the evidence adduced and the arguments made before the trial court, the trial court acquitted the accused for the reason that the goods had been supplied by the complainants to M/s. Shree Nath Spinners Pvt. Ltd. and the cheques had not been given by M/s. Shree Nath Spinners Pvt. Ltd. but they had been given by M/s. A.T. Overseas Ltd. As M/s. Shree Nath Spinners Pvt. Ltd. and M/s. A.T. Overseas Ltd. are two different legal entities and as there was nothing on record to show that the cheques were given by M/s. A.T. Overseas Ltd. in consideration of goods supplied by the complainants to M/s. Shree Nath Spinners Pvt. Ltd., the conclusion was that there was no liability of M/s. A.T. Overseas Ltd. and, therefore, dishonour of the aforestated cheques would not make signatory of the cheques from the account of M/s. A.T. Overseas Ltd. liable under the provisions of the Act.

8. Being aggrieved by the orders passed by the learned Judicial Magistrate, First Class, Ludhiana, dated 4th May, 2007, criminal appeals were filed before the High Court of Punjab and Haryana at Chandigarh, but the said appeals have been dismissed and, therefore, the original complainants have approached this Court by way of these appeals.

9. It may be noted here that during the pendency of the proceedings, Mohinder Jain, accused/respondent no.3 expired and, therefore, deleted from the array of parties.

10. Mr. Nidhesh Gupta, learned Senior Counsel appearing for the complainants mainly submitted that the learned Judicial Magistrate as well as the High Court committed an error by acquitting the accused simply because the goods had been supplied to M/s. Shree Nath Spinners Pvt. Ltd. whereas the cheques were given by M/s. A.T. Overseas Ltd. He submitted

that both the concerns, referred to hereinabove, are sister concerns having common Directors and, therefore, the courts below ought to have lifted the corporate veil so as to find out the realities. He also submitted that Munish Jain, who had signed the aforesaid cheques was Director in both the sister concerns viz. M/s. Shree Nath Spinners Pvt. Ltd. and M/s. A.T. Overseas Ltd. Moreover, he submitted that once the cheques had been issued by the accused, as per provisions of Section 139 of the Act, burden was on the accused to show that there was no consideration. So as to substantiate his aforestated submission, the learned counsel relied upon the Judgments delivered by this Court in *ICDS Ltd. v. Beena Shabeer and Anr.* [2002(6) SCC 426], *K.K. Ahuja v. V.K. Vora and Anr.,* [2009(10) SCC 48] and *K.N. Beena v. Muniyappan and Anr.* [2001(8) SCC 458].

11. For the aforestated reasons, the learned counsel strenuously submitted that the High Court had erred in confirming the orders of acquittal because upon lifting the corporate veil, the correct position could have been revealed and the correct position according to the learned counsel was that the cheques had been given by a sister concern, namely, M/s. A.T. Overseas Ltd. in consideration of the goods supplied to M/s Shree Nath Spinners Pvt. Ltd. The learned counsel also drew our attention to the fact that there were several inter se transactions between the above-named two sister concerns and, therefore, the courts below ought to have believed that the payment had been made by one company for another company and the courts below ought to have believed that there was a consideration behind issuance of the aforestated two cheques. He also draw our attention to the relevant evidence which was adduced by the complainants to establish the aforestated facts.

12. On the other hand, the learned counsel appearing for the respondents supported the reasons recorded by the courts below while acquitting the accused. He mainly submitted that the cheques had been issued by M/s. A.T. Overseas Ltd. to

whom no goods had been supplied by the complainants and, therefore, there was no consideration. In absence of any consideration, according to the learned counsel, the accused could not have been held guilty and, therefore, the courts below rightly acquitted the respondents. The learned counsel relied upon the judgments delivered in *Indowind Energy Ltd. v. Wescare (India) Ltd. and Anr.* [2010(5) SCC 306] and in *Rahul Builders v. Arihant Fertilizers & Chemicals and Anr.* [2008(2) SCC 321]. According to him, even if two companies are having common Directors, both companies would remain different legal entities and, therefore, the submission made on behalf of the appellants that both the companies are sister concerns and, therefore, one company should be made liable for the dues of another company cannot be sustained. He further submitted that there was nothing to substantiate the submission that M/s. A.T. Overseas Ltd. had made payment in consideration of goods supplied to M/s. Shree Nath Spinners Pvt. Ltd. He, therefore, submitted that the appeals be dismissed.

13. Upon hearing the learned counsel appearing for the parties and upon perusal of the record pertaining to the cases and the impugned judgment delivered by the High Court confirming the order passed by the trial court and upon considering the judgments cited by the learned counsel, we are of the view that the decision rendered by the courts below cannot be sustained.

14. Upon perusal of the record, we find that the complainants had established before the trial court that there was an understanding among the complainants and the accused that in consideration of supply of goods to M/s. Shree Nath Spinners Pvt. Ltd., M/s. A.T. Overseas Ltd. was to make the payment. The aforestated understanding was on account of the fact that directors in both the aforestated companies were common and the aforestated companies were sister concerns. In the circumstances, it can be very well said and it has been proved that in consideration of supply of goods to M/s. Shree

Nath Spinners Pvt. Ltd., M/s. A.T. Overseas Ltd. had made the payment. In view of the above fact, in our opinion, the trial court was not right when it came to the conclusion that there was no reason for M/s. A.T. Overseas Ltd. to give the cheques to the complainants. The aforestated facts are very well reflected in the statement made in the complaint and in the evidence by the complainant which have not been controverted. Paras 2 and 3 of the complaint are reproduced herein below:

> "2. That the accused had business dealings with the complainant and supply of the goods which duly supplied by my client vide separate bills from time to time which was duly acknowledged by the accused no. 5 Varun Jain director of the accused no. 1.
>
> 3. That in order to discharge the liability of making the payment, the accused issued following two cheques in favour of the complainant through their sister concern M/S A.T. Overseas Ltd. i.e. Accused No. 1 and the cheques were duly signed by Mr. Munish Jain one of its directors"

15. The trial court materially erred while coming to a conclusion that in criminal law no presumption can be raised with regard to consideration as no goods had been supplied by the complainants to M/s. A.T. Overseas Ltd.. The trial court ought to have considered provisions of Section 139 of the Act, which reads as under:-

> "139. Presumption in favour of holder – It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability."

16. According to the provisions of the aforestated section, there is a presumption with regard to consideration when a cheque has been paid by the drawer of the cheque. In the instant case, M/s. A.T. Overseas Ltd. paid the cheque which

had been duly signed by one of its Directors, namely, Munish Jain. Munish Jain is also a Director in M/s. Shree Nath Spinners Pvt. Ltd.. As stated hereinabove, both are sister concerns having common Directors. Extracts of books of accounts had been produced before the trial court so as to show that both the companies were having several transactions and the companies used to pay on behalf of each other to other parties or their creditors. The above fact strengthens the presumption to the effect that M/s. A.T. Overseas Ltd. had paid the cheques to the complainants, which had been signed by Munish Jain, in consideration of goods supplies to M/s Shree Nath Spinners Pvt. Ltd. Of course, the presumption referred to in Section 139 is rebuttable. In the instant case, no effort was made by Munish Jain or any of the Directors of M/s. A.T. Overseas Ltd. for rebuttal of the aforestated presumption and, therefore, the presumption must go in favour of the holder of the cheques. Unfortunately, the trial court did not consider the above facts and came to the conclusion that there was no consideration for the cheques which had been given by M/s. A.T. Overseas Ltd. to the complainants.

17. It is true that a limited company is a separate legal entity and its directors are different legal persons. In spite of the aforestated legal position, in view of the provisions of Section 139 of the Act and the understanding which had been arrived at among the complainants and the accused, one can safely come to a conclusion that the cheques signed by Munish Jain had been given by M/s. A.T. Overseas Ltd. to the complainants in discharge of a debt or a liability, which had been incurred by M/s Shree Nath Spinners Pvt. Ltd.

18. We may also refer to the judgment delivered by this Court in the case of *ICDS Ltd.* (supra). In the said judgment this Court has referred to the nature of liability which is incurred by the one who is a drawer of the cheque. If the cheque is given towards any liability or debt which might have been incurred even by someone else, the person who is a drawer of the

cheque can be made liable under Section 138 of the Act. The relevant observation made in the aforestated judgment is as under:

> "The words "any cheque" and "other liability" occurring in Section 138 are the two key expressions which stand as clarifying the legislative intent so as to bring the factual context within the ambit of the provisions of the statute. These expressions leave no manner of doubt that for whatever reason it may be, the liability under Section 138 cannot be avoided in the event the cheque stands returned by the banker unpaid. Any contra-interpretation would defeat the intent of the legislature. The High Court got carried away by the issue of guarantee and guarantor's liability and thus has overlooked the true intent and purport of Section 138 of the Act.
>
> ……
>
> The language, however, has been rather specific as regard the intent of the legislature. The commencement of the section stands with the words "where any cheque". The above noted three words are of extreme significance, in particular, by reason of the user of the word "any" - the first three words suggest that in fact for whatever reason if a cheque is drawn on an account maintained by him with a banker in favour of another person for the discharge of any debt or other liability, the highlighted words if read with the first three words at the commencement of Section 138, leave no manner of doubt that for whatever reason it may be, the liability under this provision cannot be avoided in the event the same stands returned by the banker unpaid. The legislature has been careful enough to record not only discharge in whole or in part of any debt but the same includes other liability as well. This aspect of the matter has not been appreciated by the High Court, neither been dealt with or even referred to in the impugned judgment."

19. Looking to the facts of the case and law on the subject, we are of the view that all the four cheques referred to in both the complaints are presumed to have been given for consideration. The presumption under Section 139 of the Act has not been rebutted by the accused and, therefore, we are of the view that the trial court wrongly acquitted the accused by taking a view that there was no consideration for which the cheques were given by Munish Jain to the complainants. The aforesaid incorrect view was wrongly confirmed by the High Court. We, therefore, set aside the acquittal order and convict accused Munish Jain under Section 138 of the Act.

20. In view of the aforestated facts and legal position, in our opinion, the accused ought to have been held guilty, especially accused no. 4, Munish Jain who had signed all the cheques for M/s A.T. Overseas Ltd. We, therefore, hold Munish Jain, accused no. 4 and respondent no. 4 herein, in both the cases guilty of the offence under Section 138 of the Act.

21. Accused Munish Jain was acquitted by the trial court and the High Court has confirmed the acquittal, which is being set aside by this Court by allowing these appeals. In the circumstances, as per the provisions of Section 235(2) of the Criminal Procedure Code, this Court will have to give an opportunity of being heard to him on the question of sentence. We, therefore, adjourn the case to 2-8-2011 for hearing the accused Manish Jain on the question of sentence. If on that day he fails to appear before this Court, we shall hear his counsel on the question of sentence.

ORDER

1. We have heard the learned counsel appearing for the parties on the question of sentence. Having gone through the records, we find that Mr. Munish Jain, against whom the notice was issued on the question of sentence had died. Accordingly, so far he is concerned, the matter stands abated.

2. There is yet one more accused in the case, apart from the company, who was also impleaded as a party in the present proceedings. The said Director of the company is Mr. Varun Jain.

3. We have heard the learned counsel appearing for the parties on the question of sentence. Considering the provisions of Section 138 of the Negotiable Instruments Act, we consider that imposition of fine of an amount of Rs. 10,00,000/- (Rupees ten lacs only) would meet the ends of justice in the present case. Considering the facts and circumstances of the case, we, therefore, impose a fine of Rs. 10,00,000/- (Rupees ten lacs only) on the respondent payable to the appellants/complainants by way of compensation.

4. At this stage, the counsel appearing for the respondent has handed over drafts amounting to Rs. 10,00,000/- payable to the appellants/complainants, to the counsel appearing for the appellants/complainants, who receives the said amount which is imposed as fine and payable to the appellants. Fine having been paid and received the litigation to an end.

5. In that view of the matter, nothing further survives in these appeals, which stand disposed of.

R.P. Appeals disposed of.

DANDU JAGGARAJU

v.

STATE OF A.P.

(Criminal Appeal No. 764 of 2008)

JULY 20, 2011

[HARJIT SINGH BEDI AND GYAN SUDHA MISRA, JJ.]

Penal Code, 1860 – ss. 302, 201 and 379 – Victim, member of upper caste married PW1, member of the Scheduled Caste against wishes of her family – Death of the victim six years after the marriage – Allegation against appellant-paternal uncle of the victim that he took away the victim under some pretext and thereafter killed her – Recovery of victim's jewellery, from the pocket of the appellant on his arrest – Trial court on basis of the last seen evidence of the prosecution witnesses, the medical evidence and the recoveries made, convicted the appellant u/ss. 302, 201 and 379 – High Court upheld the conviction – On appeal, held: The family of the deceased had accepted the marriage for about six years more particularly, as even a child had been born to the couple – Thus, the motive is clearly suspect – The last seen evidence of the prosecution witnesses is equally uncertain – The ornaments allegedly taken from the deceased is commonly available to all and sundry – It is also difficult to believe that the appellant, who statedly killed his niece on account of family honour, would act so low as to take such trifle jewellery from her dead body – It cannot be accepted that from the date of the incident till the recovery of the ornaments from the appellant i.e. till 24 days after the incident, the appellant continued to move around with the jewellery – Also the said jewellery had not been recovered under a disclosure u/s. 27 of the Evidence Act but was taken on a search of the appellant's person – Thus, the appellant is acquitted.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 764 of 2008.

From the Judgment & Order dated 20.02.2007 of the High Court of Judicature Andhra Pradesh at Hyderabad in Criminal Appeal No. 93 of 2005.

Siddharth Dave, Jemtiben Ao for the Appellant.

D. Mahesh Babu, Ramesh Allanki, Savita Dhanda for the Respondent.

The following order of the Court was delivered

O R D E R

1. At the very outset, Mr. M.K. Gupta, Advocate, who claims to be a junior counsel with Mr. J.M. Khanna, Advocate appeared before us and prayed that the matter be adjourned for the day as Mr. J.M. Khanna was not yet prepared with the matter and on the earlier date they had missed the case in the list. We are told that Mr. J.M. Khanna is sitting in his Chamber. We, accordingly refuse to recall the order dated 14th July, 2011.

2. The deceased Varalakshmi who was a Kshatriya had married P.W. 1, a member of the Scheduled Castes, against the wishes of her family due to which her family had become annoyed with her. The annoyance was particularly, felt by the appellant who was the paternal uncle of the deceased. As per the prosecution story the appellant telephoned the deceased on the 14th of August, 2002, informing her that her grand mother was seriously ill and wanted to see her and that he would come to her village to pick her up later that day. He also told her that as he would not be able to locate her house somebody should be sent to the telephone booth of P.W. 4 to guide him. P.W. 2 thereupon sent her son P.W. 3 to the telephone booth of P.W. 4 and after a short while the appellant too arrived at the telephone booth and was brought to the house of the deceased. She introduced the appellant as her uncle to P.Ws.

2 and 3. The deceased, believing the information that her grand mother was sick, left with the appellant on his white coloured scooter leaving her young son with P.W. 2. P.W.1, the husband of the deceased, returned home from work late that evening and was told by P.Ws. 2 and 3 that his wife had gone with the appellant and had not returned since then. As the deceased did not return that evening or even the next day and as the efforts of P.W. 1 to search her out remained unsuccessful, he lodged a First Information Report on the 16th of August to the effect that his wife had left for the house of her relatives but had not been seen thereafter. The dead body of the deceased was, however, recovered later that day, whereupon a second F.I.R. was recorded at the instance of P.W. 1 in which he, for the first time, expressed his suspicion that she had been taken away under a pretext by the appellant and thereafter killed. The appellant was, accordingly, arrested on the 7th September, 2002 and some of the jewellery that the deceased was said to be wearing at the time of her disappearance was recovered from his pockets. The dead body of the deceased was also subjected to a post mortem examination and it was revealed that she had died of asphyxia due to smothering as her chunni had been thrust into her mouth.

3. On the completion of the investigation, the appellant was brought to trial for offences punishable under Section 302, 201 and 379 of the Indian Penal Code. The trial court on a consideration of the evidence of P.W. 1, the first informant and the husband of the deceased, P.W. 2 the house owner in which the deceased and P.W. 1 were living, P.W. 3 the son of P.W. 2 who stated that he had gone to the telephone booth of P.W. 4 and had brought the appellant to their house on the 14th of August, 2002 and P.W. 4 the telephone booth owner who deposed to the fact that the appellant had come to the booth on the day in question where P.W. 3 had been waiting for him and thereafter gone along with him to the house of P.W. 2, P.W. 6 a press reporter and a colleague of P.W. 1 who had last seen the deceased and the appellant at the bus stand at

Ravulapalem and as supported by the medical evidence and the recoveries of the ornaments from the appellant convicted him of the offences charged and sentenced him accordingly. The High Court has, in appeal, confirmed the judgment of conviction and sentence and the matter is before us after the grant of special leave.

4. Mr. Siddharth Dave, the learned Amicus for the appellant, has submitted that there was absolutely no evidence to connect the appellant to the crime and the First Information Report recorded on the 18th August, 2002 was no FIR in the eyes of law as the first FIR recorded was that of a missing person on the 16th August, 2002 and in this report the first informant(P.W. 1) had not expressed his suspicion about the identify of the culprit. He has also pointed out that except for the last seen evidence of P.Ws. 2, 3 and 6, there was no other evidence to connect the appellant with the murder as the recoveries alleged to have been made by the police on the 7th of September, 2002 could not be believed. It has, accordingly, been submitted that the chain of circumstances envisaged in a case resting on circumstantial evidence were clearly missing.

5. Mr. D. Mahesh Babu, the learned counsel for the State of Andhra Pradesh has, however, supported the judgment of the trial court and has pointed out that the last seen evidence and the recoveries by themselves did constitute such a chain and as both the courts below had found that the case had been proved, no case for interference was made out.

6. We have heard the learned counsel for the parties and gone through the evidence on record.

7. It has to be noticed that the marriage between P.W. 1 and the deceased had been performed in the year 1996 and that it is the case of the prosecution that an earlier attempt to hurt the deceased had been made and a report to that effect had been lodged by the complainant. There is, however, no documentary evidence to that effect. We, therefore, find it

somewhat strange that the family of the deceased had accepted the marriage for about six years more particularly, as even a child had been born to the couple. In this view of the matter, the motive is clearly suspect. In a case relating to circumstantial evidence, motive is often a very strong circumstance which has to be proved by the prosecution and it is this circumstance which often forms the fulcrum of the prosecution story.

8. We also see that the last seen evidence of P.Ws. 2, 3 and 6 is equally uncertain. Significantly, the statements of P.Ws.2 and 3 were recorded by the Magistrate for the first time under Section 164 about four months after the alleged incident and though both witnesses had deposed that they would be able to identify the appellant who was otherwise a stranger to them, no effort had been made to hold a test identification parade. Mr. Mahesh Babu, has, however, placed reliance on the statement of P.W. 6 who is stated to be a completely independent witness. Even this witness had testified that he did not know the appellant personally but he still claimed that he had seen the appellant at the bus depot on the day in question along with the deceased and that he was called upon to identify him for the first time in Court when his statement was recorded on the 4th of November, 2004 which was two and a half years after the murder.

9. The only other piece of evidence against the appellant is the recovery of the ornaments allegedly taken from the deceased. We find that the jewellery is of the variety known as 'disco jewellery' and is commonly available to all and sundry. It is also difficult to believe that the appellant, who statedly killed his niece on account of family honour, would act so low as to take the jewellery which was little more than trinkets from her dead body. We also find it completely unacceptable that though the incident happened on the 14th of August, 2002 the appellant had continued to move around with the jewellery still in his pocket till its recovery from him on the 7th of September, 2002.

We also see from the record that the said jewellery had not been recovered under a disclosure under Section 27 of the Evidence Act but was taken on a search of his person. This circumstance, therefore, does not even remotely support the prosecution story in any manner.

10. For the reasons recorded above, we find that the judgments of the courts below cannot be sustained. We, accordingly, allow the appeal and order the appellant's acquittal. We are told that he is in custody. He shall be released forthwith if not wanted in any other case.

11. The fee of the Amicus is fixed at Rs. 7,000/-.

N.J. Appeal allowed.

MOHD.HAMID & ANR ETC.ETC.

v.

BADI MASJID TRUST & ORS.ETC.ETC.

(Civil Appeal No(s). 5860-5861 of 2011)

JULY 20, 2011

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

MOHAMMEDAN LAW:

Shifting of a grave – HELD: There could be shifting of Muslim grave from an unauthorised place to a place which is authorised by law for such burial – Besides, interring a corpse in an unauthorised place without permission or consent of the owner and lessee of the property amounts to usurping somebody else's property – Shifting of such graves would not be un-Islamic nor would it be violative of Articles 25 and 26 of the Constitution of India – In the instant case, the records clearly disclose that a group of people took law into their own hands, took the dead body away forcibly from the place where it was proposed to be buried, forcibly entered the school premises and buried the dead body in the said school premises, without permission and without any authority – The entire action, therefore, was illegal, without jurisdiction and in violation of the law which brought in disturbances in the area and also created huge law and order problem for the Government – It is directed that the dead body of the saint be exhumed from the place of its present burial and shifted to another appropriate place and buried in accordance with law with all dignity and respect and he shall be laid in peace for enabling his devotees to offer their prayers and respects as and when they desire in accordance with law – Constitution of India, 1950 – Articles 226 read with Articles 25 and 26.

Constitution of India, 1950:

Article 226 read with Articles 25 and 26 – Writ petition seeking redressal of grievances caused due to unauthorized burial of a saint in the school premises –HELD: The action done created disturbance of law and order and public order and in that situation to restore peace and communal harmony and to control the volatile situation, the recourse taken of filing a writ petition cannot be said to be unwarranted – Since there was statutory violation in the unauthorised action of burial of the saint, Article 226 was the only remedial measure available, which could be taken for immediate redressal of the grievances – Mohammedan Law – Code of Criminal Procedure, 1973 – s.133 – City of Nagpur Corporation Act – s.269.

Consequent upon the death of a Baba, when his dead body was taken to the burial ground where the necessary arrangements were made for the burial, some people took the body from the burial ground to the premises of the school run by respondent no. 7-Committee, and by forcibly entering into the school premises buried the dead body there. This created law and order and public order disturbances and curfew had to be imposed in the area. Writ petitions were filed before the High Court, which issued directions that appropriate steps be taken to exhume the body of Baba with full respect to his saintly-hood and to arrange for its appropriate honourable burial in accordance with law; and to forthwith take all appropriate steps to restore normalcy in the area.

In the instant appeals it was contended for the appellants that according to the Fatwa issued under Mohammden law, a dead body, once buried, could not be exhumed; and that the High Court acted illegally and without jurisdiction in entertaining the writ petitions and

it should have relegated the parties to the civil court for decision of their disputes.

Dismissing the appeals, the Court

HELD: 1.1 Hanafi Law Relating to Wakf or Trusts, reveals at p.406, a Fatwa contained in Fatawi Alamgiri at page 556 in which it is stated under the heading "A burial-ground" that a body that has been buried in the ground, may lawfully be exhumed when it appears that the land was usurped, or another is entitled to it under a right of pre-emption". There is yet another Fatwa, namely, Fatwa Rajviya Jild 4 Safah 119 in Hadis, which is recognised by Deoband Madarsa and which is known as 'Fatwa Darululoom Deoband (Mez 403), which states, if such burial is without consent of land owner, he is entitled to remove it and use the land for proper purpose. Besides, in the instant case, the burial and using the place as a burial ground is also against the specific condition of the Nazul Khasara by which the Government had leased out the land in favour of respondent no. 7. [para 16-17] [356-C-G]

Hanafi Law Relating to Wakf or Trusts, p.406; and *Hadis, Fatwa Rajviya Jild* **4 Safah 119 – referred to.**

1.2 In *Abdul Jalil & Ors*.*, **it was held that Muslim graves coming up unauthorisedly and illegally on others' land can be shifted in the larger interest of society for maintaining public order. It was also held that such action of shifting of graves would not be un-Islamic and also would not be violative of Articles 25 and 26 of the Constitution of India. [para 19] [357-G-H; 358-A]**

Abdul Jalil & Ors*. *Versus State of U.P. & Ors*. **(1984) 2 SCC 138; and *Gulam Abbas & Others Versus State of U.P. & Ors* **1984 (1) SCR 64 = (1984) 1 SCC 81 – relied on.**

1.3 In the instant case, the situation which was

created and under which the burial had taken place within the school premises, created disturbances of public order and in order to maintain the public order, there could be shifting of Muslim grave from an unauthorised place to a place which is authorised by law for such burial. Besides, interring a corpse in an unauthorised place without permission or consent of the owner and lessee of the property amounts to usurping somebody else's property. The entire action was illegal, without jurisdiction and in violation of the law which brought in disturbances in the area and also created huge law and order problem for the Government. [para 14 and 20] [355-G-H; 356-A; 358-B]

2.1 Since there was statutory violation in the unauthorised action of burial of the saint, Article 226 of the Constitution of India was the only remedial measure available, which could be taken for immediate redressal of the grievances. There was statutory violation of s. 269 of the City of Nagpur Corporation Act and, as held by the High Court, there was also violation of s.133 of the Code of Criminal Procedure, 1973. The action done created disturbance of law and order and public order and in that situation to restore peace and communal harmony and to control the volatile situation, the recourse taken of filing a writ petition cannot be said to be unwarranted. [para 21] [358-C-E]

2.2 There is no reason to interfere with the orders passed by the High Court. It is directed that the dead body of the saint would be exhumed from the place of its present burial and shifted to another appropriate place and buried in accordance with law with all dignity and respect and he shall be laid in peace for enabling his devotees to offer their prayers and respects as and when they desire in accordance with law. [para 22] [358-F-G]

Case Law Reference:

1984 (1) SCR 64	**relied on**	**para 18**
(1984) 2 SCC 138	**relied on**	**para 18**

CIVIL APPELLATE JURISDICTION : Civil Appeal No.5860-5861 of 2011.

From the Judgment & Order dated 12.07.2011 of the High Court of Judicature at Bombay, Nagpur Bench, Nagpur in Writ Petition No. 3123 and 3177 of 2011.

U.U. Lalit, Manish Pitale, Shubail Farook, Wasi Haider, Chander Shekhar Ashri for the Appellants.

Shyam Divan, Rushikesh Marathe, Ravindra Keshavrao, Anand Parchure, Gopal Balwant Sathe, Huzefa Ahmadi, Ejaz Maqbool, Mrigank Prabhakar, Garima Kapoor, Shakil Ahmed Syed, S.A. Saud, Shuaibuddin, Parvez Dabas, Sanjay V. Kharde, Sachin J. Patil, Asha Gopalan Nair for the Respondents.

The following order of the Court was delivered

O R D E R

1. Application for permission to file SLP is allowed.

2. Leave granted.

3. These Appeals are directed against the judgment and order dated 12.7.2011 passed by the Bombay High Court, Nagpur Bench at Nagpur allowing the two writ petitions being Writ Petition No. 3123 of 2011 and Writ Petition No. 3177 of 2011.

4. By the said judgment and order, while allowing the writ petitions, the High Court issued certain directions contained in paragraph 49 and 50. One of the directions issued by the High Court was that appropriate steps would be taken by respondent

nos. 3 and 5 therein to exhume the body of late Baba with full respect to his saintly-hood and to arrange for its appropriate honourable burial in accordance with law, within a period of three days.

5. One of the other directions was to the respondent nos. 1, 2, 4 and 5 therein to forthwith take all appropriate steps within their powers to restore normalcy in the area so as to prevent the wrongdoers and mischief mongers from creating/continuing to affect the law and order situation, so that schools can be reopened and normal tempo of life is restored.

6. The aforesaid directions have been issued in the light of the facts that 'Mohd. Mustafa Mohd. Ansari', popularly known as “Baba” died on 28.6.2011 at about 00.30 hours and the burial was done about 5.30 a.m. on 29.6.2011. Said Baba, who was respected by the people of the locality, used to sit regularly outside the school area being managed by the respondent no. 7, Central Tanzeem Committee. The school authority had a hostel classrooms, playground, etc., within the aforesaid premises leased out to it by the State Government under a lease deed to which reference shall be made hereinafter. In the ground floor of the said hostel, there are certain shops facing the main road and in front of shop no. 11 and off the road, Baba used to sit regularly.

7. On his death, his body was taken to Tajbagh. After performing some religious functions there, a group of persons decided to take the dead body to Mominpura burial ground on 29.6.2011, where necessary arrangements were also made for his burial. However, all of a sudden, some people took a decision otherwise and took the body of Baba and forcibly entered into the premises of Respondent no. 7, dug portion of the land in the playground of the school and buried the dead body there. The aforesaid action was done by the said group of persons by forcibly occupying the area by breaking open the lock of the school and also despite opposition from the lessee, namely, Respondent no. 7, who informed the police about the

illegal action committed by the said group of people. As a result of the aforesaid act, and forcible action taken by the group of people, there was disturbance of law and order in the locality and consequently there was also disturbance of the communal harmony amongst two sects at Mominpura.

8. Since no action could be taken by the police, some writ petitioners filed three writ petitions in the High Court. The first writ petition came to be filed which was registered as Criminal Writ Petition No. 375 of 2011. The said writ petition was disposed of with certain directions on 1.7.2011.

9. However, as the situation did not improve, two other writ petitions came to be filed, which were registered as W.P. No. 3123 of 2011 and W.P. No. 3177 of 2011. All the parties entered appearance and thereafter the writ petitions were heard in presence of all the parties and they were allowed and disposed of in terms of the observations made therein referred to earlier.

10. Being aggrieved by the aforesaid findings recorded, the Appellants are before this Court by filing the present Appeals, in which we have heard the learned counsel appearing for the contesting parties.

11. Counsel appearing for the parties have drawn our attention to various documents on record and also drawn our attention to two judgments of this Court to which reference shall be made hereinafter. One of the contentions that is raised by Shri Lalit, the senior counsel appearing for the Appellants is that the High Court acted illegally and without jurisdiction in entertaining the writ petition in the manner in which it was entertained and that the High Court should have relegated the parties to the civil court for deciding the disputes between the parties. The next contention which is raised by him is that according to the Fatwa issued under Mohammden law, a dead body, once buried, cannot be exhumed and in support of the same, he has referred to certain passages from the Fatwas, which are annexed in the present appeals.

12. The aforesaid submissions of the counsel appearing for the appellants are refuted by the counsel appearing for the respondents, who have also placed reliance on similar but other Fatwas and also on the two decisions of this Court.

13. Having considered the said submissions, we propose to dispose of these appeals by giving our reasons.

14. Records placed before us clearly disclose the very fact that a group of people took law into their own hands, took the dead body away forcibly from where it was proposed to be buried and proper arrangements were made to give a proper burial with honour and dignity and after taking it to the school premises, which is leased out in favour of the respondent no. 7 herein, broke open forcibly the lock of the door of the school in the entry point and thereafter forcibly occupied the area concerned and buried the dead body in the said school premises, without permission and without any authority. The justification that is sought to be given now for the aforesaid illegal action is that Baba used to sit at that place where he has been buried. That position is also not borne out from the records as Baba was not sitting at the place where he has been buried but he was sitting at a place away from that place, outside the school premises and off the road and in front of shop no. 11. No permission was taken by the said group of people from the concerned authority, namely, the Government, the owner and the respondent No. 7, the lessee. The said land was given by the Government to Respondent no. 7 for the purpose of establishing a Sarai. In column no. 12 of the Nazul Khasra of the land in dispute, it is recorded that land cannot be used for any purpose other than Dharamshala and Garden. Even the lessee, namely, Respondent No. 7, could not have given any permission for any burial within the aforesaid premises, which was leased out by the Government in favour of Respondent No. 7. Despite the fact, the group of persons forcibly occupied the said place and buried the body of the Baba at an unauthorised place without any authority. The entire action, therefore, was illegal, without jurisdiction and in violation of the law which brought in

disturbances in the area and also created huge law and order problem for the Government.

15. We are informed that curfew had to be imposed in the area in order to maintain law and order and peaceful atmosphere. Same situation, namely, curfew, is still being imposed even today for a particular period of time.

16. Counsel appearing for the Appellants also submitted that the dead body cannot be exhumed under the Muslim law, once it is buried at a particular place. In order to appreciate the aforesaid contention, we have looked into the records. The High Court has also referred to some of the religious authorities, which were placed before it by the parties hereto. Page 406 of Hanafi Law Relating to Wakf or Trusts was also placed before the High Court and has also been placed before us by the counsel appearing for the Respondents. Page 406 of the said law reveals a Fatwa contained in Fatawi Alamgiri at page 556, in which it is stated under the heading “A burial-ground” in the following manner:

> “When a body has been buried in the ground, whether for a long or short time, it cannot be exhumed without some excuse. But it may lawfully be exhumed when it appears that the land was usurped, or another is entitled to it under a right of pre-emption”.

17. There is yet another Fatwa referred to by the High Court in paragraph 29 of the judgment which is Fatwa Rajviya Jild 4 Safah 119 in Hadis, which is recognised Deoband Madarsa and which is known as 'Fatwa Darululoom Deoband (Mez 403). According to the said Fatwa, if such burial is without consent of land owner, land owner is entitled to remove it and use the land for proper purpose. Besides, the aforesaid burial and using the place as a burial ground is also against the specific condition of the Nazul Khasara by which the Government had leased out the land in favour of the respondent no. 7.

18. In this connection, we may also refer to the decision of this Court in *Gulam Abbas & Others Versus State of U.P. & Ors* reported in (1984) 1 SCC 81. In the said decision, this Court has considered the scope and ambit of Articles 25 and 26 of the Constitution of India and also the jurisdiction of this court under Article 32 of the Constitution of India. In the said decision, the question which arose for consideration was that whether two graves could be shifted to some other place for the purpose of finding out some permanent solution to perennial problem of clashes between the two religious communities. While dealing with the aforesaid issue, this Court considered various Fatwas issued by religious heads, namely, Head Muftis and Shahi Imams from Delhi, Banaras and Patna stating the position of law for shifting the graves under the Sheriat law. After going through all those Fatwas, this Court found that the common theme in all these Fatwas is that under Sheriat law respecting of graves is the religious obligation of every Muslim, that shifting of dead bodies after digging old graves in which they are lying buried is not permissible and to do so would amount to interference with their religious rights. It was further found that such religious rights of every person and every religious are, however, subject to "public order", the maintenance whereof is paramount in the larger interest of the society. It was also held that if it becomes necessary to shift graves in certain situations and exigencies of public order, the same would surely provide a requisite situation, especially as the fundamental rights under Articles 25 and 26 are expressly made subject to public order.

19. However, another decision which may also have relevance is one which arises out of the same subject matter and heard subsequently in another writ petition filed in this Court between *Abdul Jalil & Ors. Versus State of U.P. & Ors.* Reported in (1984) 2 SCC 138, wherein it was held that Muslim graves coming up unauthorisedly and illegally on others' land can be shifted in the larger interest of society for maintaining public order. It was also held that such action of shifting of

graves would not be un-Islamic and also would not be violative of Articles 25 and 26 of the Constitution of India.

20. The situation which was created and under which the aforesaid burial had taken place within the school premises created disturbances of public order and in order to maintain the public order, there could be shifting of Muslim grave from an unauthorised place to a place which is authorised by law for such burial. Besides, interring a corpse in an unauthorised place without permission or consent of the owner and lessee of the property amounts to usurping somebody else's property.

21. Since there was statutory violation in the unauthorised action of burial of the saint, in our considered opinion, Article 226 of the Constitution of India was the only remedial measure available, which could be taken for immediate redressal of the grievances. There was statutory violation in the instant case of Section 269 of the City of Nagpur Corporation Act and as held by the High Court, there was also violation of Section 133 of the Code of Criminal Procedure. The action done created disturbance of law and order and public order and in that situation to restore peace and communal harmony and to control the volatile situation, the recourse taken of filing a writ petition cannot be said to be unwarranted.

22. In that view of the matter, we find no reason to interfere with the orders passed by the High Court and dismiss these appeals. We also direct that the dead body of the saint would be exhumed from the place of its present burial and shifted to another appropriate place and buried in accordance with law with all dignity and respect and he shall be laid in peace for enabling his devotees to offer their prayers and respects as and when they desire in accordance with law.

23. With the aforesaid observations, these appeals are dismissed but leaving the parties to bear their own costs.

R.P. Appeals dismissed.

DISHA

v.

STATE OF GUJARAT & ORS.

(Writ Petition (Criminal) No. 33 of 2011)

JULY 20, 2011

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

Constitution of India, 1950:

Article 32 r/w s.173 CrPC – Writ petition seeking to transfer investigation to Central Bureau of Investigation – The Firms of petitioner and her husband and his associates said to have duped a large number of investors of crores of rupees – An FIR lodged against petitioner and other partners of her firm/agents/ franchises – Charge-sheet filed against 13 persons including the petitioner – Petitioner's husband said to have committed suicide and investigation in the said suicide case pending — Writ petition by petitioner seeking directions to transfer the investigation into the financial transactions of her late husband and his associates through various firms and the cause of her husband's death, to CBI and further to hand over all complaints made by various investors, to CBI for investigation – HELD: The petitioner herself is the accused – A huge amount has been collected from innocent persons giving them false assurances that their amount would have a high premium – No allegation of mala fide or bias has been alleged against any investigating authority nor had it been pleaded that charge sheet had been filed against the petitioner without investigating the case or having any vindictive attitude towards the petitioner – There is no cogent reason to interfere in the matter – Code of Criminal Procedure, 1973 – s.173.

The petitioner and her husband were engaged in commercial/business activities in share broking. The

petitioner's husband along with his maternal uncle and his sons started share broking business in Rajkot and subsequently at Ahmedabad also. In 2008, another firm was constituted of which the petitioner was the proprietor. During the period between 2008 and 2010, the petitioner's husband and his associates appointed several agents/ franchises for their firms all over Gujarat and the said agents collected a huge amount from large number of persons/investors giving them assurance that their money would be multiplied within a short span of time.

On 28.12.2010, petitioner's husband was said to have jumped from 22nd floor of a hotel and died spontaneously. The matter was being investigated by the police.

On 12.1.2011, an FIR was lodged at Gandhigram Police Station in Rajkot for offences punishable u/ss 406, 420 and 120-B, IPC with the allegations that the partners/ agents/franchises of the firm owned by the petitioner had given fake promises to the complainant and other investors that they would get a high return of their investments within a short stipulated period, but the investors could not get any amount; that the accused persons in conspiracy with each other made a fraudulent scheme duping the innocent investors. The police filed a charge sheet against 13 accused persons including the petitioner. According to investigation held, so far, the investors had been duped by petitioner's firms of a sum of Rs.60 crores. Seven accused were arrested and further investigation was in progress.

The petitioner filed the instant writ petition seeking the directions that investigations into the financial transactions of her late husband and his associates through various firms and the mysterious cause of her husband's death be transferred to the Central Bureau of

Investigation u/s 173 Cr.P.C. and further to handover all complaints made by various investors against the firms owned by her family members to the CBI for investigation.

Dismissing the petition, the Court

HELD: 1.1 So far as the case of suicide of petitioner's husband is concerned, respondent No.2, the Maharashtra police, is investigating the matter. During the investigation, three suicidal notes in the hand-writing of the deceased have been recovered. Father of the deceased identified the hand-writing of the deceased, and the investigation is going on. The petitioner did not render any assistance whatsoever to the Maharashtra Police in investigation of the said case. [para 4-5] [366-C-D; G]

1.2 As regards the investigation by the Gujarat Police, according to the counter affidavit filed by the State of Gujarat, only one FIR has been lodged, wherein the investigation has been concluded and a charge sheet has been filed against 13 accused persons including the petitioner. [para 6] [367-B]

Kashmeri Devi v. Delhi Admn. & Anr., **1988 SCR 700 = AIR 1988 SC 1323;***Gudalure M.J. Cherian v. Union of India*, **1991 (3) Suppl. SCR 251 = (1992) 1 SCC 397;** *Punjab & Haryana High Court Bar Assn., Chandigarh through its Secretary v. State of Punjab & Ors*. **1993 (3) Suppl. SCR 915 =AIR 1994 SC 1023;** *Vineet Narain & Ors. v. Union of India & Anr*. **1996 (1) SCR 1053 = AIR 1996 SC 3386;** *Union of India v. Sushil Kumar Modi,* **2006 (4) Suppl. SCR 742 = (1998) 8 SCC 661;** and *Rajiv Ranjan Singh 'Lalan'* (*VIII) v. Union of India*,**(2006) 6 SCC 613 – referred to.**

1.3 This Court has transferred matters to CBI or any other special agency only when the Court was satisfied

that the accused had been very powerful and influential person or State authorities like high police officials were involved and the investigation had not proceeded with in proper direction or it had been biased. In such a case, in order to do complete justice and having belief that it would lend the final outcome of the investigation credibility, such directions have been issued. [para 16] [369-F-G]

R.S. Sodhi v. State of U.P. & Ors., **AIR 1994 SC 38;** *Rubabbuddin Sheikh v. State of Gujarat & Ors.,* **2010 (1) SCR 991 AIR 2010 SC 3175;** *Ashok Kumar Todi v. Kishwar Jahan & Ors*., **(2011) 3 SCC 758;** *Narmada Bai v. State of Gujarat,* **JT 2011 (4) SC 279 – referred to.**

1.4 In the instant case, the petitioner herself is the accused. A huge amount of Rs.60 crores has been collected from innocent persons giving them false assurances that their amount would have a high premium. It has not been alleged in the petition that any of the investor is very powerful or capable to manage the investigation against the petitioner or that the case of suicide of her husband is not properly investigated. It is nobody's case that the police has unnecessarily harassed the petitioner; rather, the record of the case reveals that it is only after completing the investigation, that the charge sheet has been filed against 13 persons including the petitioner. No allegation of *mala fide* or bias has been alleged against any investigating authority nor has it been pleaded that charge sheet had been filed against the petitioner without investigating the case or having any vindictive attitude towards the petitioner. In fact, the petition is based purely on mere apprehension by the petitioner. None of the grounds taken by the petitioner for transfer is tenable. In such a fact-situation, there is no cogent reason to interfere in the matter. [para 19] [370-C-F]

Case Law Reference:

1988 SCR 700	**referred to**	**para 8**
1991 (3) Suppl. SCR 251	**referred to**	**para 9**
1993 (3) Suppl. SCR 915	**referred to**	**para 9**
AIR 1994 SC 38	**referred to**	**para 10**
1996 (1) SCR 1053	**referred to**	**para 11**
2006 (4) Suppl. SCR 742	**referred to**	**para 13**
2010 (1) SCR 991	**referred to**	**para 14**
2011 (3) SCC 758	**referred to**	**para 15**
JT 2011 (4) SC 279	**referred to**	**para 15**

CRIMINAL ORIGINAL JURISDICTION : Writ Petition (Crl.) No. 33 of 2011.

Under Article 32 of the Constitution of India.

A.K. Sanghi, Sudheer Voditel, Rameshwar Prasad Goyal for the Petitioner.

H.P. Rawal, P.P. Malhotra, ASG, Shweta Verma, T.A. Khan, Harsh N. Parekh, Arvind Kumar Sharma, N. Nanavati, Hemantika Wahi, S. Banerjee, Sanjay Kharde, Asha Gopalan Nair for the Respondents.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This writ petition has been filed for seeking the directions that investigations into the financial transactions of the petitioner's late husband Shri Deven Malviya and his associates through various firms, and the mysterious cause of her husband's death in Hotel Marriott, Senapati Bapat Road, Pune be transferred to Central Bureau of Investigation (hereinafter called CBI) under Section 173 of the Code of Criminal Procedure, 1973 (hereinafter referred to as Cr.P.C.); and further to hand over all complaints made by various investors against the firms owned by her family members to the CBI for investigation.

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

A. Petitioner indulged herself in commercial/business activities alongwith her husband late Deven Malviya, particularly in share broking in the name and style of M/s Disha Credit and Marketing Services alongwith one another partner Mr. Ajay Gandeja in Nagpur from 1998 to 2004.

B. Late Mr. Deven Malviya, for certain reasons, shifted from Nagpur to Pune and started his own share broking business in the year 2007. Petitioner's husband and his maternal uncle namely, Shri Narendra Dhruv and his sons started share broking business in Rajkot in the name of M/s Vision Equities and Commodities and subsequently at Ahmedabad also. In 2008, another firm was constituted in the name of Vibrant Equities and Commodities, of which the petitioner was the proprietor.

C. During that period, i.e., between 2008 and 2010, petitioner's husband, his maternal uncle and his sons appointed a large number of agents/franchises for their firms all over Gujarat and the said agents collected a huge amount from large number of persons/investors giving them assurance that their money would be multiplied within a short span of time.

D. On 28.12.2010, Late Deven Malviya, petitioner's husband checked in Hotel Marriott at Senapati Bapat Marg, Pune in a Room on 20th floor. He jumped from 22nd floor of Hotel Marriott at 11.30 a.m. on 30.12.2010 and died spontaneously. The matter of death of petitioner's husband is being investigated by Chhatushingi Police Station, Pune.

E. An FIR No. CR No. 1-18/2011 was lodged on 12.1.2011 at Gandhigram Police Station in Rajkot under Sections 406,

420 and 120-B of the Indian Penal Code, 1860 (hereinafter called IPC) by the complainant with the allegations that the partners/ agents/franchises of the firm owned by the petitioner herself had given fake promises to the complainant and other investors that they would get Rs.1,40,000/- in return of their investment of Rs.1,00,000/- within a short stipulated period. But the investors could not get any amount. The accused persons in conspiracy with each other made a fraudulent scheme duping the innocent investors.

F. The police filed a charge sheet against 13 accused persons including the petitioner after examining 23 witnesses. Seven accused have already been arrested and further investigation is in progress for obtaining the Forensic Science Laboratory report in connection with the seized Muddamaal (Crime property, e.g. Computer, CPU, Hard disk etc.). According to investigation held, so far, it is evident that the investors have been duped by petitioner's Firms for a sum of Rs.60 crores.

3. The grounds on which the transfer is sought are as follows:

(1) Petitioner will face acute harassment owing to the number of investors.

(2) Petitioner likely to be victimised, and all associates, agents, partners would suppress material information fastening all charges on her to save themselves.

(3) Number of scattered complaints would lead to uncoordinated investigation and not uncovering the truth.

(4) Death in most suspicious circumstances since the alleged scam involves politicians, bureaucrats and influential business men who could have abetted the suicide since they invested crores of rupees.

(5) Petitioner is interested in finding out the truth.

(6) Interference needed for putting the investigations on proper track relating to the death of the husband/deceased and for enquiry into scam by CBI.

(7) To avoid botch up in investigation due to prevailing corruption.

4. Heard Shri A.K. Sanghi, learned Senior counsel for the petitioner, Shri H.P. Rawal, learned ASG for CBI, Shri N. Nanavati, learned counsel for the State of Gujarat and Shri Sanjay Kharde, learned counsel for the State of Maharashtra.

So far as the case of suicide of petitioner's husband is concerned, the respondent No.2, Maharashtra police, is investigating the matter. During the investigation, three suicidal notes in the hand-writing of the deceased have been recovered. Father of the deceased identified the hand-writing of Deven Malviya, the deceased and investigation is going on. However, according to the investigation so far conducted it appears to be a plain and simple case of suicide, may be because of pressure of investors in his commercial activities.

He was facing large number of demands from investors who could not even get back the principal amount, what to talk of multiplied amount or compounded interest etc. as assured by their agents and collectors/franchises. Therefore, he could not stand the pressure of his commitments, and as the angry investors were reported to have forcibly demanded their money back and had seized the documents of sale of house and office properties from his maternal uncle at Rajkot.

5. The petitioner did not render any assistance whatsoever to the Maharashtra Police in investigation of the said case, nor has she raised any grievance before this court that the investigation conducted by the Maharashtra Police is not fair, though she is fully aware that the firms owned by the petitioner and her family members/relatives had collected huge amount from investors which had not been returned to them as promised and they had been pressing hard for recovery of their amount.

In such circumstances, naturally a person will be under the pressure and may also commit suicide. However, in view of the fact that the matter is still being investigated by the Maharashtra Police, we do not think it proper to make any comment on it.

6. So far as the Gujarat Police is concerned, according to the counter affidavit filed by the State of Gujarat, only one FIR has been lodged, wherein the investigation has been concluded and charge sheet has been filed against 13 accused persons including petitioner.

7. In this background, the case is required to be examined as to whether in the facts and circumstances of the case, where in case of cheating, a charge sheet has been filed, the matter can, and is required to be transferred for investigation/further investigation to the CBI.

8. In *Kashmeri Devi v. Delhi Admn. & Anr.,* AIR 1988 SC 1323, this Court held that the magistrate can direct CBI to investigate a case, after charge sheet has been filed, by exercising his powers under Section 173(8) Cr.PC. It was stated accordingly:-

"Since according to the respondents charge-sheet has already been submitted to the Magistrate we direct the trial court before whom the charge-sheet has been submitted to exercise his powers under Section 173(8) CrPC to direct the Central Bureau of Investigation for proper and thorough investigation of the case. On issue of such direction the Central Bureau of Investigation will investigate the case in an independent and objective manner and it will further submit additional charge-sheet, if any, in accordance with law. The appeal stands disposed of accordingly."

9. In Gudalure *M.J. Cherian v. Union of India,* (1992) 1 SCC 397, this Court however, held that the power of directing investigation by CBI after chargesheet was filed, should not ordinarily be used, but only when necessary. The investigation having been completed by the police and charge-sheet

submitted to the court, it is not for this Court, ordinarily, to reopen the investigation specially by entrusting the same to a specialised agency like CBI.

Same view has been reiterated by this Court in Punjab & Haryana High Court Bar Assn., Chandigarh through its *Secretary v. State of Punjab & Ors.* AIR 1994 SC 1023.

10. In *R.S. Sodhi v. State of U.P. & Ors.,* AIR 1994 SC 38, this Court examined the case where the accusations were directed against the local police personnel. The Court held that it would be desirable to entrust the investigation to an independent agency like the CBI so that all concerned including the relatives of the deceased may feel assured that an independent agency was looking into the matter and that would lend the final outcome of the investigation credibility. However faithfully the local police may carry out the investigation, the same would lack credibility since the allegations were against them.

11. This Court refused to direct the investigation by the CBI, after the charge sheet was filed in *Vineet Narain & Ors. v. Union of India & Anr.* AIR 1996 SC 3386.

12. In case of persons against whom a prima facie case is made out and a charge-sheet is filed in the competent court, it is that court which will then deal with that case on merits in accordance with law. (See : *Union of India v. Sushil Kumar Modi,* (1998) 8 SCC 661).

13. Relying on the observations in *Union of India v. Sushil Kumar Modi* (supra), this Court in Rajiv Ranjan Singh `Lalan' (VIII) v. Union of India,(2006) 6 SCC 613, reiterated that the Court does not have the power to direct the CBI to investigate a matter after the chargesheet was filed.

14. The above three cases i.e. of Vineet Narain, Sushil Kumar Modi and Rajiv Rajan Singh were differentiated in a recent judgment by this Court in *Rubabbuddin Sheikh v. State*

of Gujarat & Ors., AIR 2010 SC 3175, wherein this Court held:-

> "Therefore, it can safely be concluded that in an appropriate case when the court feels that the investigation by the police authorities is not in the proper direction and in order to do complete justice in the case and as the high police officials are involved in the said crime, it was always open to the court to hand over the investigation to the independent agency like CBI."

15. In *Ashok Kumar Todi v. Kishwar Jahan & Ors.,* (2011) 3 SCC 758, this Court dealt with a case in which Kishwar Jahan, mother of the deceased Rizwanur Rahman approached the High Court to transfer the investigation of his death from local police to CBI expressing her apprehension that State police would not conduct investigation fairly because her son had contracted inter-religion marriage with the daughter of a very affluent and influential businessman, who had very close relationship with high police officials. She produced sufficient material to establish the nexus between the main accused and top police officials. This court considering the reasonable apprehension in her mind about fair investigation by the State CID, directed CBI to investigate the cause of death of Rizwanur Rahman.

(See also: and *Narmada Bai v. State of Gujarat,* JT 2011 (4) SC 279).

16. Thus, it is evident that this Court has transferred the matter to CBI or any other special agency only when the Court was satisfied that the accused had been very powerful and influential person or State authorities like high police officials were involved and the investigation had not proceeded with in proper direction or it had been biased. In such a case, in order to do complete justice and having belief that it would lend the final outcome of the investigation credibility, such directions have been issued.

17. The case requires to be examined in the light of the

aforesaid settled legal proposition.

18. Shri A.K. Sanghi, learned senior counsel appearing for the petitioner has tried to convince the court placing reliance on various newspaper cuttings filed as Annexures submitting that it could be a big scam of thousand of crores rupees, but we are not impressed by such submissions as the police could find out that the total investments by investors had been only about Rs.60 crores.

19. In the instant case, the petitioner herself is the accused. A huge amount of Rs.60 crores has been collected from innocent persons giving them false assurances that their amount would have a high premium. It has not been alleged in the petition that any of the investor is very powerful or capable to manage the investigation against the petitioner or that the case of suicide of her husband is not properly investigated. It is no body's case that the police has unnecessarily harassed the petitioner; rather, the record of the case reveals that it is only after completing the investigation, that the charge sheet has been filed against 13 persons including the petitioner. No allegation of mala fide or bias has been alleged against any investigating authority nor had it been pleaded that charge sheet had been filed against the petitioner without investigating the case or having any vindictive attitude towards the petitioner. In fact, the petition is based purely on mere apprehension by the petitioner. None of the grounds taken by the petitioner for transfer is tenable.

20. In such a fact-situation, we do not see any cogent reason to interfere in the matter. The petition lacks merit and is accordingly dismissed.

However, in case any action is taken by the investigating agency against the petitioner, she would be at liberty to seek the appropriate remedy before the appropriate forum and any observation made herein, shall not be treated adverse to her.

R.P. Writ Petition dismissed.

VINNY PARMVIR PARMAR
v.
PARMVIR PARMAR
(Civil Appeal Nos. 5831-33 of 2011)

JULY 20, 2011

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

Hindu Marriage Act, 1955:

s.25 r/w s.13-B – Decree of divorce by mutual consent – Permanent alimony and maintenance – Factors to be considered by the court – Maintenance of wife fixed by Family Court at Rs.20,000/- per month – High Court, as an alternative also fixed permanent alimony at Rs.40 lakh in lump-sum to be paid by the husband to the wife – Appeal by wife – HELD: No fixed formula can be laid for fixing the amount of maintenance – It has to be in the nature of things which depend on various facts and circumstances of each case – It is relevant to point out that the status and mode of life of the claimant when she lived with her husband is also one of the relevant factors for determining the amount of maintenance – In the instant case, the wife was working as Air Hostess with Cathay Pacific Airlines and getting sizeable income and after the marriage, at the instance of the husband, she resigned from her job – Considering the conditions prescribed in s. 25 relating to claim of permanent alimony/ maintenance and the facts that as on date the wife is not permanently employed and is living with her sister at Mumbai and she does not possess any immovable property at Mumbai, the husband's income from salary as Sr. Commander in Air India, other properties standing in his name, his age being 42 years, future employment prospects and also considering the fact that he has re-married, has a child and has also to look after his parents, the ends of justice would be met by fixing maintenance at the rate of Rs.40,000/

- per month – In the alternative, the amount of permanent alimony/ maintenance is fixed at Rs. 40 lakhs in lump sum to be paid by the husband to the wife which will forfeit all her claims.

In the appeals filed before the High Court against the order of the Family Court, the divorce petition of the respondent-husband was converted into divorce by mutual consent and the marriage was dissolved by a decree u/s 13-B of the Hindu Marriage Act, 1955. The Family Court had fixed maintenance to be paid to the wife at Rs. 20,000/- per month which was affirmed by the High Court. While disposing of the appeals, as an alternative measure, the High Court also fixed the amount of permanent alimony at Rs. 20 lakhs in lump sum to be paid by the husband to the wife. Being not satisfied with the amount of maintenance fixed, the wife filed the instant appeals for enhancement.

The only point for consideration before the Court was: what would be the reasonable amount the appellant-wife was entitled by way of maintenance from the husband in terms of s. 25 of the Act.

Partly allowing the appeals, the Court

HELD: 1.1 As per s. 25, of the Hindu Marriage Act, 1955, while considering the claim for permanent alimony and maintenance of either spouse, the respondent's own income and other property, and the income and other property of the applicant are all relevant material in addition to the conduct of the parties and other circumstances of the case. It is further seen that the court considering such claim has to consider all the relevant materials and determine the amount which is to be just for living standard. No fixed formula can be laid for fixing the amount of maintenance. It has to be in the nature of things which depend on various facts and circumstances

of each case. The court has to consider the status of the parties, their respective needs, the capacity of the husband to pay, having regard to reasonable expenses for his own maintenance and others whom he is obliged to maintain under the law and statute. The court also has to take note of the fact that the amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and mode of life she was used to live when she lived with her husband. At the same time, the amount so fixed cannot be excessive or affect the living condition of the other party. [para 12] [379-B-E]

Shri Bhagwan Dutt vs. *Smt. Kamla Devi and Anr.* **1975 (2) SCR 483 = (1975) 2 SCC 386;** *Chaturbhuj* vs. *Sita Bai,* **2007 (12) SCR 577 = (2008) 2 SCC 316 – relied on.**

1.2 In the instant case, it is not in dispute that before the marriage, the appellant-wife was working as Air Hostess with Cathay Pacific Airlines and getting sizeable income. It is also brought to the notice of the Court that after marriage, at the instance of the respondent, she resigned from her job. The particulars furnished also show that as on date she is living with her sister at Mumbai and she does not possess any immovable property at Mumbai. [para 13] [379-F-G]

1.3 In the light of the details furnished by both the parties, the Court is of the view that the amount of Rs. 1,40,000/- determined as net monthly income of the respondent-husband is not acceptable. Equally, direction for payment of maintenance at the rate of Rs. 20,000/- per month to the appellant-wife is also inadequate. Considering the conditions prescribed in s. 25 of the Act relating to claim of permanent alimony/maintenance and the fact that the appellant is not permanently employed as on date and is residing with her sister at Mumbai, taking note of the respondent's income from salary as Sr.

Commander in Air India, other properties standing in his name, his age being 42 years, future employment prospects and also considering the fact that the respondent has re-married, has a child and has also to look after his parents, the ends of justice would be met by fixing the maintenance at Rs.40,000/- per month. The same shall be payable from the date of her application and shall be continued to be paid in terms of s. 25 of the Act. It is made clear that if there is any change in the circumstance of either party, they are free to approach the court concerned to modify or rescind the order. In the alternative, the amount of permanent alimony/ maintenance is fixed at Rs. 40 lakhs in lump sum to be paid by the respondent to the appellant which will forfeit all her claims. The respondent is free to opt any one mode to comply with the same. [para 15] [380-E-H; 381-A-D]

Case Law Reference:

1975 (2) SCR 483	**relied on**	**para 10**
2007 (12) SCR 577	**relied on**	**para 11**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5831-5833 of 2011.

From the Judgment & Order dated 24.04.2009 of the High Court of Bombay in the matter of Family Court Appeal No. 110 of 2004 and 127 of 2004 read with the Review Order dated 17.07.2009 passed in Review Petition Stamp No. 15671 of 2009.

Nidish Gupta, D.K. Monga, Vivek Sharma, Naresh Bakshi, Arun Monga for the Appellant.

Indu Malhotra, Prena Priyadarsani, Vikas Mehta for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. These appeals are filed against the final order dated 24.04.2009 passed by the High Court of Bombay in Family Court Appeal Nos. 110 of 2004 and 127 of 2004 and the order dated 17.07.2009 in Review Petition Stamp No. 15671 of 2009 whereby the appellant's appeal was dismissed in entirety and the petition filed by the respondent in Family Court for divorce on ground of cruelty was converted into divorce by mutual consent and the marriage was dissolved by a decree under Section 13-B of the Hindu Marriage Act, 1955 (hereinafter referred to as "the Act").

3. Since the parties have dissolved their marriage by consent and a fresh decree of divorce by consent has been directed, the other question adjudicated before the High Court was about the amount of maintenance/permanent alimony in terms of Section 25 of the Act. By the impugned order, the High Court confirmed the order passed by the Family Court fixing the amount of permanent alimony at Rs. 20,000/- per month. While disposing of the appeals, as an alternative measure, the High Court also fixed the amount of permanent alimony at Rs. 20 lakhs in lump sum to be paid by the husband to his wife within a period of 3 months from the date of the order. Being not satisfied with the maintenance fixed at Rs. 20,000/- per month, the appellant-wife filed these appeals for enhancement by pointing out her difficulties and the income of the respondent.

4. Heard Mr. Nidish Gupta, learned senior counsel for the appellant-wife and Ms. Indu Malhotra, learned senior counsel for the respondent-husband.

5. The only point for consideration in these appeals is what would be the reasonable amount the appellant-wife is entitled by way of maintenance from the husband in terms of Section 25 of the Act.

6. Considering the fact that after the marriage the appellant herein resigned from the post of Air Hostess in Cathay Pacific Airlines and after dispute between them she was not employed

and getting regular income, she was staying with her sister at Mumbai and also taking note of the financial status of the husband, namely, his salary as a Sr. Commander in Air India and rental income from his properties, the Family Court fixed maintenance at Rs. 20,000/- per month which was affirmed by the High Court. While arriving at such amount, the Family Court has determined the income of the husband as Rs. 1,40,000/- per month.

Discussion:

7. Mr. Nidish Gupta, learned senior counsel for the appellant, by drawing our attention to various factual details placed before the Family Court, High Court and in this Court, submitted that from the salary slips it is seen that even after income tax deductions the respondent's income from salary and allowances alone for the period 01.04.2009 to 31.03.2010 was Rs. 83,19,031/-. In support of the above claim, the appellant has produced TDS certificate issued by his employer/the Income-Tax Department. According to him, apart from the above salary income, the respondent has rental income between Rs. 7,20,000 and Rs. 10,80,000 from his properties. He further highlighted that in addition to the salary and the rental income, the respondent has huge bank deposits, investment in shares and mutual funds. He also highlighted that the respondent being 42 years of age and a Sr. Commander in Air India has a promising career with bright chances of further promotions. With these facts and figures, Mr. Nidish Gupta prayed for intervention of this Court by fixing reasonable amount towards maintenance and welfare of the appellant.

8. In reply to the same, Ms Indu Malhotra, learned senior counsel for the respondent-husband submitted that the figures furnished by the appellant before the courts below as well as in this Court are exaggerated. In any event, according to her, the income shown above includes allowance and other benefits which cannot be construed as actual salary or income as claimed. She also pointed out that apart from the salary from

Air India he owns 1 acre of land in Pune and 1 Bedroom flat in Mumbai. All other properties, according to the learned senior counsel, belong to his father and he is not entitled for anything from it at this moment. She further highlighted that at present respondent-husband has married and having a child apart from taking care of his parents. She finally submitted that the amount determined by the Family Court as affirmed by the High Court is quite reasonable and, therefore, there is no valid ground for interference by this Court exercising jurisdiction under Article 136 of the Constitution of India.

9. Before considering the rival claims based on facts and figures, it is useful to refer to Section 25 of the Act which reads as under:-

> **"25. Permanent alimony and maintenance.**- (1) Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant, the conduct of the parties and other circumstances of the case, it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent.
>
> (2) If the court is satisfied that there is a change in the circumstances of either party at any time after it has made an order under sub-section (1), it may, at the instance of either party, vary, modify or rescind any such order in such manner as the court may deem just.
>
> (3) If the court is satisfied that the party in whose favour

> an order has been made under this section has remarried or, if such party is the wife, that she has not remained chaste, or, if such party is the husband, that he has had sexual intercourse with any woman outside wedlock, it may at the instance of the other party vary, modify or rescind any such order in such manner as the Court may deem just."

10. In *Shri Bhagwan Dutt vs. Smt. Kamla Devi and Anr.* (1975) 2 SCC 386, though this Court has considered the amount of maintenance payable to wife under Section 488 of the Code of Criminal Procedure, 1898, the principle laid down is applicable to the case on hand. In para 19, this Court held:

> "19. The object of these provisions being to prevent vagrancy and destitution, the Magistrate has to find out as to what is required by the wife to maintain a standard of living which is neither luxurious nor penurious, but is modestly consistent with the status of the family. The needs and requirements of the wife for such moderate living can be fairly determined, only if her separate income, also, is taken into account together with the earnings of the husband and his commitments."

11. In *Chaturbhuj vs. Sita Bai,* (2008) 2 SCC 316, which also relates to maintenance claim by deserted wife under Section 125 of the Code of Criminal Procedure, 1973. The following statement in para 8 is relevant which reads as under:

> "…..Where the personal income of the wife is insufficient she can claim maintenance under Section 125 CrPC. The test is whether the wife is in a position to maintain herself in the way she was used to in the place of her husband. In *Bhagwan Dutt v. Kamla Devi* it was observed that the wife should be in a position to maintain a standard of living which is neither luxurious nor penurious but what is consistent with status of a family. The expression "unable to maintain herself" does not mean that the wife must be

absolutely destitute before she can apply for maintenance under Section 125 CrPC."

12. As per Section 25, while considering the claim for permanent alimony and maintenance of either spouse, the respondent's own income and other property, and the income and other property of the applicant are all relevant material in addition to the conduct of the parties and other circumstances of the case. It is further seen that the court considering such claim has to consider all the above relevant materials and determine the amount which is to be just for living standard. No fixed formula can be laid for fixing the amount of maintenance. It has to be in the nature of things which depend on various facts and circumstances of each case. The court has to consider the status of the parties, their respective needs, the capacity of the husband to pay, having regard to reasonable expenses for his own maintenance and others whom he is obliged to maintain under the law and statute. The courts also have to take note of the fact that the amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and mode of life she was used to live when she lived with her husband. At the same time, the amount so fixed cannot be excessive or affect the living condition of the other party. These are all the broad principles courts have to be kept in mind while determining maintenance or permanent alimony.

13. It is not in dispute that before their marriage, the appellant-wife was working as Air Hostess with Cathay Pacific Airlines and getting sizeable income. It is also brought to our notice that after marriage, at the instance of the respondent, she resigned from her job. The particulars furnished also show that at present she is living with her sister at Mumbai and she does not possess any immovable property at Mumbai.

14. According to the respondent-husband, at the time of filing of petition under Section 25, she suppressed her employment and income thereon and on this ground her entire

case has to be rejected. The fact remains, though she was employed for a shorter period which was not stated so subsequently, she clarified that she had earned only an amount of Rs. 1.5 lakhs from casual assignments from July, 2004 to September, 2009. She also asserted that her income was not fixed or regular and she is struggling to take up casual assignments of interior decoration even though she was not formally trained for the same. She also explained that at particular time her employment with JJ Valaya Couture was only transitory in nature and was not permanent, it was not a source of regular and permanent income for her and that she had not been issued even any letter of appointment setting out the terms of employment and she further explained that at the relevant time she was earning an ad hoc remuneration of Rs. 20,000/- per month. There is no reason to either reject or disbelieve her explanation. In the same way, though she had highlighted salary income of the respondent, admittedly, those figures include allowances and other payments under various heads of salary. The respondent has also placed certificates from income tax authorities such as Form 16C etc.

15. In the light of the details furnished by both the parties, we are of the view that the amount of Rs. 1,40,000/- determined as net monthly income of the respondent-husband is not acceptable. Equally, direction for payment of maintenance at the rate of Rs. 20,000/- per month to the appellant-wife is also inadequate. It is relevant to point out that the status of the appellant before her marriage is also one of the relevant factors for determining the amount of maintenance. It is not in dispute that before her marriage with the respondent, she was working as an Air Hostess in Cathay Pacific Airlines and after marriage she resigned from the said post. Considering the conditions prescribed in Section 25 of the Act relating to claim of permanent alimony/maintenance and the fact that the appellant is not permanently employed as on date and residing with her sister at Mumbai, taking note of the respondent's income from salary as Sr. Commander in Air India, other properties standing

in his name, age being 42 years, future employment prospects and also considering the fact that the respondent re-married, having a child and also to look after his parents, we feel that the ends of justice would be met by fixing maintenance at the rate of Rs.40,000/- per month instead of Rs.20,000/- per month as fixed by the Family Court and affirmed by the High Court. The same shall be payable from the date of her application and continue to pay in terms of Section 25 of the Act. The respondent is granted one year time from 01.08.2011 to pay all the arrears payable in six equal instalments. It is made clear that if there is any change in the circumstance of either party, they are free to approach the Court concerned to modify or rescind. As suggested and fixed by the High Court, in the alternative, we fix the amount of permanent alimony/ maintenance at Rs. 40 lakhs in lump sum to be paid by the respondent within a period of six months from 01.08.2011 which will forfeit all her claims. The respondent is free to opt any one mode to comply with the same. If the respondent opts the first method, the same is subject to the conditions prescribed in sub-Section (3) of Section 25 of the Act. The appeals are allowed to the extent mentioned hereinabove. No order as to costs.

R.P. Appeals Partly allowed.

M/S. SMS TEA ESTATES PVT. LTD.
v.
M/S. CHANDMARI TEA CO. PVT. LTD.
(Civil Appeal No. 5820 of 2011)

JULY 20, 2011

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

Arbitration and Conciliation Act, 1996:

ss. 11 and 16(1)(a) read with s.49 of Registration Act and ss. 33, 35, 38 and 40 of Stamp Act – Arbitration clause in an unregistered lease deed granting lease of two tea states for 30 years – Dispute between the parties – Application for appointment of arbitrator – Rejected by Chief Justice of High Court – HELD: An arbitration agreement does not require registration under the Registration Act – When a contract contains an arbitration clause, it is a collateral term relating to the resolution of disputes, unrelated to the performance of the contract – Therefore, having regard to the proviso to s. 49 of Registration Act read with s.16(1)(a) of the 1966 Act, an arbitration agreement in an unregistered but compulsorily registrable document can be acted upon and enforced for the purpose of dispute resolution by arbitration – However, having regard to s. 35, unless the stamp duty and penalty due in respect of the instrument is paid, the court cannot act upon the instrument, which means that it cannot act upon the arbitration agreement also which is part of the instrument – Procedure to be adopted where the arbitration clause is contained in a document which is not registered (but compulsorily registrable) and which is not duly stamped summed up – Order of the High Court set aside and the matter remitted to the Chief Justice of the High Court to first decide the issue of stamp duty, and if the document is duly stamped, then appoint an arbitrator in accordance with law –

Registration Act, 1908 – s.49, proviso – Stamp Act, 1899 – ss. 33,35,38 and 40.

The respondent, under a lease deed dated 21.12.2006, granted lease of its two tea estates with all appurtenances to the appellant for a term of 30 years. Clause 35 of the said lease deed provided for settlement of disputes between the parties by arbitration. It was the case of the appellant that prior to the execution of the said lease deed, on 29.11.2006 the respondent had offered to sell the said two tea estates to the appellant for a consideration of Rupees four crores and the appellant agreed to purchase them subject to detailed verification; the appellant wrote a letter dated 27.6.2007 to the respondent agreeing to purchase the said two tea estates; the appellant invested huge sums of money for improving the tea estates in the expectation that it would either be purchasing the said estates or have a lease for 30 years; the respondent, however, abruptly and illegally evicted the appellant from the tea estates and took over their management in January 2008; the appellant issued a notice dated 5.5.2008 calling upon the respondent to refer the matter to arbitration under Clause 35 of the lease deed and, ultimately, filed an application for appointment of arbitrator. The Chief Justice of the Guwahati High Court dismissed the application holding that the lease deed was compulsorily registrable u/s 17 of the Registration Act and s. 106 of the Transfer of Property Act; and as the lease deed was not registered, no term therein could be relied upon for any purpose and, therefore, Clause 35 could not be relied upon for seeking reference to arbitration. The High Court also held that the arbitration agreement contained in Clause 35 could not be termed as a collateral transaction and, therefore, the proviso to s 49 of the Registration Act would not assist the appellant.

In the instant appeal, the questions for consideration before the Court were: (i) "Whether an arbitration agreement contained in an unregistered (but compulsorily registrable) instrument is valid and enforceable?" (ii) "Whether an arbitration agreement in an unregistered instrument which is not duly stamped, is valid and enforceable?" and (iii) "Whether there is an arbitration agreement between the appellant and respondent and whether an Arbitrator should be appointed?"

Allowing of the appeal, the Court

HELD: 1. An arbitration agreement does not require registration under the Registration Act, 1908. Even if it is found as one of the clauses in a contract or instrument, it is an agreement to refer the disputes to arbitration, which is independent of the main contract or instrument. When a contract contains an arbitration agreement, it is a collateral term relating to the resolution of disputes, unrelated to the performance of the contract. Therefore, having regard to the proviso to s. 49 of Registration Act read with s.16(1)(a) of the Arbitration and Conciliation Act, 1996 an arbitration agreement in an unregistered but compulsorily registrable document can be acted upon and enforced for the purpose of dispute resolution by arbitration. [para 7 and 9] [393-E-F; 394-H; 395-A]

2.1 Section 35 of Stamp Act, 1899 provides that an instrument not duly stamped is inadmissible in evidence and cannot be acted upon. Having regard to s. 35, unless the stamp duty and penalty due in respect of the instrument is paid, the court cannot act upon the instrument, which means that it cannot act upon the arbitration agreement also which is part of the instrument. Section 35 of Stamp Act is distinct and different from s. 49 of Registration Act in regard to an unregistered

document. Section 35 of Stamp Act, does not contain a proviso like to s.49 of Registration Act enabling the instrument to be used to establish a collateral transaction. But if the deficit duty and penalty is paid in the manner set out in s. 35 or s. 40 of the Stamp Act, the document can be acted upon or admitted in evidence. [para 10-11] [395-G; 396-D-E; 397-C-D]

2.2 The scheme for appointment of arbitrators by the Chief Justice of Guwahati High Court 1996 requires an application u/s 11 of the Act to be accompanied by the original arbitration agreement or a duly certified copy thereof. In fact, such a requirement is found in the schemes/rules of almost all the High Courts. If what is produced is a certified copy of the agreement/contract/ instrument containing the arbitration clause, it should disclose the stamp duty that has been paid on the original. [para 11] [396-F-H]

2.3 The procedure to be adopted where the arbitration clause is contained in a document which is not registered (but compulsorily registrable) and which is not duly stamped is summed up as follows:

(i) The court should, before admitting any document into evidence or acting upon such document, examine whether the instrument/document is duly stamped and whether it is an instrument which is compulsorily registrable.

(ii) If the document is found to be not duly stamped, s. 35 of Stamp Act bars the said document being acted upon. Consequently, even the arbitration clause therein cannot be acted upon. The court should then proceed to impound the document u/s 33 of the Stamp Act and follow the procedure u/ss 35 and 38 of the Stamp Act.

(iii) If the document is found to be duly stamped, or if the deficit stamp duty and penalty is paid, either before the court or before the Collector (as contemplated in s. 35 or s.40 of the Stamp Act), and the defect with reference to deficit stamp is cured, the court may treat the document as duly stamped.

(iv) Once the document is found to be duly stamped, the court shall proceed to consider whether the document is compulsorily registrable. If the document is found to be not compulsorily registrable, the court can act upon the arbitration agreement, without any impediment.

(v) If the document is not registered, but is compulsorily registrable, having regard to s. 16(1)(a) of the Act, the court can de-link the arbitration agreement from the main document, as an agreement independent of the other terms of the document, even if the document itself cannot in any way affect the property or cannot be received as evidence of any transaction affecting such property. The only exception is where the respondent in the application demonstrates that the arbitration agreement is also void and unenforceable. If the respondent raises any objection that the arbitration agreement was invalid, the court will consider the said objection before proceeding to appoint an arbitrator.

(vi) Where the document is compulsorily registrable, but is not registered, but the arbitration agreement is valid and separable, what is required to be borne in mind is that the arbitrator appointed in such a matter cannot rely upon the unregistered instrument except for two purposes, that is (a) as evidence of contract in a claim for specific performance and (b) as evidence of any collateral transaction which does not require registration. [Para 12] [397-D-H; 398-A-F]

3.1 Where a lease deed is for a term of thirty years and is unregistered, the terms of such a deed cannot be relied upon to claim or enforce any right under or in respect of such lease. It can be relied upon for the limited purposes of showing that the possession of the lessee is lawful possession or as evidence of some collateral transaction. Even if an arbitrator is appointed, he cannot rely upon or enforce any term of the unregistered lease deed. Where the arbitration agreement is not wide and does not provide for arbitration in regard to all and whatsoever disputes, but provides only for settlement of disputes and differences *arising in relation to the lease deed*, the arbitration clause though available in theory is of little practical assistance, as it cannot be used for deciding any dispute or difference with reference to the unregistered deed. [Para 13] [398-G-H; 399-A-B]

3.2 In the instant case, in view of Clause 35 of the lease deed and having regard to the limited scope of the said arbitration agreement (restricting it to disputes in relation to or in any manner touching upon the lease deed), the arbitrator will have no jurisdiction to decide any dispute which does not relate to the lease deed. Though the arbitrator will have jurisdiction to decide any dispute touching upon or relating to the lease deed, as the lease deed is unregistered, the arbitration will virtually be a non-starter. [Para 14] [399-B-F]

3.3 Before an arbitrator can be appointed u/s 11 of the Act, the applicant should satisfy the Chief Justice or his designate that the arbitration agreement is available in regard to the contract/document in regard to which the dispute has arisen. [para 15] [399-G-H]

Yogi Agarwal vs. Inspiration Clothes & U **2008 (16) SCR 895 = (2009) 1 SCC 372 - referred to.**

3.4 In the instant case, the appellant seeks arbitration

in regard to three distinct disputes: (a) for enforcing an alleged agreement of sale of two tea estates, (b) for enforcing the lease for thirty years; and (c) for recovery of amounts spent by it in regard to the estates on the assumption that it was entitled to purchase the property or at least have a lease of 30 years. It is clear from the petition averments that the alleged agreement of sale was entered prior to the lease deed dated 21.12.2006 and there was no arbitration agreement in regard to such agreement of sale, and, as such, the appellant cannot seek arbitration with reference to any dispute regarding such agreement of sale, whether it is for performance or for damages for breach or any other relief arising out of or with reference to the agreement of sale. [Para 16 and 17] [400-G-H]

3.5 An arbitrator can no doubt be appointed in regard to any disputes relating to the lease deed. But, in the instant case, as the lease deed was not registered, the arbitrator can not rely upon the lease deed or any term thereof and the lease deed cannot affect the immovable property which is the subject matter of the lease nor be received as evidence of any transaction affecting such property. Therefore, the arbitrator will not be able to entertain any claim for enforcement of the lease. [Para 18] [400-H; 401-A-B]

3.6 As regards the claim for recovery of the amounts allegedly spent towards the tea estates, as a consequence of respondents not selling the estates or not permitting the appellant to enjoy the lease for 30 years, if this claim is treated as a claim for damages for breach in not granting the lease for 30 years then it would be for enforcement of the terms of the lease deed which is impermissible u/s 49 of the Registration Act. If it is treated as claim *de hors* the lease deed then the arbitrator may not have jurisdiction to decide the dispute as the arbitration agreement (clause 35) is available only to settle

any dispute or difference arising between the parties in relation to or in any manner touching upon the lease deed and not in regard to disputes in general. [Para 19] [401-B-D]

4. In the result, the order of the High Court is set aside and the matter remitted to the Chief Justice of Guwahati High Court to first decide the issue of stamp duty, and if the document is duly stamped, then appoint an arbitrator in accordance with law. [Para 21] [401-F-G]

Case Law Reference:

2008 (16) SCR 895 referred to Para 15

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5820 of 2011.

From the Judgment & Order dated 28.05.2010 of the Gauhati High Court in Arbitration Petition No. 12 of 2008.

Suman Shyam, Rameshwar Prasad Goyal for the Appellant.

Anish Shrestha, Satpal Singh for the Respondent.

The Judgment of the Court was delivered by

R.V.RAVEENDRAN, J. 1. Leave granted. Heard.

2. The appellant filed an application under section 11 of the Arbitration & Conciliation Act, 1996 ('Act' for short) for appointment of an arbitrator. The averments made in the said application in brief were as under :

2.1) On 7.10.2006 the appellant requested the respondent to grant a long term lease in respect of two Tea estates (Chandmari Tea Estate and Burahapahar Tea Estate). A lease deed dated 21.12.2006 was executed between the respondent and appellant under which respondent granted a lease to the appellant for a term of 30 years in regard to the said two Tea

estates with all appurtenances. Clause 35 of the said lease deed provided for settlement of disputes between the parties by arbitration. As the estates were hypothecated to United Bank of India, on 27.12.2006, the respondent requested the said bank for issue of a no objection certificate for entering into a long term lease. The Bank sent a reply dated 17.7.2007, stating that it would issue a no objection certificate for the lease, if the entire balance amount due to it was deposited by 14.8.2007.

2.2) Prior to the execution of the said lease deed, on 29.11.2006 the respondent had offered to sell the two Tea estates to the appellant for a consideration of Rupees four crores. The appellant agreed to purchase them subject to detailed verification. The appellant wrote a letter dated 27.6.2007 to the respondent agreeing to purchase the said two Tea estates.

2.3) The appellant invested huge sums of money for improving the tea estates in the expectation that it would either be purchasing the said estates or have a lease for 30 years. The respondent however abruptly and illegally evicted the appellant from the two estates and took over their management in January 2008. The appellant thereafter wrote a letter dated 28.3.2008 to the respondent expressing its willingness to purchase the said two estates for a mutually agreed upon consideration and also discharge the liability towards the bank.

2.4) The appellant issued a notice dated 5.5.2008 calling upon the respondent to refer the matter to arbitration under section 35 of the lease deed. The respondent failed to comply. According to appellant the dispute between the parties related to the claim of the appellant that the respondent should either sell the estates to the appellant, or permit the appellant to continue in occupation of the estates for 30 years as lessees or reimburse the amounts invested by it in the two estates and the payments made to the Bank.

3. The respondents opposed the said application. The respondents contended that the unregistered lease deed dated

21.12.2006 for thirty years was invalid, unenforceable and not binding upon the parties, having regard to section 107 of Transfer of Property Act 1882 ('TP Act' for short) and section 17 and section 49 of the Registration Act, 1908 ('Registration Act' for short); that the said lease deed was also not duly stamped and was therefore invalid, unenforceable and not binding, having regard to section 35 of Indian Stamp Act, 1899; that clause 35 providing for arbitration, being part of the said lease deed, was also invalid and unenforceable. The respondent denied that they had agreed to sell the two tea estates to the respondent for a consideration of Rupees four crores. The appellant also denied that the respondent had invested any amount in the tea estates. It contended that as the lease deed itself was invalid, the appellant could not claim appointment of an arbitrator under the arbitration agreement forming part of the said deed.

4. The learned Chief Justice of Guwahati High Court dismissed the appellant's application by order dated 28.5.2010. He held that the lease deed was compulsorily registrable under section 17 of the Registration Act and section 106 of the TP Act; and as the lease deed was not registered, no term in the said lease deed could be relied upon for any purpose and therefore clause 35 could not be relied upon for seeking reference to arbitration. The High Court also held that the arbitration agreement contained in clause 35 could not be termed as a collateral transaction, and therefore, the proviso to section 49 of the Registration Act would not assist the appellant. The said order is challenged in this appeal by special leave.

5. On the contentions urged the following questions arise for consideration :

(i) Whether an arbitration agreement contained in an unregistered (but compulsorily registrable) instrument is valid and enforceable?

(ii) Whether an arbitration agreement in an unregistered instrument which is not duly stamped, is valid and enforceable?

(iii) Whether there is an arbitration agreement between the appellant and respondent and whether an Arbitrator should be appointed?

Re : Question (i)

6. Section 17(1)(d) of Registration Act and section 107 of TP Act provides that leases of immovable property from year to year, or for any term exceeding one year or reserving a yearly rent, can be made only by a registered instrument. Section 49 of the Registration Act, 1908, sets out the effect of non-registration of documents required to be registered. The said section is extracted below :

"49.**Effect of non-registration of documents required to be Registered.**- No document required by section 17 or by any provision of the Transfer of Property Act, 1882 (4 of 1882)], to be registered shall--

(a) affect any immovable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power,

unless it has been registered:

provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (3 of 1877) as evidence of any collateral transaction not required to be effected by registered instrument."

Section 49 makes it clear that a document which is

compulsorily registrable, if not registered, will not affect the immovable property comprised therein in any manner. It will also not be received as evidence of any transaction affecting such property, except for two limited purposes. First is as evidence of a contract in a suit for specific performance. Second is as evidence of any collateral transaction which by itself is not required to be effected by registered instrument. A collateral transaction is not the transaction affecting the immovable property, but a transaction which is incidentally connected with that transaction. The question is whether a provision for arbitration in an unregistered document (which is compulsorily registrable) is a collateral transaction, in respect of which such unregistered document can be received as evidence under the proviso to section 49 of the Registration Act.

7. When a contract contains an arbitration agreement, it is a collateral term relating to the resolution of disputes, unrelated to the performance of the contract. It is as if two contracts -- one in regard to the substantive terms of the main contract and the other relating to resolution of disputes -- had been rolled into one, for purposes of convenience. An arbitration clause is therefore an agreement independent of the other terms of the contract or the instrument. Resultantly, even if the contract or its performance is terminated or comes to an end on account of repudiation, frustration or breach of contract, the arbitration agreement would survive for the purpose of resolution of disputes arising under or in connection with the contract. Similarly, when an instrument or deed of transfer (or a document affecting immovable property) contains an arbitration agreement, it is a collateral term relating to resolution of disputes, unrelated to the *transfer* or transaction affecting the immovable property. It is as if two documents – one affecting the immovable property requiring registration and the other relating to resolution of disputes which is not compulsorily registrable – are rolled into a single instrument. Therefore, even if a deed of transfer of immovable property is challenged as not valid or enforceable, the arbitration agreement would remain

unaffected for the purpose of resolution of disputes arising with reference to the deed of transfer. These principles have now found statutory recognition in sub-section (1) of section 16 of the Arbitration and Conciliation Act 1996 ('Act' for short) which is extracted below :

> "16. **Competence of arbitral tribunal to rule on its jurisdiction.** - (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,--
>
> (a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and
>
> (b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."

8. But where the contract or instrument is voidable at the option of a party (as for example under section 19 of the Indian Contract Act, 1872), the invalidity that attaches itself to the main agreement may also attach itself to the arbitration agreement, if the reasons which make the main agreement voidable, exist in relation to the making of the arbitration agreement also. For example, if a person is made to sign an agreement to sell his property under threat of physical harm or threat to life, and the said person repudiates the agreement on that ground, not only the agreement for sale, but any arbitration agreement therein will not be binding.

9. An arbitration agreement does not require registration under the Registration Act. Even if it is found as one of the clauses in a contract or instrument, it is an independent agreement to refer the disputes to arbitration, which is independent of the main contract or instrument. Therefore having regard to the proviso to section 49 of Registration Act read with section 16(1)(a) of the Act, an arbitration agreement

in an unregistered but compulsorily registrable document can be acted upon and enforced for the purpose of dispute resolution by arbitration.

Re : Question (ii)

10. What if an arbitration agreement is contained in an unregistered (but compulsorily registrable) instrument which is not duly stamped? To find an answer, it may be necessary to refer to the provisions of the Indian Stamp Act, 1899 ('Stamp Act' for short). Section 33 of the Stamp Act relates to examination and impounding of instruments. The relevant portion thereof is extracted below :

> "33.Examination and impounding of instruments.-(1) Every person having by law or consent of parties authority to receive evidence, and every person in charge of a pubic office, except an officer of police, before whom any instrument, chargeable, in his opinion, with duty, is produced or comes in the performance of his functions, shall, if it appears to him that such instrument is not dull stamped, impound the same.
>
> (2) For that purpose every such person shall examine every instrument so chargeable and so produced or coming before him in order to ascertain whether it is stamped with a stamp of the value and description required by the law in force in India when such instrument was executed or first executed :
>
> x x x x "

Section 35 of Stamp Act provides that instruments not duly stamped is inadmissible in evidence and cannot be acted upon. The relevant portion of the said section is extracted below:

> "35. **Instruments not duly stamped inadmissible in evidence, etc.** -- No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped :
>
> Provided that--
>
> (a) any such instrument shall be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion."
>
> x x x x x

Having regard to section 35 of Stamp Act, unless the stamp duty and penalty due in respect of the instrument is paid, the court cannot act upon the instrument, which means that it cannot act upon the arbitration agreement also which is part of the instrument. Section 35 of Stamp Act is distinct and different from section 49 of Registration Act in regard to an unregistered document. Section 35 of Stamp Act, does not contain a proviso like to section 49 of Registration Act enabling the instrument to be used to establish a collateral transaction.

11. The scheme for appointment of arbitrators by the Chief Justice of Guwahati High Court 1996 requires an application under section 11 of the Act to be accompanied by the original arbitration agreement or a duly certified copy thereof. In fact, such a requirement is found in the scheme/rules of almost all the High Courts. If what is produced is a certified copy of the agreement/contract/instrument containing the arbitration clause, it should disclose the stamp duty that has been paid on the original. Section 33 casts a duty upon every court, that is a person having by law authority to receive evidence (as also every arbitrator who is a person having by consent of parties,

authority to receive evidence) before whom an unregistered instrument chargeable with duty is produced, to examine the instrument in order to ascertain whether it is duly stamped. If the court comes to the conclusion that the instrument is not duly stamped, it has to impound the document and deal with it as per section 38 of the Stamp Act. Therefore, when a lease deed or any other instrument is relied upon as contending the arbitration agreement, the court should consider at the outset, whether an objection in that behalf is raised or not, whether the document is properly stamped. If it comes to the conclusion that it is not properly stamped, it should be impounded and dealt with in the manner specified in section 38 of Stamp Act. The court cannot act upon such a document or the arbitration clause therein. But if the deficit duty and penalty is paid in the manner set out in section 35 or section 40 of the Stamp Act, the document can be acted upon or admitted in evidence.

12. We may therefore sum up the procedure to be adopted where the arbitration clause is contained in a document which is not registered (but compulsorily registrable) and which is not duly stamped :

(i) The court should, before admitting any document into evidence or acting upon such document, examine whether the instrument/document is duly stamped and whether it is an instrument which is compulsorily registrable.

(ii) If the document is found to be not duly stamped, Section 35 of Stamp Act bars the said document being acted upon. Consequently, even the arbitration clause therein cannot be acted upon. The court should then proceed to impound the document under section 33 of the Stamp Act and follow the procedure under section 35 and 38 of the Stamp Act.

(iii) If the document is found to be duly stamped, or if the deficit stamp duty and penalty is paid, either before the Court or before the Collector (as contemplated in section 35 or 40 of the Stamp Act), and the defect with reference to deficit stamp is cured, the court may treat the document as duly stamped.

(iv) Once the document is found to be duly stamped, the court shall proceed to consider whether the document is compulsorily registrable. If the document is found to be not compulsorily registrable, the court can act upon the arbitration agreement, without any impediment.

(v) If the document is not registered, but is compulsorily registrable, having regard to section 16(1)(a) of the Act, the court can de-link the arbitration agreement from the main document, as an agreement independent of the other terms of the document, even if the document itself cannot in any way affect the property or cannot be received as evidence of any transaction affecting such property. The only exception is where the respondent in the application demonstrates that the arbitration agreement is also void and unenforceable, as pointed out in para 8 above. If the respondent raises any objection that the arbitration agreement was invalid, the court will consider the said objection before proceeding to appoint an arbitrator.

(vi) Where the document is compulsorily registrable, but is not registered, but the arbitration agreement is valid and separable, what is required to be borne in mind is that the Arbitrator appointed in such a matter cannot rely upon the unregistered instrument except for two purposes, that is (a) as evidence of contract in a claim for specific performance and (b) as evidence of any collateral transaction which does not require registration.

Re : Question (iii)

13. Where a lease deed is for a term of thirty years and is unregistered, the terms of such a deed cannot be relied upon to claim or enforce any right under or in respect of such lease. It can be relied upon for the limited purposes of showing that the possession of the lessee is lawful possession or as evidence of some collateral transaction. Even if an arbitrator is appointed, he cannot rely upon or enforce any term of the unregistered lease deed. Where the arbitration agreement is

not wide and does not provide for arbitration in regard to all and whatsoever disputes, but provides only for settlement of disputes and differences arising in relation to the lease deed, the arbitration clause though available in theory is of little practical assistance, as it cannot be used for deciding any dispute or difference with reference to the unregistered deed.

14. In this case, clause 35 of the lease deed reads as under :

> "That any dispute or difference arising between the parties in relation to or in any manner touching upon this deed shall be settled by Arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 which shall be final and binding on the parties hereto. The Government law will be Indian. The venue of Arbitration shall be at Assam and Court at Assam alone shall have jurisdiction for disputes and litigations arising between the lessor/first party and the lessee/second party in context with the above mentioned scheduled property."

Having regard to the limited scope of the said arbitration agreement (restricting it to disputes in relation to or in any manner touching upon the lease deed), the arbitrator will have no jurisdiction to decide any dispute which does not relate to the lease deed. Though the Arbitrator will have jurisdiction to decide any dispute touching upon or relating to the lease deed, as the lease deed is unregistered, the arbitration will virtually be a non-starter. A party under such a deed may have the luxury of having an arbitrator appointed, but little else. Be that as it may.

15. Before an Arbitrator can be appointed under section 11 of the Act, the applicant should satisfy the learned Chief Justice or his designate that the arbitration agreement is available in regard to the contract/document in regard to which the dispute has arisen. For example if the parties had entered into two agreements and arbitration clause is found only in the first agreement and not in the second agreement, necessarily

an arbitrator can be appointed only in regard to disputes relating to the first agreement and not in regard to any dispute relating to the second agreement. This court in *Yogi Agarwal vs. Inspiration Clothes & U* – (2009) 1 SCC 372 held :

> "When Sections 7 and 8 of the Act refer to the existence of an arbitration agreement in regard to the current dispute between the parties, they necessarily refer to an arbitration agreement in regard to the current dispute between the parties or the subject-matter of the suit. It is fundamental that a provision for arbitration, to constitute an arbitration agreement for the purposes of Sections 7 and 8 of the Act, should satisfy two conditions. Firstly, it should be between the parties to the dispute. Secondly, it should relate to or be applicable to the dispute."

16. In this case, the appellant seeks arbitration in regard to the following three distinct disputes: (a) for enforcing an alleged agreement of sale of two tea estates, (b) for enforcing the lease for thirty years; and (c) for recovery of amounts spent by it in regard to the estates on the assumption that it was entitled to purchase the property or at least have a lease of 30 years.

17. It is clear from the petition averments (Para 11 of the application) that the alleged agreement of sale was entered prior to the lease deed dated 21.12.2006 and there was no arbitration agreement in regard to such agreement of sale. When admittedly there is no arbitration agreement in regard to the alleged agreement of sale, the appellant cannot seek arbitration with reference to any dispute regarding such agreement of sale, whether it is for performance or for damages for breach or any other relief arising out of or with reference to the agreement of sale.

18. An Arbitrator can no doubt be appointed in regard to any disputes relating to the lease deed. But as noticed above, as the lease deed was not registered, the Arbitrator can not rely upon the lease deed or any term thereof and the lease deed

cannot affect the immovable property which is the subject matter of the lease nor be received as evidence of any transaction affecting such property. Therefore, the Arbitrator will not be able to entertain any claim for enforcement of the lease.

19. Lastly we may consider the claim for recovery of the amounts allegedly spent towards the tea estates, as a consequence of respondents not selling the estates or not permitting the appellant to enjoy the lease for 30 years. If this claim is treated as a claim for damages for breach in not granting the lease for 30 years then it would be for enforcement of the terms of the lease deed which is impermissible under section 49 of the Registration Act. If it is treated as claim de hors the lease deed then the arbitrator may not have jurisdiction to decide the dispute as the arbitration agreement (clause 35) is available only to settle any dispute or difference arising between the parties in relation to or in any manner touching upon the lease deed and not in regard to disputes in general.

20. In paras 18 and 19 above, we have considered and stated the general legal position for guidance in arbitrations, even though the same does not directly arise for consideration within the limited scope of the proceedings under section 11 of the Act.

Conclusion

21. In view of the above this appeal is allowed, the order of the High Court is set aside and the matter is remitted to the learned Chief Justice of Guwahati High Court to first decide the issue of stamp duty, and if the document is duly stamped, then appoint an arbitrator in accordance with law.

R.P. Appeal allowed.

M/S. MSK PROJECTS (I) (JV) LTD
v.
STATE OF RAJASTHAN & ANR.
(Civil Appeal No. 5416 of 2011)

JULY 21, 2011

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

Contract:

Construction of a bypass road – Concession agreement authorising contractor to collect toll fee – Dispute between parties as to delay in issuance of notification by State Government barring the use of old route as also entitlement of contactor to collect toll fee from vehicles using a specific patch of the road – Arbitral tribunal holding that there had been delay on the part of the State in issuing the notification and the State failed to implement the same and the contractor was entitled to collect fee even from vehicles using the specific patch of the road – District Judge and High Court holding that there was no clause in the agreement to issue notification barring the old route – However, the High Court held that the contractor could collect toll fee from the specific patch of the road – HELD: The State Government had not taken the defence that it was not agreed between the parties to issue the notification barring the traffic through the old route – The only issue remained as to whether there was delay in issuance of notification and implementation thereof – In such a fact-situation, the District Judge as well as the High Court fell in error in considering the issue which was not taken by the State before the arbitral tribunal during the arbitration proceedings and holding that there was no agreement for issuance of notification by State barring the old route – The issue as to whether the specific patch of the road was an integral or composite part of the project and the contractor could collect the toll fee on that part also stands concluded

by the High Court and stands settled in favour of the contractor – Rajasthan Motor Vehicles Taxation (Amendment) Act, 1994 – Tolls Act, 1851.

Tolls Act, 1851:

Toll fee – Nature of – Construction of a bypass road – Concession agreement authorising the contractor to collect toll fee – Dispute between parties – Arbitration – HELD: Toll fee is compensatory in nature wherein the Government can reimburse itself the amount which it had spent on construction of road/bridge etc. – State is competent to levy/collect the toll fee only for the period stipulated under the Statute or till the actual cost of the project with interest etc. is recovered – It cannot be a source of revenue for the State – A person is debarred by law and statutory inhibition, as contained in Clause IV(a) of the notification, from collection of toll beyond the recovery of cost of construction – In the instant case, the work was to be executed in two phases – The first phase was completed and the amount spent by contractor on the said work was recovered with certain profit – The work of second phase was never executed – Therefore, contractor cannot be permitted to claim damages/compensation on this count – The arbitrator cannot proceed beyond the terms of reference and, therefore, the question of considering the non-execution of the work of second phase was neither permissible nor possible as it had arisen subsequent to the date of award in the arbitration proceedings – In order to do complete justice between the parties and protect the public exchequer, matter remitted to arbitral tribunal to work out the entitlement of the contractor – Arbitration and Conciliation Act, 1996 – Code of Civil Procedure, 1908 – O.8, r.5.

Arbitration:

Jurisdiction of arbitrator/arbitral tribunal – HELD: Special tribunals like arbitral tribunals and Labour Courts get jurisdiction to proceed with the case only from the reference

made to them – Thus, an arbitrator cannot be allowed to assume jurisdiction over a question which has not been referred to him. Similarly, he cannot widen his jurisdiction by holding contrary to the fact that the matter which he wants to decide is within the submission of the parties in the case.

***Interest** – HELD: While award of interest for the period prior to an arbitrator entering upon the reference is a matter of substantive law, the grant of interest for the post-award period is a matter of procedure – Therefore, the arbitrator is competent to award interest for the period commencing with the date of award to the date of decree or date of realisation, whichever is earlier – So far as the rate of interest is concerned, s. 3 of Interest Act empowers the court to award interest at the rate prevailing in the banking transactions – Thus, impliedly, the court has a power to vary the rate of interest agreed by the parties – In the instant case, the High Court rightly held that the District Judge was justified in reducing the rate of interest to 10% from 18% as had been awarded by the arbitral tribunal – Interest Act, 1978 – s.3 – Arbitration and Conciliation Act, 1976.*

Words and Phrases:

Expressions, 'compensation', 'reimbursement' – Connotation of.

The Public Works Department of the State of Rajasthan accepted the tender of the appellant-contractor to construct Bharatpur by-pass road for Rs.1,325 lacs. The total extent of the road was 10.85 km out of which 9.6 kms was new construction and 1.25 kms. was improvement of existing portion of the Bharatpur-Deeg road. A concession agreement dated 19.8.1998 was also entered into between the parties authorising the contractor to collect the toll fee for a period of 111 months till 6.4.2008. The agreement contained an arbitration clause. According to the contractor, it completed the

work on 10.4.2000. It started collection of toll fee w.e.f. 28.4.2000. The State issued the Notification preventing the entry of commercial vehicles into Bharatpur city w.e.f. 1.10.2000. The contractor invoked the arbitration clause raising the dispute with respect to: (a) delay in issuance of the Notification and (b) collection of toll from vehicles using Bharatpur-Deeg patch of the road. The arbitral tribunal, *inter alia,* held that there had been delay on the part of the State in issuing the Notification and the State failed to implement the same and the contractor was entitled to collect toll fee even from the vehicles using Bharatpur-Deeg part of the road. The State Government was directed to pay a sum of Rs.990.52 lacs to the contractor as loss due upto 31.12.2003 with 18% interest from 31.12.2003 onwards. The State filed objections u/s 34 of the 1996 Act. The District Judge set aside the arbitral award on the grounds that there was no clause in the agreement to issue notification barring the entry of vehicles in the city of Bharatpur; that the arbitral tribunal erred in taking 1997 survey as basis for calculating the loss suffered by the contractor; and that the contractor was only entitled to extension of concession period. The rate of interest was reduced from 18% to 10%. On appeal by the contractor, the High Court held that Bharatpur-Deeg section was part of the project and the contractor could collect the toll fee from the users of this part of the road also; that there was no agreement for issuance of Notification by the State barring the use of old route and directing the vehicles to use the new route alone; therefore, the question of grant of compensation on that account for the traffic loss could not arise; and that the District Judge was justified in reducing the rate of interest from 18% to 10%. Aggrieved, both the contractor as also the State Government filed the appeals.

The issues for consideration before the Court were: (i) whether it was mandatory/necessary in view of the

agreement/contract or on the basis of pre-bid understanding that the State had to issue the notification barring the vehicles through the markets of Bharatpur city; (ii) whether the contractor had a right to collect the toll fee on the patch between Bharatpur – Deeg; and (iii) whether the rate of interest could be reduced from 18% to 10% by the courts below.

Disposing of the appeals, the Court

HELD: 1. The arbitral tribunal considered the relevant agreement provisions as well as the land lease deed, the total package documents, the minutes of pre-bid meetings and the deed authorising collection of toll fee etc., and proceeded with the arbitration proceedings. The State Government had not taken the defence that it was not agreed between the parties to issue the notification barring the traffic through the markets of Bharatpur city. The only issue remained as to whether there was delay in issuance of notification and implementation thereof. In such a fact-situation, the District Judge as well as the High Court fell in error in considering the issue which was not taken by the State before the arbitral tribunal during the arbitration proceedings; and holding that there was no agreement for issuance of Notification by the State barring the use of old route. [para 14, 2G] [422-D-F; 417-B-C]

2.1 The issue as to whether the Bharatpur-Deeg patch was an integral or composite part of the project and the contractor could collect the toll fee on that part also stands concluded by the High Court after considering the entire evidence on record. It is evident from the record as well as the judgments of the courts below that the bid documents contained the data collected on the flow of traffic on 14th and 15th April, 1994 to find out the viability and requirement of the establishment of Bharatput bye-pass and it included the

traffic flow on the Bharatpur-Deeg section also which indicates that this particular patch had also been an integral part of the project. Besides, in pre-bid conference, it was clarified by the State authorities that the users of Bharatpur-Deeg patch would be required to pay the toll fee. [para20-22] [424-F-H; 425-A-B]

2.2 Further, clause 5 of the concession agreement also provided that Government would levy and charge the fee from all persons using the project facilities. The project was not in parts rather it was a composite and integrated project, which included the Bharatpur-Deeg section also. Therefore, it was not permissible for the State to take the plea that persons using such section of the road were not liable to pay the toll fee. It has not been denied that the said portion of road had been widened and strengthened by the contractor. Thus, the issue raised by the State that Bharatpur-Deeg section of the road was out of the project and the contractor was not entitled to collect the toll fee on that part of the road, stands settled in favour of the cotnractor. [para 23-24] [425-B-F]

3.1 It is a settled legal proposition that the arbitrator is competent to award interest for the period commencing with the date of award to the date of decree or date of realisation, whichever is earlier. This is also quite logical for, while award of interest for the period prior to an arbitrator entering upon the reference is a matter of substantive law, the grant of interest for the post-award period is a matter of procedure. [para 15] [422-G-H]

Union of India v. Bungo Steel Furniture Pvt. Ltd., **1967 SCR 324 =AIR 1967 SC 1032;** *Executive Engineer, Irrigation, Galimala & Ors. v. Abnaduta Jena*, **1988 (1) SCR 253 = AIR 1988 SC 1520;** *Gujarat Water Supply & Sewerage Board v. Unique Erectors (Gujarat) (P) Ltd. & Anr.*, **1989 (1)**

SCR 318 =AIR 1989 SC 973; *Secretary, Irrigation Department, Govt. of Orissa & Ors. v. G.C. Roy,* **1991 (3) Suppl. SCR 417 = AIR 1992 SC 732;** *Hindustan Construction Co. Ltd. v. State of Jammu & Kashmir*, **1992 (1) Suppl. SCR 297 =AIR 1992 SC 2192;** *Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa v. N.C. Budharaj (Dead) by Lrs.*, **2001 (1) SCR 264 = AIR 2001 SC 626;** *Bhagawati Oxygen Ltd. v. Hindustan Copper Ltd.*, **2005 (3) SCR 232 = AIR 2005 SC 2071;** and *Indian Hume Pipe Co. Ltd. v. State of Rajasthan* **2009 (15) SCR 254 = (2009) 10 SCC 187 – relied on**

3.2 So far as the rate of interest is concerned, s. 3 of the Interest Act 1978 empowers the court to award interest at the rate prevailing in the banking transactions. Thus, impliedly, the court has a power to vary the rate of interest agreed by the parties. In the instant case, the High Court, while dealing with the rate of interest, has relied upon the judgment of this Court in *Krishna Bhagya Jala Nigam Ltd.* and, thus, there is no scope for this Court to interfere with the rate of interest fixed by the courts below. [para 16 and 19] [423-D, F-G; 424-E]

Krishna Bhagya Jala Nigam Ltd. v. G. Harischandra Reddy & Anr., **2007 (1) SCR 698 = AIR 2007 SC 817;** *H.U.D.A v. Raj Singh Rana*, **2008 (10) SCR 1034 =AIR 2008 SC 3035,** *Ghaziabad Development Authority v. Balbir Singh,* **2004 (3) SCR 68 =AIR 2004 SC 2141;** *Bihar State Housing Board v. Arun Dakshy*, **2005 (2) Suppl. SCR 819 = (2005) 7 SCC 103;** *Haryana Urban Development Authority v. Manoj Kumar & Anr.*, **(2005) 9 SCC 541;** *H.U.D.A v. Prem Kumar Agarwal & Anr.*, **2008 (1) SCR 807 = JT 2008 (1) SC 590 - relied on.**

4. As regards the jurisdiction of the arbitral tribunal to decide an issue not referred to, it is a settled legal proposition that special tribunals like arbitral tribunals and Labour Courts get jurisdiction to proceed with the

case only from the reference made to them. Thus, an arbitrator cannot be allowed to assume jurisdiction over a question which has not been referred to him and, similarly, he cannot widen his jurisdiction by holding contrary to the fact that the matter which he wants to decide is within the submission of the parties. If the dispute is within the scope of the arbitration clause, it is no part of the province of the court to enter into the merits of the dispute on the issue not referred to it. If the award goes beyond the reference or there is an error apparent on the face of the award, it would certainly be open to the court to interfere with such an award. If the arbitrator commits an error in the construction of the contract, this is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, be commits a jurisdictional error, which needs to be proved by evidence extrinsic to the award. [para 6-8] [419-B-H; 420-A-B]

Grid Corporation of Orissa Ltd. & Anr. v. Balasore Technical School, **AIR 1999 SC 2262;** and *Delhi Development Authority v. R.S. Sharma and Company, New Delhi,* **2008 (12) SCR 785 =(2008) 13 SCC 80;** *Associated Engg. Co. v. Govt. of Andhra Pradesh & Anr.*,**1991(2) SCR 924 =AIR 1992 SC 232;** *Gobardhan Das v. Lachhmi Ram & Ors.*, **AIR 1954 SC 689;** *Seth Thawardas Pherumal v. The Union of India,* **1955 SCR 48 =AIR 1955 SC 468;** *Union of India v. Kishorilal Gupta & Bros.*, **1960 SCR 493=AIR 1959 SC 1362;** *Alopi Parshad & Sons. Ltd. v. Union of India,* **1960 SCR 793 =AIR 1960 SC 588;** *Jivarajbhai Ujamshi Sheth & Ors. . Chintamanrao Balaji & Ors.,* **1964 SCR 480 = AIR 1965 SC 214;** and *Renusagar Power Co. Ltd. v. General Electric Company & Anr.*, **1985 (1) SCR 432 =AIR 1985 SC 1156;** *Kishore Kumar Khaitan & Anr. v. Praveen Kumar Singh*, **(2006) 3 SCC 312, Williams v. Lourdusamy & Anr., 2008 (6) SCR 929 =(2008) 5 SCC 647;** *Cellular Operators Association of India & Ors. v. Union of India & Ors.*, **2003 (3)**

SCR 691 = (2003) 3 SCC 186; ***Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd*. 2003 (3) SCR 691 =AIR 2003 SC 2629;** and *Hindustan Zinc Ltd. v. Friends Coal Carbonisation* **(2006) 4 SCC 445 - referred to.**

5.1 With regard to the entitlement of the contractor, the State authorities cannot be permitted to use the collection of toll fee as augmenting the State revenues. In fact, the toll fee under the Tolls Act, 1851 is compensatory in nature wherein the Government can reimburse itself the amount which it had spent on construction of road/bridge etc. The State is competent to levy/collect the toll fee only for the period stipulated under the Statute or till the actual cost of the project with interest etc. is recovered. However, it cannot be a source of revenue for the State. It is evident that Clause IV(a) of the Notification dated 10.02.1997 envisages that toll can only be collected as long as total cost of construction and maintenance including interest thereupon is recovered. A person is debarred by law and statutory inhibition, as contained in Clause IV(a) of the notification, from collection of toll beyond the recovery of cost of construction. [para 25-27] [425-G-H; 426-D-E-H; 427-A-C]

5.2 In common parlance, "reimbursement" means and implies restoration of an equivalent for something paid or expanded. Similarly, "Compensation" means anything given to make the equivalent. [para 28] [427-D]

State of Gujarat v. Shantilal Mangaldas & Ors., **1969 (3) SCR 341 = AIR 1969 SC 634;** *Tata Iron & Steel Co. Ltd. v. Union of India & Ors.,* **2000 (5) Suppl. SCR 228 =AIR 2000 SC 3706;** *Dwaraka Das v. State of Madhya Pradesh & Anr.,* **1999 (1) SCR 524 = AIR 1999 SC 1031;** *State of U.P. & Ors. v. Devi Dayal Singh,* **2000 (1) SCR 1205 =** *AIR 2000 SC* 961 **– relied on.**

5.3 Claim of expected profits is legally admissible on

proof of the breach of contract **by the erring party. What would be the measure of profit would depend upon facts and circumstances of each case. But, that there shall be a reasonable expectation of profit is implicit in a works contract and its loss has to be compensated by way of damages if the other party to the contract** is guilty of breach of contract **cannot be gainsaid. [para 30] [428-A-C]**

M/s. A.T. Brij Paul Singh & Ors. v. State of Gujarat, **AIR 1984 SC 1703; *B.S.N.L** v. Reliance Communication Ltd.*, **2010 (15) SCR 705 = (2011) 1 SCC 394 – relied on**

5.4 In the instant case, undoubtedly, the total construction was for Rs. 13.25 crores. It is evident from the bid-documents filed by the contractor that the work was to be executed in two phases. In the first phase, the contractor spent about Rs.10.45 crores and recovered the said amount with certain profit, by collection of toll fee within the stipulated period. The documents reveal that phase II work was of worth Rs.354.75 lacs, but, admittedly, this part of the contract had never been executed by the contractor and the said amount of Rs.354.75 lacs had not been spent by it. This issue has been agitated by the State before this Court in its counter affidavit and the averments made therein have not been denied by the contractor while submitting its rejoinder. Thus, there is no specific denial of the allegations/ averments taken by the State as required by the principle enshrined in O 8, r. 5 of the Code of Civil Procedure, 1908. The contractor cannot be permitted to claim damages/ compensation in respect of the amount of Rs.13.25 crores, as it did not spend the said amount stipulated in the terms of agreement. The contractor cannot claim the amount of Rs. 7.13 crores for a period of three years for a small patch of 1.25 kilometres out of the total length of the road to the extent of 10.85 kilometres. [para 33-34 and 36] [429-A-B; 430-E-F; 431-C-E-H]

5.5 In fact, the tribunal has dealt with the issue in

correct perspective only to the extent the period of delay by which the notification barring the heavy vehicles through market of Bharatpur had been issued. As the notification had been issued, and it was not the responsibility of the State to establish a police chowki etc. to implement the notification, there was no occasion for the tribunal to proceed further. The arbitrator cannot proceed beyond the terms of reference and, therefore, the question of considering the non-execution of the work of second phase was neither permissible nor possible as it had arisen subsequent to the date of award in the arbitration proceedings. Therefore, any award in favour of the contractor in that respect for non-issuance of notification beyond the date of the notification cannot be held to be justified and the same is set aside. [para 37-38] [432-A-B-F; 433-D-E]

5.6 In order to do complete justice between the parties and protect the public exchequer, the matter is remitted to the arbitral tribunal for reconsideration and adjudication as to: (i) what amount could have been recovered by the contractor for Bharatpur-Deeg part of the road from the vehicles using the road; and (ii) what could be the effect on the contract as a whole for non-executing the work of the second phase. The contractor shall be entitled only to a sum of Rs.26.34 lacs awarded by the tribunal for delay in issuing the notification with 10% interest, if not paid already or it could be adjusted in the final accounts bills. [para 38] [433-E-H; 434-A-B]

Case Law Reference:

AIR 1999 SC 2262	**referred to**	**para 6**
2008 (12) SCR 785	**referred to**	**para 6**
1991 (2) SCR 924	**referred to**	**para 7**
1955 SCR 48	**referred to**	**para 8**
1960 SCR 493	**referred to**	**para 8**

1960 SCR 793	**referred to**	**para 8**
1964 SCR 480	**referred to**	**para 8**
1985 (1) SCR 432	**referred to**	**para 8**
(2006) 3 SCC 312	**referred to**	**para 9**
2008 (6) SCR 929	**referred to**	**para 9**
2003 (3) SCR 691	**referred to**	**para 10**
2003 (3) SCR 691	**referred to**	**para 11**
2006 (4) SCC 445	**referred to**	**para 11**
1967 SCR 324	**relied on**	**para 15**
1988 (1) SCR 253	**relied on**	**para 15**
1989 (1) SCR 318	**relied on**	**para 15**
1991 (3) Suppl. SCR 417	**relied on**	**para 15**
1992 (1) Suppl. SCR 297	**relied on**	**para 15**
2001 (1) SCR 264	**relied on**	**para 15**
2005 (3) SCR 232	**relied on**	**para 15**
2009 (15) SCR 254	**relied on**	**para 15**
2007 (1) SCR 698	**relied on**	**para 15**
2008 (10) SCR 1034	**relied on**	**para 15**
2004 (3) SCR 68	**relied on**	**para 15**
2005 (2) Suppl. SCR 819	**relied on**	**para 15**
2005 (9) SCC 541	**relied on**	**para 15**
2008 (1) SCR 807	**relied on**	**para 15**
2000 (1) SCR 1205	**relied on**	**para 25**
1969 (3) SCR 341	**relied on**	**para 28**

2000 (5) Suppl. SCR 228	**relied on**	**para 28**
1999 (1) SCR 524	**relied on**	**para 29**
AIR 1984 SC 1703	**relied on**	**para 30**
2010 (15) SCR 705	**relied on**	**para 31**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5416 of 2011.

From the Judgment & Order dated 24.04.2007 of the High Court of Judicature at Rajathan at Jaipur in Civil Misc. Appeal No. 1581 of 2006.

WITH

C.A. No. 5417 of 2011.

K.K. Venugopal, Shirish Patel, Karan Patel, Ankur Saigal, Abhay Anand, Gaurav Singh, Bina Gupta for the Appellant.

Dr. Manish Singhvi, AAG, Vinay Verma, Milind Kumar for the Respondents.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. Both these appeals have been preferred by the rival parties against the judgment and order dated 24.4.2007 passed by the High Court of Rajasthan (Jaipur Bench) in Civil Misc. Appeal No.1581 of 2006 under Section 37(1)(A) of the Arbitration and Conciliation Act, 1996 (hereinafter called "Act 1996") against the order dated 17.1.2006 passed by the District Judge, Jaipur City, Jaipur in Arbitration Case No.89/2004 whereby the application filed by the State of Rajasthan under Section 34 of the Act 1996 for setting aside the arbitral award dated 1.12.2003 had been allowed.

2. Facts and circumstances giving rise to these appeals are:

A. The Public Works Department of the State of Rajasthan (hereinafter called "PWD") decided in September 1997 to construct the Bharatpur bye-pass for the road from Bharatpur to Mathura, which passed through a busy market of the city of Bharatpur. For the aforesaid work, tenders were invited with a stipulation that the work would be executed on the basis of Build Operate and Transfer (BOT). The total extent of the road had been 10.850 k.ms. out of which 9.6 k.ms. was new construction and 1.25 k.ms. was improvement, i.e. widening and strengthening of the existing portion of Bharatpur-Deeg Road.

B. After having pre-bid conference/meeting and completing the required formalities it was agreed between the tenderers and PWD that compensation would be worked out on the basis of investment made by the concerned entrepreneur. The tender submitted by MSK-appellant for Rs.1,325 lacs was accepted vide letter dated 5.2.1998 and the MSK-appellant was called upon to furnish security deposit which was done on 25.7.1998. Concession agreement dated 19.8.1998 was entered into between the parties authorising collection of toll fee by MSK-appellant. According to this agreement, period of concession had been 111 months including the period of construction. The said period would end on 6.4.2008. It also contained the provisions for making repayment/collection of toll fee and in case of any difference/ dispute to refer the matter to the Arbitrator.

C. MSK-appellant completed the Bharatpur bye-pass Project on 10.4.2000 and also started collection of toll fee as provided under the agreement with effect from 28.4.2000. There had been some problem in collecting the toll fee because of agitation by local people. The State issued Notification dated 1.9.2000 under the provisions of the Indian Tolls Act, 1851 and Rajasthan Motor Vehicles Taxation (Amendment) Act, 1994 (hereinafter called the `Notification dated 1.9.2000') preventing the entry of vehicles into Bharatpur city stipulating its operation with effect from 1.10.2000. MSK-appellant invoked arbitration

clause raising the dispute with respect to:

(a) Delay in issuance of Notification prohibiting entry of commercial vehicles into Bharatpur town and diverting traffic through the bye-pass; and

(b) Collection of toll from vehicles using Bharatpur-Deeg patch of the road.

D. The State/PWD failed to make appointment of the Arbitrator. MSK-appellant preferred SB Civil Arbitration Application No.31 of 2002 before the High Court and the High Court vide order 12.4.2002 appointed the Arbitrator. The Arbitrators so appointed in their meeting on 8.5.2002 appointed the third Arbitrator. Claim Petition was filed before the Tribunal by MSK-appellant on 23.9.2002. The State submitted its reply to the claim petition on 7.12.2002.

E. The Arbitral Award was made in favour of MSK-appellant on 1.12.2003 according to which there had been delay on the part of the State of Rajasthan in issuing the Notification and the State failed to implement the same and the contractor was entitled to collect toll fee even from the vehicles using Bharatpur-Deeg part of the road . The State of Rajasthan was directed to pay a sum of Rs.990.52 lacs to MSK-appellant as loss due upto 31.12.2003 with 18% interest from 31.12.2003 onwards. The Tribunal further gave various other directions to the State in this regard.

F. Being aggrieved, the State of Rajasthan filed objections under Section 34 of the Act 1996 and while deciding the same, the District Judge vide order dated 17.1.2006 set aside the Arbitral Award on the grounds that there was no clause in the agreement to issue notification barring the entry of vehicles in the city of Bharatpur; and the Tribunal erred in taking 1997 survey as basis for calculating the loss suffered by MSK-appellant. It held that MSK-appellant was not entitled to any monetary compensation under clause 10 of the concession

agreement, but only entitled to extension of concession period, and the rate of interest was reduced from 18% to 10%.

G. Being aggrieved, MSK-appellant preferred an appeal before the High Court wherein the High Court vide impugned judgment and order dated 24.4.2007 held that Bharatpur-Deeg section was part of the project and the contractor could collect the toll fee from the users of this part of the road also. Clause 10 of the concession agreement was not attracted in the facts of the case. There was no agreement for issuance of Notification by the State barring the use of old route and directing the vehicles to use the new route alone. Therefore, the question of grant of compensation on that account for the traffic loss could not arise. The District Judge was justified in reducing the rate of interest from 18% to 10% in view of the provisions of Section 31(7)(b) of the Act,1996 and economic realities, whereby the rate of interest had been reduced by the Banks in India.

Hence, these two appeals.

3. Mr. K.K. Venugopal, learned senior counsel appearing for the private appellant, has submitted that it was implied in the agreement and there has been an understanding between the parties that State Government would issue notification barring the vehicles driven through the markets of Bharatpur City. This was not even an issue before the Tribunal and thus, could not be agitated by the State at all. Thus, the courts below erred in setting aside the award of arbitral tribunal to that extent, and secondly, that the rate of interest as reduced from 18 per cent to 10 per cent by the District Court as well as the High Court is in contravention of the terms of contract between the parties which fixed the rate of interest at 20 per cent. Further opposing the appeal by the State of Rajasthan, Shri Venugopal has submitted that Bharatpur-Deeg patch was an integral part of the project as there was only one composite contract of the entire bye-pass and, therefore, the private appellant was entitled to collect the toll fee from the users of that part of the road also.

4. Per contra, Dr. Manish Singhvi, learned Additional Advocate General for the State of Rajasthan, has submitted that arbitration proceedings could not be proceeded in contravention to the terms of agreement and statutory provisions. There was no obligation on the part of the State authorities to issue the notification restraining the entry of vehicles to the market side of the city. The rate of interest has rightly been reduced considering the prevailing rate of interest in banking transactions during the relevant period of contract. In support of the appeal of the State, it has been submitted that there was a clear understanding between the parties that the private appellant shall not collect any toll fee on the Bharatpur-Deeg patch and to that extent the Tribunal and the courts below committed an error. It has further been submitted that the total contract had been for a sum of Rs.13.25 crores including interest. The project was to be executed in two phases. The second phase for a sum of Rs.3.24 crores had never been executed by the private appellant. The contractor could collect the compensation only on the basis of investment made by it. The concept of toll fee is of compensatory in nature wherein the State which has spent huge amount on construction of roads/bridges etc. has a right to get the said amount reimbursed, and therefore, in such a contract the concept of profit which prevails in other forms of contract cannot be the relevant component.

5. We have considered the rival submissions made on behalf of the parties and perused the record.

In the appeal filed by the private contractor, MSK Projects, two issues are involved; namely, whether it was mandatory/ necessary in view of the agreement/contract or on the basis of pre-bid understanding that the State had to issue the notification barring the vehicles through the markets of Bharatpur city; and secondly whether the rate of interest could be reduced from 18% to 10% by the courts below.

In the State appeal, the only issue required to be

considered is whether the private appellant had a right to collect the toll fee on the patch between Bharatpur - Deeg.

6. The issue regarding the jurisdiction of the Arbitral Tribunal to decide an issue not referred to is no more res integra. It is a settled legal proposition that special Tribunals like Arbitral Tribunals and Labour Courts get jurisdiction to proceed with the case only from the reference made to them. Thus, it is not permissible for such Tribunals/authorities to travel beyond the terms of reference. Powers cannot be exercised by the Tribunal so as to enlarge materially the scope of reference itself.

If the dispute is within the scope of the arbitration clause, it is no part of the province of the court to enter into the merits of the dispute on the issue not referred to it. If the award goes beyond the reference or there is an error apparent on the face of the award it would certainly be open to the court to interfere with such an award. (Vide: *Grid Corporation of Orissa Ltd. & Anr. v. Balasore Technical School,* AIR 1999 SC 2262; and *Delhi Development Authority v. R.S. Sharma and Company, New Delhi,* (2008) 13 SCC 80).

7. In *Associated Engg. Co. v. Govt. of Andhra Pradesh & Anr.,* AIR 1992 SC 232, this Court held that an umpire or arbitrator cannot widen his jurisdiction by deciding a question not referred to him by the parties. If he exceeded his jurisdiction by so doing, his award would be liable to be set aside. Thus, an arbitrator cannot be allowed to assume jurisdiction over a question which has not been referred to him, and similarly, he cannot widen his jurisdiction by holding contrary to the fact that the matter which he wants to decide is within the submission of the parties.

8. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Extrinsic evidence is

admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such a jurisdictional error needs to be proved by evidence extrinsic to the award. (See: *Gobardhan Das v. Lachhmi Ram & Ors.,* AIR 1954 SC 689; *Seth Thawardas Pherumal v. The Union of India,* AIR 1955 SC 468; *Union of India v. Kishorilal Gupta & Bros.,* AIR 1959 SC 1362; *Alopi Parshad & Sons. Ltd. v. Union of India,* AIR 1960 SC 588; *Jivarajbhai Ujamshi Sheth & Ors. v. Chintamanrao Balaji & Ors.,* AIR 1965 SC 214; and *Renusagar Power Co. Ltd. v. General Electric Company & Anr.,* AIR 1985 SC 1156).

9. In *Kishore Kumar Khaitan & Anr. v. Praveen Kumar Singh,* (2006) 3 SCC 312, this Court held that when a court asks itself a wrong question or approaches the question in an improper manner, even if it comes to a finding of fact, the said finding of fact cannot be said to be one rendered with jurisdiction. The failure to render the necessary findings to support its order would also be a jurisdictional error liable to correction.

(See also: *Williams v. Lourdusamy & Anr.,* (2008) 5 SCC 647)

10. In *Cellular Operators Association of India & Ors. v. Union of India & Ors.,* (2003) 3 SCC 186, this Court held as under:

> "As regards the issue of jurisdiction, it posed a wrong question and gave a wrong answer……The learned TDSAT, therefore, has posed absolutely a wrong question and thus its impugned decision suffers from a misdirection in law."

11. This Court, in *Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd.,* AIR 2003 SC 2629; and *Hindustan Zinc Ltd. v. Friends Coal Carbonisation,* (2006) 4 SCC 445), held that an arbitration award contrary to substantive provisions of law, or provisions of the Act, 1996 or against terms of the contract, or public policy, would be patently illegal, and if it affects the rights of the parties, it would be open for the court to interfere under Section 34(2) of the Act 1996.

12. Thus, in view of the above, the settled legal proposition emerges to the effect that the arbitral tribunal cannot travel beyond terms of reference; however, in exceptional circumstances where a party pleads that the demand of another party is beyond the terms of contract and statutory provisions, the tribunal may examine by he terms of contract as well as the statutory provisions. In the absence of proper pleadings and objections, such a course may not be permissible.

13. Be that as it may, in the instant case, a reference to the Tribunal had been made on the basis of statement of facts, claims by the private appellant, defence taken by the respondent-State and rejoinder by the claimant. After completing the formalities of admission and denial by each party in respect of each other's documents and submission of draft proposed issues and respective oral evidence, the Tribunal on 4.1.2003 framed the following issues:

1. Whether claimant as per agreement is entitled to recover its amount of claim of Rs.453.69 lacs upto 31.12.2002 and onwards or not?

2. Whether there was delay on part of State in issuing notification for restriction of traffic through the Bharatpur Town, which has effected the toll tax or not? If so, how much delay and delay in full rate of safe implementation as on date, or not? By virtue of it, is the claimant entitled to recover its claim of Rs.292.17 lacs upto 31.12.2002 and thereafter onward or not; or merely by extension of

concession period as averred by respondent?

3. As a consequence of issue 1 &2, which party breached the contract?

4. Whether the claimant is entitled to claim interest on its any due claim amount as per decision of issue 1 & 2? If so, from what date and at what rate of simple/compound interest?

5. Whether claimant or respondent is entitled for cost of arbitration incurred and claimed by, each party? If so, what amount and to which party?

6. Any other if any demanded by any party during proceedings.

14. The Tribunal considered the relevant agreement provisions as well as land lease deed, total package documents, minutes of pre-bid meetings and deed authorising collection of toll fee etc., and proceeded with the arbitration proceedings. The State of Rajasthan had not taken the defence that it was not agreed between the parties to issue the notification barring the traffic through the markets of Bharatpur city. The only issue remained as to whether there was delay in issuance of notification and implementation thereof. In such a fact-situation and considering the settled legal propositions, we are of the view that the District Judge as well as the High Court fell in error considering the issue which was not taken by the State before the Tribunal during the arbitration proceedings.

15. Furthermore, it is a settled legal proposition that the arbitrator is competent to award interest for the period commencing with the date of award to the date of decree or date of realisation, whichever is earlier. This is also quite logical for, while award of interest for the period prior to an arbitrator entering upon the reference is a matter of substantive law, the grant of interest for the post-award period is a matter of procedure.

(Vide: *Seth Thawardas Pherumal (Supra); Union of India v. Bungo Steel Furniture Pvt. Ltd.,* AIR 1967 SC 1032; *Executive Engineer, Irrigation, Galimala & Ors. v. Abnaduta Jena,* AIR 1988 SC 1520; *Gujarat Water Supply & Sewerage Board v. Unique Erectors (Gujarat) (P) Ltd. & Anr.,* AIR 1989 SC 973; *Secretary, Irrigation Department, Govt. of Orissa & Ors. v. G.C. Roy,* AIR 1992 SC 732; *Hindustan Construction Co. Ltd. v. State of Jammu & Kashmir,* AIR 1992 SC 2192; *Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa v. N.C. Budharaj (Dead) by Lrs.,* AIR 2001 SC 626; *Bhagawati Oxygen Ltd. v. Hindustan Copper Ltd.,* AIR 2005 SC 2071; and *Indian Hume Pipe Co. Ltd. v. State of Rajasthan,* (2009) 10 SCC 187).

16. So far as the rate of interest is concerned, it may be necessary to refer to the provisions of Section 3 of the Interest Act 1978, relevant part of which reads as under:

> "(1) In any proceedings for the recovery of any debt or damages or in any proceedings in which a claim for interest in respect of' any debt or damages already paid is made, the court may, if it thinks fit, allow interest to the person entitled to the debt or damages or to the person making such claim, as the case may be, *at a rate not exceeding the current rate of interest*…." (Emphasis added)

Thus, it is evident that the aforesaid provisions empower the Court to award interest at the rate prevailing in the banking transactions. Thus, impliedly, the court has a power to vary the rate of interest agreed by the parties.

17. This Court in *Krishna Bhagya Jala Nigam Ltd. v. G. Harischandra Reddy & Anr.,* AIR 2007 SC 817, while dealing with the similar issue held as under:

> "…after economic reforms in our country the interest regime has changed and the rates have substantially

> reduced and, therefore, we are of the view that the interest awarded by the arbitrator at 18% for the pre-arbitration period, for the pendente lite period and future interest be reduced to 9%."

18. In *H.U.D.A v. Raj Singh Rana,* AIR 2008 SC 3035, this Court considered various earlier judgments of this Court including *Ghaziabad Development Authority v. Balbir Singh,* AIR 2004 SC 2141; *Bihar State Housing Board v. Arun Dakshy,* (2005) 7 SCC 103; *Haryana Urban Development Authority v. Manoj Kumar & Anr.,* (2005) 9 SCC 541; *H.U.D.A v. Prem Kumar Agarwal & Anr.,* JT 2008 (1) SC 590 and came to the conclusion:

> "…….the rate of interest is to be fixed in the circumstances of each case and it should not be imposed at a uniform rate without looking into the circumstances leading to a situation where compensation was required to be paid."

19. Be that as it may, the High Court while dealing with the rate of interest has relied upon the judgment of this Court in *Krishna Bhagya Jala Nigam Ltd.* (supra) and thus, there is no scope for us to interfere with the rate of interest fixed by the courts below.

20. The issue raised by the State before this Court in its appeal as to whether the Bharatpur-Deeg patch was an integral or composite part of the project and the private appellant could collect the toll fee on that part also stands concluded by the High Court after considering the entire evidence on record.

21. It is evident from the record as well as the judgments of the courts below that bid documents contained data collected on the flow of traffic on 14th and 15th April, 1994 to find out the viability and requirement of the establishment of Bharatput bye-pass and it included the traffic flow on the Bharatpur-Deeg section also which indicates that this particular patch had also been an integral part of the project.

22. In pre-bid conference the interveners wanted a clarification as to whether the persons using this particular patch of road between Bharatpur-Deeg could be liable to pay toll fee. It was clarified by the respondent-State authorities that the users of this patch would be required to pay the toll fee.

23. Clause 5 of the Concession agreement also provided that Government would levy and charge the fee from all persons using the project facilities. The project was not in parts rather it was a composite and integrated project which included the Bharatpur-Deeg section also. Hence, it was not permissible for the respondent-State to take the plea that persons using such section of the road were not liable to pay the toll fee. We do not find any force in the submission made by Dr. Manish Singhvi, learned counsel for the State that it was not a newly constructed road. However, he is not in a position to deny that the said portion of road had been widened and strengthened by the private appellant and could not be termed as service road which could be used free of charge in view of clause 7 of the concession agreement as service road has been defined as any road constructed temporarily for use of traffic for short period during construction of the main road. Such a facility had to be provided in order to maintain the free flow of traffic during the construction of the road.

24. Thus, in view of the above, the issue raised by the State that Bharatpur-Deeg section of the road was out of the project and the private appellant was not entitled to collect the toll fee on that part of the road, stands settled in favour of the private appellant.

25. Determination of the aforesaid three issues brings us to the entitlement of the private appellant.

The Court is not oblivious to the fact that the State authorities cannot be permitted to use the collection of toll fee as augmenting the State revenues. In *State of U.P. & Ors. v. Devi Dayal Singh,* AIR 2000 SC 961, this Court defined 'toll'

as a sum of money taken in respect of a benefit arising out of the temporary use of land. It implies some consideration moving to the public either in the form of a liberty, privilege or service. In other words, for the valid imposition of a toll, there must be a corresponding benefit. The Court further held:

> "Although the section has empowered the State Government to levy rates of tolls "as it thinks fit", having regard to the *compensatory nature* of the levy, the rate of toll must bear a reasonable relationship to the providing of benefit. No doubt, by virtue of Section 8 of the Act, the tolls collected are part of the public revenue and may be absorbed in the general revenue of the State, nevertheless by definition a toll cannot be used *for otherwise augmenting the State's revenue*."
>
> (Emphasis added)

26. In fact, the toll fee under the Tolls Act, 1851 is of compensatory in nature wherein the Government can reimburse itself the amount which it had spent on construction of road/ bridge etc.

Clause IV(a) of the statutory notification dated 10.2.1997 which entitled the government to give present road on toll is reproduced below:

> "IV(a). The toll of any of the aforesaid facilities/ constructions shall be levied *only for so long as the total cost of its construction and maintenance including interest thereupon, and the total expenditure in realisation of toll has not been realised in full* or for a period of 30 years."
>
> (Emphasis added)

It is evident that Clause IV(a) of the Notification dated 10.02.1997 envisages that toll can only be collected as long as total cost of construction and maintenance including interest

thereupon is recovered. A person is debarred by law and statutory inhibition as contained in Clause IV(a) of the notification from collection of toll beyond the recovery of cost of construction.

27. Thus, from the above referred provisions, it is evident that toll fee is compensatory in nature and can be collected by the State to reimburse itself the amount it has spent on construction of the road/bridge etc. The State is competent to levy/collect the toll fee only for the period stipulated under the Statute or till the actual cost of the project with interest etc. is recovered. However, it cannot be a source of revenue for the State.

28. In common parlance, "reimbursement" means and implies restoration of an equivalent for something paid or expanded. Similarly, "Compensation" means anything given to make the equivalent. (See: *State of Gujarat v. Shantilal Mangaldas & Ors.,* AIR 1969 SC 634; *Tata Iron & Steel Co. Ltd. v. Union of India & Ors.,* AIR 2000 SC 3706; *Ghaziabad Development Authority* (Supra); and *H.U.D.A v. Raj Singh Rana,* (Supra).

29. However, in *Dwaraka Das v. State of Madhya Pradesh & Anr.,* AIR 1999 SC 1031, it was held that a claim by a contractor for recovery of amount as damages as expected profit out of contract cannot be disallowed on ground that there was no proof that he suffered actual loss to the extent of amount claimed on account of breach of contract.

30. In *M/s. A.T. Brij Paul Singh & Ors. v. State of Gujarat,* AIR 1984 SC 1703, while interpreting the provisions of Section 73 of the Indian Contract Act, 1972, this Court held that damages can be claimed by a contractor where the government is *proved to have committed breach by improperly rescinding the contract* and for estimating the amount of damages, court should make a broad evaluation *instead of going into minute details.* It was specifically held that

where in the works contract, the party entrusting the work committed *breach of contract, the contractor is entitled to claim the damages for loss of profit which he expected to earn by undertaking the works contract.* Claim of expected profits *is legally admissible on proof of the breach of contract* by the erring party. It was further observed that what would be the measure of profit would depend upon facts and circumstances of each case. But that there shall be a reasonable expectation of profit is implicit in a works contract and its loss has to be compensated by way of damages if the other party to the contract *is guilty of breach of contract* cannot be gainsaid.

31. In *B.S.N.L v. Reliance Communication Ltd.,* (2011) 1 SCC 394, this court held as under:

> "53. Lastly, it may be noted that liquidated damages serve the useful purpose of avoiding litigation and promoting commercial certainty and, therefore, the court should not be astute to categorise as penalties the clauses described as liquidated damages."

32. This Court further stated in *Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd.* (Supra):

> "64….This section is to be read with Section 74, which deals with penalty stipulated in the contract, inter alia (relevant for the present case) provides that when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of breach is entitled, whether or not actual loss is proved to have been caused, thereby to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named. Section 74 emphasizes that in case of breach of contract, the party complaining of the breach is entitled to receive reasonable compensation whether or not actual loss is proved to have been caused by such breach…."

33. Thus, the case requires consideration in the light of the

aforesaid settled legal principles.

Undoubtedly, the total construction was for Rs. 13.25 crores. It is evident from the Bid-documents filed by the private appellant that the work was to be executed in two phases and the relevant part thereof reads as under:

PHASE – I

Year	Const. Cost (in lacs)	Super-vision Charges @ 10%	Total (in lacs)	Inte-rest @ 20%	Total inves-tment of Strs	Upto date inves-tment (in lacs)
1998-99						
6/98	75	7.5	82.50	4.12	86.62	86.62
9/98	80	8.0	88.00	8.52	92.52	183.14
12/98	80	8.0	88.00	12.92	100.92	284.06
3/99	80	8.0	88.00	17.32	105.32	389.32
Total	315	31.5	346.50	42.88	389.38	389.88
1999-2000						
6/99	110	11.0	121	23.37	144.37	533.75
9/99	120	12.0	132.0	29.97	161.97	695.72
12/99	120	12.0	132.0	36.57	168.57	864.29
3/2000	125	12.50	137.50	43.44	180.94	1045.23
Total	475	47.50	522.50	133.35	655.85	1045.23
Grand Total	790	79.0	869.0	176.23	1045.23	1045.23

PHASE - II

2005-06						
6/2005	150	15.0	165	8.25	173.25	173.25
9/2005	150	15.0	165	16.50	181.50	354.75
Total	300	30.0	330	24.75	354.75	354.75

The documents further reveal that phase II work was of worth Rs.354.75 lacs and it included repairing, maintenance and second layer of bitumen on the entire road. Admittedly, this part of the contract had never been executed by the private appellant. More so, the chart filed by the State of Rajasthan shows that the estimated cost of the work had been recovered by the private appellant as the schedule prepared for repayment tally with the amount collected by the private appellant as toll fee within the stipulated period.

34. In the first phase, the private appellant spent about Rs.10.45 crores and recovered the said amount with certain profit, though the actual figure i.e. the toll fee recovered has not been disclosed. So far as the second phase is concerned, admittedly, the amount of Rs.354.75 lacs has not been spent by the private appellant. This issue has been agitated by the State of Rajasthan before this Court in its Counter Affidavit wherein it is stated as under:

> "It is respectfully submitted that as per the terms of the Agreement, petitioner was required to complete the project in two phases. In the first phase investment of Rs.1045 lacs and after 5 years in the second phase Rs. 354.75 lacs was to be made by the petitioner. However, the petitioner has not abided by the terms of the agreement and has not

made any investment for the second phase and, therefore, it has breached the terms of the contract and, therefore, it is respectfully submitted that the contention of the petitioner that he is entitled to recover its investment, is erroneous and petitioner is trying to give wrong picture about investment made and has not come to this Hon'ble Court with clean hands and, therefore, the present Special Leave Petition is liable to be dismissed by the Hon'ble Court. The concession period has come to an end."

35. The aforesaid allegations have not been denied by the private appellant while submitting its rejoinder. Relevant part of the rejoinder affidavit reads:

"…..the present contention as raised was not part of the arbitration proceeding, before the arbitral Tribunal. It is further submitted that this contention was never raised before the District Court and as well as before the Hon'ble Court of Rajasthan. The point as raised is subsequent to completion of the project and work to be done after the period of 5 years…."

Thus, there is no specific denial of the allegations/averments taken by the State as required by the principle enshrined in Order VIII Rule 5 of the Code of Civil Procedure, 1908.

36. It is strange that a person who has not complied with terms of contract and has acted in contravention of the terms of agreement claims that he was entitled to earn more profit. The private appellant cannot be permitted to claim damages/compensation in respect of the amount of Rs.13.25 crores, as he did not spend the said amount stipulated in the terms of agreement. Private appellant cannot claim the amount of Rs. 7.13 crores for a period of three years for a small patch of 1.25 kilometres out of the total length of the road to the extent of 10.85 kilometres.

37. In fact, the tribunal has dealt with the issue in correct perspective only to the extent the period of delay by which the notification barring the heavy vehicles through market of Bharatpur had been issued stating as under:

"The traffic survey conducted by the claimant on 17th, 18th & 19th April, 2000 has not been accepted by the respondent. The arbitral tribunal also feels that this survey, which has been done by the claimant alone, cannot be relied upon for this purpose, because respondent is not a party to this survey. The claim lodged by claimant on its own survey as per para 12.3(iii) from 12/4/2000 to 30/9/2000 is for Rs.31.18 lacs. In this regard tribunal is of the opinion that traffic survey of 1997 as per agreement in which both parties bears consent of each other therefore can safely be relied upon for purpose of assessment of such losses to the claimant, because the occurrence of loss as such to the claimant has not been denied by respondent, which otherwise is an established fact as per documentary evidence on record. The tribunal has assessed this part of loss on the traffic survey of 1997 for commercial vehicles only as Rs.26.34 lacs from 12/4/2000 to 30/9/2000."

As the notification had been issued, and it was not the responsibility of the State to establish a police chowki etc. to implement the notification, there was no occasion for the tribunal to proceed further. Therefore, any award in favour of the private appellant in that respect for non-issuance of notification beyond the date of the notification, cannot be held to be justified and the same is liable to be set aside.

38. The State authority has decided to establish a toll road as it was not having sufficient funds. In case the claim of the private appellant is allowed and as the State is not in a position to grant further facility to collect the toll fee at such a belated stage, the purpose of establishing the toll road itself stands

frustrated. More so, the toll fee cannot be collected to recover the amount never spent by the contractor. It is evident from the discourse in pre-bid meetings of the parties that it had been decided that compensation would be worked out on the basis of investment made by concerned contractor. More so, the statutory notification dated 10.2.1997 provided to recover the cost of construction and maintenance including interest thereon. Therefore, the question of non-execution of work of second phase of the contract becomes very material and relevant to determine the real controversy. The State authorities for the reasons best known to them, did not make reference to the arbitration proceedings for non-execution of the work of the second phase of the contract. However, the relief claimed by the private appellant would prove to be a "windfall profit" without carrying out the obligation to execute the work just on technicalities. We have held in this very case, that the arbitrator cannot proceed beyond the terms of reference and, therefore, the question of considering the non-execution of work of second phase of the work was neither permissible nor possible as it had arisen subsequent to the date of award in the arbitration proceedings.

Be that as it may, in order to do complete justice between the parties and protect the public exchequer, we feel that the matter requires adjudication and reconsideration on the following points by the arbitration tribunal:

(i) What amount could have been recovered by the private appellant for Bharatpur-Deeg part of the road from the vehicles using the road?

(ii) What could be the effect on the contract as a whole for non-executing the work of the second phase?

In view of the fact that a long time has elapsed, we request the learned tribunal to decide the case as early as possible after giving due opportunity to the parties concerned. The private

appellant shall be entitled only for a sum of Rs.26.34 lacs awarded by the tribunal for delay in issuing the notification with 10% interest, if not paid already or it could be adjusted in the final accounts bills. With these observation, the appeals stand disposed of. No costs.

R.P. Appeals disposed of.

NIKKU KHAN @ MOHAMMADEEN

v.

STATE OF HARYANA

(Criminal Appeal No. 925 of 2007)

JULY 21,2011

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

Narcotic Drugs and Phychotropic Substance Act, 1985:

ss. 2(b) and (c) – Notification specifying commercial quantity of heroin as 250 gm – Heroin recovered from accused being 125 gm with concentration of 16.93% – Conviction and sentence of 12 years and fine of Rs. 1 lac imposed by trial court – Affirmed by High Court – HELD: Accused is liable to be convicted u/s 21(b) and not u/s 21(c) of the Act as, on the relevant date, he was found in possession of 125 gm of heroin which is less than the commercial quantity as prescribed under the Act – The maximum punishment prescribed for the offence u/s 21(b) of the Act is rigorous imprisonment for a term of ten years and with fine of one lakh rupees – Keeping in view the facts and the circumstances of the case, the conviction of the accused is converted from s.21(c) to s.21(b) of the Act and sentence reduced from twelve years to ten years.

E.Micheal Raj Vs. Intelligence Office, Narcotic Control Bureau **2008 (4) SCR 644 = 2008 (5) SCC 161 – relied on.**

Case Law Reference:

2008 (4) SCR 644	**relied on**	**para 8**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 925 of 2007.

From the Judgment & Order dated 08.09.2006 of the High Court of Punjab & Haryana at Chadigarh in Criminal Appeal No. 698-DB of 2005.

R.K. Kapoor, Neelam Khanna for the Appellant.

Rajeev Gaur 'Nassem' (for Kamal Mohan Gupta) for the Respondent.

The Judgment of the Court was delivered by

SIRPURKAR, J. 1. Appellant Nikku Khan @ Mohammadeen, who has been convicted by both the courts below for the offence punishable under Section 21 of the Narcotic Drugs and Phychotropic Substance Act, 1985 (hereinafter referred to as the "Act") and sentenced to undergo rigorous imprisonment for twelve years and to pay a fine of Rs. one lakh, in default of payment of fine to further undergo rigorous imprisonment for two years, is before us in this appeal.

2. The prosecution case, in brief, is that on 1.6.2003 at 12.30 p.m., ASI Gopi Chand along with other police officials was on patrol duty at Nohar road, Ellenabad when he received a secret information that the accused-appellant, who was indulged in a trade of smack, was likely to arrive in a Maruti Car and narcotic could be recovered from him.

On receipt of this information, ASI, Gopi Chand issued notice under Section 41 of the Act and sent the same to the Deputy Superintendent of Police, Ellenabad. Thereafter, he held a picket at Nohar Road. When the accused arrived in Maruti Case bearing No. DAJ 4223 he was stopped and after serving a notice under Section 50 of the Act, he was searched in presence of Deputy Superintendent of Police, Ellenabad and heroin weighing 740 grams was recovered from his person.

3. After completion of investigation the accused was sent for trial and both the trial court as well as the High Court have

held that the accused was found in possession of 740 grams of heroin.

4. We have heard learned counsel appearing for the parties and perused the evidence as well as the judgments of the courts below.

5. We do not think that there is anything to dispute regarding the recovery of contraband from the accused on the relevant date. The prosecution has been able to prove that the accused was in possession of the contraband which was recovered from his person. It is also proved that the contraband was heroin.

6. We do not wish to interfere with the conviction awarded by the trial court and affirmed by the High Court. However, insofar as the sentence is concerned, Mr. R.K. Kapoor, learned counsel appearing for the appellant states that the percentage of the concentration was 16.93%. Mr. Kapoor, therefore, points out that the quantity of heroin recovered from the accused virtually comes to 125 grams.

7. We have seen the Notification specifying small quantity and commercial quantity under Section 2 of the Act wherein at serial No. 56, the commercial quantity of heroin is prescribed as 250 grams. Therefore, it is clear that the quantity of heroin which was recovered from the appellant was less than the commercial quantity as prescribed under the Act.

8. In that view, the law laid in E.Micheal Raj Vs. Intelligence Office, Narcotic Control Bureau 2008 (5) SCC 161 shall apply to the present case. We, therefore, hold that the accused is liable to be convicted under Section 21(b) and not under Section 21(c) of the Act as, on the relevant date, he was found in possession of 125 grams of heroin which is less than the commercial quantity as prescribed under the Act. The maximum punishment prescribed for the offence under Section 21(b) of the Act is rigorous imprisonment for a term which may extend

to ten years and with fine which may extend to one lakh rupees.

9. Keeping in view the facts and the circumstances of the present case, while affirming the impugned judgment passed by the High Court insofar as conviction of the appellant is concerned, we convert the conviction of the appellant from Section 21(c) to 21(b) of the Act and reduce the sentence of the accused from rigorous imprisonment for twelve years to ten years. The sentence of fine and default shall remain unaltered.

10. The appeal stands disposed of accordingly.

R.P. Appeal disposed of.

MUNILAL MOCHI
v.
STATE OF BIHAR & ANR.
(Criminal Appeal No.. 1429 of 2011)

JULY 21, 2011

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

Prevention of Corruption Act, 1947:

ss.5(1),(c)(d), 5(2) and 5(3), proviso – Minimum sentence of one year – Power of Court to reduce the sentence – Conviction by trial court u/ss. 120-B, 420, 467, 468, 471-A IPC r/w ss.5(1)(d), 5(2) of the Prevention of Corruption Act – Upheld by High Court reducing sentence from 2½ years to 1½ years RI – Plea before Supreme Court for reducing the sentence to the period already undergone – HELD: In view of the proviso to s.5(3) of the Prevention of Corruption Act and the facts and circumstances of the case that the accused is 71 years of age and has already undergone 6 months imprisonment, that from the date of occurrence, 29 years have passed and there is no record to show that the accused was involved in any other criminal case, ends of justice would be met by modifying the sentence to the period already undergone – Ordered accordingly – Penal Code, 1860 – ss. 120-B, 420, 467, 468, 471-A IPC – Sentence/Sentencing.

On 14.09.1983, the Dy. S.P. Cabinet (Vigilance) Department, Government of Bihar, Patna, made a written complaint before the Office-in-charge, Vigilance Police Station, Patna, alleging that in six Schemes under National Rural Employment Programme ("NREP") after preliminary enquiry, it was detected that Junior Engineer/ agents of Department/Agency concerned misappropriated government money in the said Schemes and committed offences punishable u/ss 120-B, 420, 467,

468, 471(A) IPC and s. 5(2) read with s. 5(1)(d) of the Prevention of Corruption Act, 1947. On the basis of the said complaint, an FIR was lodged and a Vigilance Case was registered. After investigation, a charge sheet was submitted wherein the name of the appellant figured for the first time as an accused, after more than 5 years of registration of the FIR. The Special Judge (Vigilance) convicted the appellant of the offences charged and sentenced him to rigorous imprisonment for a period of 2½ years and to pay fine of Rs. 15,000/-. On appeal, the High Court upheld the conviction but reduced the sentence from 2½ years to 1½ years.

The instant appeal was confined only to the question of sentence.

Partly allowing the appeal, the Court

HELD: 1.1 The only bar against the appellant insofar as reduction of sentence is, the minimum sentence prescribed in s. 5(3) of the Prevention of Corruption Act. Inasmuch as the appellant was also convicted u/ss 5(1)(c)(d) and 5(2) in the normal circumstance, the court has to impose minimum sentence of 1 year. However, the proviso appended to sub-s. (3) gives power to the court to impose a sentence of imprisonment of less than 1 year for any special reasons recorded in writing. [para 8] [444-C-G-H]

1.2 It is not in dispute that the occurrence related to the period 1982-83. The appellant retired from the post of Deputy Collector on 01.10.2003, even before his conviction. He stood convicted by the trial court in 2004, i.e., after a long period of 21 years. The High Court took more than 6 years to dispose of the appeal. The appellant has undergone the ordeal of facing trial in an uncertainty about the nature of conviction for such a long period. As on date, the appellant is 71 years of age and has already

undergone 6 months imprisonment. From the date of occurrence, 29 years have passed. There is no record to show that the appellant was involved in any other criminal case. In the circumstances, ends of justice would be met by modifying the sentence to the period already undergone. Ordered accordingly. [para 9] [445-A-F]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1429 of 2011.

From the Judgment & Order dated 28.07.2010 of the High Court of Judicature at Patna in Crl. Appeal (S.J.) No. 600 of 2004.

Nagendra Rai, T. Mahipal for the Appellant.

Gopal Singh, Rituraj Biswas for the Respondents.

The Judgment of the Court was delivered by

P.SATHASIVAM,J. 1. Leave granted.

2. This appeal is directed against the common final judgment and order dated 28.07.2010 passed by the learned Single Judge of the High Court of Judicature at Patna in Criminal Appeal (SJ) No. 600 of 2004 which was filed by the appellant herein along with Criminal Appeal (SJ) Nos. 576, 595, 609 and 625 of 2004 whereby the High Court dismissed the appeal upholding the order of conviction passed by the trial Court and reduced the sentence from two and a half years to one and a half years.

3. Brief facts:

(a) Several schemes of National Rural Employment Programme (in short "NREP") executed between the years 1982-83 by the officers posted at Piro, District Ara with the assistance of some executing agents/agencies came under the scan of the Vigilance Department. Enquiries including re-measurement of the Schemes/works executed under these

Schemes revealed that some local officers posted in the Block in connivance with agents appointed for few Schemes fraudulently withdrew and misappropriated the Government funds in relation to those schemes and created official records/ documents to cover up such defalcation.

(b) On 14.09.1983, one Hem Raj Prasad, Dy. S.P. Cabinet (Vigilance) Department, Government of Bihar, Patna, made a written complaint before the Office-in-charge, Vigilance Police Station, Patna, alleging that in Piro Block of District Ara, under NREP, six Schemes viz., Scheme Nos. 27/1982-83, 28/1982-83, 25/1982-83, 21/1982-83, 22/1982-83 and 14/1982-83 were executed and in those Schemes after preliminary enquiry, it was detected that Junior Engineer/agents of concerned Department/ Agency have misappropriated government money in the said Schemes and as such the persons have committed an offence under Sections 120-B, 420, 467, 468, 471(A) of the Indian Penal Code (hereinafter referred to as "the IPC") and Section 5(2) read with Section 5(1)(d) of the Prevention of Corruption Act, 1947 (hereinafter referred to as "the P.C. Act"). On the basis of the said complaint, police lodged a First Information Report (in short "the FIR") and registered a Vigilance P.S. Case No. 18 of 1983 under the aforesaid sections. According to the appellant, his name was not mentioned in the FIR.

(c) On 14.09.1988, Special Case no. 87 of 1983 was initiated in the Court of Special Judge (Vigilance), Patna. After investigation, charge sheet was submitted wherein the name of the appellant was figured for the first time as an accused, after more than 5 years of registration of the FIR and he was charge sheeted for offences under Sections 120-B, 420, 467, 468 and 477A of the IPC and under Section 5(2) read with Section 5(1)(c)(d) of the P.C. Act. After examining the witnesses, the Special Judge (Vigilance) Patna, by order dated 19.07.2004, convicted the appellant for the offences punishable under the aforesaid Sections and sentenced him rigorous imprisonment for a period of two and a half years and to pay fine of Rs. 15,000/- having default clause.

(d) Aggrieved by the order passed by the Special Judge, the appellant filed Criminal Appeal No. 600 of 2004 before the High Court of Judicature at Patna. The learned Single Judge of the High Court, by impugned judgment dated 28.07.2010, dismissed the appeal upholding the order of conviction passed by the trial Court but reduced the sentence from two and a half years to one and a half years.

(e) Aggrieved by the said judgment, the appellant has preferred this appeal by way of special leave before this Court.

4. Heard Mr. Nagendra Rai, learned senior counsel for the appellant and Mr. Gopal Singh, learned counsel for the respondents.

5. While ordering notice on 11.04.2001, this Court confined itself only to the question of sentence. In view of the same, there is no need to traverse or discuss the facts leading to his conviction. We have already noted that the appellant was convicted under Sections 409, 420, 467, 468, 471, 477A and 120B of IPC and Section 5(2) read with Section 5(1)(c)(d) of the P.C. Act by the Special Judge (Vigilance), Patna. The High Court modified the sentence alone on appeal filed by the appellant by reducing the substantive sentence imposed on him to undergo RI for two and a half years under Sections 409 and 120B IPC to a period of RI for one and a half years. Similarly, sentence to undergo RI for two and a half years imposed under Sections 467, 468, 471 and 477A of the IPC and Section 5(2) and Section 5(1)(c)(d) of the P.C. Act were reduced to a period of RI for one and a half years.

6. Now, we have to consider whether the appellant has made out a case for further reduction in the quantum of sentence?

7. Mr. Nagendra Rai, learned senior counsel, by drawing our attention to the fact that the present appellant was not named in the FIR and he was convicted nearly after 25 years from the date of occurrence and as on date he is 71 years of

age submitted that since he had already undergone 6 months imprisonment, the period undergone would be appropriate sentence and prayed for reduction to that extent. On the other hand, Mr. Gopal Singh submitted that it is not a fit case for reduction of sentence. In any event, according to him, in view of sub-Section 3, the imprisonment shall not be less than 1 year, hence it is not a fit case for reduction, even on the sentence.

8. The only bar against the appellant insofar as reduction of sentence is the minimum sentence prescribed in Section 5(3) of the Act. The relevant proviso appended thereto reads as under:-

> **"5. Criminal misconduct.**
>
> (1) XXX
>
> (2) XXX
>
> (3) Whoever habitually commits—
>
> (i) an offence punishable under Section 162 or Section 163 of the Indian Penal Code (45 of 1860), or
>
> (ii) an offence punishable under Section 165A of the Indian Penal Code, shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years, and shall also be liable to fine:
>
> Provided that the court may, for any special reasons recorded in writing, impose a sentence of imprisonment of less than one year.
>
> (4) XXX"

Inasmuch as, he was also convicted under Section 5(1)(c)(d) and Section 5(2) in the normal circumstance, the court has to impose minimum sentence of 1 year. However, proviso appended to sub-Section 3 gives power to the court to impose a sentence of imprisonment of less than 1 year for any special reasons recorded in writing.

9. It is not in dispute that the occurrence related to period 1982-83. Even on 01.10.2003, he retired from the post of Deputy Collector, Nalanda and stood convicted by the trial Court as aforesaid only in 2004, i.e., after a long period of 21 years. As rightly pointed out by Mr. Nagendra Rai, he had undergone the ordeal of facing trial anticipating uncertainty about the nature of conviction for such a long period. It is true that the appellant was not named in the FIR. However, after a period of 5 years, when the prosecution filed a chargesheet, he was shown as 3rd accused. As rightly pointed out by Mr. Rai, the appellant had reeled under the threat of being convicted and sentenced for all these 21 years. Even the High Court had taken more than 6 years to dispose of the appeal. As on date, the appellant is 71 years of age and has already undergone 6 months imprisonment. If we consider the date of occurrence, 29 years have been passed now. There is no record to show that the appellant was involved in other criminal case. Considering the case of the prosecution, namely, several illegalities and irregularities in execution of NREP which is a Scheme formulated by the Government of India, the fact that the occurrence relates to the year 1982-83, the trial went for 21 years and ended in conviction in 2004, the appellant retired from service even before conviction and his appeal was kept pending in the High Court for nearly 6 years, taking note of his present age, namely, 71 years and undergone 6 months imprisonment, we feel that ends of justice would be met by modifying the sentence to the period already undergone.

10. In the light of the above discussion, while confirming the conviction imposed on the appellant and having adverted to special circumstances in the case on hand, the sentence alone is modified to the extent, i.e., the period of imprisonment, namely, 6 months undergone in prison as substantive sentence. To this extent, the impugned order of the High Court is modified. The appeal is allowed in part to the extent mentioned above.

R.P. Appeal Partly allowed.

NIRMAL SINGH PEHLWAN @ NIMMA
v.
INSPECTOR, CUSTOMS, CUSTOMS HOUSE, PUNJAB
(Criminal Appeal No. 1857 of 2010)

JULY 21, 2011.

[HARJIT SINGH BEDI AND GYAN SUDHA MISRA, JJ.]

NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985:

s. 22 read with s. 50 – Right of accused to be informed that he has an option of being searched in the presence of a Gazetted Officer or a Magistrate – Accused found in possession of 2 packets containing 1kg heroin each – Consent memo signed by him to be searched in presence of a Gazetted Officer – Held: The consent memo cannot be said as informing the accused of his right to be searched in the presence of a Gazetted Officer or a Magistrate, as he was only given the option to be searched before one of the other – The Officer concerned did not utter a single word as to whether he had informed the accused of his right and he merely took his option as to whether he would like to be searched before a Gazetted Officer or a Magistrate – Thus, there has been complete non-compliance with the provisions of s. 50 – Conviction of the accused set aside – Customs Act, 1962 – 108.

CUSTOMS ACT, 1962:

s. 108 – Accused found in possession of contraband – Confession made to Customs Officer – Held: In view of decision in Noor Aga's case, the confession was hit by the embargo placed by s. 25 of Evidence Act – Judgment in Noor Aga's case being the latest in point of time, it would be proper

to follow the ratio of the said judgment, particularly, as the provisions of s. 50 of the NDPS Act, which are mandatory have also not been complied with – Narcotic Drugs and Psychotropic Substances Act, 1985 – ss. 22 and 50 – Evidence Act, 1872 – s. 25.

Vijaisingh Chandu Bha Jadeja vs. State of Gujarat **2011 (1) SCC 609: 2010 (13) SCR 255 – followed**

Noor Aga vs. State of Punjab & Anr. **2008 (16) SCC 417: 2008 (10) SCR 379 – relied on.**

Kanahiya Lal vs. Union of India **2008 (4) SCC 668: 2008 (1) SCR 350** *and Raj Kumar vs. Union of India* **1990(2) SCC 409: 1990 (2) SCR 63 – cited.**

Case Law Reference:

2010 (13) SCR 255	**followed.**	**Para 6**
2008 (10) SCR 379	**relied on.**	**Para 6**
2008 (1) SCR 350	**cited.**	**Para 7**
1990 (2) SCR 63	**cited.**	**Para 7**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1857 of 2010.

From the Judgment & Order dated 14.08.2008 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 219-SB of 2003.

Sanjay Jain, Priyanka Singh, Sidharth Tanwar for the Appellant.

R.P. Bhatt, Ajay Sharma, M. Khairaity, B. Krishna Prasad for the Respondent.

The following order of the Court was delivered

O R D E R

This appeal is directed against the concurrent judgments of the courts below whereby the appellant has been sentenced to undergo 10 years R.I. and to pay a fine of rupees one lakh and in default to undergo RI for two years for having violated the provisions of Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the 'Act').

The facts of the case are as under:

During the course of a joint Naka held on the 4th January, 1999 by a party comprising officials from the Customs Preventive Staff, the Punjab Police and the CIA Staff, Majitha, set up at the T-crossing near Saki Bridge, Ajnala, a Maruti car bearing registration No. PB-02-P-5595 was seen coming from the opposite side at about 9.40 a.m. There were three occupants in the car and two of them taking advantage of the thick fog at that time ran away whereas the third one, the appellant Nirmal Singh, was apprehended by PW.4 Prem Singh-Superintendent Customs. PW.4 disclosed his identity to the appellant and told him that as he was suspected to be in possession of some narcotic, he should give his option as to whether he wished to be searched before a Magistrate or a Gazetted Officer. The appellant stated that he would be satisfied if he was searched in the presence of a Gazetted officer. Khazan Singh and Sarup Singh were also called as public witnesses. On a search of the appellant's person two packets of brown powder each weighing 1 kilogram were found lying in his lap. The powder was tested with the aid of a drug testing kit and was found to be heroin. Samples of 5 grams were drawn from each packet and after the samples had been homogenized, they were sent to the laboratory for analysis. The Chemical Examiner in his report opined that the seized articles were indeed heroin.

During the course of the investigation the appellant also made a confession under Section 108 of the Customs Act

admitting his guilt. The matter was ultimately sent up for trial after the completion of the investigation. Sarup Singh and Khazan Singh, the independent witnesses, were given up as having been won over by the appellant. The prosecution accordingly placed primary reliance on the statement of PW.1 Jagtar Singh, Inspector of Customs and PW.4 Prem Singh and the confession of the appellant made to him as also the circumstantial evidence in the case. The accused was also examined under Section 313 of the Cr. P.C. and he stated that he had been roped in on account of his animosity with Swaran Singh-DSP and his brother Kartar Singh-SP as he had been involved in the murder case of their brother, Ranjit Singh. He also produced several witnesses in defence.

The Trial Court, on a consideration of the evidence, held that the case against the appellant had been proved beyond doubt more particularly as he had made a confession to PW.4 which was admissible in evidence as PW.4 was not a police officer. It was also found that the provisions of Section 50 of the Act had been complied with as Ex. P.A., a consent memo, had been drawn up prior to the search. The Trial Court accordingly convicted and sentenced the appellant, as already mentioned above. The conviction and sentence has been confirmed by the High Court.

Before us, Mr. Sanjay Jain, the learned counsel for the appellant, has raised primarily two arguments based on the judgments of this Court. The first is *Vijaisingh Chandu Bha Jadeja vs. State of Gujarat* (2011 (1) SCC 609). In this case it has been observed by the Constitution Bench that the provisions of Section 50 of the Act postulated that before a search was made of a person suspected of carrying a narcotic he should be *informed* of his right that he had an option of being searched in the presence of a Gazetted Officer or a Magistrate and that merely because a consent memo had been drawn up whereby he had chosen to be searched before the Magistrate or a Gazetted Officer (on the option given to him by an authorized officer) would not amount to full compliance

with the aforesaid provision. The second argument is based on the judgment of this Court in *Noor Aga vs. State of Punjab & Anr.* (2008 (16) SCC 417) in which this Court had deviated from the earlier position in law that a Customs Officer was not a police officer and a confession made to him under Section 108 of the Customs Act, was admissible in evidence. In this case it has been held that as a Custom Officer exercised police powers and a confession made by an accused could result in a conviction and sentence, such a confession was hit by the embargo placed by Section 25 of the Evidence Act, 1872, and was, therefore, not admissible in evidence.

On the other hand, Mr. R.P. Bhatt, the leaned senior counsel for the respondent – Department, has pointed out that Ext. P.A. the consent memo in fact conveyed information to the appellant that he had a right to be searched in the presence of a Magistrate or a Gazetted Officer and that this amounted to full compliance with Section 50 of the Act. He has also pointed out that although Noor Aga's case did say that a confession made to a Custom Officer was hit by Section 25 of the Evidence Act and was therefore not admissible in the evidence, yet a judgment of a coordinate Bench of this Court in *Kanahiya Lal vs. Union of India* case (2008 (4) SCC 668) had reiterated the earlier position in the law as given in *Raj Kumar vs. Union of India* – 1990(2) SCC 409 that Officers of the Revenue Intelligence and ipso facto of the Customs Department could not be said to be police officers and a confession before them would not be hit by Section 25 of the Evidence Act.

We have examined the facts of the case in the light of the arguments raised by the learned counsel for the parties and the case law cited. Ext. P.A. is the consent memo under which the appellant had opted to be searched in the presence of a Gazetted officer. This memo is in the Gurmukhi script and has been read to us and we see that it cannot by any stretch of imagination be said to be informing the appellant of his right to be searched in the presence of a Gazetted Officer or a Magistrate as he was only given the option to be searched

before one of the other. In *Vijaisingh's* case (supra) the Constitution Bench crystalised the issue before it in para 1 as under:

> "The short question arising for consideration in this batch of appeals is whether Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the NDPS Act") casts a duty on the empowered officer to "inform" the suspect of his right to be searched in the presence of a gazetted officer or a Magistrate, if he so desires or whether a mere enquiry by the said officer as to whether the suspect would like to be searched in the presence of a Magistrate or a gazetted officer can be said to be due compliance with the mandate of the said section?"

This was answered in paragraph 29 in the following terms:

> "In view of the foregoing discussion, we are of the firm opinion that the object with which the right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer of a Magistrate. We have no hesitation in holding that insofar as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision."

It is therefore apparent that the precise question that was before the Constitution Bench was as to whether a consent memo could be said to be information conveyed to an accused as to his right under Section 50 of the Act. The Constitution Bench clearly stated that a consent memo could not be said to be such information as the provisions of Section 50 of the Act were mandatory and strict compliance was called for and any deviation therefrom would vitiate the prosecution. It was further held that it was not necessary that this information should be in a written form but the information had to be conveyed in some form or manner which would depend on the facts of the case. We have accordingly gone through the evidence of PW.4 Prem Singh. He did not utter a single word as to whether he had informed the appellant of his right and he merely took his option as to whether he would like to be searched before a Gazetted Officer or a Magistrate as noted in Ex.P.A. In the light of the judgment in *Vijaisingh's* case (supra) we find that there has been complete non-compliance with the provisions of Section 50 of the Act.

We also see that the Division Bench in Kanahiya Lal's case had not examined the principles and the concepts underlying Section 25 of the Evidence Act vis.-a-vis.

Section 108 of the Customs Act the powers of Custom Officer who could investigate and bring for trial an accused in a narcotic matter. The said case relied exclusively on the judgment in *Raj Kumar's* case (Supra). The latest judgment in point of time is Noor Aga's case which has dealt very elaborately with this matter. We thus feel it would be proper for us to follow the ratio of the judgment in Noor Aga's case particularly as the provisions of Section 50 of the Act which are mandatory have also not been complied with.

In view of what has been held above we find that the conviction of the appellant must be set aside. Accordingly we allow this appeal and order his acquittal.

R.P. Appeal allowed.

A. SUBASH BABU
v.
STATE OF A.P.& ANR.
(Criminal Appeal No. 1428 of 2011)

JULY 21, 2011

[J.M. PANCHAL AND H.L. GOKHALE, JJ.]

PENAL CODE, 1860:

ss. 494 and 495, r/w s. 198(1),Cr.P.C. – Bigamy with concealment of factum of existing marriage –'Person aggrieved'— Husband governed by Hindu Law – Complaint by second wife – Maintainability of – Held: Where second wife alleges that the accused husband had married her according to Hindu rites despite the fact that he was already married to another lady and the factum of the first marriage was concealed from her, the second wife would be an aggrieved person within the meaning of s. 198 Cr. P.C. – Section 494 IPC does not restrict the right of filing complaint to the first wife and there is no reason to read the said section in a restricted manner – The complaint can also be filed by the person with whom the second marriage takes place which is void by reason of its taking place during the life of the first wife – Besides, until the declaration contemplated by s. 11 of Hindu Marriage Act is made by competent court, the woman with whom the second marriage is solemnized continues to be the wife within the meaning of s. 494 IPC and would be entitled to maintain a complaint against her husband for offences punishable u/ss 494 and 495 IPC – Code of Criminal Procedure, 1973 – s. 198 (1) – Hindu Marriage Act, 1955 – s. 11.

ss. 494, 495, 498A, 417 and 420 – Complaint by second wife against the husband – High Court quashing the proceedings pending before the Judicial Magistrate as

regards s. 498A holding that the complainant was not wife within the meaning of s. 498A and was not entitled to maintain the complaint under the said provision – HELD: High Court was not at all justified in its order – The conclusion of the High Court is such as to shake the conscience and sense of justice – Even in the absence of challenge either by the State or the complainant, in exercise of power under article 136, that part of the judgment of the High Court by which the complaint for offence punishable u/s 498A filed by the second wife is quashed by the High Court is set aside and the charge-sheet submitted by the IO shall stand revived – Constitution of India, 1950 – Article 136.

CODE OF CRIMINAL PROCEDURE, 1973

s. 156 r/w s.198 and First Schedule (as amended by Andhra Pradesh Act 3 of 1992) —Offences punishable u/ss 494 and 495 IPC made cognizable and non-bailable in the State of Andhra Pradesh – Held: The amendment made shall prevail in the State of Andhra Pradesh notwithstanding the fact that in the Code of Criminal Procedure, offences u/ss 494 and 495 are treated as non-cognizable offences – Once First Schedule to the Code of Criminal Procedure, 1973 stands amended and offences punishable u/ss 494 and 495 IPC are made cognizable offences, those offences will have to be regarded as cognizable offences in the State of Andhra Pradesh for all purposes of the Code of Criminal Procedure, 1973 including for the purpose of s.198 thereof – Therefore, as the offences have been made cognizable offences in the State of Andhra Pradesh, the same will have to be dealt with as provided u/ s 156 CrPC – Constitution of India, 1950 – Articles 246 (2), 254 (2), 254 (4) – Seventh Schedule – List III, Entry 2.

s. 155(4) – Case relating to two or more offences of which at least one is cognizable – Held: If the police files a charge-sheet in such a case, the court can take cognizance also of

non-cognizable offence along with the cognizable offence by virtue of s. 155 (4).

CONSTITUTION OF INDIA, 1950:

Articles 246 (2) and 254 (2) – Seventh Schedule – List III, Entry 2 – By Andhra Pradesh Act 3 of 1992, First Schedule to Cr. PC amended and ss. 494 and 495 IPC made cognizable and non-bailable in the State of Andhra Pradesh – Held: If a law passes a test of Clause (2) of Article 254, it will make Clause (1) inapplicable to it – To the general rule laid down in Clause (1), Clause (2) engrafts an exception, viz. if the President assents to a State Law which has been reserved for his consideration as required by Article 200, it will prevail notwithstanding its repugnancy to an earlier law of the Union – Code of Criminal Procedure (Andhra Pradesh Second Amendment) Act, 1992 (A.P. Act 3 of 1992) received the assent of the President – Constitutional law – Rule of repugnancy.

Article 136 – Scope of – Held: The power under Article 136 is plenary power exercisable outside the purview of ordinary law to meet the demand of justice – It is meant to supplement the existing legal frame work – It is conceived to meet situations which cannot be effectively and appropriately tackled by the existing provisions of law – Supreme Court while entertaining an appeal by grant of special leave has power to mould relief in favour of the respondents notwithstanding the fact that no appeal is filed by any of the respondents challenging that part of the order which is against them – Further, the power can be exercised by Supreme Court in favour of a party even suo motu when it is satisfied that compelling grounds of its exercise exist.

A complaint was filed against the appellant, a Sub-Inspector of Police, that by representing to the complainant (respondent no. 2) and her parents that his first wife had died leaving behind two children, he married

with the complainant on 9.10.1994; that the appellant collected Rs.28,000/- from the father of the complainant and further demanded a sum of Rs.20,000/- from him, which he declined and the appellant threatened the complainant and her father with dire consequences. The FIR was lodged on 26.5.1995. A charge-sheet was submitted in the court of Judicial Magistrate for commission of offences punishable u/ss 494, 495, 417, 420 and 498-A IPC. In the petition filed by the appellant seeking to quash the proceedings against him, the High Court held that as respondent no. 2 was the second wife and *prima facie* the marriage between her and the appellant was void, no offence punishable u/s 498-A IPC was made out. However, the High Court sustained the proceedings as regards other offences.

In the instant appeal filed by the husband, it was contended for the appellant that the Magistrate could not have taken cognizance of offences punishable u/ss. 494 and 495 IPC on the basis of the police report submitted by the Investigating Officer because though the State legislation amended the First Schedule to the Code of Criminal Procedure, 1973 by making the offences punishable u/ss. 494 and 495 IPC cognizable, the legislation made by Parliament in respect of s.198 of the Code of Criminal Procedure remained the same and in the event of any repugnancy between the two legislations, the legislation made by Parliament would prevail; that the High Court failed to notice that u/s 198(1)(c) CrPC only a legally wedded wife or someone on her behalf as mentioned in the said section could make a complaint to Magistrate for the offences punishable u/ss. 494 and 495 IPC and as, in the instant case, the complaint was made by respondent no. 2 who was claiming to be the second wife of the appellant and that too to the police and not in the court, the proceedings

initiated for alleged commission of those offences should have been quashed. [para 7]

Disposing of the appeal, the Court

HELD: 1.1 It cannot be said that respondent no. 2 is not an aggrieved person so far as commission of offences punishable u/ss. 494 and 495 IPC is concerned. As far as s.494 IPC is concerned, the criminality attaches to the act of second marriage either by a husband or by a wife who has a living wife or husband, in a case in which second marriage is void by reason of its taking place during the life of such husband or wife. When a law, such as s.11 of Hindu Marriage Act, 1955 declares that a second marriage by a husband, who has living wife, with another woman is void, for breach of s.5 (i) of the said Act, it brings/attaches several legal disabilities to the woman with whom the second marriage is performed. [para 10] [472-H; 473-A-E-G]

S.Radhika Sameena Vs. Station House Officer, **1997 Criminal Law Journal 1655 – referred to.**

1.2 Section 494 IPC is intended to achieve laudable object of monogamy. This object can be achieved only by expanding the meaning of the phrase "aggrieved person". For variety of reasons the first wife may not choose to file complaint against her husband. Non-filing of the complaint u/s 494 IPC by the first wife does not mean that the offence is wiped out and monogamy sought to be achieved by means of s. 494 merely remains in statute book. Having regard to the scope, purpose, context and object of enacting s.494 and also the prevailing practices in the society sought to be curbed by it, there is no manner of doubt that the complainant should be an aggrieved person. [para 10] [474-E-H; 475-A-B]

1.3 Section 198(1)(c) of the Cr.P.C., amongst other

things, provides that where the person aggrieved by an offence punishable u/s 494 or s.495 IPC is the wife, complaint on her behalf may also be filed by her father, mother, sister, son, daughter etc. or with the leave of the court, by any other person related to her by blood, marriage or adoption. [para 10] [475-A-C]

Gopal Lal Vs. State of Rajasthan **(1979) 2 SCC 170 – referred to.**

1.4 Though s. 11 of the Hindu Marriage Act provides that any marriage solemnized, if it contravenes the conditions specified in Clause (i) of s. 5 of the said Act, shall be null and void, it also provides that such marriage may on a petition presented by either party thereto, be so declared. Though the law specifically does not cast obligation on either party to seek declaration of nullity of marriage and it may be open to the parties even without recourse to the court to treat the marriage as a nullity, such a course is neither prudent nor intended and a declaration in terms of s.11 of the Hindu Marriage Act will have to be asked for, for the purpose of precaution and/or record. Therefore, until the declaration contemplated by s.11 of the Hindu Marriage Act is made by a competent court, the woman with whom second marriage is solemnized continues to be the wife within the meaning of s. 494 IPC and would be entitled to maintain a complaint against her husband. [para 10] [475-C-F]

1.5 Even otherwise, the second wife suffers several legal wrongs and/or legal injuries when the second marriage is treated as a nullity by the husband arbitrarily, without recourse to the court or where declaration sought is granted by a competent court. The expression "aggrieved person" denotes an elastic and an elusive concept. It cannot be confined within the bounds of a rigid, exact and comprehensive definition. Its scope and

meaning depends on diverse, variable factors such as the content and intent of the statute of which contravention is alleged, the specific circumstances of the case, the nature and extent of complainant's interest and the nature and the extent of the prejudice or injury suffered by the complainant. [para 10] [475-G-H; 476-A-B]

1.6 Section 494 IPC does not restrict right of filing complaint to the first wife and there is no reason to read the said section in a restricted manner; nor does it say that the complaint for commission of offence under the said section can be filed only by wife living and not by the woman with whom subsequent marriage takes place during the life time of the wife living and which marriage is void by reason of its taking place during the life of such wife. The complaint can also be filed by the person with whom second marriage takes place which is void by reason of its taking place during the life of first wife. [para 10] [476-B-D]

1.7 A bare reading of the complaint, in the instant case, together with statutory provisions, makes it abundantly clear that the appellant having a wife living, married with respondent no. 2 by concealing from her the fact of former marriage and, therefore, her complaint against the appellant for commission of offence punishable u/ss 494 and 495 IPC is, maintainable and cannot be quashed on this ground. [para 10] [476-E]

1.8 Section 495 IPC provides that if a person committing the offence defined in s. 494 IPC conceals from the person with whom subsequent marriage is contracted, the fact of the former marriage, the said person is liable to be punished as provided therein. The offence mentioned in s.495 is an aggravated form of bigamy provided in s. 494. The circumstance of aggravation is the concealment of the fact of the former

marriage to the person with whom the second marriage is contracted. Since the offence u/s 495 is in essence bigamy, it follows that all the elements necessary to constitute that offence must be present here also. Section 495 begins with the words "whoever commits the offence defined in the last preceding Section..." The reference to s.494 in s.495 makes it clear that s.495 IPC is extension of s.494 and part and parcel of it. The concealment spoken of in s.495 would be from the woman with whom the subsequent marriage is performed. Therefore, the wife with whom the subsequent marriage is contracted after concealment of former marriage would also be entitled to lodge complaint for commission of offence punishable u/s 495. [para 11] [476-G-H; 477-A-D]

1.9 Where the second wife alleges that the accused husband had married her according to Hindu rites despite the fact that he was already married to another lady and the factum of the first marriage was concealed from her, the second wife would be an aggrieved person within the meaning of s. 198 Cr. P.C. If the woman with whom the second marriage is performed by concealment of former marriage is entitled to file a complaint for commission of offence u/s 495, there is no reason why she would not be entitled to file complaint u/s 494 more particularly when s.495 IPC is extension and part and parcel of s.494. [para 11] [477-D-F]

1.10 Therefore, it is held that the woman with whom second marriage is contracted by suppressing the fact of former marriage would be entitled to maintain complaint against her husband u/ss 494 and 495 IPC. [para 11] [477-G]

2.1 Part I of the First Schedule to the Code of Criminal Procedure relating to offences under the Penal Code *inter alia* mentions that ss. 494 and 495 are non-cognizable. As ss. 494 and 495 are made non-cognizable, a Police Officer

would not have power to investigate those cases without the order of a Magistrate, having a power to try such cases or commit such cases for trial as provided u/s 155(2) of the Code. However, the Legislative Assembly of the State of Andhra Pradesh enacted the Code of Criminal Procedure (Andhra Pradesh Second Amendment) Act, 1992, by which the First Schedule to the Code of Criminal Procedure came to be amended and the offences punishable u/ss. 494 and 495 IPC were made cognizable and non-bailable in the State. What is relevant to be noticed is that the Code of Criminal Procedure (Andhra Pradesh Second Amendment) Act, 1992 was reserved by the Governor of Andhra Pradesh for consideration and assent of the President. After the Presidential assent was received, the Amending Act of 1992 was published in the Andhra Pradesh Gazette Part IV-B (Ext.). Thus, ss. 494 and 495 IPC are cognizable offences so far as State of Andhra Pradesh is concerned. [para 13] [478-G-H; 479-C-H; 480-A]

Mavuri Rani Veera Bhadranna Vs. State of A.P. and Anr. **2007 (1) ALD (Crl.) 13 (A.P.) – disapproved.**

2.2 The Amending Act of 1992 is on the subject which is already in existence in the Code of Criminal Procedure, 1973. However, in view of Clause (2) of Article 254 of the Constitution, an undoubted power to legislate, of course subject to assent of the President on the subject already in existence, is available to the State Legislature. Clause (1) of Article 254 is operative subject to provisions of Clause (2). If a law passes a test of Clause (2), it will make Clause (1) inapplicable to it. To the general rule laid down in Clause (1), Clause (2) engrafts an exception, viz. that if the President assents to a State Law which has been reserved for his consideration as required by Article 200, it will prevail notwithstanding its repugnancy to an earlier law of Union. Clause (2) provides for curing of repugnancy which would otherwise invalidate a State law

which is inconsistent with a Central law or an existing law. [para 14] [480-H; 481-A-D]

2.3. Once First Schedule to the Code of Criminal Procedure, 1973 stands amended and offences punishable u/ss 494 and 495 IPC are made cognizable offences, those offences will have to be regarded as cognizable offences in the State of Andhra Pradesh for all purposes of the Code of Criminal Procedure, 1973 including for the purpose of s.198 thereof. Section 198(1)(c), after the Amendment made by the Code of Criminal Procedure(Andhra Pradesh Second Amendment) Act, 1992 cannot be interpreted in isolation without referring to the fact that offences u/ss. 494 and 495 IPC have been made cognizable so far as the State of Andhra Pradesh is concerned. Consequently, the bar imposed by operative part of sub-s. (1) of s. 198 CrPC beginning with the words "No Court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code except upon a complaint made by some person aggrieved by the offence" gets lifted so far as offences punishable u/s 494 and 495 IPC are concerned. As those offences have been made cognizable offences in the State of Andhra Pradesh since 1992, the same will have to be dealt with as provided in s.156 CrPC.[para 14] [482-D-H; 483-A-C]

2.4. Even otherwise, where the case involves one cognizable offence also alongwith non-cognizable offences, it should not be treated as a non- cognizable case for the purpose of sub-s.(2) of s.155 CrPC and that is the intention of legislation which is manifested in s.155(4) CrPC. The Division Bench of the High Court has considered the effect of s. 155(4) CrPC and thereafter held that the bar u/s. 198 would not be applicable as the complaint lodged before police for offence punishable u/s 494 IPC also related to other cognizable offences and

if police files a charge sheet, the court can take cognizance also of offence u/s 494 along with other cognizable offences by virtue of s.155 (4) CrPC. [para 14] [483-D-H; 484-A-C]

2.5. In the instant case, in the charge sheet it is mentioned that the appellant has also committed offence punishable u/s 420 IPC which is cognizable and, therefore, this is a case which relates to two or more offences of which at least one is cognizable and, therefore, the case must be deemed to be cognizable case notwithstanding that the other offences are non-cognizable. [para 15] [484-E-F]

3.1 The High Court was not justified at all in quashing the proceedings initiated against the appellant u/s 498A IPC on the ground that respondent no. 2 was not wife within the meaning of s.498A and was not entitled to maintain complaint under the said provision. In view of the salutary provisions of Article 141 of the Constitution, the law declared by this Court in the case of Reema Aggarwal* **was binding on all courts including the single Judge of the High Court, who decided the instant case. The High Court has completely misdirected itself in quashing the proceedings for the offence punishable u/s 498A of IPC. The finding recorded by the High Court that respondent no. 2 is not the wife within the meaning of s. 498A IPC runs contrary to law declared by this Court in case of** Reema Aggarwal. **[para 18] [487-D-G]**

*** *Reema Aggarwal Vs. Anupam and others* 2004 (1) SCR 378 = (2004) 3 SCC 199 – relied on.**

3.2 There may be several reasons due to which the State might not have challenged that part of the Judgment of the single Judge by which he quashed the complaint filed by respondent no. 2 u/s 498A IPC. So also because of several reasons such as want of funds, distance, non-

availability of legal advice, etc. the original complainant might not have approached this Court to challenge that part of the judgment of the single Judge which is quite contrary to the law declared by this Court. However, this Court while entertaining an appeal by grant of special leave has power to mould relief in favour of the respondents notwithstanding the fact that no appeal is filed by any of the respondents challenging that part of the order which is against them. To notice an obvious error of law committed by the High Court and thereafter not to do anything in the matter would be travesty of justice. This Court while disposing of an appeal arising out of grant of special leave can make any order which justice demands and one who has obtained illegal order would not be justified in contending before this Court that in absence of any appeal against illegal order passed by the High Court the relief should not be appropriately moulded or that the finding recorded should not be upset by this Court. [para 18] [487-G-H; 488-A-D]

***Chandrakant Patil Vs. State* 1998 (1) SCR 447 =(1998) 3 SCC 38 – relied on.**

3.3. It is the firm proposition of law that while exercising appellate jurisdiction, the Supreme Court has power to pass any order. The power under Article 136 is meant to supplement the existing legal frame work. It is conceived to meet situations which cannot be effectively and appropriately tackled by the existing provisions of law. This Court feels that absence of challenge either by State or by the original complainant should not prevent this Court from doing justice between the parties by restoring the complaint filed by respondent no. 2 u/s 498A IPC on the file of the Magistrate. The conclusion arrived at by the High Court is such as to shake the conscience and sense of justice and, therefore, it is the duty of this Court to strike down the finding recorded with respect to

the offence punishable u/s 498A, irrespective of technicalities. The judgment of the High Court quashing the proceedings initiated by the Magistrate for commission of offence punishable u/s 498A is tainted with serious legal infirmities and is founded on a legal construction which is wrong. [para 19] [489-A-F]

3.4. The appellate power vested in the Supreme Court under Article 136 is not to be confused with the ordinary appellate power exercised by appellate courts and appellate tribunals under specific statutes. It is plenary power exercisable outside the purview of ordinary law to meet the demand of justice. Article 136 is a special jurisdiction. It is residuary power. It is extraordinary in its amplitude. [para 19] [489-G-H; 490-A]

Ramakant Rai Vs. Madan Rail **2003 (4) Suppl. SCR 17 = (2003) 12 SCC 395;** *Arunachalam Vs. P.S.R. Sadanatham* **1979 (3) SCR 482 = (1979) 2 SCC 297** and *P.S.R. Sadanatham Vs. Arunchalam* **(1980) 3 SCC 141 – followed**

3.5. Further, the powers under Article 136 can be exercised by the Supreme Court, in favour of a party even *suo motu* **when the Court is satisfied that compelling grounds for its exercise exist. Where there is manifest injustice, a duty is enjoined upon this Court to exercise its suo motu power by setting right the illegality in the judgment of the High Court as it is well settled that illegality should not be allowed to be perpetuated and failure by this Court to interfere with the same would amount to allow illegality to be perpetuated. When an apparent irregularity is found by this Court in the order passed by the High Court, the Supreme Court cannot ignore substantive rights of a litigant while dealing with the cause pending before it. There is no reason why the relief cannot be and should not be appropriately moulded while disposing of an appeal arising by grant of special**

leave under Article 136 of the Constitution. [para 19] [490-A-D]

3.6. Therefore, that part of the impugned judgment by which the complaint filed by respondent no. 2 u/s 498A IPC is quashed by the High Court is set aside and the complaint lodged by respondent no. 2 u/s 498A IPC as well as charge sheet submitted by the Investigating Officer for the same shall stand restored/revived. [para 20-21] [490-E-G]

Case Law Reference:

2007 (1) ALD (Crl.) 13 (A.P.)	**disapproved**	**para 5**
1997 Criminal Law Journal 1655	**referred to**	**para 5**
(1979) 2 SCC 170	**referred to**	**para 10**
2004 (1) SCR 378	**relied on**	**para 16**
2004 (1) SCR 378	**relied on**	**para 16**
1998 (1) SCR 447	**relied on**	**para 19**
1998 (1) SCR 447	**relied on**	**para 19**
2003 (4) Suppl. SCR 17	**followed**	**para 19**
1979 (3) SCR 482	**followed**	**para 19**
(1980) 3 SCC 141	**followed**	**para 19**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1428 of 2011.

From the Judgment & Order dated 26.02.2010 of the High Court of Andhra Pradesh at Hyderabad in Crl. P. No. 2426 of 2005.

D. Rama Krishna Reddy, D. Bharathi Reddy for the Appellant.

Gaurav Pachnanda, Sidhant Goel, Raheel Kohli, Y. Ali, D. Mahesh Babu, P. Venkat Reddy, Anil Kumar Tandale for the Respondents.

The Judgment of the Court was delivered by

J.M. PANCHAL, J. 1. Leave granted.

2. This appeal by grant of Special Leave, questions the legality of Judgment dated 26.02.2010, rendered by the learned Single Judge of the High Court of Judicature, Andhra Pradesh in Criminal Petition No. 2426 of 2005 by which the prayer made by the appellant, a Police Officer, to quash the proceeding in C.C. No. 820 of 1996 initiated for commission of offences punishable under Sections 498A, 494, 495, 417 and 420 IPC, has been partly allowed by quashing proceedings insofar as offence punishable under Section 498A IPC is concerned, whereas the proceedings relating to the offences punishable under Sections 494, 495, 417 and 420 IPC are ordered to continue against the appellant.

3. The appeal arises in the following circumstances:-

The respondent no. 2 is the original complainant. According to her, the petitioner who is Sub-Inspector of Police, cheated her and her parents by stating that his first wife had died after delivering two children who are studying and staying in a hostel, even though his first wife by name Sharda is very much alive and living with him at Avanthinagar near Erragadda and thus by making false and fraudulent representation, the appellant married with her at Yadagirigutta on 09.10.1994. The case of the respondent no. 2 is that the appellant had collected total amount of Rs.28,000/- from her father towards hand loan on the false plea that he was constructing his own house at Borabanda and the appellant further demanded a sum of Rs.20,000/- from her father and when her father expressed inability to pay the amount, the appellant threatened the complainant and her father with dire consequences by showing his licensed revolver.

According to the complainant, several times the appellant had tried to snatch away gold ornaments put on by her by threatening her with dire consequences and had demanded gold ornaments together with cash of Rs.15,000/- from her parents. The case of the respondent no. 2 is that when additional demand was not fulfilled the appellant had threatened her and her father again by saying that he would wipe out the evidence of his marriage with the complainant which had taken place at Yadagirigutta by destroying all the photographs and negatives and would walk out of her life. Thus feeling aggrieved by the acts of the appellant in cheating her, committing bigamy and meting out cruelty to her for dowry, etc., the respondent no. 2 lodged FIR dated 26.05.1995 with Ranga Reddy Police Station, Balanagar and prayed to take appropriate action against the appellant for alleged commission of offences under Sections 498A and 420 IPC.

4. The Investigating Officer, investigated the FIR lodged by the respondent no. 2 and submitted charge sheet in the Court of learned Judicial Magistrate, First Class, Hyderabad, West and South Court, R.R.District at Kothapet, Sarunagar for commission of offences punishable under Sections 494, 495, 417, 420 and 498A IPC. On receipt of the charge sheet the learned Magistrate took cognizance of the offences and summoned the appellant. The record shows that earlier Criminal Petition No. 812 of 2001 was filed by the appellant before the High Court to quash the proceedings initiated pursuant to C.C. No. 820 of 1996 pending on the file of the learned Judicial Magistrate. However, the said petition was withdrawn by the appellant and therefore the petition was dismissed by the High Court vide order dated 09.04.2005 reserving liberty to the appellant to file a fresh petition in case of necessity. After few days thereof, the appellant filed Criminal Petition No. 2426 of 2005 in the High Court for quashing the proceedings in the Criminal Case pending before the learned Magistrate. The record does not indicate as to why Criminal Petition No. 812 of 2001 filed by the appellant in which similar reliefs as claimed

in Criminal Petition No. 2426 of 2005, were claimed, was withdrawn and which were the new/additional circumstances/ grounds which prompted the appellant to file Criminal Petition No. 2426 of 2005. The said petition was filed mainly on the ground that the proceedings against the appellant were registered for commission of above mentioned offences on the basis of charge sheet submitted by the Sub-Inspector of Police, Women Police Station, Amberpet, R.R. District and not on the basis of complaint made by the aggrieved person within the meaning of Section 198 of the Code. According to the appellant the person aggrieved by alleged commission of offences under Sections 494 and 495 is his wife and cognizance of those offences could have been taken only on the basis of the complaint filed by his wife in the Court or by someone on her behalf as contemplated by Section 198A (1)(c) of the Code, and therefore, the learned Magistrate could not have taken cognizance of those offences on the basis of submission of charge sheet by Sub-Inspector of Police on the basis of the investigation into the FIR lodged by the respondent No. 2 who is not the aggrieved person within the meaning of Section 198 of the Code. It was pleaded that there was no averment that pursuant to deception or fraudulent or dishonest inducement made by the appellant, there was any delivery or destruction of property belonging to the original complainant and therefore Section 420 IPC was not attracted. It was the case of the appellant that the provision of Section 498A was also not attracted because the respondent no. 2 was not the wife of the appellant. It was also the case of the appellant that Section 417 IPC merged into offence under Section 495 IPC which is a graver offence than Section 417 and as there were no allegations constituting offence under Section 417 IPC, the proceedings initiated for alleged commission of the offences should be quashed.

5. The High Court considered the submissions advanced at the Bar as well as the provisions of Sections 198(1)(c) of the Code of Criminal Procedure, Section 494 and 495 IPC and

the Judgment of Division Bench of Andhra Pradesh High Court in *Mavuri Rani Veera Bhadranna Vs. State of A.P. and Anr.* 2007 (1) ALD (Crl.) 13 (A.P.) and concluded that the Division Bench in *Mavuri Rani Veera Bhadranna* (supra) had taken note of the fact that the offence punishable under Section 494 IPC as amended by the State of Andhra Pradesh was made cognizable, and though there was no corresponding amendment to Section 198 of the Criminal Procedure Code, the investigating agency was entitled to investigate, and the Magistrate was not precluded from taking cognizance of the said offence on report filed by the police. Having so concluded the Division Bench proceeded to quote part of the Judgment in *Mavuri Rani Veera Bhadranna* (supra) and after noting contentions on behalf of the parties proceeded to consider the decision in the case of *S.Radhika Sameena Vs. Station House Officer,* 1997 Criminal Law Journal 1655 and held that the decision of the Division Bench in *Mavuri Rani Veera Bhadranna* (supra) was holding the field with regard to competency of the police to file charge sheet and competency of the Magistrate to take cognizance of the offences punishable under Sections 494 and 495 IPC on the report filed by the police. The High Court further concluded that taking cognizance of the offences punishable under Sections 417, 420, 494 and 495 IPC was in accordance with law, but the victim i.e. the respondent no. 2 in the present case was second wife and therefore prima facie marriage between appellant and the second respondent was void and therefore, offence under Section 498A IPC was not made out against the appellant.

6. In view of the above mentioned conclusions, the learned Single Judge of the High Court by the impugned Judgment partly accepted the petition filed by the appellant under Section 482 of the Code of Criminal Procedure by quashing the proceedings in C.C.No. 820 of 1996 on the file of the learned Judicial Magistrate, First Class, West and South, Kothapet, R.R.District, insofar as offence punishable under Section 498A IPC is concerned, whereas the prayer made by the appellant

to quash the proceedings insofar as the offences punishable under Sections 494, 495, 417 and 420 IPC, are concerned, is rejected, giving rise to the instant appeal.

7. The learned Counsel for the appellant argued that the learned Magistrate could not have taken cognizance of offences under Sections 494 and 495 IPC on the basis of the police report submitted by the Investigating Officer because though the State legislation amended the First Schedule to the Code of Criminal Procedure, 1973 by making the offences under Section 494 ad 495 IPC cognizable, the legislation made by the Parliament in respect of Section 198 of the Code of Criminal Procedure remained the same and in the event of any repugnancy between the two legislations, the legislation made by the Parliament would prevail. It was emphasized that Section 198 A inserted by Section 5 of the Act 46 of 1983 with effect from 25.12.83 provides that no Court shall take cognizance of an offence punishable under Section 498A of the Indian Penal Code except upon a police report of facts which constitute such offences or upon a complaint made by the person aggrieved by the offence or by her father, mother, brother, sister or by her father's, her mother's, brother or sister or with the leave of the Court by any other person related to her by blood, marriage or adoption, but no provision is made to enable a court to take cognizance of offences punishable under Sections 494 and 495 of the Indian Penal Code upon police report and therefore the proceedings pending before the learned Magistrate in respect of those offences should have been quashed. Referring to Section 198(1)(c) which inter alia provides that no Court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code except upon a complaint made by a person aggrieved, where the person aggrieved by an offence punishable under Section 494 or Section 495 of the Indian Penal Code, is the wife etc., it was pleaded that in the instant case no complaint was made to the Court but was made to the police and on the basis of charge sheet, the Magistrate had taken cognizance of the offences which is contrary to Section

198 of the Code and is illegal. What was asserted was that the High Court failed to notice that under Section 198(1)(c) of the Criminal Procedure Code only a legally wedded wife or someone on her behalf as mentioned in the said Section can make a complaint to Magistrate for the offences under Section 494 and 495 IPC and as admittedly the complaint was made by the respondent no. 2 who is claiming to be second wife of the appellant herein and that too to the police and not in the Court, the proceedings initiated for alleged commission of those offences should have been quashed. In support of above stated contentions, the learned Counsel for the petitioner placed reliance on the decision in *Mavuri Rani Veera Bhadranna* (Supra).

8. On the other hand, the learned Counsel for the respondents argued that by Code of Criminal Procedure (Andhra Pradesh Second Amendment) Act, 1992, the offences under Sections 494 and 495 have been made cognizable in the State of Andhra Pradesh, and therefore the respondent No. 2 who is aggrieved person so far as commission of offences punishable under Sections 494 and 495 IPC are concerned, was justified in lodging FIR with the police and the police after investigation, was justified in submitting charge sheet on the basis of which proceedings are pending before the learned Magistrate in respect of alleged commission of offences by the appellant under Section 494, 495, 417, 420 and 498A IPC. The contention by the learned Counsel for the respondents was that 198(1)(c) of the Code of Criminal Procedure will have to be read in the light of the amendment made in the Code by the State Legislature and therefore the learned Magistrate did not commit any error in taking cognizance of the offences on the basis of charge sheet submitted by the Investigating Officer.

9. This Court has heard the learned Counsel for the parties at length and also considered the documents forming part of the appeal.

10. The contention that the respondent no. 2 is not an

aggrieved person so far as commission of offences punishable under Sections 494 and 495 IPC is concerned, has no substance and cannot be accepted. Section 494 of IPC reads as under:-

> "Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

Whereas Section 495 of the IPC is as follows:-

> "Whoever commits the offence defined in the last preceding section having concealed from the person with whom the subsequent marriage is contracted, the fact of the former marriage, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

As far as Section 494 IPC is concerned, the criminality attaches to the act of second marriage either by a husband or by a wife who has a living wife or husband, in a case in which second marriage is void by reason of its taking place during the life of such husband or wife. When a law, such as Section 11 of Hindu Marriage Act, 1955 declares that a second marriage by a husband, who has living wife, with another woman is void, for breach of Section 5 (i) of the said Act, it brings/ attaches several legal disabilities to the woman with whom second marriage is performed. Say for example, she would not be entitled to claim maintenance from her husband even if she is inhumanly treated, subjected to mental and physical cruelty of variety of kinds etc. and is not able to maintain herself. Law of inheritance would prejudicially operate against her. She herself would suffer outrageous, wrong and absurd social stigma of being another woman in the life of the male who contracts second marriage with her. The members of the cruel

society including her kith and kin like parents, brother, sister etc. would look down upon her and she would be left in lurch by one and all. When a Court of law declares second marriage to be void on a petition presented by husband who contracts the second marriage on the ground that he has a spouse living at the time of marriage, it only brings untold hardships and miseries in the life of the woman with whom second marriage is performed apart from shattering her ambition to live a comfortable life after marriage.

Having noticed the agony, trauma etc. which would be suffered by the woman with whom second marriage is performed, if the marriage is declared to be void, let us make an attempt to ascertain the purpose of enacting Section 494 IPC. This Section introduces monogamy which is essentially voluntary union of life of one man with one woman to the exclusion of all others. It enacts that neither party must have a spouse living at the time of marriage. Polygamy was practiced in many sections of Hindu society in ancient times. It is not a matter of long past that in India, hypergamy brought forth wholesale polygamy and along with it misery, plight and ignominy to woman having no parallel in the world. In post vedic India a King could take and generally used to have more than one wife. Section 4, of Hindu Marriage Act nullifies and supersedes such practice all over India among the Hindus. Section 494 is intended to achieve laudable object of monogamy. This object can be achieved only by expanding the meaning of the phrase "aggrieved person". For variety of reasons the first wife may not choose to file complaint against her husband e.g. when she is assured of re-union by her husband, when husband assures to snap the tie of second marriage etc. Non-filing of the complaint under Section 494 IPC by first wife does not mean that the offence is wiped out and monogamy sought to be achieved by means of Section 494 IPC merely remains in statute book. Having regard to the scope, purpose, context and object of enacting Section 494 IPC and also the prevailing practices in the society sought to

be curbed by Section 494 IPC, there is no manner of doubt that the complainant should be an aggrieved person. Section 198(1)(c) of the Criminal Procedure Code, amongst other things, provides that where the person aggrieved by an offence under Section 494 or Section 495 IPC is the wife, complaint on her behalf may also be filed by her father, mother, sister, son, daughter etc. or with the leave of the Court, by any other person related to her by blood, marriage or adoption. In Gopal Lal Vs. State of Rajasthan (1979) 2 SCC 170 this Court has ruled that in order to attract the provisions of Section 494 IPC both the marriages of the accused must be valid in the sense that the necessary ceremonies required by the personal law governing the parties must have been duly performed. Though Section 11 of the Hindu Marriage Act provides that any marriage solemnized, if it contravenes the conditions specified in Clause (i) of Section 5 of the said Act, shall be null and void, it also provides that such marriage may on a petition presented by either party thereto, be so declared. Though the law specifically does not cast obligation on either party to seek declaration of nullity of marriage and it may be open to the parties even without recourse to the Court to treat the marriage as a nullity, such a course is neither prudent nor intended and a declaration in terms of Section 11 of the Hindu Marriage Act will have to be asked for, for the purpose of precaution and/or record. Therefore, until the declaration contemplated by Section 11 of the Hindu Marriage Act is made by a competent Court, the woman with whom second marriage is solemnized continues to be the wife within the meaning of Section 494 IPC and would be entitled to maintain a complaint against her husband.

Even otherwise, as explained earlier, she suffers several legal wrongs and/or legal injuries when second marriage is treated as a nullity by the husband arbitrarily, without recourse to the Court or where declaration sought is granted by a competent Court. The expression "aggrieved person" denotes an elastic and an elusive concept. It cannot be confined within

the bounds of a rigid, exact and comprehensive definition. Its scope and meaning depends on diverse, variable factors such as the content and intent of the statute of which contravention is alleged, the specific circumstances of the case, the nature and extent of complainant's interest and the nature and the extent of the prejudice or injury suffered by the complainant. Section 494 does not restrict right of filing complaint to the first wife and there is no reason to read the said Section in a restricted manner as is suggested by the learned Counsel for the appellant. Section 494 does not say that the complaint for commission of offence under the said section can be filed only by wife living and not by the woman with whom subsequent marriage takes place during the life time of the wife living and which marriage is void by reason of its taking place during the life of such wife. The complaint can also be filed by the person with whom second marriage takes place which is void by reason of its taking place during the life of first wife.

A bare reading of the complaint together with statutory provisions makes it abundantly clear that the appellant having a wife living, married with the respondent no. 2 herein by concealing from her the fact of former marriage and therefore her complaint against the appellant for commission of offence punishable under Section 494 and 495 IPC is, maintainable and cannot be quashed on this ground.

To hold that a woman with whom second marriage is performed is not entitled to maintain a complaint under Section 494 IPC though she suffers legal injuries would be height of perversity.

11. Section 495 IPC provides that if a person committing the offence defined in Section 494 IPC conceals from the person with whom subsequent marriage is contracted, the fact of the former marriage, the said person is liable to punished as provided therein. The offence mentioned in Section 495 IPC is an aggravated form of bigamy provided in Section 494 IPC. The circumstance of aggravation is the concealment of the fact

of the former marriage to the person with whom the second marriage is contracted. Since the offence under Section 495 IPC is in essence bigamy, it follows that all the elements necessary to constitute that offence must be present here also. A married man who by passing himself off as unmarried induces an innocent woman to become, as she thinks his wife, but in reality his mistress, commits one of the grossest forms of frauds known to law and therefore severe punishment is provided in Section 495 IPC. Section 495 begins with the words "whoever commits the offence defined in the last preceding Section....." The reference to Section 494 IPC in Section 495 IPC makes it clear that Section 495 IPC is extension of Section 494 IPC and part and parcel of it. The concealment spoken of in Section 495 IPC would be from the woman with whom the subsequent marriage is performed. Therefore, the wife with whom the subsequent marriage is contracted after concealment of former marriage, would also be entitled to lodge complaint for commission of offence punishable under Section 495 IPC. Where second wife alleges that the accused husband had married her according to Hindu rites despite the fact that he was already married to another lady and the factum of the first marriage was concealed from her, the second wife would be an aggrieved person within the meaning of Section 198 Cr. P.C. If the woman with whom the second marriage is performed by concealment of former marriage is entitled to file a complaint for commission of offence under Section 495 IPC, there is no reason why she would not be entitled to file complaint under Section 494 IPC more particularly when Section 495 IPC is extension and part and parcel of Section 494 IPC.

For all these reasons, it is held that the woman with whom second marriage is contracted by suppressing the fact of former marriage would be entitled to maintain complaint against her husband under Sections 494 and 495 IPC.

12. The argument that the learned Magistrate could not have taken cognizance of offence punishable under Sections

494 and 495 IPC on the basis of the police report i.e. charge sheet, as those offences are non- cognizable and therefore, the relief claimed in the petition filed before the High Court under Section 482 of the Code should have been granted is devoid of merits.

13. In this regard, it would be, relevant to notice the provisions of Article 246 of the Constitution. Article 246 deals with subject matter of laws made by the Parliament and by the legislatures of State. Clause (1) of Article 246 inter alia provides that notwithstanding anything contained in Clauses (2) and (3) of Article 246, the Parliament has exclusive power to make laws with respect to any of the maters enumerated in List 1 in the Seventh Schedule. Sub-Clause 2 of the said Article provides that notwithstanding anything in Clause (3), Parliament and subject to Clause (1), the legislature of any State also have power to make laws with respect to any of the matters enumerated in List 3 in the Seventh Schedule, whereas, Clause (3) of Article 246 amongst other things provides that subject to Clauses (1) and (2), the legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List 2 in the Seventh Schedule. Entry 2 in List 3 i.e. Concurrent List in the Seventh Schedule mentions "Criminal Procedure, including in matters included in the Code of "Criminal procedure, at the commencement of this Constitution". Thus there is no manner of doubt that Parliament and subject to Clause (1), the legislature of any State also has power to make laws with respect to Code of Criminal Procedure. Section 2(c) of the Code of Criminal Procedure, 1973 defines the phrase "Cognizable Offence" to mean an offence for which and "Cognizable Case" means a case in which, a Police Officer may, in accordance with the First Schedule or under any other law for the time being in force arrest without warrant. Part I of the First Schedule to the Code of Criminal Procedure, 1973 relating to offences under the Indian Penal Code inter alia mentions that Section 494 and 495 are non-cognizable. Section

154 of the Criminal Procedure Code relates to information in cognizable cases and provides inter alia that every information relating to the commission of a cognizable offence, if given orally to an Officer in charge of a Police Station, shall be reduced to writing by him and be read over to the informant. Section 156 of the Code provides that any Officer in charge of a Police Station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over a local area within the limits of such station would have power to enquire into or try under provisions of Chapter XIII of Criminal Procedure Code. As Sections 494 and 495 are made non-cognizable, a Police Officer would not have power to investigate those cases without the order of a Magistrate, having a power to try such cases or commit such cases for trial as provided under Section 155(2) of the Code.

However, this Court finds that the Legislative Assembly of the State of Andhra Pradesh enacted the Code of Criminal Procedure (Andhra Pradesh Second Amendment) Act, 1992. By the said Amending Act, the First Schedule to Central Act 2 of 1974 i.e. the Code of Criminal Procedure, 1973 came to be amended and against the entries relating to Section 494 in column 4 for the word "Ditto", the word "Cognizable" and in column 5 for the word "Bailable" the word "Non-bailable" were substituted. Similarly, against the entries relating to Section 495 in column 4, for the word "Ditto" the word "Cognizable" and in column 5 for the word "Ditto", the word "Non-bailable" were substituted. What is relevant to be noticed is that the Code of Criminal Procedure (Andhra Pradesh Second Amendment) Act, 1992 was reserved by the Governor of Andhra Pradesh on the 21st October, 1991 for consideration and assent of the President. The Presidential assent was received on 10th February, 1992 after which the Code of Criminal Procedure (Andhra Pradesh Second Amendment) Act, 1992 was published on the 15th February, 1992 in the Andhra Pradesh Gazette Part IV-B (Ext.). Thus there is no manner of doubt that Sections 494 and 495 IPC are cognizable offences so far as

State of Andhra Pradesh is concerned.

14. Having noticed the amendment made by the Legislative Assembly of the State of Andhra Pradesh regarding Section 494 and 495 IPC, this Court proposes to consider the effect of assent given by the President on 10th February, 1992 to the Code of Criminal Procedure (Andhra Pradesh Second Amendment) Act, 1992. Article 254 of the Constitution reads as under:-

> "254 Inconsistency between laws made by Parliament and laws made by the Legislatures of States:-
>
> (1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.
>
> (2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has bee reserved for the consideration of the President and has received his assent, prevail in that State.
>
> Provided that nothing in this clause shall prevent Parliament from enacting a law adding to, amending, varying or repealing the law made by the legislature of the State".

There is no manner of doubt that Amending Act of 1992

is on the subject which is already in existence in the Code of Criminal Procedure, 1973. However, in view of Clause (2) of Article 254 of the Constitution, an undoubted power to legislate, of course subject to assent of the President on the subject already in existence, is available to the State Legislature. Clause (1) of Article 254 is operative subject to provisions of Clause (2). If a law passes a test of Clause (2), it will make Clause (1) inapplicable to it. To the general rule laid down in Clause (1), Clause (2) engrafts an exception, viz., that if the President assents to a State Law which has been reserved for his consideration as required by Article 200, it will prevail notwithstanding its repugnancy to an earlier law of Union. Clause (2) provides for curing of repugnancy which would otherwise invalidate a State law which is inconsistent with a Central law or an existing law. The clause provides that where the State law has been reserved for the consideration of the President and has received his assent, the State law would prevail in the particular State notwithstanding its repugnancy to a Central law or an existing law. Clause (2) comes into play only when (1) the two laws in question deal with a matter in Concurrent List (2) the State law has been made with the consent of the President and (3) the provision of law made by Parliament was earlier. When all these three conditions are satisfied, the law made by the State Legislature will prevail. Where there is inconsistency between laws made by Parliament and laws made by the State Legislature, the law made by the Parliament shall prevail. If the State makes law enumerated in Concurrent List which contains provisions repugnant to the provision of an earlier law made by the Parliament, the law so made by the State if it receives assent of President will prevail in the State. When the State Act prevails under Article 254(2) over a Central Act, the effect is merely to supersede the Central Act or to eclipse it by the State Act. In short, the result of obtaining the assent of the President to a State Act which is inconsistent with a previous Union Law relating to a concurrent subject would be that the State Act will prevail in that State and overrule the provisions of the Central Act, in that State.

In view of the above settled legal position, this Court has no doubt that the amendment made in the First Schedule to the Code of Criminal Procedure, 1973 by the Code of Criminal Procedure (Andhra Pradesh Second Amendment) Act, 1992, shall prevail in the State of Andhra Pradesh, notwithstanding the fact that in the Criminal Procedure Code, 1973 offences under Section 494 and 495 are treated as cognizable offences. The reasoning given by the Division Bench of High Court of Andhra Pradesh in *Mavuri Rani Veera Bhadranna* (supra) that though the State Legislation amended the Schedule making the offence under Section 494 IPC cognizable, the legislation made by the Parliament i.e. Section 198 of the Criminal Procedure Code remains and in the event of any repugnancy between the two legislations, the legislation made by the Parliament would prevail, because, Section 198 of the Criminal Procedure Code still holds the field despite the fact that the State Legislation made amendment to the Schedule of Criminal Procedure Code, with respect, is erroneous and contrary to all cannons of interpretation of statute. Once First Schedule to the Code of Criminal Procedure, 1973 stands amended and offences punishable under Sections 494 and 495 IPC are made cognizable offences, those offences will have to be regarded as cognizable offences for all purposes of the Code of Criminal Procedure, 1973 including for the purpose of Section 198 of the Criminal Procedure Code. Section 198(1)(c), after the Amendment made by the Code of Criminal Procedure(Andhra Pradesh Second Amendment) Act, 1992 cannot be interpreted in isolation without referring to the fact that offences under Sections 494 and 495 IPC have been made cognizable so far as the State of Andhra Pradesh is concerned. Therefore, the provision made in Section 198(1)(c) that no Court shall take cognizance of an offences punishable under Chapter XX of the IPC except upon a complaint made by some person aggrieved will have to be read subject to the amendment made by the Legislative Assembly of the State of Andhra Pradesh in 1992. Once, it is held that the offences under Section 494 and 495 IPC are cognizable offences, the bar

imposed by operative part of sub-section 1 of Section 198 of the Criminal Procedure Code beginning with the words "No Court shall take cognizance of an offence punishable under Chapter XX of the Indian Penal Code except upon a complaint made by some person aggrieved by the offence" gets lifted so far as offences punishable under Sections 494 and 495 IPC are concerned. As those offences have been made cognizable offences in the State of Andhra Pradesh since 1992, the same will have to be dealt with as provided in the Section 156 which inter alia provides that any officer in charge of a Police Station, may without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to enquire into or try under the provisions of Chapter XIII. Even without the authorization under Section 155(2) or Section 156(3) of Criminal Penal Code, offences under Sections 494, 495 and 496 having been rendered cognizable and non-bailable by virtue of the Criminal Procedure Code (Amendment Act, 1992) can be investigated by the Police and no illegality is attached to the investigation of these offences by the police. If the Police Officer in charge of a Police Station is entitled to investigate offences punishable under Section 494 and 495 IPC, there is no manner of doubt that the competent Court would have all jurisdiction to take cognizance of the offences after receipt of report as contemplated under Section 173(2) of the Code. Thus, this Court finds that correct proposition of law was not laid down in *Mavuri Rani Veera Bhadranna* (supra) when the Division Bench of the Andhra Pradesh High Court in the said case held that as Section 198 of Criminal Procedure Code still holds the field despite the amendment made by State Legislature, the Court would have no jurisdiction to take cognizance of an offence punishable under Section 494 IPC on the basis of report submitted by the Investigating Officer. Even if it is assumed for the sake of argument that in view of Section 198(1)(c) of the Code of Criminal Procedure, the Magistrate is disentitled to take cognizance of the offences punishable under Sections 494 and 495 IPC despite the State

amendment making those offences cognizable, this Court notices that in *Mavuri Rani Veera Bhadranna* (supra), the Division Bench has considered effect of Section 155(4) of the Criminal Procedure Code and thereafter held that the bar under Section 198 would not be applicable as complaint lodged before police for offence under Section 494 IPC also related to other cognizable offences and if police files a charge sheet, the Court can take cognizance also of offence under Section 494 along with other cognizable offences by virtue of Section 155 (4) of the Criminal Procedure Code.

15. Section 155(4) of the Code inter alia provides that:-

> "Where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non-cognizable"

Here in this case in the charge sheet it is mentioned that the appellant has also committed offence punishable under Section 420 of the Indian Penal Code which is cognizable and therefore this is a case which relates to two or more offences of which at least one is cognizable and therefore the case must be deemed to be cognizable case notwithstanding that the other offences are non- cognizable. This is not a case in which the FIR is exclusively filed for commission of offences under Sections 494 and 495 IPC. The case of the respondent no. 2 is that the appellant has committed offences punishable under Sections 417, 420, 494, 495 and 498A of the IPC. A question may arise as to what should be the procedure to be followed by a complainant when a case involves not only non- cognizable offence but one or more cognizable offences as well. It is somewhat anomalous that the aggrieved person by the alleged commission of offences punishable under Sections 494 and 495 IPC should file complaint before a Court and that the same aggrieved person should approach the police officer for alleged commission of offences under Sections 417, 420 and 498A of the Indian Penal Code. Where the case involves one

cognizable offence also alongwith non-cognizable offences it should not be treated as a non- cognizable case for the purpose of sub-section 2 of Section 155 and that is the intention of legislation which is manifested in Section 155(4) of the Code of Criminal Procedure. Therefore, the argument that the learned Magistrate could not have taken cognizance of the offences punishable under Sections 494 and 495 IPC on the basis of submission of charge sheet, cannot be accepted and is hereby rejected.

16. This Court finds that the High Court has quashed the proceedings pending before the learned Magistrate under Section 498A of IPC on the spacious ground that the marriage of the appellant with the respondent no. 2 is void and as respondent no. 2 is not the wife, she was not entitled to lodge first information report with the police for commission of offence u/s. 498A IPC and on the basis of police report, cognizance of the said offence against the appellant could not have been taken by the learned Magistrate. Such reasoning is quite contrary to the law declared by this Court in *Reema Aggarwal Vs. Anupam and others* (2004) 3 SCC 199. After examining the scope of Section 498A of the Indian Penal Code and holding that a person who enters into marital arrangement cannot be allowed to take shelter behind the smoke screen of contention that since there was no valid marriage the question of dowry does not arise, this Court speaking through Hon'ble Mr. Justice Arijit Pasayat, has held as under:-

> "Such legalistic niceties would destroy the purpose of the provisions. Such hairsplitting legalistic approach would encourage harassment to a woman over demand of money. The nomenclature "dowry" does not have any magic charm written over it. It is just a label given to demand of money in relation to marital relationship. The legislative intent is clear from the fact that it is not only the husband but also his relations who are covered by Section 498A. The legislature has taken care of children born from

> invalid marriages. Section 16 of the Marriage Act deals with legitimacy of children of void and voidable marriages. Can it be said that the legislature which was conscious of the social stigma attached to children of void and voidable marriages closed its eyes to the plight of a woman who unknowingly or unconscious of the legal consequences entered into the marital relationship? If such restricted meaning is given, it would not further the legislative intent. On the contrary, it would be against the concern shown by the legislature for avoiding harassment to a woman over demand of money in relation to marriages. The first exception to Section 494 has also some relevance. According to it, the offence of bigamy will not apply to "any person whose marriage with such husband or wife has been declared void by a court of competent jurisdiction". It would be appropriate to construe the expression "husband" to cover a person who enters into marital relationship and under the colour of such proclaimed or feigned status of husband subjects the woman concerned to cruelty or coerces her in any manner or for any of the purposes enumerated in the relevant provisions- Sections 304B/ 498A, whatever be the legitimacy of the marriage itself for the limited purpose of Sections 498A and 304B IPC. Such an interpretation, known and recognized as purposive construction has to come into play in a case of this nature. The absence of a definition of "husband" to specifically include such persons who contract marriages ostensibly and cohabit with such woman, in the purported exercise of their role and status as "husband" is no ground to exclude them from the purview of Section 304B or 498A IPC, viewed in the context of the very object and aim of the legislations introducing those provisions."

17. In view of firm and clear law laid down on the subject, this Court is of the confirmed view that the High Court was not justified at all in quashing the proceedings initiated against the appellant under Section 498A of the Code on the ground that

the respondent no. 2 was not wife within the meaning of Section 498A of the IPC and was not entitled to maintain complaint under the said provision. The question therefore which arises for consideration of the Court is whether the said finding recorded by the High Court can and should be set aside in the present appeal which is filed by the husband. It was argued by the learned Counsel for the appellant that quashing of proceedings with reference to offence punishable under Section 498A of Indian Penal Code is neither challenged by the State Government nor by the original complainant before this Court and the same having attained finality, the same cannot be disturbed in an appeal filed by the husband appellant in which grievance is made regarding non-grant of relief in full by the High Court.

18. This Court does not find any substance in the above mentioned argument of the learned Counsel for the appellant. The law declared by this Court in case of *Reema Aggarwal* (Supra) was binding on all Court including the learned Single Judge of High Court of A.P. who decided the present case in view of salutary provisions of Article 141 of the Constitution. The learned Single Judge of the High Court could not have afforded to ignore the law declared by this Court in *Reema Aggarwal* (Supra) while considering the question whether proceedings initiated by the respondent no. 2 for commission of offence punishable under Section 498A of IPC should be quashed or not. The High Court has completely misdirected itself in quashing the proceedings for the offence punishable under Section 498A of IPC. There is no manner of doubt that the finding recorded by the High Court that the respondent no. 2 is not the wife within the meaning of Section 498A of the Indian Penal Code runs contrary to law declared by this Court in case of *Reema Aggarwal* (Supra). There may be several reasons due to which the State might not have challenged that part of the Judgment of the learned Single Judge quashing the complaint filed by the respondent no. 2 under Section 498A of the Indian Penal Code. So also because of several reasons

such as want of funds, distance, non-availability of legal advice, etc. the original complainant might not have approached this Court to challenge that part of the judgment of the learned Single Judge which is quite contrary to the law declared by this Court. However, this Court while entertaining an appeal by grant of special leave has power to mould relief in favour of the respondents notwithstanding the fact that no appeal is filed by any of the respondents challenging that part of the order which is against them. To notice an obvious error of law committed by the High Court and thereafter not to do anything in the matter would be travesty of justice. This Court while disposing of an appeal arising out of grant of special leave can make any order which justice demands and one who has obtained illegal order would not be justified in contending before this Court that in absence of any appeal against illegal order passed by the High Court the relief should not be appropriately moulded by the Court or that the finding recorded should not be upset by this Court.

19. In *Chandrakant Patil Vs. State* (1998) 3SCC 38, even in absence of an appeal by Government specifically for that purpose and in absence of revisional power as is available to High Court and Sessions Court, under Criminal Procedure Code, this Court held that the Supreme Court has power under Article 142 read with Section 19 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 to enhance the sentence for doing complete justice in the matter that in the circumstances of the case appeared to it, to be too inadequate. In the said case it was contended that the Supreme Court has no power to enhance sentence in the absence of an appeal by the Government presented specifically for that purpose more so because Supreme Court has no revisional powers which the High Court and Court of Sessions are conferred with by the Criminal Procedure Code. While negativating the said contention this Court has firmly ruled that powers of the Supreme Court in appeals filed under Article 136 of the Constitution are not restricted by the appellate provisions

enumerated under the Code of Criminal Procedure or any other statute. What is held as firm proposition of law is that when exercising appellate jurisdiction the Supreme Court has power to pass any order. The power under Article 136 is meant to supplement the existing legal frame work. It is conceived to meet situations which cannot be effectively and appropriately tackled by the existing provisions of law. Though challenge was not made by any of the two respondents to the finding recorded by the learned Single Judge that the complaint lodged by the respondent no. 2 for alleged commission of offence punishable under Section 498A of the Indian Penal Code is not maintainable because she is not a wife, this Court feels that absence of challenge either by State or by the original complainant should not persuade or prevent this Court from doing justice between the parties by restoring the complaint filed by the respondent no. 2 under Section 498A of the Indian Penal Code on the file of the learned Magistrate. The conclusion arrived at by the High Court is such as to shake the conscience and sense of justice and therefore it is the duty of this Court to strike down the finding recorded with respect to the offence punishable under Section 498A, irrespective of technicalities. The judgment of the High Court quashing the proceedings initiated by the learned Magistrate for commission of offence punishable under Section 498A is tainted with serious legal infirmities and is founded on a legal construction which is wrong. So the technical plea advanced by the learned counsel for the appellant that in absence of appeal by any of the respondents, quashing of proceedings with respect to the offence punishable under Section 498A IPC, cannot be set aside, is hereby rejected. As held in *Ramakant Rai Vs. Madan Rail* (2003) 12 SCC 395 following *Arunachalam Vs. P.S.R. Sadanatham* (1979) 2 SCC 297 and *P.S.R. Sadanatham Vs. Arunchalam* (1980) 3 SCC 141, the appellate power vested in the Supreme Court under Article 136 is not to be confused with the ordinary appellate power exercised by appellate Courts and appellate Tribunals under specific statutes. It is plenary power exercisable outside the purview of ordinary law to meet

the demand of justice. Article 136 is a special jurisdiction. It is residuary power. It is extraordinary in its amplitude. The limits of Supreme Court when it chases injustice, is the sky itself. Further, the powers under Article 136 can be exercised by the Supreme Court, in favour of a party even suo motu when the Court is satisfied that compelling grounds for its exercise exist. Where there is manifest injustice, a duty is enjoined upon this Court to exercise its suo motu power by setting right the illegality in the judgment of the High Court as it is well settled that illegality should not be allowed to be perpetuated and failure by this Court to interfere with the same would amount to allow illegality to be perpetuated. When an apparent irregularity is found by this Court in the order passed by the High Court, the Supreme Court cannot ignore substantive rights of a litigant while dealing with the cause pending before it. There is no reason why the relief cannot be and should not be appropriately moulded while disposing of an appeal arising by grant of special leave under Article 136 of the Constitution.

20. Therefore, that part of the impugned judgment by which the complaint filed by the respondent no. 2 under Section 498A of the Indian Penal code is quashed by the High Court will have to be set aside while disposing the appeal filed by the appellant.

21. For the foregoing reasons, the appeal filed by the appellant fails and therefore the same is hereby dismissed. The impugned Judgment quashing the complaint filed by the respondent no. 2 for alleged commission of offence by the appellant under Section 498A IPC, is hereby set aside and the complaint lodged by the respondent no. 2 under Section 498A of the Indian Penal Code as well as charge sheet submitted by the Investigating Officer for the same shall stand restored/ revived. Subject to above mentioned direction the appeal stands disposed of.

R.P. Appeal disposed of.

KACHCHH JAL SANKAT NIVARAN SAMITI & ORS.

v.

STATE OF GUJARAT & ANR.

I.A. NO. 5 OF 2011

IN

(Special Leave Petition (Civil) No(s).5822 of 2006)

JULY 22, 2011

[MARKANDEY KATJU AND CHANDRAMAULI KR. PRASAD, JJ.]

WATER Disputes:

Narmada Waters – Allocation of to Kachchh district – Construction of Kachchh Branch canal – Interim application in an SLP seeking to appoint a Committee of experts to consider alternative systems of mode of conveyance of Narmada waters through Kachchh Branch canal to the region of Kachchh – HELD: The prayer for allocation of adequate water in Kuchchh district is not one which can be a matter of judicial review – It is for the executive authorities to look into this matter – There must be judicial restraint in such matters – The Court is not inclined to grant any of the prayers made in the interlocutory application – Application dismissed – Interlocutory applications.

Divisional Manager, Aravali Golf Club & Anr. Vs. Chander Hass & Anr. **2007 (12) SCR 1084 = (2008) 1 SCC 683- relied on.**

Case Law Reference:

2007 (12) SCR 1084 relied on para 4

CIVIL APPELLATE JURISDICTION : I.A. Nos. 5-6 of 2011.

IN

SLP (Civil) No. 5822 of 2006.

From the Judgment & Order dated 04.10.2005 of the High Court of Gujarat at Ahmedabad in Special Civil Application No. 3358 of 1999.

R.S. Suri, N.L. Ganpathi, K.S. Prasad, Chanchal Kumar Ganguli for the Petitioners.

Shyam Diwan, Hemantika Wahi, Ashwini Kumar for the Respondents.

The following order of the Court was delivered

O R D E R

Heard learned counsel for the applicant(s)/petitioner(s).

This interlocutory application for directions is filed in the special leave petition. The special leave petition has been filed against the judgment of the Gujarat High Court dated 04.10.2005 dismissing the writ petition filed by way of Public Interest Litigation. The prayer in the Writ Petition related to the alleged grievance of meagre allocation of water from Sardar Sarovar Dam by the State Government of Gujarat to the district of Kuchchh which is alleged to constitute 1/4th of the total area of the State of Gujarat and is alleged to be a drought prone district.

By means of the impugned judgment the Division Bench of the High Court dismissed the writ petition holding that there are no judicially manageable standards for adjudication for allocation of water in favour of any region within the State. The Government is the best judge to decide how much water should be released from the Narmada Canal to Kuchchh and how much water is to be left for other regions. All these decisions require delicate balancing and consideration of complex social and economical considerations which cannot be brought under the judicial scrutiny. In fact, the State Government has accepted the decision of the Narmada Water Disputes Tribunal which cannot be said to be arbitrary.

Now, this interlocutory application for interim directions has

been filed with the following prayers :-

"(a) to appoint a committee comprising of experts to go into the pros and cons of various alternative systems of mode of conveyance of Narmada waters through Kachchh Branch Canal to the region of Kachchh with reference to cost benefit ratio and other relevant aspects and be further please to direct the committee to submit a detailed report in this regard to the Hon'ble Court, and this Hon'ble Court be further pleased to pass further appropriate orders on receipt of such expert report.

(b) restrain the respondents from commencing the construction of proposed Kachchh Branch Canal until the aforesaid exercise is completed by this Hon'ble Court.

(c) direct the respondents to consider the relative cost advantage among various methods for transportation of water through Kuchchh Branch Canal.

(d) direct the respondents to consider the relative cost advantage in transporting water through Kuchchh Branch by pipeline as suggested by CWC.

(e) direct the respondents to present facts and figures on the basis of which the decision to transport the water through Kuchchh Branch Canal has been arrived at by the respondents."

We are of the opinion that the prayer for allocation of adequate water in Kuchchh district is not one which can be a matter of judicial review. It is for the executive authorities to look into this matter. As held by this Court in *Divisional Manager, Aravali Golf Club & Anr. Vs. Chander Hass & Anr.* (2008) 1 SCC 683, there must be judicial restraint in such matters.

For the reasons above stated, we are not inclined to grant any of the prayers made in the interlocutory application. The interlocutory application is dismissed accordingly.

R.P. Interloculory Application dismissed.

STATE OF PUNJAB
v.
JAGTAR SINGH AND ORS.
(Criminal Appeal No. 78 of 2003)

JULY 26, 2011

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

Penal Code, 1860 – s.304 Part-I r/w s.34 IPC and s.300, First exception –Culpable homicide not amounting to murder – Case of grave and sudden provocation – Four accused – Accused-respondents allegedly killed their sister 'P' and her lover 'G' – Bodies of the two deceased found in the courtyard of the house of the accused – PW5 claimed that he had last seen 'G' when he was being taken away by the respondents on the pretext of serving him liquor – Trial court accepted the evidence of PW5 and convicted the respondents u/s.302 r/w s.34 and sentenced them to life imprisonment – High Court, however, found the evidence of PW5 to be unreliable and on the basis of the post-mortem report that semen was found in the vaginal swabs of 'P', came to the conclusion that on the date of incident 'G' himself must have sneaked into the house of the accused persons and must have had sexual intercourse with 'P' and on seeing them in a compromising position, the accused persons must have killed them, and that thus it was a case of grave and sudden provocation and accordingly altered the conviction to u/s.304 Part I r/w s.34 and converted the sentence to rigorous imprisonment for five years – On appeal, held: There was no error in the approach of the High court in disbelieving the evidence of PW5 – Also, no reason to differ with the conclusion arrived at by the High Court that the offence was committed due to grave and sudden provocation and would fall under first explanation to s.300 and would amount to culpable homicide not amounting to murder – Thus, the offence would be covered under s.304

Part-I r/w s.34 – However, the incident in question took place 18 years back – Further, considering the fact that the accused persons had not even crossed the age of 25 years at the time of the incident and the fact that they have already undergone rigorous imprisonment for five years and have come out of jail, quantum of sentence not interfered with by Supreme Court.

According to the prosecution, the four accused persons killed their sister – 'P' and the brother of PW4 - 'G' by strangulation because 'P' had sexual relations with 'G'. The dead bodies of 'G' and 'P' were found in the courtyard of the house of the accused. PW5 stated that prior to the incident, when he was sleeping in the threshing floor of his wheat field for guarding the wheat, he saw the accused persons coming there in a drunken condition and taking away 'G' with them on the pretext of serving him liquor. Accused 'N' pleaded that on the night of the incident he heard some muffled sound from the court yard and that when he went there, he saw 'G' strangulating 'P' and in order to save 'P' from the clutches of 'G', he picked up a rope lying nearby, put it around the neck of 'G' and strangulated him; however in the meanwhile, 'G' had already strangulated 'P'. The trial court negated the plea of the defence and accepted the evidence of PW5 and accordingly convicted the accused under Section 302/34 IPC and sentenced each of them to undergo imprisonment for life.

In appeal, the High Court found the evidence of PW5 to be unreliable and rejected the same. However, the High Court, on the basis of the post-mortem report that semen was found in the vaginal swabs of deceased 'P', came to the conclusion that it was deceased 'G' who himself sneaked into the house of the accused persons and must have had sexual intercourse with 'P' and on seeing them in a compromising position, the accused persons must have killed them. On this basis, the High Court

came to the conclusion that even if this was proved, it was a case of grave and sudden provocation and as such it could not be a case of murder and would come under Section 304 Part-I read with Section 34 IPC on the basis of first exception to Section 300 IPC. Therefore, the High Court converted the sentence of the accused to rigorous imprisonment for five years each. The State filed the instant appeal against the order of the High Court.

Dismissing the appeal, the Court

HELD:1. The contention raised by the State that the version of PW5 was natural, as on the date of occurrence, he was guarding his threshed wheat crop in his threshing floor which was situated near the threshing floor of 'G' and he had all the opportunity of watching the happenings in the field of deceased 'G', cannot be accepted. Had that been the case there was no question of semen being found in the vaginal swabs of deceased 'P'. Secondly, considering the distance between the field of deceased 'G' and the house of the accused there was no necessity to take him upto their house. He could have been done away with in the way only. It was obvious that there was a sexual intercourse with deceased 'P' which was not possible if the accused had taken deceased 'G' with them. [Para 7] [501-A-D]

2. The evidence of PW5 cannot be accepted. PW5 in his evidence did not even mention that when he had accompanied PW4 to the house of accused 'N' on the next morning, he saw the two bodies in the courtyard of the house of accused persons. PW4 in his evidence stated that on reaching the house of accused 'N', he came to know that both 'P' and 'G' were murdered by the accused persons. However, he also did not state as to from where he came to know that they were murdered. It is not a case of either PW5 or PW4 that they, in any way, entered the house of the accused persons or talked to

anybody. Again, this Court is not satisfied with the explanation offered by the prosecution for delay in sending the copy of FIR to the Magistrate on 16..5.1993 at 10.30 p.m. when the same was registered in the morning at 9.15 a.m. [Para 8] [501-F-G]

3. There is no error in the approach of the High court in disbelieving the evidence of PW5. That would only give further credence to the theory that 'G' must have sneaked on the night of 15.5.1993 in the house of accused persons and he must have had sexual intercourse with 'P' which might have been seen by the accused persons and in a fit of rage, they killed both of them on the spot. There is no reason to differ with the conclusion arrived at by the High Court that the offence was committed due to grave and sudden provocation and would fall under first explanation to Section 300 IPC and would amount to culpable homicide not amounting to murder. Thus, the offence would be covered under Section 304 Part-I read with Section 34 IPC. [Para 9] [501-H; 502-A-C]

4. However, the incident in question took place in the year 1993 and thus 18 years have passed. Further, considering the fact that the accused persons had not even crossed the age of 25 years at the time when the incident took place and further considering the fact that they have already undergone rigorous imprisonment for five years and have come out of jail, this Court is not inclined to interfere with the quantum of sentence. [Para 10] [502-D-F]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 78 of 2003.

From the Judgment & Order dated 17.10.1997 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 319 DB of 1995.

Kuldip Singh, Harinder Singh for the Appellant.

O.P. Khullar, R.C. Kohli for the Respondents.

The Judgment of the Court was delivered by

SIRPURKAR, J. 1. This appeal is filed by the State of Punjab challenging the judgment dated 17.10.1997 in Criminal Appeal No. 319 of 1995 whereby the High Court, while partly allowing the appeal, altered the conviction and sentence of the appellants-accused from Section 302/34 IPC to Section 304 Part-I read with Section 34 IPC and sentenced them to undergo rigorous imprisonment for five years each and to pay a fine of Rs. 1,000/- each, in default of payment of fine to further undergo rigorous imprisonment for one year.

2. The prosecution case, in short, is as under:-

Desa Singh, Jessa Singh and Gurnam Singh were three brothers. On the night of 15.5.1993, Gurnam Singh, resident of village Pakan, Police Station Sadar Fazlika, District Ferozpur was sleeping in the threshing floor of his wheat field for guarding the wheat. According to the prosecution, the accused persons came there at about 10 p.m.in a drunken condition and took Gurnam Singh with them on the pretext of serving him liquor. This was allegedly seen by Santa Singh (PW5). Next day i.e. on 16.5.1993, in the morning at 6 a.m., Desa Singh (PW4), brother of deceased Gurnam Singh reached in the field to serve him tea. He did not find Gurnam Singh there. On enquiry, he was told by Santa Singh (PW5) of the adjoining field that last night at about 10 p.m., the accused persons had taken him away. The prosecution further alleges that on being told by Santa Singh (PW5) that the accused persons had taken him away, Desa Singh along with Santa Singh went to the residence of accused Nishan Singh where they came to know that the accused persons had killed Gurnam Singh and their sister Paramjit Kaur by strangulation because Paramjit Kaur had sexual relations with Gurnam Singh. Thereafter, Desa

Singh along with Santa Singh went for lodging the report of murder of Gurnam Singh and Parmajit Kaur. SI Talwinderjit Singh met them on bus stand to whom they reported the matter. That is how the FIR came to be recorded on 16.3.1993 at about 9.15 a.m. It is significant to note that a copy of this FIR reached the area Magistrate only on 16.3.1993 at 10.30 p.m.

3. Upon lodging of FIR, SI Talwinderjit Singh (PW7) went to the house of accused at "Dhani Gowarewali" in village Pakkan and found the dead bodies of Gurnam Singh and Paramjit Kaur lying in the courtyard of house of accused. It is on that basis that the investigation started. During investigation, the prosecution claims to have found an eye-witness Mohan Singh (PW6) who, on the night of 15.5.1993 is alleged to have seen the murder of Gurnam Singh and Paramjit Kaur by strangulation by putting a rope around their neck by all the accused persons but had never bothered to report the matter to any of the family members of the deceased Gurnam Singh though admittedly he himself was the first cousin of the deceased Gurnam Singh. He ultimately became available for recording the statement only on the third day. He has been disbelieved by both the courts below.

4. Trial court accepted the evidence of Santa Singh (PW5) to the effect that he had last seen the deceased Gurnam Singh with all the four accused when Gurnam Singh was taken away by them on the pretext of serving him liquor. The trial court also accepted the fact that thereafter the dead bodies of Gurnam Singh and Paramjit Kaur were found in the courtyard of house of accused. It did not accept the defence suggestion that accused Nishan Singh was living separately from his other three brothers. The trial court also believed the Chemical Analyser's report showing semen was found on the private parts of Paramjit Kaur.

5. The defence at the trial was novel. In his statement under Section 313 Cr.P.C., accused Nishan Singh stated that on the night of 15.5.1993, he heard some muffled sound from the court

yard when he was sleeping on the roof of his house. He then corrected himself and said that the sound was coming from the room. When he went there, he saw Gurnam Singh strangulating his sister Paramjit Kaur and in order to save Paramjit Kaur from the clutches of Gurnam Singh, he picked up a rope lying nearby, put it around the neck of Gurnam Singh and strangulated him. In the meanwhile, Gurnam Singh had already strangulated his sister Paramjit Kaur. The trial court did not accept the defence of the accused persons and proceeded to convict them for the offence under Section 302/34 IPC and sentenced each of them to undergo imprisonment for life and to pay a fine of Rs. 1000/- each, in default to further undergo rigorous imprisonment for one year.

6. In appeal, the High Court has discussed the evidence of the all the witnesses threadbare. The High Court found the evidence of Santa Singh (PW5) unreliable and rejected the same. However, the High Court, on the basis of the post-mortem report that semen was found in the vaginal swabs of deceased Paramjit Kaur which were sent for chemical examination, came to the conclusion that it was deceased Gurnam Singh who himself sneaked into the house of the accused persons and must have had sexual intercourse with Paramjit Kaur and on seeing them in a compromising position, the accused persons must have killed them. On this basis, the High Court came to the conclusion that even if this was proved, it was a case of grave and sudden provocation and as such it could not be a case of murder and would come under Section 304 Part-I read with Section 34 IPC on the basis of first exception to Section 300 IPC. Therefore, the High Court converted the sentence of the accused from imprisonment for life to rigorous imprisonment for five years with fine of Rs. 1000/- each. Hence, this appeal by special leave by the State of Punjab.

7. Mr. Kuldip Singh, learned counsel appearing for the State very strenuously argued that this was a clear case of murder as there was no explanation offered by the accused

persons having found two bodies in the courtyard of their house. Mr. Kuldip Singh further pointed out that the High Court has erred in disbelieving the version of Santa Singh (PW5). According to him, it was natural version of Santa Singh (PW5), as on the date of occurrence, he was guarding his threshed wheat crop in his threashing floor which was situated near the threashing floor of Gurnam Singh. He had all the opportunity of watching the happenings in the field of deceased Gurnam Singh. The argument is incorrect. Had that been the case there was no question of semen being found in the vaginal swabs of deceased Paramjit Kaur. Secondly, considering the distance between the field of deceased Gurnam Singh and the house of the accused there was no necessity to take him upto their house. He could have been done away with in the way only. It was obvious that there was a sexual intercourse with deceased Paramjit Kaur which was not possible if the accused had taken deceased Gurnam Singh with them.

8. We have carefully seen the evidence of Santa Singh (PW5). However, we are not in a position to accept the evidence of Santa Singh (PW5). In our view, Santa Singh (PW5) in his evidence did not even mention that when he accompanied Desa Singh (PW4) to the house of Nishan Singh on the next morning, he saw the two bodies in the courtyard of the house of accused persons. Desa Singh (PW4) in his evidence stated that on reaching the house of accused Nishan Singh, he came to know that both Parmajit Kaur and Gurnam were murdered by the accused persons. However, he also did not state as to from where he came to know that they were murdered. It is not a case of either Santa Singh (PW5) or Desa Singh (PW4) that they, in any way, entered the house of the accused persons or talked to anybody. Again, we are not satisfied with the explanation offered by the prosecution for delay in sending the copy of FIR to the Magistrate on 16..5.1993 at 10.30 p.m. whereas the same was registered in the morning at 9.15 a.m.

9. Be that as it may, we do not find any error in the

approach of the High court in disbelieving the evidence of Santa Singh (PW5). That would only give further credence to the theory that Gurnam Singh must have sneaked on the night of 15.5.1993 in the house of accused persons and he must have had sexual intercourse with Paramjit Kaur which might have been seen by the accused persons and in the fit of rage, they killed both of them on the spot. We do not find any reason to differ with the conclusion arrived at by the High Court that the offence was committed due to grave and sudden provocation and would fall under first explanation to Section 300 IPC and would amount to culpable homicide not amounting to murder. Thus, the offence would be covered under Section 304 Part-I read with Section 34 IPC.

10. Mr. Kuldip Singh, then strenuously urged that the accused persons have been awarded only five years of rigorous imprisonment and it is ridiculously less. He pointed out that even according to the High Court, this would amount to honour killing which cannot be taken lightly. The argument is undoubtedly correct. However, considering that the incident in question took place in the year 1993 and thus 18 years have passed. Further, considering the fact that the accused persons had not even crossed the age of 25 years at the time when the incident took place and further considering the fact that they have already undergone rigorous imprisonment for five years and have come out of jail, we are not inclined to interfere with the quantum of sentence and would choose to dismiss this appeal. We order accordingly.

B.B.B. Appeal dismissed.

GOSU JAIRAMI REDDY & ANR.
v.
STATE OF A.P.
(CRIMINAL APPEAL NO. 1321 OF 2006)

JULY 26, 2011

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

Constitution of India, 1950:

Article 136 – Scope of – HELD: The extra-ordinary jurisdiction of the Court under Article 136 is not and cannot be a substitute for a regular appeal –Appellant cannot seek reversal of views taken by the courts below simply because another view was possible on the evidence adduced in the case – It must be demonstrated that the view taken by the trial court or the appellate court for that matter is affected by any procedural or legal infirmity or is perverse or has caused miscarriage of justice – Penal Code, 1860 – ss. 147, 148, 302/149 – Explosive Substances Act, 1908 – ss. 3 and 5.

Penal Code, 1860:

ss. 147, 148, 302/149 IPC and ss. 3 and 5 of the Explosive Substances Act – Accused hurling bombs at the Jeep of complainants and hacking one of the victims to death by hunting sickles – Conviction and life sentence by courts below – HELD: It is evident from the depositions of the three eye-witnesses that the deceased had come to his factory accompanied by them and the driver of the Jeep and that the deceased was killed inside the factory by five accused persons – The version of these eye-witnesses has been accepted as truthful by the trial court as also the High Court in appeal – In the absence of any material contradiction in the version given by the eye-witnesses and in the absence of any other cogent reason rendering the depositions

unacceptable, there is no reason why the said version should not be accepted as truthful – The depositions of two other witnesses who were also in the factory premises substantially support the prosecution case and prove the presence of deceased and the three other eye-witnesses apart from the driver of the Jeep inside the compound of the factory at 5 p.m. when the incident took place – In the circumstances, there is no reason to interfere with the view taken by the courts below.

Criminal Law:

***Motive** – Relevance of – HELD: In a case based on eye witness account of the incident, proof or absence of the motive is not of any significant consequence – If the motive is proved it may support the prosecution version – In the instant case, the prosecution case that the accused appellants had a motive for the commission of the offence alleged against them stood satisfactorily proved.*

***Plea of alibi –** HELD**:** In the instant case**,** the courts below have rejected the plea – A finding of fact concurrently recorded on the question of alibi is not disturbed by the Supreme Court in an appeal by special leave – The plea of alibi has been rightly rejected by the courts below even on an appraisal of the evidence on record – Though the defence witnesses stated that they had gone to the district headquarters on the day of occurrence and A-1 and A-3 were with them there was no evidence to corroborate their version – Constitution of India, 1950 – Article 136.*

Delay/Laches:

Delay of 1 hour in lodging FIR – Delay in sending copy of FIR to jurisdictional Magistrate – HELD: The credibility of the report was not affected on account of the so called delay of one hour in lodging of the complaint – So also, the receipt of the report by the Magistrate at 1.05 a.m. was not so inordinately delayed as to render suspect the entire

prosecution case especially when no question regarding the cause of delay was put to the Investigating Officer.

Evidence:

Eye-witness account and medical evidence – Discrepancy – Witness stating that injury was inflicted on the neck of the deceased – In the post-mortem report, injury noted on right clavicle – HELD: It is a case where the witness describes the infliction of the injury in a region which may not be accurate from the point of view of human anatomy but which is capable of being understood in a layman's language to be an injury in an area that is proximate.

Non-examination of some of the witnesses of incident – HELD: It is entirely in the discretion of the Public Prosecutor to decide which of the listed witnesses are essential for unfolding the prosecution story – Simply because more than one witnesses have been cited to establish the very same fact is no reason why the prosecution must examine all of them – The prosecution, in the instant case, examined three eye-witnesses to prove the incident in question – There was no particular fact that could be proved only by the deposition of the driver and not by other witnesses – So also the non-examination of another named person does not make any dent in the prosecution case nor would it render the version given by three eye-witnesses, who have supported the prosecution version, unworthy of credit – As a matter of fact once the deposition of the eye-witnesses examined at the trial is accepted as trustworthy, non-examination of other witnesses would become inconsequential.

Investigation:

Non-seizure of the Jeep in which the victims travelled – Accused hurled bombs at the Jeep and hacked one of its occupants to death – HELD: The vehicle in question was not used for the commission of the offence – It was, therefore, not

necessary to seize the vehicle – All that the prosecution was required to establish was that the Jeep was indeed damaged on account of throwing of bombs one of which had exploded on the bonnet of the vehicle and the other on the left side of its door – The Investigating Officer had taken care to have the damaged portions of the vehicle cut, seized and sent the same to the Forensic Science Laboratory for opinion – The report from the FSL supports the prosecution case and proves that explosive mixture used in manmade bombs was found in the same.

The five appellants along with five others were prosecuted for the murder of one 'PR'. The prosecution case was that A-1 and A-3 were set up by a political party, namely, TDP to contest the election to MPTC/ZPTC. They approached 'PR' to support their candidature, but 'PR' declined stating that he being a staunch congressman was committed to support the candidate set up by his party. A-1 and A-3 lost the election and started nursing a grudge against 'PR'. On 31.7.2001 at 5.00 P.M., when 'PR' accompanied by his son (PW-1), nephews (PWs 2 and 3) and two others reached his slab polishing factory on a Sumo Jeep and the driver parked the jeep inside the factory premises, A-1, his brother A-2 and A-3 and his sons A-4 and A-5, armed with bombs and hunting sickles, entered the factory. A-2 hurled two bombs towards the Jeep and when the occupants of the Jeep ran for safety, A-1 and A-3 to A-5 attacked 'PR' with hunting sickles, causing his death. The trial court convicted A-1 to A-5 of the offences punishable u/ss 147, 148 and 302/149 IPC and ss. 3 and 5 of the Explosive Substances Act, 1908, and sentenced each of them, *inter alia,* to imprisonment for life with fine. The High Court affirmed the conviction and the sentence.

In the instant appeals filed by the accused, it was contended for the appellants that the trial court had rightly rejected the theory of motive set up by the prosecution,

but the High Court erred in believing the prosecution case in this regard; that there was no explanation for lodging the FIR with the delay of one hour and the delay in despatch of copy of FIR to the jurisdictional Magistrate; that the driver of the Jeep and two other persons accompanying the complainant party to the place of incident were not examined by the prosecution; and that there was contradiction in medical report and the eye-witness account as regards the injuries caused to the deceased. The plea of alibi on behalf of A-1 to A-3 was also reiterated.

Dismissing the appeals, the Court

HELD: 1. The extra-ordinary jurisdiction of the Court under Article 136 is not and cannot be a substitute for a regular appeal where the same is not provided for by the law. The scope of any such appeal has, therefore, to be limited lest the spirit and the intent of the law that does not sanction a second round of appellate hearing in criminal cases, is defeated and a remedy that is not provided directly made available indirectly through the medium of Article 136. The appellant cannot seek reversal of views taken by the courts below simply because another view was possible on the evidence adduced in the case. In order that the appellant may succeed before this Court, it must be demonstrated that the view taken by the trial court or the appellate court for that matter is affected by any procedural or legal infirmity or is perverse or has caused miscarriage of justice. [para 10-11] [520-A-C; 521-C-D]

Gurbaksh Singh v. State of Punjab **AIR 1955 SC 320;** *D. Macropollo and (Pvt.) Ltd. v. D. Macropollo and (Pvt.) Ltd. Employees' Union and Ors.* **AIR 1958 SC 1012;** *Ramaniklal Gokaldas & Ors. v. State of Gujarat* **AIR 1975 SC 1752;** *Pallavan Transport Corporation Ltd. v. M. Jagannathan* **2001 AIR SCW 4786;** *Radha Mohan Singh alias Lal Saheb and*

Ors. v. State of U.P. **2006 (1) SCR 519 = AIR 2006 SC 951;** *Bhagwan Singh v. State of Rajasthan* **AIR 1976 SC 985;** *Suresh Kumar Jain v. Shanti Swarup Jain and Ors.* **1996 (9) Suppl. SCR 28 = AIR 1997 SC 2291;** and *Kirpal Singh v. State of Utter Pradesh* **1964 SCR 992 = AIR 1965 SC 712 – relied on**

2.1 It is settled by a series of decisions of this Court that in cases based on eye-witness account of the incident, proof or absence of the motive is not of any significant consequence. If the motive is proved it may support the prosecution version. But existence or otherwise of the motive plays a significant role in cases based on circumstantial evidence. [para 13] [522-B-C]

2.2 In the instant case, the finding of the trial court that there was no material to show enmity between the accused and the complainants was manifestly erroneous. Not only was there evidence on record in the form of depositions of PW1 and PW2, the alleged political rivalry between the two sides was mentioned even in the first information report lodged by PW1 in writing. The complaint and so also the FIR registered on the basis of the same clearly referred to the reason why the deceased had been killed. It attributed the reason for the ghastly murder of the deceased to his refusal to support the candidature of A1 and A3 in the ZPTC/MPTC elections. It was not, therefore, a case where motive was introduced as an improvement in the prosecution story. It was on the contrary a case where right from the stage of lodging of the FIR till recording of depositions in the court, political rivalry was said to be the motive for the killing of the deceased. The High Court appreciated the above evidence and rightly observed that there was political rivalry between the accused party and the deceased party and the accused bore grudge against the deceased on account of the refusal of the deceased to support them in the elections and on account of the defeat of A-

1 and A-3 in the ZPTC elections. There is no reason much less a compelling one for this Court to take a view different from the one taken by the High Court. The prosecution case that the accused appellants had a motive for the commission of the offence alleged against them thus stood satisfactorily proved. [para 15-16] [523-A-G]

3. A report regarding the commission of a cognizable offence, lodged within an hour of the incident cannot be said to be so inordinately delayed as to give rise to a suspicion that the delay – if at all the time lag can be described to be constituting any delay – was caused because the complainant, resorted to deliberations and consultations with a view to presenting a distorted, inaccurate or exaggerated version of the actual incident. Besides, no such suggestion was made to PW1, the first informant. It is the totality of the circumstances that would determine whether the delay long or short has in any way affected the truthfulness of the report lodged in a given case. The credibility of a report cannot be judged only by reference to the days, hours or minutes it has taken to reach the police station concerned. Viewed thus, the credibility of the report was not affected on account of the so called delay of one hour in lodging of the complaint. So also, the receipt of the report by the Magistrate at 1.05 a.m. was not so inordinately delayed as to render suspect the entire prosecution case, especially, when no question regarding the cause of delay was put to the Investigating Officer. [para 18] [524-C-H]

4.1 As regards the eye-witness account of the incident, according to PW 1, as soon as the jeep carrying the complainant party was parked by the driver inside the factory premises, A1 to A5 came running through the gate into the factory. A2 was armed with bombs while the other accused were armed with hunting sickles. A2

hurled two bombs towards the jeep. The witness ran and stood behind the workers room from where he witnessed the occurrence. He saw that when 'PR' was running to the office room of the factory, A1 attacked him with a hunting sickle on his head. Similarly A3 also attacked 'PR' on the neck. 'PR' fell down at a distance of 3 ft. from the office room. A3 instigated the other accused to kill 'PR' whereupon A4 and A5 also hacked the deceased. The accused left the place from the same gate carrying the blood stained sickles. The witness goes on to state that PW 3 also came to the spot after the occurrence and saw the dead body of the deceased. Persons were sent by the witness to the village to inform his mother and brother. The witness himself went to the Police Station and lodged the report at the Police Station. At the inquest, the watchman told the witness that he had seen A6 to A10 outside the factory gate. It was on the basis of the said statement that the names of A6 to A10 were also included as persons responsible for the commission of the offence. Despite extensive cross-examination nothing material has been extracted from the witness which could possibly discredit his testimony. [para 20-21] [526-B-H; 527-A-C]

4.2 To the same effect are the depositions of PW 2 and PW3 who too have fully supported the prosecution case and the narrative given by PW1. The version of these witnesses who, according to the prosecution, were eye-witnesses to the occurrence, has been accepted as truthful by the trial court as also the High Court. In the absence of any material contradiction in the version given by these witnesses and in the absence of any other cogent reason rendering the depositions unacceptable, there is no reason why the said version should not be accepted as truthful. [para 22] [527-D-F]

4.3 It is evident from the depositions of the three witnesses (PWs 1 and 3) that the deceased accompanied

by them reached his factory on a Sumo Jeep and that the deceased was killed inside the factory by the five accused. The depositions of PW 4 who was staying in a labour room of the factory and PW-5, who was a factory worker, substantially support the prosecution case and prove the presence of the deceased and PWs 1, 2 and 3 apart from the driver of the Sumo Jeep inside the compound of the factory at 5 p.m. on 31.7.2001 when the incident took place. Once the presence of PWs 1, 2 and 3 was established by their own depositions which have remained unshattered and the supporting evidence of PWs 4 and 5, the version given by the said three witnesses cannot be brushed aside lightly. [para 25] [528-E-G]

5.1 It is true that PW 1 has in his depositions attributed an injury to A 3 which according to the witness was inflicted on the neck of the deceased. It is also true that the post-mortem examination did not reveal any injury on the neck. But this discrepancy cannot affect the prosecution case, in the light of the evidence on record and the fact that it is not always easy for an eye-witness to a ghastly murder to register the precise number of injuries that were inflicted by the assailants and the part of the body on which the same were inflicted. Courts need to be realistic in their expectation from witnesses and go by what would be reasonable, based on ordinary human conduct with ordinary human frailties of memory and power to register events and their details. In the instant case, injury no.6 was found over the right clavicle. The injury was bone deep and the clavicle fractured. It is a case where the witness describes the infliction of the injury in a region which may not be accurate from the point of view of human anatomy but which is capable of being understood in a layman's language to be an injury in an area that is proximate. Further, the injuries noticed on the dead body of the deceased, according to the

medical evidence, had been inflicted by sharp cutting instrument like sickles as deposed by the eye-witnesses. [para 28-30] [530-A-E; 532-F-G; 533-A-C]

6. As regards the non-examination of the driver, it is well-settled that every witness that the prosecution may have listed in the charge-sheet need not be examined. It is entirely in the discretion of the Public Prosecutor to decide as to how he proposes to establish his case and which of the listed witnesses are essential for unfolding the prosecution story. Simply because more than one witnesses have been cited to establish the very same fact is no reason why the prosecution must examine all of them. The prosecution, in the instant case, examined three eye-witnesses to prove the incident in question. There was no particular fact that could be proved only by the deposition of the driver and not by other witnesses. The driver of the vehicle reversed and parked it facing the gate, was the fact regarding which each one of the occupants of the vehicle was a competent witness. PWs. 1, 2 and 3 have in their depositions testified that the vehicle was parked facing the gate by the driver of the vehicle after reversing the same. So also the non-examination of 'HR' does not make any dent in the prosecution case nor would it render the version given by three eye-witnesses, who have supported the prosecution version, unworthy of credit. As a matter of fact once the deposition of the eye-witnesses examined at the trial is accepted as trustworthy, non-examination of other witnesses would become inconsequential. [para 31] [533-G-H; 534-A-E]

Nirpal Singh v. State of Haryana **1977 (2) SCR 901 = (1977) 2 SCC 131;** ***State of U.P. v. Hakim Singh and Ors.*** **(1980) 3 SCC 55,** *Nandu Rastogi alias Nandji Rastogi and Anr. v. State of Bihar* **2002 (3) Suppl. SCR 30 =(2002) 8 SCC 9,** *Hem Raj & Ors. v. State of Haryana* **AIR 2005 SC 2010;** *State of M.P. v. Dharkole @ Govind Singh and Ors.*

2004 (5) Suppl. SCR 780 = AIR 2005 SC 44 and *Raj Narain Singh v. State of U.P. & Ors*. **(2009) 10 SCC 362 – relied on.**

7. With regard to the plea that failure of the Investigating Officer to seize the Jeep must give rise to an adverse inference and discredit the entire prosecution case, sufficie it to say that the vehicle in question was not used for the commission of the offence. It was, therefore, not necessary to seize the vehicle. All that the prosecution was required to establish was that the Jeep was indeed damaged on account of throwing of bombs one of which had exploded on the bonnet of the vehicle and the other on the left side of its door. The Investigating Officer had taken care to have the damaged portions of the vehicle cut, seized and sent to the Forensic Science Laboratory for opinion. The report from the FSL supports the prosecution case and proves that explosive mixture used in manmade bombs was found in the same. Thus, the non-seizure of the Jeep made no difference to the veracity of the prosecution case. [para 33-34] [535-C-G]

8.1 So far as the plea of alibi set up by accused A-1 and A-3 is concerned, their case was that they were at Anantpuram, between 11 A.M. to 5 P.M. on the date of occurrence. The trial court has rejected the plea. The High Court has affirmed the said finding. A finding of fact concurrently recorded on the question of alibi is not disturbed by the Supreme Court in an appeal by special leave. [para 35] [535-H; 536-A-E]

Thakur Prasad v. The State of Madhya Pradesh **AIR 1954 SC 30 Vol. 41 – relied on**

8.2 That apart, the plea of alibi has been rightly rejected by the courts below even on an appraisal of the evidence on record. DW1 an Agriculturist deposed that he approached A-1 to help him in getting compensation for compulsory acquisition of his land and for that

purpose A1 and A3 and others reached Anantpur. DW2 in her deposition stated that she had made an application for the grant of a fair price shop licence and on the date of the incident she went to Anntpur and met A1 in the RDO office along with DW1. These witnesses did not have any supporting material, such as copy of their applications etc., with regard to their respective claims. In the absence of any evidence to corroborate their version that they were at Anantpur on 31.7.2001, the courts below were justified in rejecting the same. DW3 also claims to be at Anantpur on 31.7.2001 and stated that A-1 and A-3 accompanied him to SP Office at 5 P.M. The courts below have rightly rejected the testimony of this witness also. The close affiliation of this witness and A-1 and A-3 to the party to which they belong and his antecedents, suggesting involvement in several criminal cases registered against him, was reason enough for the courts to disbelieve his version also and consequently reject the plea of alibi raised by the accused in their defence. [paras 36, 37-39, 41] [536-G-H; 537-A-B; G-H; 538-A-F; 539-D-E]

9. In the circumstances, there is no reason to interfere with the view taken by the courts below. [para 42] [539-F]

Case Law Reference:

AIR 1955 SC 320	**relied on**	**para 10**
AIR 1958 SC 1012	**relied on**	**para 10**
AIR 1975 SC 1752	**relied on**	**para 10**
2001 AIR SCW 4786	**relied on**	**para 10**
2006 (1) SCR 519	**relied on**	**para 10**
AIR 1976 SC 985	**relied on**	**para 10**
1996 (9) Suppl. SCR 28	**relied on**	**para 10**

1964 SCR 992	**relied on**	**para 10**
1977 (2) SCR 901	**relied on**	**para 31**
(1980) 3 SCC 55	**relied on**	**para 32**
2002 (3) Suppl. SCR 30	**relied on**	**para 32**
AIR 2005 SC 2010	**relied on**	**para 32**
2004 (5) Suppl. SCR 780	**relied on**	**para 32**
(2009) 10 SCC 362	**relied on**	**para 32**
AIR 1954 SC 30 Vol. 41	**relied on**	**para 35**

CRIMINAL APPELLATE JURISDICITION : Criminal Appeal No. 1321 of 2006.

From the Judgment & Order dated 20.07.2006 of the High Court of Andhra Pradesh at Hyderabad in Criminal Appeal No. 1112 of 2005.

WITH

Crl. A. No. 1327 of 2006.

Sushil Kumar, Ranjit Kumar, Guntur Pramod Kumar, K. Rani Reddy, Guntur Prabhakar, T. Anamika, Chandra Mohani Setty for the Appellants.

June Chaudhary, Ramesh Allanki, G. Madhavi, Prabhat Kr. Rai, Savita Dhanda, D. Mahesh Babu for the Respondent.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. Political rivalry at times degenerates into personal vendetta where principles and policies take a back seat and personal ambition and longing for power drive men to commit the foulest of deeds to avenge defeat and to settle scores. These appeals by special leave present a somewhat similar picture and assail the judgment and orders of conviction and sentence passed by the Additional Sessions

Judge, Anantapur of Gooty and the High Court of Andhra Pradesh in appeal. The prosecution case may be summarised as under:

2. Gosu Ramchandra Reddy (A1) and his two brothers Gosu Jayarami Reddy (A2) & Gosu Jayaranga Reddy (A3) together with Gosu Rameshwar Reddy (A4) and Gosu Rajagopal Reddy (A5) sons of Gosu Ramchandra Reddy (A1) all residents of village Aluru of Anantapur District in the State of A.P. were political activists owing their allegiance to the Telugu Desam Party. The opposite group active in the region and owing allegiance to the Congress party comprised Shri Midde Chinna Pulla Reddy (deceased) his son Shri M. Sanjeeva Reddy (PW1) and his two nephews M. Rammohan Reddy (PW2) and M. Veeranjaneyuly (PW3); all residents of village Kaveti Samudram in the District of Anantpur.

3. Elections to MPTC/ZPTC were held in July 2001 which saw Gosu Jayaranga Reddy (A3) contesting for M.P.T.C. from Virapuram village, while Gosu Ramchandra Reddy (A1) sought election from the neighbouring Yerraguntapalli village. Both of them were set up by Telugu Desam Party. Electoral contest took a bitter turn when the duo mentioned above sought the support of the deceased M. Chinna Pulla Reddy which he declined for he claimed to be a staunch congressman committed to supporting the candidate set up by his party. It so happened that A1 and A3 were both defeated at the hustings.

4. The accused did not, according to the prosecution, reconcile to the defeat. Instead they started nursing a grudge against M. Chinna Pulla Reddy who was in their view the cause of their humiliation in the electoral battle. The animosity arising out of the electoral debacle of the two accused persons provided the motive for a murderous assault and resultant death of M. Chinna Pulla Reddy on 31st July, 2001 at village Sajjaladinne where the deceased had established a slab

polishing factory in the name and style of Reddy & Reddy Slab Polishing factory.

5. The prosecution case is that the deceased Shri M. Chinna Pulla Reddy reached his house at Tadipatri from his village in a Tata Sumo Jeep alongwith his son M. Sanjeeva Reddy (PW1) and his nephews M. Rammohan Reddy (PW2) and M. Veeranjaneyuly (PW3). One Hanumanatha Reddy and Mabu also accompanied them. From there the deceased and his companions came to the Slab Polishing Factory at Sajjaladinne at about 5.00 p.m. Hardly had Ganur Shankar the driver of the jeep parked the jeep at the factory office when A1 to A5 entered the factory from the main gate, with A2 carrying bombs and A1 & A3 to A5 carrying hunting sickles. Coming closer, accused Gosu Jayarami Reddy (A2) hurled two bombs towards the Jeep out of which one fell and exploded on the bonnet of the Jeep while the other fell on its left side door and exploded thereby partially damaging the Jeep. The inmates of the Jeep ran for safety in different directions. The deceased also got down from the jeep and started running towards the office room of the factory, when A-1 Gosu Ramchandra Reddy and A3 to A5 viz. Gosu Jayaranga Reddy, Gosu Rameshwar Reddy and Gosu Rajagopal Reddy attacked him with the hunting sickles which they were carrying. The prosecution case is that A1 Gosu Ramchanda Reddy hacked the deceased on his head, while A3 Gosu Jayaranga Reddy assaulted him on his neck. A4 Gosu Rameshwar Reddy and A5 Gosu Rajagopal Reddy also similarly hacked the deceased resulting in the death of the deceased on the spot. The entire incident is said to have been witnessed by M. Sanjeeva Reddy (PW1) from behind the workers room and by M. Ram Mohan Reddy (PW2) from the Pial of the Southern door of the office room. The incident was witnessed even by M. Veeranjane Reddy allegedly from the side of the labour room.

6. A written complaint about the occurrence was lodged by M. Sanjeeva Reddy (PW1) on the basis whereof FIR No.85/

01 was registered in the Police Station at Tadipatri at 6 p.m. on 31st July, 2001. The police arrived at the scene of occurrence at about 7 p.m., conducted an inquest and sent the dead body for post-mortem examination to the Government hospital at Tadipatri. After completion of the investigation, a chargesheet was presented against A1 to A5 and five others for commission of offences punishable under Sections 147, 148 and 302 read with Section 149 IPC and Sections 3 and 5 of the Explosive Substances Act, before the Judicial Magistrate, Ist Class, Tadipatri who committed the accused persons to the Court of Sessions at Anantpur. The case was then made over to VIth Additional District and Sessions Judge, (Fast Track) Anantapur before whom the accused persons pleaded not guilty and claimed a trial.

7. In support of its case the prosecution examined PWs 1 to 10 apart from placing reliance upon the documents marked Ex.P1 to P22 and MOs marked 1 to 20. Accused Gosu Ramchandra Reddy (A1) and Gosu Jayaranga Reddy (A3) examined DW1 to DW4 apart from placing reliance on documents marked D1 to D12, in support of the plea of alibi raised in defence.

8. By its judgment and order dated 15th July, 2005, the Trial Court convicted A1 to A5 for commission of offences punishable under Sections 147, 148, 302 read with Section 149 and Sections 3 and 5 of Explosive Substances Act and sentenced them to suffer rigorous imprisonment for a period of one year for the commission of an offence under Section 147 IPC, two years under Section 148 IPC and life imprisonment for the offence punishable under Section 302 IPC. They were also convicted and sentenced to ten years imprisonment for the offence punishable under Sections 3 and 5 of the Explosive Substances Act. The sentences were ordered to run concurrently. The Trial Court also directed payment of fine of Rs.10,000/- each by the accused persons and a default sentence of three months simple imprisonment for the offence

under Section 302 IPC and a fine of Rs.1,000/- each for the offence under Sections 3 and 5 of the Explosive Substances Act and in default simple imprisonment for a period of one month. A6 to A10 were, however, acquitted of the charges framed against them.

9. Aggrieved by the judgment and order passed by the Trial Court the appellants filed Criminal Appeal No.1112 of 2005 before the High Court of Andhra Pradesh at Hyderabad. The High Court after reappraisal of the entire evidence on record affirmed the conviction and sentence awarded to the appellants and dismissed the appeal. The present appeals by special leave assail the correctness of the said judgment and order.

10. We have heard learned counsel for the parties who have taken pains to extensively refer to the evidence adduced by the prosecution and the defence before the Trial Court in a bid to show that the Trial Court as well as the High Court both have failed to properly appreciate the same hence erroneously found the appellants guilty of the offences alleged against them. Before we advert to the criticism levelled against the inferences & conclusions drawn by the Courts below we need to point out that an appeal to this Court by special leave under Article 136 of the Constitution of India is not an ordinary or regular appeal against an order of conviction recorded by a competent Court. In an ordinary or regular appeal, the appellate Court can and indeed is duty bound to re-appraise the evidence and arrive at its own conclusions. It has the same power as the Trial Court when it comes to marshalling of facts and appreciation of the probative value of the evidence brought on record. The accused can, therefore, expect and even demand a thorough scrutiny and discussion of his case in all its factual and legal aspects from the appellate Court, in the same manner as would be required of a Trial Court. But once the appellate Court has done its task, no second appeal lies against the judgment; under the Cr.P.C. whether to the High Court or to this Court. A revision against an appellate judgment of a criminal Court is

maintainable before the High Court but the same has its own limitations. Suffice it to say that the extra-ordinary jurisdiction of this Court under Article 136 of the Constitution is not and cannot be a substitute for a regular appeal where the same is not provided for by the law. The scope of any such appeal has, therefore, to be limited lest the spirit and the intent of the law that does not sanction a second round of appellate hearing in criminal cases, is defeated and a remedy that is not provided directly made available indirectly; through the medium of Article 136 of the Constitution. The decisions of this Court on the subject are a legion. Reference to some of them would however suffice. In *Gurbaksh Singh v. State of Punjab* (AIR 1955 SC 320) this Court held that it cannot consistently with its practice convert itself into a third Court of facts. In *D. Macropollo and (Pvt.) Ltd. v. D. Macropollo and (Pvt.) Ltd. Employees' Union and Ors.* (AIR 1958 SC 1012) this Court declared that it will not disturb concurrent findings of fact save in most exceptional cases. In *Ramaniklal Gokaldas & Ors. v. State of Gujarat* (AIR 1975 SC 1752) this Court observed that it is not a regular Court of appeal which an accused may approach as of right in criminal cases. It is an extraordinary jurisdiction which this court exercises when it entertains an appeal by special leave and this jurisdiction by its very nature is exercisable only when the Court is satisfied that it is necessary to interfere in order to prevent grave or serious miscarriage of justice. In *Pallavan Transport Corporation Ltd. v. M. Jagannathan* (2001 AIR SCW 4786) this Court held that reassessment of evidence in proceedings under Article 136 is not permissible even if another view is possible. In Radha Mohan Singh alias *Lal Saheb and Ors. v. State of U.P.* (AIR 2006 SC 951) this Court declared that re-appreciation of evidence was permissible only if the Trial Court or the High Court is shown to have committed an error of law or procedure and conclusions arrived at are perverse. This Court further held that while it does not interfere with concurrent findings of fact reached by the Trial Court or the High Court, it will interfere in those rare and exceptional cases where it finds that several important circumstances have not

been taken into account by the Trial Court and the High Court resulting in serious miscarriage of justice or where the trial is vitiated because of some illegality or irregularity of procedure or is otherwise held in a manner violating the rules of natural justice or that the judgment under appeal has resulted in gross miscarriage of justice. (See also *Bhagwan Singh v. State of Rajasthan* (AIR 1976 SC 985), *Suresh Kumar Jain v. Shanti Swarup Jain and Ors.* (AIR 1997 SC 2291) and *Kirpal Singh v. State of Utter Pradesh* (AIR 1965 SC 712).

11. It is in the light of the above pronouncements of this Court evident that an appeal by special leave against the judgment and order of conviction and sentence is not a regular appeal against the judgment of the Trial Court. The appellant cannot seek reversal of views taken by the Courts below simply because another view was possible on the evidence adduced in the case. In order that the appellant may succeed before this Court, it must be demonstrated that the view taken by the Trial Court or the appellate Court for that matter is affected by any procedural or legal infirmity or is perverse or has caused miscarriage of justice.

12. It is now our task to determine whether the order of conviction and sentence recorded by the courts below suffers from any such infirmity as is mentioned above so as to justify interference with the same in exercise of our extra ordinary jurisdiction. On behalf of the appellants it was argued that the alleged motive behind the killing of the deceased Midde Chinna Pulla Reddy has not been established. The Trial Court has according to the learned counsel rejected the plea of political rivalry being the driving force behind the incident in question. The High Court was, argued the learned counsel for the appellants, in error in reversing that finding and holding that the prosecution had established the existence of political rivalry as the motive for the murder of the deceased. Absence of a strong motive was a circumstance, that according to the learned counsel rendered the entire prosecution story suspect, the

benefit whereof ought to go to the appellants.

13. It is settled by a series of decisions of this Court that in cases based on eye witness account of the incident proof or absence of a motive is not of any significant consequence. If a motive is proved it may supports the prosecution version. But existence or otherwise of a motive plays a significant role in cases based on circumstantial evidence. The prosecution has in the instant case examined as many as five eye witnesses in support of its case that the deceased was done to death by the appellants. The depositions of Shri M. Sanjeeva Reddy (PW1), Shri M. Rammohan Reddy (PW2), Shri Veeranjaneyu (PW3), Shri D. Dastnagiramma (PW4) and Shri Eswaraiah (PW5) have been relied upon by the prosecution to substantiate the charge framed against the appellants. If the depositions giving the eye witness account of the incident that led to the death of late Shri Midde Chinna Reddy are indeed reliable as the same have been found to be, by the Trial Court and the first appellate Court, absence of a motive would make little difference.

14. Having said that we need to examine the reasoning of the Trial Court while it dealt with the question of motive – which finding of the trial Court has been reversed by the High Court. The trial court has on the question of motive observed:

> "In the present case 3 eye witnesses are there and their evidence is supported by PW.4. Even though both parties accused group and the deceased group belonged to different political parties, but actually there is no evidence that there are pending civil litigations between them. In the MPTC Elections the accused No.1 and 3 contested for the post of MPTC on behalf of the Telugu Desam Party and the deceased supported the congress back ground candidates and who succeeded and the accused persons were defeated in the elections. Except that there is no material to state that the deceased and his sons got enmity towards the accused persons"

15. The above finding was manifestly erroneous. Not only was there evidence on record in the form of depositions of Shri M. Sanjeeva Reddy PW1 and Shri M. Rammohan Reddy PW2, the alleged political rivalry between the two sides was mentioned even in the first information report lodged by PW1 in writing. The complaint and so also the FIR registered on the basis of the same clearly referred to the reason why the deceased had been killed. It attributed the reason for the ghastly murder of the deceased to his refusal to support the candidature of A1 and A3 in the ZPTC/MPTC elections. It was not, therefore, a case where motive was introduced as an improvement in the prosecution story. It was on the contrary a case where right from the stage of lodging of the FIR till recording of depositions in the court political rivalry was said to be the motive for the killing of the deceased. Shri M. Sanjeeva Reddy PW1, who was also the first informant had stood by his version regarding the political rivalry being the cause for the murder of his father Chinna Pulla Reddy. So had M. Rammohan Reddy PW 2 who had also in no uncertain terms said that the rivalry between the two groups was the reason why the deceased was done to death. The High Court appreciated the above evidence and rightly observed:

> "From the above evidence, it is clear that there was political rivalry between the accused party and the deceased party and the accused bore grudge against the deceased on account of the refusal of the deceased to support them in the elections and on account of the defeat of A-1 and A-3 in the ZPTC elections."

16. There is, in our opinion, no reason much less a compelling one for us to take a view different from the one taken by the High Court. The prosecution case that these accused appellants had a motive for the commission of the offence alleged against them thus stood satisfactorily proved.

17. It was next contended that the incident in question having occurred at 5 p.m. the first information report lodged at

6 p.m. was delayed for which delay, the prosecution had offered no explanation. It was further contended that the jurisdictional Magistrate had received a copy of the FIR only at 1.05 a.m. Keeping in view the distance between the place of occurrence and the Police Station as also the distance between the Police Station and the jurisdictional Magistrate's court the delay in lodging of the report and in sending a copy thereof to the Magistrate were significant which would in the absence of any valid explanation render the entire prosecution case, suspect.

18. There is in our view no merit even in this submission of the learned counsel. A report regarding the commission of a cognizable offence, lodged within an hour of the incident cannot be said to be so inordinately delayed as to give rise to a suspicion that the delay – if at all the time lag can be described to be constituting delay, was caused because the complainant, resorted to deliberations and consultations with a view to presenting a distorted, inaccurate or exaggerated version of the actual incident. No suggestion was made to PW1 the first informant that he delayed the lodging of the report because he held any consultation in order to present a false or distorted picture of the incident. A promptly lodged report may also at times be inaccurate or distorted just as a delayed report may despite the delay remain a faithful version of what had actually happened. It is the totality of the circumstances that would determine whether the delay long or short has in any way affected the truthfulness of the report lodged in a given case. The credibility of a report cannot be judged only by reference to the days, hours or minutes it has taken to reach the police station concerned. Viewed thus the credibility of the report was not affected on account of the so called delay of one hour in lodging of the complaint. So also, the receipt of the report by the magistrate at 1.05 a.m. was not so inordinately delayed as to render suspect the entire prosecution case especially when no question regarding the cause of delay was put to the Investigating Officer. If delay in the despatch of the First Information Report to the Magistrate was material the attention

of the Investigating Officer ought to have been drawn to that aspect to give him an opportunity to offer an explanation for the same. How far was the explanation acceptable would then be a matter for the court to consider.

19. It was then contended by the learned counsel for the appellants that there were certain erasures and interpolations in the first information report which according to them suggested a manipulation and raised a doubt about the registering of the first information report. A similar contention, it appears was raised even before the Trial Court, who repelled the same holding that the only discrepancy in the first information report was a correction of FIR No.84 to First Information Report No.85. The Trial Court further held that the said correction was wholly immaterial and did not affect the prosecution version. Before us, an attempt was made by the learned counsel for the appellants to argue that the correction made in the first information report altered the FIR number from 86 to 85 meaning thereby that the first information report had been ante timed. There is no merit in that contention either. The trial court has in our opinion correctly found that the over-writing in the First Information Report was limited to converting the digit 4 to digit 5 in the number assigned to the FIR. This correction is visible to the naked eye. The contention that the correction had the effect of converting FIR No.86 into FIR No.85 is not supported by the record. As a matter of fact the correction simply altered the FIR number from 84 to 85. In the circumstances, unless the correction is shown to be of any significance, nothing much turns on the same. Learned counsel for the appellants were unable to demonstrate that the correction of the First Information Report No.84 to 85 suggested any distortion in the prosecution case or prove that the first information report was false or ante timed. It is also significant that neither in the memo of appeal before the High Court nor in the special leave petition filed before this Court had the appellants pursued the challenge or urged the alleged

interpolation in the First Information Report as a ground warranting rejection of the prosecution case.

20. That brings us to the substance of the prosecution case which essentially comprises the depositions of M. Sanjeeva Reddy PW1, M. Rammohan Reddy, PW2 and M. Veeranjaneya Reddy PW 3. According to M. Sanjeeva Reddy PW 1, late Shri Chinna Pulla Reddy, Ramamohan Reddy, Hanumantha Reddy, Veeranjaneya Reddy, Mabu and driver Shankar started from Kavetimasumdram in a Tata Sumo Jeep driven by Shankar on 31st of July, 2001 and reached Tadipatri at 4 p.m. From the house of the deceased at Tadipatri the aforesaid persons including the deceased travelled to Sanjjaladinne village and reached the slab polishing factory by 5 p.m. The driver of the vehicle drove through the gate of the factory premises and then reversed the same for parking the jeep facing the gate. It was at this stage that A1 to A5 came running through the gate into the factory. A2 was armed with bombs while the other accused were armed with hunting sickles. A2 hurled two bombs, one of which fell on the bonnet of the Jeep and exploded while the other bomb exploded on the left side door of the vehicle. All of them were terrified by the sudden attack and started running away for shelter. The witness ran towards labour room of the factory on the west side and stood behind the workers room from where he witnessed the occurrence. He saw that when the deceased was running to the office room of the factory Gosu Ramachandra Reddy A1 hacked him with a hunting sickle on his head. Similarly Gosu Rajagopal Reddy A3 also hacked the deceased on the neck. Because of the blows sustained by the deceased he fell down at a distance of 3 ft. from the office room. A3 instigated the others to kill the deceased whereupon A4 and A5 also hacked the deceased. The witness was stunned out of fear and remained frozen at the place from where he watched the occurrence, while the accused left the place from the same gate carrying their hunting sickles stained with blood.

21. The witness goes on to state that PW 3 M.

Veeranjaneya Reddy also came to the spot after the occurrence and saw the dead body of the deceased. Mabu and Ramamohan Reddy were sent by the witness to the Village to inform his mother and brother. The witness himself went to the Police Station and lodged a report at Tadipatri Police Station, Ex.P1. The police arrived at the spot and conducted an inquest between 7 p.m. to 10 p.m. with the help of electric lights and two petromax lamps. At the inquest the watchman told the witness that he had seen A6 to A10 outside the factory gate. It was on the basis of the said statement that the names of A6 to A10 were also included as persons responsible for the commission of the offence. Despite extensive cross examination nothing material has been extracted from the witnesses which could possibly discredit his testimony nor was any specific contention based on the said statement made in the courts below or urged before us.

22. To the same effect are the depositions of PW 2 and PW3 who too have fully supported the prosecution case and the narrative given by PW1. The version of these witnesses who according to the prosecution were eye witnesses to the occurrence has been accepted as truthful by the trial court as also the High Court in appeal. In the absence of any material contradiction in the version given by these witnesses and in the absence of any other cogent reason rendering the depositions unacceptable, we see no reason why the said version should not be accepted as truthful.

23. Deposition of D. Dastagiramma PW4 has also substantially supported the prosecution version although she was declared hostile by the public prosecutor on account of her refusal to identify the accused. According to this witness she was staying in the slab factory of the deceased Pulla Reddy in a labour room. Pulla Reddy had come to the factory along with PW1, PW2 and PW3. Hanumantha Reddy and Mabu, Driver Shankar was also with him in the white jeep. They reached the factory at 5 p.m. The Jeep was reversed by the driver and

parked facing towards the gate, when five persons came running from the gate. One person was having bombs while the remaining were armed with hunting sickles. Both the bombs thrown at the jeep exploded whereafter PW 1 to PW 3 ran away. PW 1 had run towards the Labour room while the five assailants surrounded the deceased China Pulla Reddy. At this stage the witness ran away due to fear to the back side of the factory and left for Ramapuram her parents' village.

24. Eswaraiah PW5 was also a labourer who was working in the factory of the deceased Pulla Reddy. This witness was taking care of the poultry in the factory owned by the deceased. Since some of the birds had escaped from the factory, he was chasing them back into the factory. At about 5 p.m. he heard a loud noise from the factory. He returned to the factory within 10 minutes and found that Pulla Reddy had been hacked and was lying dead in a pool of blood at a short distance from the jeep. This witness saw PWs 1 to 3, Mabu, Hanumantha Reddy near the dead body but did not see the assailants as they had run away from there.

25. It is evident from the depositions of the three witnesses referred to above that the deceased Pulla Reddy had come to his factory accompanied by PW 1 M. Sanjeeva Reddy, PW 2 M. Rammohan Reddy, PW 3 M. Veeranjaneya Reddy and Shankar the driver of the sumo jeep and that the deceased was killed inside the factory by five persons. The depositions of PWs 4 and 5 substantially supports the prosecution case and proves the presence of the deceased Pulla Reddy, and PWs 1, 2 and 3 apart from Shanker, the driver of the Sumo jeep inside the compound of the factory at 5 p.m. on 31st July, 2001 when the incident took place. Once the presence of PWs 1, 2 and 3 was established by their own depositions which have remained unshattered and the supporting evidence of PWs 4 and 5, the version given by the said three witnesses cannot be brushed aside lightly.

26. Mr. Ranjit Kumar, learned Sr. counsel appearing for

A1, A4 and A5 contended that since the accused persons belonged to a different village in the absence of any evidence to show, that they knew that the deceased was visiting his factory it would be difficult to believe that they were lying in wait to assault and kill him. There is indeed no evidence to show that the accused persons knew about the visit of the deceased to his factory but that does not in our view, make any material difference. What is important is that the stone polishing factory was owned by the deceased and was not far from his house at Tadipatri. A visit by the owner of the factory was not so improbable that the accused could not expect the same especially when those with a sinister design like a cold blooded murder, could lie in wait if necessary to strike at an opportune time. The fact that a factory owned by Accused No.1 was in close proximity to the factory of the deceased, made it all the more easy for the assailants to carry out their nefarious design. That the deceased had been killed in the factory, is not even questioned by the defence as indeed the same cannot be questioned in the light of the deposition of the witnesses examined by the prosecution. The depositions of the eye witnesses PWs 1 to 3 are clear and free from any embellishments hence completely reliable. It is also difficult to believe that the witnesses who are closely related to the deceased would screen the real offenders and falsely implicate the appellants only because of the political rivalry between the two groups.

27. Mr. Kumar next argued that the weapons allegedly used by the appellants were said to be hunting sickles, whereas the injuries found on the person of the deceased were said to have contused margins which could not be caused by a hunting sickle. It was also argued that while the eye witnesses had attributed to A3 an injury on the neck of the deceased no such injury was reported by the doctor in the post mortem examination. This was, according to the defence, a major contradiction, that would render the prosecution story doubtful.

28. It is true that PW 1 has in his depositions attributed an injury to A 3 which according to the witness was inflicted on the neck of the deceased. It is also true that the post mortem examination did not reveal any injury on the neck. But this discrepancy cannot in the light of the evidence on record and the fact that it is not always easy for an eye witness to a ghastly murder to register the precise number of injuries that were inflicted by the assailants and the part of the body on which the same were inflicted. A murderous assault is often a heart-rending spectacle in which even a witness wholly unconnected to the assailant or the victim may also get a feeling of revulsion at the gory sight involving merciless killing of a human being in cold blood. To expect from a witness who has gone through such a nightmarish experience, meticulous narration of who hit whom at what precise part of the body causing what kind of injury and leading to what kind of fractures or flow of how much blood, is to expect too much. Courts need to be realistic in their expectation from witnesses and go by what would be reasonable based on ordinary human conduct with ordinary human frailties of memory and power to register events and their details. A witness who is terrorised by the brutality of the attack cannot be disbelieved only because in his description of who hit the deceased on what part of the body there is some mix up or confusion. It is the totality of the evidence on record and its credibility that would eventually determine whether the prosecution has proved the charge against the accused. Having said that let us see the nature of the injuries that were noticed by Dr. Satyanarayana Reddy PW 6, who conducted the post mortem on the deceased and examine whether the discrepancy pointed out by the defence makes any real dent in the prosecution case. The witness has described the injuries as under:

"EXTERNAL INJURIES

1. Incised injury over left side of head Fronto parietal area 15 cms x 2 cms x bone deep. Bones fractured. Brain

matter seen out side through the injuries. Margins contused.

2. Incised injury over the occipital area of head on right side 8 cms x 2 cms. bone deep, margins contused.

3. Incised injury over left side of face 6 cms. x 2 cms. muscle deep. Margins contused.

4. Incised injury over the lower Jaw extending on both side of face 16 cms. x 3 cms. x bone deep, margins contused, mandible fractured.

5. Incised injury over lower lip on left side 7 cm x 2 cm. muscle deep, margins contused.

6. Incised injury over right clavicle 6 cm x 2 cm bone deep, margins contused, right clavicle fractrured.

7. Incised injury over left shoulder 6 cm x 2 cm muscle deep, margins contused.

8. Incised injury over left side of chest below clavicle 15 cm x 2 cm cavity deep, margins contused. Lung tissue protruding over through the injury.

9. Incised injury over the palm of left hand near wrist 2 cm x 1 cm tissue deep, margins contused.

10. Incised injury over the palm of left hand near little finger 2 cm x 1 cm tissue deep, margins contused.

11. Incised injury over the dorsal aspect of left forearm upper 1/3 5cm x 2 cm muscle deep, margins contused.

12. Incised injury over the back of left scapular area 4 cm x 2 cm muscle deep, margins contused.

Deep dissection and internal examination: Skull: fracture of left frontal and left parietal bone present.

Fracture of occipital bone right side fractured. Brain underlying the fractured bones extensively injured. Intracranial haemorrhage present. Hyoid normal fracture of mandible present. Fracture of right clavicle present. Thorax on left side fracture of ribs from 1 to 3 present. Lung tissue protruding out through the injury. Left lung extensively injured. Extravasations of blood about 800 cc present in left thoracic cavity. Heart chambers empty. Right lungs normal and pale. Stomach contain digested food, Liver normal and pale. Kidneys normal and pale. Extravasations of blood surrounding all external injuries. The injuries are ante mortem in nature. Rectum empty. Bladder empty.

Opinion : The deceased would appear to have died of shock and haemorrhage due to multiple injuries, especially injuries to vital organs. Brain: caused by injuries No.1 and 2 and injury to left lung caused by the injury No.8 and died 15 to 18 hours prior to post mortem examination. Injuries would have been caused by sharp weapons like sickles. The P.M. certificate is Ex.P.3. Injuries 1 to 12 are ante mortem in nature. The above injuries sufficient to cause to death in ordinary course of nature."

29. Two aspects are clear from the above. First is that injury no.6 (supra) was found over the right clavicle. The injury was bone deep and the clavicle fractured. A witness who has a momentary view of the incident which is over within a few minutes may not have his testimony rejected only because instead of describing the injury to the clavicle he described the same to be an injury to the neck. It is not a case where the witness attributes an injury to the assailants on a vital part like the head but no such actual injury is found in that region of the body. Instead an injury is found say on the leg or any other portion of the body. It is a case where the witness describes the infliction of the injury in a region which may not be accurate from the point of view of human anatomy but which is capable of being understood in a layman's language to be an injury in an area that is proximate.

30. The other aspect is that the deposition of the doctor establishes the fact that the injuries noticed on the dead body of the deceased had been inflicted by sharp cutting instrument like sickles. It is further stated by the doctor that in all probabiliting the deceased might have died on receipt of the first injury itself. There is nothing in the examination of the eye-witnesses from which the court may infer that the injuries found in the post mortem examination of the deceased could not have been caused by sharp edged sickles that the accused were carrying with them and are said to have used in the course of the incident. The argument that there is a material contradiction between the ocular evidence on the one hand and the medical evidence on the other must therefore fail and is hereby rejected.

31. It was then contended on behalf of the appellants that the prosecution had dropped Shankar the driver of the Sumo Jeep and Hanumantha Reddy who according to the defence witnesses could have given true account of incident if at all they were accompanying the deceased on the date of the occurrence. It was argued by Mr. Sushil Kumar, learned senior counsel for the appellants that the non-examination of Shankar, the driver of the Jeep assumes importance because according to the prosecution version the driver had after entering the factory premises reversed the Jeep and parked it facing the gate. This part of the case could be supported only by the driver and since the driver had been given up at the trial the prosecution case that the vehicle was parked facing the gate, must be deemed to have remained unproved. The parking of the vehicle in the manner suggested by the prosecution was according the learned counsel material in as much as unless the prosecution introduced the theory of the vehicle being parked by the driver facing the gate the so-called eye-witness to the occurrence would have had no opportunity to see the accused persons entering the factory with bombs and sickles. We regret to say that there is no merit in that contention either. It is well-settled that every witness that the prosecution may have listed in the charge-sheet need not be examined. It is

entirely in the discretion of the Public Prosecutor to decide as to how he proposes to establish his case and which of the listed witnesses are essential for unfolding the prosecution story. Simply because more than one witnesses have been cited to establish the very same fact is no reason why the prosecution must examine all of them. The prosecution in the present case examined three eye-witnesses to prove the incident in question. There was no particular fact that could be proved only by the deposition of the driver and not by other witnesses. That Shanker was the driver of the vehicle at the relevant time, and that he reversed the vehicle and parked it facing the gate, were facts regarding which each one of the occupants of the vehicle was a competent witness. PWs. 1, 2 and 3 have in their depositions testified that the vehicle was parked facing the gate by Shankar driver of the vehicle after reversing the same. So also the non-examination of Hanumantha Reddy does not, in our opinion, make any dent in the prosecution case or render the version given by three eye-witnesses who have supported the prosecution version unworthy of credit. As a matter of fact once the deposition of the eye-witnesses examined at the trial is accepted as trustworthy the non-examination of other witnesses would become inconsequential. This Court in *Nirpal Singh v. State of Haryana* (1977) 2 SCC 131 stated the principles in the following words:

> "The real question for determination is not as to what is the effect of non-examination of certain witnesses as the question whether the witnesses examined in Court on sworn testimony should be believed or not. Once the witnesses examined by the prosecution are believed by the Court and the Court comes to the conclusion that their evidence is trust-worthy, the non-examination of other witnesses will not affect the credibility of these witnesses. It is not necessary for the prosecution to multiply witnesses after witnesses on the same point. In the instant case, once the evidence of the eye witnesses is believed, there is an end of the matter."

32. To the same effect are the decisions of this Court in *State of U.P. v. Hakim Singh and Ors.* (1980) 3 SCC 55, *Nandu Rastogi alias Nandji Rastogi and Anr. v. State of Bihar* (2002) 8 SCC 9, *Hem Raj & Ors. v. State of Haryana* (AIR 2005 SC 2010), *State of M.P. v. Dharkole @ Govind Singh and Ors.* (AIR 2005 SC 44) and *Raj Narain Singh v. State of U.P. & Ors.* (2009) 10 SCC 362.

33. It was argued on behalf of the appellants that the failure of the Investigating Officer to seize the Jeep must give rise to an adverse inference and discredit the entire prosecution story. That submission needs notice only to be rejected. The vehicle in question was not used for the commission of the offence. It was, therefore, not necessary to seize the vehicle. All that the prosecution was required to establish was that the Jeep was indeed damaged on account of throwing of bombs one of which had exploded on the bonnet of the vehicle and the other on the left side of its door. The Investigating Officer had taken care to have the damaged portions of the vehicle, cut, seized and sent to the Forensic Science Laboratory for opinion. The report from the FSL marked Ex.P20 supports the prosecution case and proves that explosive mixture used in manmade bombs was found in the same. The relevant part of the report is as under:

> "The above items are analysed and Potassium, Chlorate, Chloride, Arsenic, Sulphide, Sulphate are found in both of them.
>
> The above radicals are the resultant components and residues of explosive Potassium Chlorate, Arsenic Sulphide and Sulphur after explosion. This explosive mixture is used in countrymade bombs of throw type."

34. In the light of the above the non-seizure of the Jeep made no difference to the veracity of the prosecution case.

35. Time now to examine the plea of alibi set up by accused Nos.1 and 3. In support of their plea the accused have

examined four witnesses viz. Thirupalu DW1, Radha Kumari, DW2 and Prem Nagi Reddy DW 3 and Shri Jageeshwara Reddy D.W.4 as witnesses. Based on the depositions of the said witnesses the defence has attempted to prove that A1 and A3 were at Anantpur from 11 a.m. to 5 p.m. on the date of the incident, and were not therefore responsible for the murder of deceased Pulla Chinna Reddy committed at 5 p.m. on 31st July, 2001. The Trial Court has carefully examined the evidence adduced by defence but rejected the plea that accused A1 and A3 were at Anantpur at the time of the incident. The High Court has affirmed that finding upon a reappraisal of the evidence on record. What we have to examine is whether the concurrent finding on a question which is a pure question of fact namely whether accused A1 and A3 were at Anantpur at the time of incident leading to the murder of deceased Pulla Chinna Reddy took place in his stone polishing factory at Village Sajjaladinne warrants any interference. We may at the threshold say that a finding of fact concurrently recorded on the question of alibi is not disturbed by this Court in an appeal by special leave. The legal position in this regard is settled by the decision of this Court in *Thakur Prasad v. The State of Madhya Pradesh* AIR 1954 SC 30 Vol. 41

> "The plea of alibi involves a question of fact and both the courts below have concurrently found that fact against the appellant. This Court, therefore, cannot, on an appeal by special leave, go behind that concurrent finding of fact."

36. That apart the plea of alibi has in our opinion been rightly rejected by the courts below even on an appraisal of the evidence on record. We may in this regard briefly refer to the defence evidence adduced in support of the plea. Thirapalu, DW1 an Agriculturist from Tadipatri Mandal, deposed that 3½ acres of land owned by him was compulsorily acquired by the Government for a public purpose. No compensation for the acquisition was however paid to him. It was in that connection that the witness had approached A1 for help before the RDO

at Anantpur. According to the witness A1 and A3 apart from Krishna Reddy, Gopal Reddy and one Ranga Reddy reached Anantpur and went to the house of Paritala Ravindra to attend a meeting organized at his residence. After the meeting, they went to a hotel and then to the R&B Bungalow at Anantpur to meet the Hon'ble Minister Sri Nimmala Kristappa. After A1 had spoken to the Minister for a few minutes they went to the office of RDO where they met some persons including Radhakumari, DW2 who had come there in connection with the grant of a fair price shop licence. Accused No.1 entered the RDO office and talked to one Allabakash, the clerk in the said office, who dealt with payment of compensation and from there they went to Panchayatraj office and then to the office of Superintendent of Police when Jagadeeswara Reddy, DW4 informed them about the murder of Pulla China Reddy. According to the witness, the police detained A3 in the SP office itself. Thereafter the witness returned to his village. There are in deposition of this witness certain striking features that need to be noticed. The witness had neither any notice nor any other record suggesting acquisition of land owned by him which was said to be the reason for his alleged visit to Anantpur. Secondly, A1 and A3 had according to the witness gone to the office of the RDO and talked to one Allabaksh posted as a clerk there. No application to the RDO or any other authority for that matter was made either by the witness or by the accused on his behalf. Surprisingly the witness does not even talk to Allabaksh the clerk although it was his case in connection with which the accused had accompanied him to that office. So also there was no evidence to corroborate the version given by the witness that there was any meeting at the house of Partitala Ravindra, nor any evidence to show that any Minister had visited Anantpur on that day.

37. Radhakumari DW2 in her deposition stated that she had studied up to 10th standard and had made an application for the grant of a fair price shop licence. On the date of the incident she is said to have come to Anantpur in connection

with an interview for the grant of the licence and met A1 in the RDO office along with DW1 Thirapalu. The witness further claimed that she was selected for the grant of licence in pursuance of the interview held on 31st July, 2001.

38. In her cross examination the witness admitted that she did not receive any appointment letter for the fair price shop dealership at Sajjaladinne. She denied the suggestion that no interview was fixed for 31st July, 2001 before the RDO Anantpur. The witness admitted that the dealership was cancelled but denied that the cancellation was because of malpractices alleged against her. What is significant is that the witness did not have any supporting material like a copy of the application for the grant of fair price shop licence or a copy of the interview call inviting her for interview on 31st July, 2001 or a copy of the letter informing her that she was selected and appointed pursuant to the said interview. In the absence of any evidence to corroborate the version of the witness that she was indeed at Anantpur on 31st July, 2001, the courts below were justified in rejecting the same.

39. Prem Nagi Reddy, DW3 also claims to be at Anantpur on 31st July, 2001. He was there in connection with a Review meeting allegedly fixed by the High Command of TDP. The meeting was held in the House of Paritala Ravindra at Anantpur. A1 and A3 and few others accompanied them to SP office at about 5 pm.

40. In cross-examination the witness admitted that he was a prominent TDP leader and had contested, though unsuccessfully, the assembly elections against Shri J.C. Diwakar Reddy thrice. That the deceased Chinna Pulla Reddy was a close associate of Diwakar Reddy and that Pulla Reddy was a senior congress party leader in Tadipatri Mandal was also admitted by this witness. That A1 and A3 had contested MPTC elections as TDP candidates and got defeated at the hands of the congress party candidate was also admitted just as he admitted that there was no record to prove that a TDP

review meeting on 31st July, 2001 was held at Anantpur. The witness also admitted having been convicted in crime No. 17 of 1999 under Section 324 r/w Section 140 IPC and having been sentenced to undergo rigorous imprisonment for one year and a fine but acquitted by the Appellate Court. He expressed ignorance about his being an accused in crime no.58 of 1988 under Section 307 r/w 149 IPC, Sections 3 and 5 of E.S. Act and Section 25(1)(b)(a) of Arms Act of Yadiki P.S. He admitted that he was an accused person in crime No.59 of 1992 under Sections 3 and 5 of E.S. Act registered in police Station Tadipatri, Crime No.1 of 1993 under Section 7(1) (a) of Crl. Law Amendment of Act, Crime No.127 of 1994 under Section 136 of R.P. Act and Crime No.4 of 1996 under Section 307 r/w Sections 149 IPC and 3 & 5 of E.S. Act registered in town Police Station Tadipatri.

41. The courts below have rejected the testimony of this witness also and in our opinion rightly so. The close affiliation of this witness to the party to which they belong and his antecedents, suggesting involvement in several criminal cases registered against him, was reason enough for the courts to disbelieve his version also and consequently reject the plea of alibi raised by the accused in their defence.

42. In the circumstances we see no reason to interfere with the view taken by the courts below. These appeals accordingly fail and are hereby dismissed.

R.P. Appeals dismissed.

M/S EUREKA FORBES LIMITED
v.
STATE OF BIHAR AND ORS
(Civil Appeal No. 5996 of 2011)

JULY 27, 2011

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

Sales Tax – Bihar Finance Act, 1981 read with Bihar Sales Tax Rules, 1983 – Assessment proceedings under – Assessment years 1990-91, 1991-92, 1992-93 and 1993-94 – Assessee-appellant was levied tax on its product - vacuum cleaner, at the rate of 12% treating it as electrical goods as against the contention of the appellant that vacuum cleaner is taxable at the rate of 8% – Whether vacuum cleaner is an electrical good or instrument and, therefore, it falls within Entry 81 of the Notification dated 26-12-1977 issued by the respondents under Section 12 of the Bihar Finance Act- Bihar Sales Tax Act, 1959 and thus taxable at the rate of 12% – Held: Entry 81 of the said Notification provides that electrical goods, instruments, apparatus and appliances would have to be levied 12% tax effective from 1-4-1982 – However, when it states of electrical goods, the same appears to be an inclusive description – Vacuum cleaner is a machinery run by electricity and therefore, is an electrical good – It is not excluded from the purview and ambit of Entry 81 in any manner as is apparent from a bare reading of the contents of Entry 81 – Plea of appellant that since vacuum cleaner is not specifically included within the Entry 81, therefore, it should be deemed to be excluded cannot be accepted in view of the fact that none of the electrical goods, instruments, apparatus, which is included in the said Entry is specifically mentioned and if that interpretation is accepted, all electrical goods would have to be excluded because they are not specifically mentioned therein – That could not be the

intention of the framers of the Notification while exercising the powers under the subordinate legislation – If such an interpretation is accepted, entire Entry 81 would be rendered otiose.

The Federation of Andhra Pradesh Chambers of Commerce & Industry and Ors. Etc. Etc. v. State of Andhra Pradesh and Ors. Etc. Etc., **(2000) 6 SCC 550: 2000 (2) Suppl. SCR 151;** *Eureka Forbes Ltd. v. State of Bihar and Ors.,* **2000 (119) STC 460 (Pat.)** *and Indian National Shipowners' Association v. Union of India (UOI) through Secretary, Dept. of Revenue,*

Ministry of Finance Govt. of India and Ors., **2009 (14) STR 289 (Bom.) – distinguished.**

Case Law Reference:

2000 (2) Suppl. SCR 151	**distinguished**	**Para 15**
2000 (119) STC 460 (Pat.)	**distinguished**	**Para 15**
2009 (14) STR 289 (Bom.)	**distinguished**	**Para 15**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5996 of 2011.

From the Judgment & Order dated 26.02.2010 of the High Court of Judicature at patna in Civil Writ Jurisdiction Case No. 1351 of 2008.

S.B. Sanyal, Alok Kumar for the Appellant.

Gopal Singh, Rudreshwar Singh for the Respondents.

The following order of the Court was delivered

O R D E R

1. Leave granted.

2. The present case relates to assessment of the Appellant herein concerning assessment years 1990-91, 1991-92, 1992-93 and 1993-94.

3. The assessment proceedings were initiated under the Bihar Finance Act, 1981 read with Bihar Sales Tax Rules, 1983. Notices under Section 17 (2)(a) of the Act were issued to the assessee for examination of books of accounts. The said books of accounts were produced and assessment orders under Section 17 (2)(b) of the Act were passed. In the said assessment order, the assessee was levied tax on vacuum cleaner at the rate of 12% treating it as electrical goods as against the contention of the Appellant that vacuum cleaner, which is an article dealt with by the Appellant, is taxable at the rate of 8%.

4. The Assessing Officer by the assessment order rejected the aforesaid contention of the assessee while holding that the assessee is liable to pay tax on vacuum cleaner at the rate of 12%. Being aggrieved by the aforesaid findings and assessment order passed by the Assessing Officer, the Appellant filed appeals which were entertained and disposed of dismissing the said appeals.

5. Being aggrieved by the aforesaid order passed in appeals, the assessee preferred Revision Applications before the Commercial Taxes Tribunal. By an order passed on 15.4.2004, the Tribunal dismissed the said Revisions holding that the vacuum cleaner is an electrical good or instrument and, therefore, it falls within Entry 81 of the Notification dated 26.12.1977 issued under Section 12 of the Bihar Finance Act - Bihar Sales Tax Act, 1959.

6. Being aggrieved by the aforesaid order of the Tribunal, a writ petition was filed, which was again dismissed by the High Court by judgment and order dated 26.2.2010 as against which this appeal was filed.

7. We have heard the learned counsel appearing for the parties in this appeal, who have taken us through the records. In the light of their submissions and on perusal of the records, we propose to dispose of this appeal by recording our reasons.

8. The issue that arises for consideration is whether the

article vacuum cleaner could be included within the Entry 81 of the Notification dated 26.12.1977 issued under Section 12 by the respondents.

9. Entry 81 of the said notification reads as follows:-

"81. Electrical goods, instrument, apparatus and appliances including electric fans and lighting bulbs, electric earthware and porcelain and all other accessories excluding electric motor, dry cell batteries, torch, torch bulbs, exhaust fans, air circulators, and spare parts and accessories, electric heaters of all varieties."

10. Counsel appearing for the Appellant has submitted before us that particular article, namely, vacuum cleaner, which is the article dealt with by the appellant in the course of its business cannot be included within the ambit and scope of Entry 81 in view of the fact that the said article is not mentioned specifically within the aforesaid Entry. In order to reinforce his arguments, Mr. S.B. Sanyal, learned senior counsel also relied upon the subsequent Notification which is issued by the respondents on 26.7.2000. He has drawn our attention to the contents of the said Notification and particularly to serial no. 247 where vacuum cleaner is specifically mentioned with the rate of sales tax payable @ 12%. It is submitted by him that since in the subsequent Notification in 2000, vacuum cleaner has been specifically stated under serial no. 247 specifying the rate of sales tax at 12%, it should be assumed that the aforesaid vacuum cleaner having not been specifically mentioned in the earlier Notification under Entry 81, would be liable for the purpose of tax at 8% being an unspecified good. We have considered the said submissions in the light of the records. The Entry 81, which we have extracted above, provides that electrical goods, instruments, apparatus and appliances would have to be levied 12% tax effective from 1.4.1982. However, when it states of electrical goods, the same appears to us to be an inclusive description as it emphasises on the word 'including electrical fans and lighting bulbs, etc.' and again it

excludes from its purview electric motor, dry cell batteries, etc.

11. A reference to Section 12 of the Act would also make the position clear for Section 12 says in the proviso that the State Government can issue a notification fixing higher rate than eight percentum by specifying such goods or class of goods or description of goods. Therefore, by issuing a notification under Section 12, a higher rate than of 8% could be levied by the State Government on a class of articles of goods or goods specifically mentioned therein. The aforesaid position would be more explicit when we look to the Entries 116 and 127 of the same Notification of 1977 wherein by the Entry 116, articles like refrigerators, air-conditioners, air-coolers and air-conditioning plants, etc. have been taken out from the items "electrical goods" under Entry 81 by levying higher rate of tax.

12. That the vacuum cleaner dealt with by the appellant is an electrical good, there is no dispute raised for in the Special Leave Petition itself it is stated by the Appellant that the vacuum cleaner is a machinery which is run by electricity. Therefore, it is an agreed and uniform case of the parties that vacuum cleaner is an electrical good. The said vacuum cleaner is not excluded from the purview and ambit of Entry 81 in any manner as is apparent from a bare reading of the contents of Entry 81.

13. We are concerned with the assessment years prior to 2000 and, therefore, the Notification issued on 26.7.2000 shall have no relevance or application to the facts of the present case.

14. Counsel appearing for the Appellant has submitted that since vacuum cleaner is not specifically included within the Entry 81, therefore, it should be deemed to be excluded. We are unable to accept the aforesaid contention in view of the fact that none of any electrical goods, instruments, apparatus, which is included in the said Entry is specifically mentioned and if that interpretation is accepted, all electrical goods would have to be excluded because they are not specifically mentioned therein. That could not be the intention of the framers of the

Notification while exercising the powers under the subordinate legislation. If we also accept such an interpretation, in our opinion, entire Entry 81 would be rendered otiose.

15. Learned counsel also relied upon a decision of this Court in The Federation of Andhra Pradesh Chambers of Commerce & Industry and Ors. Etc. Etc. v. State of Andhra Pradesh and Ors. Etc. Etc. reported in (2000) 6 SCC 550, wherein it is laid down in para 7 that taxing statutes are to be strictly construed and that nothing could be added to what is stated in the statute itself. We agree and accept the aforesaid principles of law laid down by this Court. That is a settled position of law, but according to us, the said decision in no way helps the Appellant in view of the reasoning given by us for the findings arrived at by us. So far the decision of the Division Bench of the Patna High Court in Eureka Forbes Ltd. v. State of Bihar and Ors. reported in 2000 (119) STC 460 (Pat.) is concerned, the same is also not applicable to the facts of the present case as the same relates to a case of re-opening of assessment on the ground of change of opinion and therefore, the said case also has no application at all. The decision of the Bombay High Court in Indian National Shipowners' Association, a Company having its registered office through its Deputy Secretary and Mr. Badrinath Durvasula having his place of business v. Union of India (UOI) through Secretary, Dept. of Revenue, Ministry of Finance Govt. of India and Ors. reported in 2009 (14) STR 289 (Bom.) also has no application to the facts of the present case.

16. We have given our reasons for arriving at our findings and in our considered opinion, the decisions given by the High Court as also by all other authorities are correct decisions, recording cogent reasons, and, therefore, we are not inclined to interfere with the same.

17. The appeal has no merits and is dismissed accordingly but leaving the parties to bear their own costs.

B.B.B. Appeal dismissed.

DISTRICT PRIMARY SCHOOL COUNCIL, WB
v.
MRITUNJOY DAS & ORS.
(Civil Appeal No. 6007 of 2011)

JULY 27, 2011

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

Service law – Dismissal from service – Appointment/ selection of respondents as Assistant teacher in Primary Schools – Respondents as a pre-requisite had taken admission in the training course for obtaining Primary Teachers' Training Institute Certificate to get appointment as Assistant Teacher – However, subsequently, the School Council found that the admission in the training course was obtained by inflating their marks – Respondents dismissed from service – Writ petitions by the respondents – Dismissed by the Single Judge of the High Court – However, the Division Bench of the High Court allowed the appeal – On appeal, held: If a particular act is fraudulent, any consequential order to such fraudulent act or conduct is non est and void ab initio – No person should be allowed to keep an advantage which has been obtained by fraud – Respondents inflated their marks in order to obtain admission in the Primary Teachers' Training Institute – Thus, the admission sought for was through an illegal means which is deprecated – No fault can be found with the course of action taken by the appellant – Also respondents were issued show cause notice and were given an opportunity of hearing – Thus, there was no violation of the principles of natural justice – Order passed by the Division Bench of the High Court is set aside and that of the Single Judge of the High Court is restored – Doctrines/ Principles – Natural justice.

Ram Preeti Yadav v. U.P. Board of High School and

IntermediateEducation and Ors. **(2003) 8 SCC 311: 2003 (3) Suppl. SCR 352 – referred to.**

Case Law Reference

2003 (3) Suppl. SCR 352 Referred to. Para 7

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6007 of 2011.

From the Judgment & Order dated 28.04.2010 of the High Court of Calcutta in MAT No. 254 of 2010.

WITH

C.A. No. 6008 of 2011.

Deba Prasad Mukherjee, Nandini Sen for the Appellant.

Sahasrangshu Bhattacharjee, Chanchal Kumar Ganguli, Abhijit Sengupta, B.P. Yadav for the Respondents.

The following order of the Court was delivered by

O R D E R

1. Leave granted.

2. As the facts and the legal issues arising for our consideration in both these appeals are similar, we propose to dispose of both these appeals by this common judgment and order.

3. The contesting respondents herein got themselves admitted for a training course, for obtaining the Primary Teachers' Training Institute certificate, which is pre-requisite and mandatory in order to get appointment as Assistant Teacher in primary schools in West Bengal. The contesting respondents herein obtained certificates after completing their training course. Thereafter, they also submitted their candidature for such appointment as Assistant Teacher in primary school in which they were selected and were consequently appointed as

teachers. However, subsequently, it was found that they had taken admission in the aforesaid training course for Primary Teachers' Training Institute Certificate by inflating their marks. It is pointed out that in the said institute, where they got admission for undergoing training, the minimum marks that one had to obtain for admission in that particular year was 600. Both the contesting respondents inflated their marks. In one case, it was 621 as against 430 marks actually obtained and in the other case, it was 614 as against actual obtained marks of 425. After the aforesaid fact came to light, the appellant herein issued show cause notice to the contesting respondents and the contesting respondents were also called for a personal hearing. However, none of the contesting respondents availed the opportunity of personal hearing given to them despite the fact they submitted their replies to the show cause notices. The appellant thereafter passed orders dismissing the contesting respondents from service.

4. Being aggrieved by the said order of dismissal, the contesting respondents herein filed writ petitions in the Calcutta High Court which were dismissed. On appeals filed by the contesting respondents before the Division Bench of the High Court, the same were allowed as against which the present appeals have been filed.

5. The issue that arises for our consideration in these appeals is whether the aforesaid order of dismissal issued by the appellant was justified in view of the fact that at the time of appointment as Assistant Teacher in primary school, there was no fraud played by the contesting respondents and that they had got the appointment after qualifying in the test held for appointment as Assistant Teacher in primary schools. It is submitted that they had also completed the training course successfully and got the appointment after duly qualifying in the test and, therefore, the allegation which is prior to the said date could not and should not have been given a weightage so as to disentitle the contesting respondents from continuing with

their job. These were the contentions of the learned counsel for the contesting respondents in the writ petition.

6. The contentions of the appellant who were respondents in the writ petition before the learned Single Judge are that once a fraud is played and certificate is obtained fraudulently, such conduct is required to be considered as adverse. It was submitted that obtaining a certificate in a fradulent manner, makes the certificate itself non-est and void ab initio. It is also submitted by the learned counsel appearing for the appellant that the aforesaid action of dismissal from service of the contesting respondents was taken in view of their conduct as it was thought that a person of such a conduct should not be allowed to be appointed and continue as a teacher in a primary school as at the stage the students whom the respondents are going to teach are in formative stage.

7. We have considered the submissions of the counsel for the parties. On going through the records placed before us, what we find is that the contesting respondents herein inflated their marks in order to obtain admission in the primary teachers' training institute. Had the marks not been inflated in the aforesaid manner, the contesting respondents would not have got the admission in that particular institute as it is disclosed from the records. Therefore, the admission sought for was through an illegal means which is to be deprecated. The conduct of the contesting respondents being such, we cannot find fault with the course of action taken by the appellant herein. It is not that the contesting respondents were not given any opportunity of hearing. They were given a show cause notice and were also given an opportunity of hearing which opportunity they did not accept although they submitted a reply to the show cause notice. There is, therefore, no violation of the principles of natural justice in the present case. If a particular act is fraudulent, any consequential order to such fradulent act or conduct is non est and void ab initio and, therefore, we cannot find any fault with the action of the appellant in dismissing the

service of the contesting respondents. In this context we refer to the decision of this Court in *Ram Preeti Yadav v. U.P. Board of High School and Intermediate Education and Others* reported in (2003) 8 SCC 311 for the proposition that no person should be allowed to keep an advantage which he has obtained by fraud.

8. In view of the aforesaid position, we set aside the judgment and order passed by the Division Bench of the Calcutta High Court and restore the order passed by the learned Single Judge of the High Court.

9. The appeals are allowed to the aforesaid extent leaving the parties to bear their own costs.

N.J. Appeals allowed.

UMERKHAN

v.

BISMILLABI @ BABULAL SHAIKH & ORS.

(Civil Appeal No. 6034 of 2011)

JULY 28, 2011

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

Code of Civil Procedure, 1908 – s. 100 – Second appeal – Jurisdiction of the High Court – Held: Second appeal is entertainable by the High Court only upon its satisfaction that a substantial question of law is involved in the matter and its formulation thereof – However, it is open to the High Court to reframe substantial question of law or frame substantial question of law afresh or hold that no substantial question of law is involved at the time of hearing the second appeal – On facts, the High Court interfered with the judgment and decree of the first appellate court without formulating the substantial question of law – Thus, the judgment of the High Court in the second appeal is set aside and the matter is remitted back to the High Court for consideration afresh.

The plaintiff-respondent filed a suit for partition and separate possession against her brother (1st defendant) and her sister (2nd defendant). The trial court decreed the suit declaring that the plaintiff and 2nd defendant were entitled to 1/4th share each and 1st defendant was entitled to 1/2 share in the suit property. The defendant filed the first appeal. The first appellate court set aside order of the trial court holding that 1st defendant became the owner of the suit property by adverse possession. The plaintiff filed a second appeal and the High Court allowed the same. Therefore, 1st defendant-appellant filed the instant appeal.

Allowing the appeal, the Court

HELD: The very jurisdiction of the High Court in hearing a second appeal is founded on the formulation of a substantial question of law. The judgment of the High Court is rendered patently illegal, if a second appeal is heard and judgment and decree appealed against is reversed without formulating a substantial question of law. The second appellate jurisdiction of the High Court under Section 100 CPC is not akin to the appellate jurisdiction under Section 96 of the Code; it is restricted to such substantial question or questions of law that may arise from the judgment and decree appealed against. As a matter of law, a second appeal is entertainable by the High Court only upon its satisfaction that a substantial question of law is involved in the matter and its formulation thereof. Section 100 of the Code provides that the second appeal shall be heard on the question so formulated. It is, however, open to the High Court to reframe substantial question of law or frame substantial question of law afresh or hold that no substantial question of law is involved at the time of hearing the second appeal but reversal of the judgment and decree passed in appeal by a court subordinate to it in exercise of jurisdiction under Section 100 of the Code is impermissible without formulating substantial question of law and a decision on such question. The constraints of Section 100 of the Code and the mandate of the law contained in Section 101 that no second appeal shall lie except on the ground mentioned in Section 100, yet it appears that the fundamental legal position concerning jurisdiction of the High Court in second appeal is ignored and overlooked time and again. In the instant matter, unfortunately the High Court interfered with the judgment and decree of the first appellate court in total disregard of the legal position. Thus, the impugned judgment of the High Court is set aside. The second appeal is restored to the file of the High Court for fresh consideration in

accordance with law. [Paras 13 and 19] [558-E-H; 559-A-C; 560-F-G]

Ishwar Dass Jain (Dead) through LRs. v. Sohan Lal (Dead) by LRs. **(2000) 1 SCC 434: 1999 (5) Suppl. SCR 24;** *Roop Singh (Dead) through L.Rs., v. Ram Singh (Dead) through L.Rs.* **(2000) 3 SCC 708: 2000 (2) SCR 605;** *Chadat Singh v. Bahadur Ram and Ors.* **(2004) 6 SCC 359: 2004 (3) Suppl. SCR 298;** *Sasikumar and Ors.* v. *Kunnath Chellappan Nair and Ors.* **(2005) 12 SCC 588: 2005 (4) Suppl. SCR 363;** *C.A. Sulaiman and Ors.* v. *State Bank of Travancore, Alwayee and Ors.* **(2006) 6 SCC 392: 2006 (4) Suppl. SCR 152;** *Municipal Committee, Hoshiarpur v. Punjab State Electricity Board andOrs.* **(2010) 13 SCC 216: 2010 (13) SCR 658 – referred to.**

Case Law Reference:

1999 (5) Suppl. SCR 24	**Referred to.**	**Para 14**
2000 (2) SCR 605	**Referred to.**	**Para 15**
2004 (3) Suppl. SCR 298	**Referred to.**	**Para 16**
2005 (4) Suppl. SCR 363	**Referred to.**	**Para 17**
2006 (4) Suppl. SCR 152	**Referred to.**	**Para 17**
2010 (13) SCR 658	**Referred to.**	**Para 18**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3064 of 2011.

From the Judgment & Order dated 27.11.2009 of the High Court of Judicature a Bombay, Bench at Aurangabad in Second Appeal No. 528 of 2011.

P.G. Godhamgoankar (for Chandan Ramamurthi) for the Appellant.

Nitin Lonkar, Prashant R. Dahat, Rauf Rahim for the Respondents.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. Leave granted.

2. This appeal, by special leave, has been preferred by the original 1st defendant against the judgment of the High Court of Judicature of Bombay, Aurangabad Bench whereby the learned Single Judge of that Court reversed the judgment and decree passed in the appeal by the Additional District Judge, Osmanabad and restored the judgment and decree of the trial court.

3. Sardar Khan was the owner of a property bearing land Block No. 386 and House No. 206 situate at Mangrul, Taluqa Kallam, District Osmanabad. He died in 1948 leaving behind a son -Umerkhan and two daughters-Bismillabi and Aminabi. Both daughters were minor at the time of the death of their father. They got married later. Bismillabi (hereinafter referred to as, 'plaintiff') filed a suit for partition and separate possession to the extent of 1/4th share in the above property against her brother Umerkhan (hereinafter referred to as, '1st defendant') and her sister Aminabi (hereinafter referred to as, '2nd defendant'). The plaintiff's case in the plaint was that as per the Muhammadan Law, the 1st defendant has 1/2 share while the 2nd defendant like her has 1/4th share in the suit property.

4. The 1st defendant contested the suit on diverse grounds. Inter alia, a plea was taken by him that plaintiff has been ousted of her right, title and possession in 1967 and the suit having been brought in 1990 was not only barred by limitation but also he has acquired title by adverse possession as he has been holding hostile possession over the property to the knowledge of the plaintiff. The 2nd defendant did not file any written statement and the suit proceeded against her ex-parte.

5. The trial court framed as many as four issues; issue no.

4 being whether 1st defendant has proved that he has become owner of the suit property by adverse possession. The trial court recorded the evidence and after hearing the advocates for the plaintiff and the 1st defendant vide its judgment and decree dated October 18, 1993 declared that plaintiff and 2nd defendant were entitled to 1/4th share each and the 1st defendant was entitled to 1/2 share in the suit property. The trial court ordered for effecting partition by metes and bounds accordingly.

6. Against the judgment and decree of the trial court, the 1st defendant preferred first appeal before the District Court, Osmanabad which was transferred to the Court of Additional District Judge, Osmanabad for its disposal. The first appellate court reversed the finding of the trial court on issue no.4 and held that the 1st defendant became owner of the suit property by adverse possession and, accordingly, allowed the first appeal on August 1, 2001 and set aside the judgment and decree of the trial court.

7. The plaintiff challenged the judgment and decree of the first appellate court in the second appeal before the High Court. In the course of second appeal, 2nd defendant died and her legal representatives were brought on record. The High Court allowed the second appeal and, as noticed above, set aside the judgment and decree of the first appellate court.

8. Pertinently, the judgment of the High Court that runs into eight foolscap pages does not indicate that scope of second appeal as provided in Section 100 and Section 101 of the Code of Civil Procedure, 1908 (for short, 'the Code') was kept in mind while hearing the second appeal. In para 7 of the judgment, the High Court observed thus:

> "I have minutely gone through both the judgments of the Courts below only on the issue of adverse possession which is also a mixed question of law and fact."

9. The High Court then proceeded to record the arguments of the counsel for the 1st defendant (respondent no. 1 therein) in paragraph 8. Thereafter in paragraphs 9, 10 and 11 it was observed and held as follows :

> "9. The case of ouster is pleaded by Respondent No. 1 in the written statement stating that after two years of her marriage sometime in the year 1967 both the sisters asked for their share and it was denied to them.
>
> 10. Party when plead adverse possession it must be proved by the evidence. The suit property is immovable property and there is no documentary evidence supporting the case of the Respondent No. 1 that he is in exclusive possession of the agricultural land and the same was held by him in his exclusive possession after death of his father or from 1967. Only one document i.e. 7/12 extra of the year 1989-90 was filed by Respondent No. 1 showing his possession and cultivation which is jointly in the name of Respondent No. 1 and his wife. Crop statements are prepared every year and 7/12 extract has a presumptive value for possession and cultivation of agricultural land. Since there are no such crop statements of 7/12 extract filed on record, adverse inference will have to be drawn against the Respondent No. 1. His exclusive or continuous possession is not established on record for a period of over 12 years preceding to the filing of the suit. No case of ouster is made out. Oral evidence of Vishnu Baburao Jadhav, witness No. 2, cannot be accepted as evidence of possession for such long period and has been rightly rejected and not considered by the trial court in the light of the evidence of Respondents. So also case of adverse possession was dismissed by learned trial Court after going through the evidence of Respondent No. 1.
>
> 11. Mere refusal to give share will not give rise to claim adverse possession and thus it is seen that learned appellate Court failed to appreciate the evidence on the

point of demand of share by the plaintiff from the Respondent No. 1 and further law on the point of adverse possession in the light of the authorities referred above. In that view of the matter, the impugned judgment of the 1st appellate Court does not sustain in law. The appeal deserves to be allowed. The judgment and decree of the learned trial Court is hereby upheld and appeal is allowed with costs."

10. Section 100 of the Code reads as follows :

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

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

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

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

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

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

11. Section 101 of the Code provides that no second appeal shall lie except on the ground mentioned in Section 100.

12. Section 103 of the Code empowers High Court to determine any issue necessary for disposal of the second appeal in the circumstances stated therein. Section 103 reads as under:-

"S.103.- Power of High Court to determine issues of fact. - In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal, -

(a) which has not been determined by the lower Appellate Court or both by the Court of first instance and the lower Appellate Court, or

(b) which has been wrongly determined by such Court or Courts by reason of a decision on such question of law as is referred to in section 100."

13. In our view, the very jurisdiction of the High Court in hearing a second appeal is founded on the formulation of a substantial question of law. The judgment of the High Court is rendered patently illegal, if a second appeal is heard and judgment and decree appealed against is reversed without formulating a substantial question of law. The second appellate jurisdiction of the High Court under Section 100 is not akin to the appellate jurisdiction under Section 96 of the Code; it is restricted to such substantial question or questions of law that may arise from the judgment and decree appealed against. As a matter of law, a second appeal is entertainable by the High Court only upon its satisfaction that a substantial question of law is involved in the matter and its formulation thereof. Section 100 of the Code provides that the second appeal shall be heard on the question so formulated. It is, however, open to the High Court to reframe substantial question of law or frame substantial question of law afresh or hold that no substantial question of

law is involved at the time of hearing the second appeal but reversal of the judgment and decree passed in appeal by a court subordinate to it in exercise of jurisdiction under Section 100 of the Code is impermissible without formulating substantial question of law and a decision on such question. This Court has been bringing to the notice of the High Courts the constraints of Section 100 of the Code and the mandate of the law contained in Section 101 that no second appeal shall lie except on the ground mentioned in Section 100, yet it appears that the fundamental legal position concerning jurisdiction of the High Court in second appeal is ignored and overlooked time and again. The present appeal is unfortunately one of such matters where High Court interfered with the judgment and decree of the first appellate court in total disregard of the above legal position.

14. In *Ishwar Dass Jain (Dead) through LRs. v. Sohan Lal (Dead) by LRs.* , in paragraph 10 (page 441) of the Report, this Court stated :

> "Now under Section 100 CPC, after the 1976 Amendment, it is essential for the High Court to formulate a substantial question of law and it is not permissible to reverse the judgment of the first appellate court without doing so."

15. In *Roop Singh (Dead) through L.Rs., v. Ram Singh (Dead) through L.Rs.* , this Court reminded the High Courts, in para 7 (page 713) of the report, that the second appellate jurisdiction of High Court was confined to appeals involving substantial question of law. This Court said :

> "It is to be reiterated that under Section 100 CPC jurisdiction of the High Court to entertain a second appeal is confined only to such appeals which involve a substantial question of law and it does not confer any jurisdiction on the High Court to interfere with pure questions of fact while exercising its jurisdiction under Section 100 CPC……..".

16. In *Chadat Singh v. Bahadur Ram and Ors. ,* this Court

set aside the judgment of the High Court that was passed without formulating the substantial question of law. In para 8 (page 361) of the Report, the Court said :

> "A perusal of the impugned judgment passed by the High Court does not show that any substantial question of law has been formulated or that the second appeal was heard on the question, if any, so formulated. That being so, the judgment cannot be maintained."

17. The above three judgments have been relied upon in Sasikumar and Ors. v. Kunnath Chellappan Nair and Ors. and C.A. Sulaiman and Ors. v. State Bank of Travancore, Alwayee and Ors. and this Court set aside the judgments of the High Court and the matters were remanded to the High Court for disposal of second appeal in accordance with law.

18. Recently, in the case *of Municipal Committee, Hoshiarpur v. Punjab State Electricity Board and Ors. ,* the above legal position has been restated. This Court stated in paragraph 16 (page 225) of the Report as under :

> "…….The existence of a substantial question of law is a condition precedent for entertaining the second appeal; on failure to do so, the judgment cannot be maintained. The existence of a substantial question of law is a sine qua non for the exercise of jurisdiction under the provisions of Section 100 CPC……"

19. In light of the above, the appeal is allowed and impugned judgment of the High Court is set aside. The second appeal No. 528 of 2001, Bismillabi v. Umerkhan and Ors., is restored to the file of the High Court for fresh consideration in accordance with law. No order as to costs.

N.J. Appeal allowed.

BIHAR STATE HOUSING BOARD & ORS.
v.
ASHA LATA VERMA
(Civil Appeal No. 5779 of 2008)

JULY 28, 2011

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

Housing – Allotment of flat – Re-determination/re-fixation of price after delivery of possession – Allotment of flat in favour of original allottee on payment of the prescribed amount – Death of allottee – Transfer of flat in the name of allottee's wife on her furnishing the proof of payment and other documents – Subsequently permission sought by wife-respondent to transfer the flat in the name of her daughter-in-law – Issuance of notice by Housing Board to the respondent raising huge demand towards outstanding dues against the flat – Writ petition filed by the respondent – Single Judge of the High Court quashed the demand notice and directed the Board to grant permission for transfer of the flat in favour of the respondent's daughter-in-law; and ordered for Vigilance inquiry against the Board and its officials – Order upheld by the Division Bench – On appeal, held: In absence of specific complaint furnishing required details by the respondent or anyone pointing mismanagement in the affairs of the Housing Board, the Single Judge was not justified in issuing directions for Vigilance Inquiry – Order relating to the relief granted to the respondent is upheld and all other directions relating to the Board and its officials are set aside.

Appellant-State Housing Board allotted a flat in favour of original allottee. The allottee paid the entire amount to the Board within the time prescribed. The original allottee expired and his wife (respondent) applied for transfer of the flat in her name. The respondent furnished the proof of payment and other documents and the flat was

transferred in her name. Thereafter, the respondent sought transfer of the flat in her daughter-in-law's name. The Housing Board raised a huge demand towards outstanding dues against the flat. Aggrieved, the respondent filed a writ petition for quashing the demand notices and that the Board was not entitled to re-determine/re-fix the price after delivery of the possession of the flat. The Single Judge of the High Court quashed the demand notice and directed the Board to grant permission for transfer of the flat in favour of the respondent's daughter-in-law. It also directed the Additional Director General of Vigilance to institute a case against the Board and to inquire into the activities of the officials involved in the process of decision making and also to initiate enquiry into the assets and properties of such officials of the Board. The Division Bench of the High Court upheld the order passed by the Single Judge. Therefore, the appellant-Housing Board filed the instant appeal.

Partly allowing the appeal, the Court

HELD: 1.1 As early as on 07.02.2008, the Single Judge disposed of the writ petition by allowing the same and granted relief to the respondent and ordered for Vigilance inquiry against the Board and its officials. Thereafter, even though the L.P.A. filed by the Board against the order of the Single Judge was also disposed of by the Division Bench, it is not clear and understandable how the matter was heard by the Single Judge then and there. Even after perusing the report of the Vigilance Department based on the opinion of the Advocate General, the Single Judge passed further order on 03.05.2010 and again directed the Vigilance Department to submit further report. It is the grievance of the Board that inasmuch as the writ petitioner has secured an appropriate relief and in the absence of any

specific claim/complaint furnished with required details, the Single Judge was not justified in directing the Vigilance Department for roving inquiry into the affairs of the Board. [Para 9] [569-D-G]

1.2 The only question before the Single Judge was related to the demand notice issued by the Board. No doubt, the petitioner made certain statements against the officials of the Board, however, there is no specific complaint either by the writ petitioner or anyone pointing mismanagement in the affairs of the Board. If there is any specific complaint giving all the details, undoubtedly, the Court can forward it to the forum concerned for investigation and further action pursuant to the outcome of the same. Merely on the basis of certain observations in the orders of the High Court in other matters which were either set aside or modified or not applicable to the case on hand, the Single Judge was not justified in issuing directions for Vigilance inquiry. The direction also proceeds as if that the officials of the Board benefited with the huge amount without basing reliable and acceptable materials. Normally, the function of the Court is to sort out the dispute raised and only in exceptional cases that too when adequate materials are there such inquiry can be ordered but not on the basis of the general information, assumption or presumption. Apart from this, after disposal of the writ petition as early as on 07.02.2008, how the Single Judge assumed jurisdiction and issued several directions in the matter. [Para 10] [569-H; 570-A-E]

1.3 The direction relating to inquiry by the Vigilance Department and subsequent orders and directions by the Single Judge cannot be sustained. While confirming the order of the Single Judge relating to the relief granted to the respondent, all other directions relating to the Board and its officials are set aside. However, it is made clear that if there is any specific complaint with facts and figures against any of the officer of the Board, it is for the

person concerned to move the appropriate prosecuting agency and if any such complaint is made, the agency is free to proceed in accordance with law. [Para 11] [570-E-G[

Smt. Meera Mishra vs. *State of Bihar* **2001 (3) PLJR 809;** *SanjeevKumar Singh* vs. *Managing Director* **2003 (2) PLJR 513;** *Sita Devi* vs. *Bihar State Housing Board* **2007 (1) PLJR 246 – referred to.**

Case Law Reference:

2001 (3) PLJR 809	**Referred to**	**Para 7**
2003 (2) PLJR 513	**Referred to**	**Para 7**
2007 (1) PLJR 246	**Referred to**	**Para 7**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5779 of 2008.

From the Judgment & Order dated 02.07.2008 of the High Court of Judicature at Patna L.P.A No. 211 of 2008.

S. Chandra Shekhar, Manoj Kumar, Ramraghvendra, Suraj Rathi for the Appellants.

Praneet Ranjan, Pranay Ranjan, Raghwendra Tiwari for the Respondent.

The Judgment of the Court as delivered by

P. SATHASIVAM, J. 1. This appeal is directed against the final judgment and order dated 02.07.2008 passed by the High Court of Judicature at Patna in L.P.A. No. 211 of 2008 whereby the Division Bench of the High Court declined to interfere with the order dated 07.02.2008 passed by the learned single Judge of the High Court in CWJC No. 11753 of 2007 and disposed of the appeal filed by the appellants herein.

2. Brief facts:

(a) In 1972, the Bihar State Housing Board (hereinafter referred to as "the Board") floated a Scheme for construction of Flats for Middle Income Group (in short "MIG") at Hanuman Nagar, Patna. Ram Chandra Prasad Verma (since expired) - the husband of the respondent submitted his application. Subsequently, on demand being made, on 28.09.1978, he deposited a sum of Rs.6500/- for allotment of a MIG flat/house. The allotment fructified in his favour and MIG Flat No. 171, Hanuman Nagar, Patna was allotted to him vide Board's Order No. 7273 dated 23.09.1981. After execution of hire-purchase agreement, the possession was handed over to him on 28.11.1981. At that time, the total cost of the flat determined by the Board was Rs.66,382/-. The entire amount was paid to the Board within the time prescribed.

(b) On 25.03.1991, the husband of the respondent died and in the year 1992, she sought for transfer of the Flat in her name. The flat was transferred in the name of the respondent after furnishing the details of payment and other required documents to the Board vide letter No. 1459 dated 05.05.1998.

(c) Later on, the respondent decided to transfer the flat in favour of her daughter-in-law, Ms. Meera Verma and sought transfer of the same. At this time, the Board raised a demand of Rs. 3,64,419/- towards outstanding dues against the flat in question vide Letter No. 2169 dated 29.06.2006, asking the respondent to deposit the same by 31.07.2006.

(d) Against the said demand notice, the respondent filed writ petition bearing CWJC No. 11753 of 2007 before the High Court of Patna for quashing the same on the ground that the payment of the flat had already been made in 144 equal instalments and that the Board is not justified in raising such demand and not entitled to re-determination/re-fixation of the price after delivery of possession. The learned single Judge, by order dated 07.02.2008, allowed the writ petition and quashed the demand notice and directed the Board to grant permission for transfer of the flat in favour of Ms. Meera Verma,

daughter-in-law of the respondent herein. The learned single Judge also directed the Additional Director General of Vigilance, State of Bihar to institute a case against the Board and to enquire into the activities of the officials involved in the process of decision making and also to initiate enquiry into the assets and properties of such officials of the Board.

(e) Against the said order of the learned single Judge, the Board filed appeal being L.P.A. No. 211 of 2008 before the Division Bench of the High Court. The Division Bench, by impugned order dated 02.07.2008, declined to interfere with the order passed by the learned single Judge disposed of the appeal filed by the appellants herein. Aggrieved by the same, the Board preferred this appeal by way of special leave petition before this Court.

3. Heard Mr. S. Chandra Shekhar, learned counsel for the appellants-Board and Mr. Praneet Ranjan, learned counsel for the respondent.

4. Since the learned single Judge of the High Court while allowing the writ petition filed by the respondent expressed his anguish over the manner in which the Board and its officials are conducting its affairs, issued certain directions for Vigilance inquiry, the Board being aggrieved by the said directions filed an appeal before the Division Bench. The Division Bench, by impugned order dated 02.07.2008, after observing that since the Vigilance Department has already started preliminary inquiry, declined to interfere with the order passed by the learned single Judge. The Board is very much aggrieved by the directions of the learned single Judge directing Additional Director General of Vigilance, State of Bihar to institute a case against the Board and to enquire into the activities of all persons who are involved in the decision making process as well as who have been responsible in creating false accounts and raising false demands in relation to the writ petitioner, namely, Asha Lata Verma. In the same order, the learned single Judge also directed that an inquiry into the assets and

properties of such officials of the Board be carried out to see whether they have been benefited at the cost of innocent citizens.

5. Before considering the directions of the learned single Judge asking the Additional Director General of Vigilance, State of Bihar to enquire into the conduct of the officials of the Board, we have to see the grievance of the respondent. The grievance of the respondent is that even though entire money for MIG flat bought by her husband in the year 1981 was paid yet the officials of the Board acting in most arbitrary manner have raised huge demand. By various orders of the High Court, ultimately the Board transferred the ownership of the flat in question in favour of daughter-in-law of the respondent. Though the counsel appearing for the Board has stated that the Board was justified in demanding an additional amount, in the absence of such details and in view of the fact that now the Board has transferred the title of the flat in favour of the daughter-in-law of the respondent, as requested, we are not inclined to go into the claim of the Board.

6. Let us consider the directions issued by the learned single Judge in the foregoing paragraphs. The learned single Judge having noticed that the cost of the flat as determined by the Board was paid by the allotee, after the death of the original allottee, his wife – respondent herein applied for transferring the flat in her name, at this stage, the Board officials required her to furnish proof of payments and other documents which were duly furnished by her, thereafter permission was granted for transfer of the flat in her name, ultimately, on a request being made by the respondent for transferring the said flat in the name of her daughter-in-law, the officials of the Board calculated huge amount showing as outstanding and with this background, the learned single Judge examined the claim of the writ petitioner and considered the stand of the Board. It is the grievance of the Board that whether in a writ proceeding where the writ petitioner challenged the demand notice issued by the Board, the writ Court could have gone beyond the relief sought by the

petitioner and ordered an inquiry by the Vigilance Department after registering FIR? It is also the grievance of the Board that whether in a writ proceeding, the learned single Judge could have ordered registration of FIR without there being an allegation of any offence committed by anyone and whether in the absence of any specific allegation, the learned single Judge is justified in ordering a roving inquiry?

7. The learned single Judge took note of many findings and observations of the High Court in several similar cases. It is important to mention here that the learned single Judge while passing the order dated 07.02.2008 placed reliance on the following judgments, viz., *Smt. Meera Mishra vs. State of Bihar* 2001 (3) PLJR 809, *Sanjeev Kumar Singh vs. Managing Director* 2003 (2) PLJR 513 and *Sita Devi vs. Bihar State Housing Board* 2007 (1) PLJR 246. It was pointed out that these matters were either set aside or modified or not applicable to the case on hand. In those observations, the High Court has indicted the Board for its mismanaged affairs and the manner in which it was conducting its functioning. Heavily relying on those observations and findings, the learned single Judge held that the demand notice was totally unjustified and, therefore, it was quashed and the Board was directed to issue permission to the writ petitioner for transfer of the flat in favour of her daughter-in-law. Having noticed the conduct of the Board, the learned single Judge felt that its functionaries should be subjected to an investigation by the State Vigilance and accordingly a direction was issued to the Additional Director General of Vigilance, State of Bihar to institute a case against the Board and inquire into the activities of all persons who were involved in the decision making process as well as who have been responsible in creating false accounts and raising false demands. The learned single Judge also directed to enquire into the assets and properties of such officials of the Board.

8. It is seen from the additional documents filed by the Board that based on the direction of the learned single Judge, Additional Director General Vigilance had sought opinion from

the Advocate General. By letter dated 19.07.2008, after verifying the relief sought for by the writ petitioner and after analyzing the directions of the learned single Judge and the materials placed by the investigation team, the Advocate General has opined that the materials, which are collected so far during preliminary inquiry and placed on record do not constitute any prima facie criminal offence against the officials of the Board so as to warrant institution of a regular case. The said report was placed before the learned single Judge by the Superintendent of Police, Vigilance, on 03.05.2010. After going through the report of the Vigilance Department and the opinion of the Advocate General, the learned single Judge directed the Vigilance Department to spend more time on the investigation and file a report on the issue since the earlier report was not up to the expectation of the Court.

9. It is not in dispute that even as early as on 07.02.2008, the learned single Judge disposed of the writ petition by allowing the same and granted relief to the respondent and ordered for Vigilance inquiry against the Board and its officials. Thereafter, even though the L.P.A. filed by the Board against the order of the learned single Judge was also disposed of by the Division Bench, it is not clear and understandable how the matter was heard by the learned single Judge then and there. Even after perusing the report of the Vigilance Department based on the opinion of the Advocate General, the learned single Judge passed further order on 03.05.2010 and again directed the Vigilance Department to submit further report. It is the grievance of the Board that inasmuch as the writ petitioner has secured an appropriate relief and in the absence of any specific claim/complaint furnished with required details, the learned single Judge was not justified in directing the Vigilance Department for roving inquiry into the affairs of the Board.

10. It is not in dispute that the only question before the learned single Judge was related to the demand notice issued by the Board. No doubt, the petitioner therein has made certain

statements against the officials of the Board, however, there is no specific complaint either by the writ petitioner or anyone pointing mismanagement in the affairs of the Board. If there is any specific complaint giving all the details, undoubtedly, the Court can forward it to the forum concerned for investigation and further action pursuant to the outcome of the same. Merely on the basis of certain observations in the orders of the High Court in other matters which were either set aside or modified or not applicable to the case on hand, the learned single Judge was not justified in issuing directions for Vigilance inquiry. The direction also proceeds as if that the officials of the Board benefited with the huge amount without basing reliable and acceptable materials. Normally, the function of the Court is to sort out the dispute raised and only in exceptional cases that too when adequate materials are there such inquiry can be ordered but not on the basis of the general information, assumption or presumption. Apart from this, after disposal of the writ petition as early as on 07.02.2008, how the learned single Judge assumed jurisdiction and issued several directions in the matter.

11. In the light of the above discussion, we are satisfied that the direction relating to inquiry by the Vigilance Department and subsequent orders and directions by the learned single Judge cannot be sustained. While confirming the order of the learned single Judge relating to the relief granted to the respondent, all other directions relating to the Board and its officials are set aside. However, it is made clear that if there is any specific complaint with facts and figures against any of the officer of the Board, it is for the person concerned to move the appropriate prosecuting agency and if any such complaint is made, the agency is free to proceed in accordance with law.

12. The civil appeal is allowed to the extent mentioned above. There shall be no order as to costs.

N.J. Appeal Partly allowed.