RAJESH AWASTHI

v.

NAND LAL JAISWAL & ORS.

(Civil Appeal No. 7600 of 2012)

OCTOBER 19, 2012

[K.S. RADHAKRISHNAN AND DIPAK MISRA, JJ.]

Electricity Act, 2003:

s.85(5) – Selection of Chairperson of State Electricity Regulatory Commission – Selection Committee recommending to State Government two names asking the Government to ensure compliance of sub-s. (5) of s. 85 – Held: Power conferred under sub-s. (5) of s.85 of the Act has to be exercised by Selection Committee and not by the Government – The question as to whether the persons who have been named in the panel have got any financial or other interest which is likely to affect prejudicially their functions as Chairperson, is a matter which depends upon the satisfaction of Selection Committee and that satisfaction has to be arrived at before recommending any person for appointment as Chairperson to State Government – Selection Committee has given a complete go-by to that provision and entrusted that function to the State Government which is legally impermissible – State Government also, without application of mind and overlooking that statutory provision, appointed the appellant – In the instant case, there has been total non-compliance of the statutory provision by the Selection Committee which makes the decision making process vulnerable warranting interference by constitutional courts and, therefore, High Court is justified in holding that the appointment is non est in law – Constitution of India, 1950 – Art. 226.

Constitution of India, 1950:

Art. 226 – Writ of quo warranto – Held: A citizen can claim a writ of quo warranto and he stands in the position of a relater – A writ of quo warranto will lie when the appointment is made contrary to the statutory provisions – In the instant case, the question as to whether, being Vice-President of the private company, the appellant had any financial or other interest which would prejudicially affect his function as Chairperson was an issue which the Selection Committee ought to have considered – The statutory requirements as prescribed in sub-r. (3) of r. 3 of 1999 Rules were also not followed over and above, the non-compliance of sub-s. (5) of s.85 of the Act – The expression "before recommending any person" in sub s. (5) of s. 85 clearly indicates that it is a mandatory requirement to be followed by the Selection Committee before recommending the name of any person for the post of Chairperson – The expression "before" clearly indicates the intention of the Legislature – Non-compliance of sub-s. (5) of s. 85 of the Act is not a procedural violation, and vitiates the entire selection process – High Court has rightly held that the appointment of appellant was in clear violation of sub-s. (5) of s.85 of the Act and, consequently, he has no authority to hold the post of Chairperson of the Commission – Electricity Act, 2003 – s.85(5) – U.P. Electricity Regulatory Commission (Appointment and Conditions of Service of the Chairperson and Members) Rules, 1999 – r.3(3) – Locus Standi.

Consequent upon the post of Chairperson, U.P. State Electricity Regulatory Commission falling vacant, applications were invited from eligible candidates and out of 30 applicants, the Selection Committee constituted u/ s 85 of the Electricity Act, 2003, selected two persons on merit, including the appellant and forwarded their names to the State Government with an asterisk against the name of the appellant that if he was appointed, the Government would first ensure the compliance of sub-s. (5) of s.85 of the Act. The Government appointed the appellant as Chairperson of the Commission on

29.12.2008, on which date the appellant sent a letter to the State Government stating that he had resigned from his previous assignment in the private sector on 27.12.2008. The respondent, who was the General Secretary, Jal Vidyut Unit, filed a writ petition before the High Court seeking a writ of quo warranto challenging the appointment of the appellant, inter alia, on the ground that the Selection Committee did not follow the provisions of sub-s. (5) of s.85 of the Act and the appellant could not have been selected as he was working with a private sector company and had financial and other interests in that company. The High Court allowed the writ petition, issued a writ of quo warranto and quashed the appointment of the appellant declaring the same as illegal and void.

Dismissing the appeal, the Court

HELD:

(Per Radhakrishnan, J)

1.1 The Electricity Act, 2003 is an Act enacted to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalization of electricity tariff etc. [para 10] [898-E-F]

1.2 In view of s. 84 of the Electricity Act, 2003, the Chairperson shall be a person of ability, integrity and standing, who has adequate knowledge of, and has shown capacity in, dealing with problems relating to engineering, finance, commerce, economics, law or management. The Selection Committee, as per s.85, has to recommend a panel of two names for filling up the post

of the Chairperson, but before recommending any person for the purpose it has to satisfy itself that such person does not have any financial or other interest which is likely to affect prejudicially his functions as Chairperson. [para 11] [899-D-F]

Crowford vs. Spooner ***(1846) 6 Moore PC 1;*** *Attorney General v. Milne* **(1914-15) All England Report 1061;** *Nokes v. Dancaster Amalgamated Collieries Ltd.* **(1940) 3 All England Report 549 – referred to.**

1.3 The language used in sub-s. (5) of s.85 of the Act, calls for no interpretation. Words are crystal clear, unambiguous and when read literally, there is no doubt that the power conferred under sub-s. (5) of s.85 of the Act has to be exercised by the Selection Committee and the Committee alone and not by the Government. Some of the words used in sub-s. (5) of s.85 are of considerable importance, such as "before recommending", "the Selection Committee shall satisfy" and "itself". The Legislature has emphasized the fact that 'the Selection Committee itself has to satisfy', meaning thereby, it is not the satisfaction of the government what is envisaged in sub-s. (5) of s.85 of the Act, but the satisfaction of the Selection Committee. The question as to whether the persons who have been named in the panel have got any financial or other interest which is likely to affect prejudicially their functions as Chairperson, is a matter which depends upon the satisfaction of the Selection Committee and that satisfaction has to be arrived at before recommending any person for appointment as Chairperson to the State Government. The government could exercise its powers only after getting the recommendations of the Selection Committee after due compliance of sub-s. (5) of s.85 of the Act. In the instant case, the Selection Committee has given a complete go-by to that provision and entrusted that function to the

State Government which is legally impermissible. The State Government also, without application of mind and overlooking that statutory provision, appointed the appellant. [para 15] [902-F-H; 903-A-D]

2.1 It is true that suitability of a candidate for appointment does not fall within the realm of writ of quo warranto. However, a writ of quo warranto will lie when the appointment is made contrary to the statutory provisions. In the instant case, the question which the Selection Committee ought to have considered, was as to whether, being Vice-President of the private company, the appellant had any financial or other interest which would prejudicially affect his function as chairperson. When the Selection Committee was constituted, the 1999 Rules were in force and the 2008 Rules came into force only on 1.1.2009. By virtue of s.85 of the Act, the then existing Rules 1999 were also safeguarded. Rule 3 of the 1999 Rules deals with the selection process for the post of Chairperson, which is almost *pari-materia* to the 2008 Rules. The statutory requirements as prescribed in sub-r. (3) of r. 3 of 1999 Rules were also not followed in the instant case, over and above, the non-compliance of sub-s. (5) of s.85 of the Act. [para 16, 18-20] [903-E-F; 904-C-E-G; 905-A]

Mor Modern Coop. Transport Coop. Transport Society Ltd. v. Govt. of Haryana **2002 (1) Suppl. SCR 87 = (2002) 6 SCC 269;** *B. Srinivasa Reddy v. Karnataka Urban Water Supply & Drainage Board Employees Associaition* **2006 (5) Suppl. SCR 462 = (2006) 11 SCC 731; and** *Hari Bansh Lal v. Sahodar Prasad Maht and others* **2010 (10) SCR 561 = (2010) 9 SCC 655 – relied on**

R. v. Speyer **(1916) 1 K.B. 595 – referred to**

2.2 The expression "before recommending any person" in sub s. (5) of s. 85 clearly indicates that it is a

mandatory requirement to be followed by the Selection Committee before recommending the name of any person for the post of Chairperson. The expression "before" clearly indicates the intention of the Legislature. Non-compliance of sub-s. (5) of s. 85 of the Act is not a procedural violation, as it affects the very substratum of the appointment. Non-compliance of mandatory requirements results in nullification of the process of selection unless it is shown that performance of that requirement was impossible or it could be statutorily waived. [para 21] [905-D-G]

State Bank of Travancore v. Mohammadv 1982 (1) SCR 338 = **(1981) 4 SCC 82 – relied on**

2.3 This Court is of the view that the appointment of the first respondent is in clear violation of sub-s. (5) of s.85 of the Act. Consequently, he has no authority to hold the post of Chairperson of the U.P. State Electricity Regulatory Commission; and the High Court has rightly held so. [para 22] [906-C]

University of Mysore & Anr. v. C.D. Govinda Rao & Anr. **(1964) 4 SCR 575,** *Mahesh Chandra Gupta vs. Union of India* **2009 (10) SCR 921 = (2009) 8 SCC 273 - cited.**

Per Dipak Misra, J (Concurring):

1. A citizen can claim a writ of quo warranto and he stands in the position of a relater. He need not have any special interest or personal interest. The real test is to see whether the person holding the office is authorised to hold the same as per law. A writ of quo warranto can be issued when there is violation of statutory provisions/ rules. Delay and laches do not constitute any impediment to deal with the lis on merits. [para 6] [908-F-G; 909-A]

The University of Mysore v. C.D. Govinda Rao and

another **1964 SCR 575 = 1965 AIR 491;** *High Court of Gujarat v. Gujarat Kishan Mazdoor Panchayat* **2003 (2) SCR 799 = 2003 (4) SCC 712;** *B.R. Kapur v. State of Tamil Nadu and another* **2001 (3) Suppl. SCR 191 = 2001 AIR 3435;** *Dr. Kashinath G. Jalmi and another v. The Speaker and others* **1993 (2) SCR 820 =1993 AIR 1873;** *Retd. Armed Forces Medical Association and others v. Union of India and others* **(2006) 11 SCC 731 (I);** *Centre for PIL and another v. Union of India and another* **2011 (4) SCR 445 = 2011 (4) SCC 1;** *R.K. Jain v. Union of India* **1993 (3) SCR 802 = 1993 (4) SCC 119 – referred to.**

2.1. State Electricity Regulatory Commission is an expert body and in such a situation the selection has to be absolutely in accord with the mandatory procedure as enshrined u/s 85 of the Act. Section 85(5) of the Act has inherent inviolability and every word used therein has to be understood in the context regard being had to the legislative intendment. There has to be concentrated focus on the purpose of legislation and the text of the language, for any deviation is likely to bring in hazardous results. [para 18 and 21] [915-C-D; 916-C]

Utkal Contractors Joinery Pvt. Ltd. and others etc. v. State of Orissa and others **1987 AIR 1454 = 1987 (3) SCR 317;** *Atma Ram Mittal v. Ishwar Singh Punia* **1988 (2) Suppl. SCR 528 = 1988 (4) SCC 284;** *Popatlal Shah v. State of Madras* **1953 SCR 677 : AIR 1953 SC 274;** *Sangeeta Singh v. Union of India and others* **2005 (2) Suppl. SCR 823 = 2005 (7) SCC 484;** *Uttar Pradesh Power Corporation Limited v. National Thermal Power Corporation Limited and others* **(2011) 12 SCC 400;** *W.B. Electricity Regulatory Commission v. CESC Ltd.* **2002 (8) SCC 715; and** *ITC Limited v. State of Uttar Pradesh and others* **2011 (7) SCR 66 = 2011 (7) SCC 493 – referred to.**

Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg ***A G*** **1975 AC 591- referred to.**

2.2 In the present context, it has become necessitous to dwell upon the role of the Selection Committee. Section 85(1) of the Act provides for constitution of Selection Committee to select Members of the State Commission. The said Committee, as the composition would show, is a high powered committee, which has been authorised to adjudge all aspects. In the case at hand the issue in singularity pertains to total non-compliance of the statutory command as envisaged u/s 85(5). Section 85(5) employs the term "recommendation", (which means "suggest as fit for employment). [para 22 and 23] [916-D-E, G]

A. Pandurangam Rao v. State of Andhra Pradesh and others **1976 (1 SCR 620 =1975 AIR 1922 – relied on**

2.3 In the instant case, on a perusal of the report of the Selection Committee it is manifest that the Committee has not recorded its satisfaction with regard to ingredients contained in s. 85(5) of the Act and left it to the total discretion of the State Government. The Selection Committee is legally obliged to record that it has been satisfied that the candidate does not have any financial or other interest which is likely to affect prejudicially his functions as Chairman or Member, as the case may be. The said satisfaction has to be reached before recommending any person for appointment. The abdication of said power tantamounts to breach of Rule of Law because it not only gives a go by to the warrant of law but also creates a dent in the basic index of law. Therefore, the selection is vitiated and it can never come within the realm of curability, for there has been statutory non-compliance from the very inception of selection. The Selection Committee has failed to obey the mandate of the law as a consequence of which the appellant has been selected and, therefore, in the ultimate eventuate the selection becomes unsustainable. There has been total

non-compliance of the statutory provision by the Selection Committee which makes the decision making process vulnerable warranting interference by the constitutional courts and, therefore, the High Court is justified in holding that the appointment is *non est* in law. [para 10, 23, 24 and 27] [910-B-C; 917-B-D; 918-A, F]

Chief Constable of the North Wales Police v. Evans **(1982) 1 W.L.R. 1155 – referred to.**

Case Law Reference:

(As per Radhakrishnan, J)

(1964) 4 SCR 575	**cited**	**para 6**
2009 (10) SCR 921	**cited**	**para 6**
2010 (10) SCR 561	**relied on**	**para 6**
2006 (5) Suppl. SCR 462	**relied on**	**para 6**
(1846) 6 Moore PC	**referred to**	**para 14**
(1914-15) All England Report 1061	**referred to**	**para 14**
(1940) 3 All England Report 549	**referred to**	**para 14**
2002 (1) Suppl. SCR 87	**relied on**	**para 16**
(1916) 1 K.B. 595	**referred to**	**para 20**
1982 (1) SCR 338	**relied on**	**para 21**
(As per Dipak Misra, J.)		
2001 (3) Suppl. SCR 191	**referred to**	**para 4**
1964 SCR 575	**referred to**	**para 5**
1993 (2) SCR 820	**referred to**	**para 6**

2003 (2) SCR 799	**referred to**	**para 7**
(2006) 11 SCC 731 (I)	**referred to**	**para 7**
2011 (4) SCR 445	**referred to**	**para 8**
1993 (3) SCR 802	**referred to**	**para 8**
1987 (3) SCR 317	**referred to**	**para 14**
1988 (2) Suppl. SCR 528	**referred to**	**para 15**
1953 SCR 677	**referred to**	**para 16**
1975 AC 591	**referred to**	**para 16**
2005 (2) Suppl. SCR 823	**referred to**	**para 17**
(2011) 12 SCC 400	**referred to**	**para 19**
2002 (8) SCC 715	**referred to**	**para 19**
2011 (7) SCR 66	**referred to**	**para 20**
1976 (1) SCR 620	**relied on**	**para 23**
(1982) 1 W.L.R. 1155	**referred to**	**para 26**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7600 of 2012.

From the Judgment and Order dated 10.01.2012 of the High Court of Judicature at Allahabad, Bench at Lucknow in Writ Peition No. 1428 (M/B) of 2011.

L. Nageswara Rao, Ravindra Shrivastava, Gaurav Bhatia, AAG, Shail Kr. Dwivedi, Gunna Venkateswara Rao, Sanjay Kumar Visen, Sathosh Krishnan, Prashant Bhushan. Devvrat, C.D. Singh, Ayesha Chaudhry, Prashant Chaudhary, Anoop Jain and Anshuman Srivastava for the Appearing Parties.

The Judgments of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. Leave granted.

2. We are, in this case, concerned with the question whether the High Court was justified in issuing a writ of *quo warranto* holding that the appellant has no authority in continuing as Chairperson of U.P. State Electricity Regulatory Commission (for short 'the Commission') on the ground that the Selection Committee had not complied with sub-section (5) of Section 85 of the Electricity Act, 2003 (for short 'the Act').

3. The post of the Chairperson of the Commission fell vacant on 21.10.2008. The government of Uttar Pradesh, in exercise of its powers conferred under Section 85(1) of the Act, constituted a Selection Committee vide notification dated 22.12.2008 consisting of three members headed by a retired judge of the High Court and two other members i.e. Chief Secretary of the State of U.P. and Chairman of the Central Electricity Commission for finalizing the selection of the Chairperson. Applications were invited intimating various authorities including Ministry of GOI, CAG, CEA, all the Secretaries of Power working in different States in the country, CBDT, PSUs power sectors etc. Thirty persons applied for the post including the appellant. The meeting of the Selection Committee was held on 26.12.2008 and Selection Committee selected two persons on merit, namely, the appellant and one Mr. Amit Kumar Asthana. Panel of two names was forwarded by the Selection Committee to the government of U.P. with an asterisk against the name of the appellant stating that if he was appointed, the government would ensure first that the provisions of sub-section (5) of Section 85 of the Act would be complied with. The government appointed the appellant as the Chairman of the Commission on 29.12.2008. The appellant on that date sent a letter to the State Government stating that he had resigned from his previous assignments on 27.12.2008 and severed all his links with the private sector as required under

Section 85 of the Act.

4. The first respondent herein who was the General Secretary, Jal Vidyut Unit, filed a writ petition before the High Court of Allahabad, Lucknow Bench seeking a writ of *quo warranto,* challenging the appointment of the appellant on various grounds. Apart from the contention that the Selection Committee had not followed the provisions contained in sub-section (5) of Section 85 of the Act, it was also alleged that the appellant could not have been selected since he was working as the Joint President of the J.P. Power Ventures Ltd at the time of selection, hence he had financial and other interests in that company which would prejudicially affect his functions as the Chairperson of the Commission. Further, it was also pointed out that the procedure laid down in U.P. Electricity Regulatory Commission (Appointment and Conditions of Service of the Chairperson and Members) Rules, 1999 (for short 'the 1999 Rules') were also not complied with before initiating the selection process. The appellant questioned the *locus standi* of the first respondent and contended that he was not an aspirant for the post and that the writ petition was filed after a period of more than two years after his assumption of charge as Chairperson of the Commission. Referring to the minutes of the Selection Committee dated 26.12.2008, it was pointed out that the selection was validly made and the appellant was ranked first in panel on merit and sub-section (5) of Section 85 was also complied with. Further, it was stated that the appellant had no financial or other interests in J.P. Power Venture Ltd. so as to prejudicially affect his functions as Chairperson. In any view, it was pointed out that he had resigned from that post on 27.12.2008.

5. The High Court after considering the rival contentions came to the conclusion that the Selection Committee had failed to follow the provisions of sub-section (5) of Section 85 of the Act, hence the appointment was vitiated and the appellant had

no authority to hold the post of Chairperson. Further, it was also found that the Selection Committee had no power to delegate the powers conferred on it under Section 85(5) of the Act to the State Government. The court also held that the first respondent had sufficient *locus standi* to move the writ petition and the delay in approaching the court was not a ground, since a person who had been appointed contrary to a statutory provisions had no legal right to hold on to that post. The High Court, therefore, allowed the writ petition, issued a writ of quo warranto and quashed the appointment of the appellant declaring the same as illegal and void.

6. Shri L. Nageswara Rao, learned senior counsel appearing for the appellant submitted that the High Court has committed an error in holding that the appointment of the appellant was in violation of sub-section (5) of Section 85 of the Act. Learned senior counsel took us through the minutes of the Committee meeting held on 26.12.2008 and pointed out that the Selection Committee, after examination of the bio-data of 30 candidates, prepared a panel in which the appellant's name was shown as first in the order of merit. The Selection Committee, according to learned counsel, was very much aware of the fact that the appellant was the joint Vice President of J.P. Power Venture Ltd. and hence had put an asterisk against his name and reminded the State Government that if he was to be appointed, the provisions of sub-section (5) of Section 85 of the Act be first ensured. Learned senior counsel, therefore, submitted that there was substantial compliance of that provision and in any view it is only a curable defect, procedural in nature and a writ of quo warranto be not issued, being a discretionary remedy. Referring to the judgment of this Court in *University of Mysore & Anr. v. C.D. Govinda Rao & Anr.* (1964) 4 SCR 575, learned senior counsel submitted that the suitability arrived at by the Committee is not a matter amenable to proceedings under quo warranto. Learned senior

counsel also referred to the judgments of this Court in *Mahesh Chandra Gupta vs. Union of India* (2009) 8 SCC 273, *Hari Bansh Lal v. Sahodar Prasad Maht and others* (2010) 9 SCC 655.

7. Learned senior counsel submitted that, in any view of the matter, writ of *quo warranto* will not lie where the breach in question is curable, hence procedural in nature. Assuming there is non-compliance of sub-section (5) of Section 85 of the Act, the matter can be relegated back to Selection Committee for due compliance of that provision. Learned senior counsel also submitted that the writ of quo warranto is a discretionary remedy and hence such a course can be adopted by this Court. Reference was also made to the judgment of this Court in *B. Srinivasa Reddy v. Karnataka Urban Water Supply & Drainage Board Employees Associaition* (2006) 11 SCC 731.

8. Mr. Prashant Bhushan, learned counsel appearing for the first respondent submitted that the High Court has rightly issued the writ of quo warranto after having found that the appointment was made in gross violation of sub-section (5) of Section 85 of the Act. Learned counsel submitted that even the procedure laid down in 1999 Rules was also not complied with. Learned counsel referring to the bio-data of the applicants for the post of Chairperson tried to make a comparison of the merit of other candidates and submitted that many of the candidates who had applied were far superior to the appellant. Learned counsel also submitted that the appellant was appointed due to extraneous reasons and the merit was not properly assessed, leave aside, the non-compliance of sub-section (5) of Section 85 of the Act and 1999 Rules. Learned counsel also pointed out that since the appellant was Joint President of the J.P. Power Venture Ltd. - a private company at the time of selection, he was disqualified in occupying the post of Chairperson since he had financial and other interest which would prejudicially affect his functions as Chairperson. Mr.

Ravindra Shrivastava, learned senior counsel appearing for the state of U.P. submitted that the appointment of the appellant was in violation of sub-section(5) of Section 85 of the Act and the 1999 Rules and the State is taking steps to conduct fresh selection after complying with the provisions of the Act and 2008 Rules, which is in force.

9. We heard learned counsel appearing on either side. The *locus standi* of the first respondent or the delay in approaching the writ court seeking a writ of quo warranto was not seriously questioned or urged before us. The entire argument centered around the question whether there was due compliance of the provisions of sub-section (5) of Section 85 of the Act. Section 85 is given for ready reference:

> **"SECTION 85**: **Constitution of Selection Committee to select Member of the State Commission:**
>
> (1) The State Government shall, for the purposes of selecting the Members of the State Commission, constitute a Selection Committee consisting of –
>
> (a) a person who has been a Judge of the High Court… . Chairperson;
>
> (b) the Chief Secretary of the concerned State… .Member;
>
> (c) the Chairperson of the Authority or the Chairperson of the Central Commission … … … … .. Member:
>
> Provided that nothing contained in this section shall apply to the appointment of a person as the Chairperson who is or has been a Judge of the High Court.
>
> (2) The State Government shall, within one month from the date of occurrence of any vacancy by reason of death, resignation or removal of the Chairperson or a Member and six months before the superannuation or end of tenure

> of the Chairperson or Member, make a reference to the Selection Committee for filling up of the vacancy.
>
> (3) The Selection Committee shall finalise the selection of the Chairperson and Members within three month from the date on which the reference is made to it.
>
> (4) The Selection Committee shall recommend a panel of two names for every vacancy referred to it.
>
> (5) Before recommending any person for appointment as the Chairperson or other Member of the State Commission, the Selection Committee shall satisfy itself that such person does not have any financial or other interest which is likely to affect prejudicially his functions as Chairperson or Member, as the case may be.
>
> (6) No appointment of Chairperson or other Member shall be invalid merely by reason of any vacancy in the Selection Committee."

10. The Electricity Act, 2003 is an Act enacted to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalization of electricity tariff etc. The Act also envisages the constitution of Central Electricity Authority, Regulatory Commission and establishment of Appellate Tribunal etc. The State Electricity Regulatory Commission (for short 'the State Commission') is constituted under sub-section (1) of Section 82 of the Act. Sub-section (5) of Section 85 of the Act states that the Chairperson and Members of the State Commission shall be appointed by the State Government on the recommendation of a Selection Committee as per Section 85 of the Act. Section 84 of the Act deals with the qualifications for appointment of Chairperson and

Members of the State Commission which reads as follows:

"84. **Qualifications for appointment of Chairperson and Members of State Commission:**

(1) The Chairperson and the Members of the State Commission shall be persons of ability, integrity and standing who have adequate knowledge of, and have shown capacity in, dealing with problems relating to engineering, finance, commerce, economics, law or management.

(2) Notwithstanding anything contained in sub-section (1), the State Government may appoint any person as the Chairperson from amongst persons who is, or has been, a Judge of a High Court."

11. The Chairperson, therefore, shall be a person of ability, integrity and standing and has adequate knowledge of, and has shown capacity in, dealing with problems relating to engineering, finance, commerce, economics, law or management. The Selection Committee, as per Section 85, has to recommend a panel of two names for filling up the post of the Chairperson, but before recommending any person for appointment as the Chairperson, the Selection Committee has to satisfy itself that such person does have any financial or other interest which is likely to affect prejudicially his functions as Chairperson. The State Government under Section 82(5) of the Act has to appoint the Chairperson on the recommendation of the Selection Committee.

12. We have gone through the minutes of the Selection Committee meeting dated 26.12.2008 and also the bio-data of the applicants for the post of Chairperson of the State Commission. Reference to the bio data of some of the candidates is useful, hence given below:

Bio-data of applicants for the post of Chairperson U.P.E.R.C.

S. No. and name	Date of Birth	Educational Qualification			Retd. From	Post Holdings	Experience
		Academic	Professional	specialization			
1. S.K. Shukla	01-01-1950		BE (Mech. Engg.	ME (Prod. Engg.)		Director (Technical) Tehri Hydro Devpt. Corporation	33 years in T.H.D.C.
3. Anil Kumar Asthana	29-07-1952		B. Tech. (Electrical)	M.Tech (Power App. & Systems)		Chief Engr. System planning & Project appraisal CEA	33 Years in CEA Transmission opration
18. U.C. Misra	31-07-1949	B.E. Electri-cal Engg.)				Chairman Bhakra Beas Management Board	4.5 Years UPSEB, 15 Years NHPC, 16 Years PGCIL, 2 Years Chairman BBMB
20.	19-01-	Civil &				Joint President	3 Years

Rajesh Awasthi	1950	Municipal Engg. Graduate				J.P. Power Ventures	Central Designs Organization Government of Maharashtra, 7.5 Years Mining & Allied Machinery Co. Ltd., W.B., 24.5 Years NTPC, Joint President J.P. Power Ventures Ltd. from 17.11.08
21. S.M. Agarwal	15-06-1949	BSc.(Elec. Engg.)	M.Sc. (Elec Engg.)			D.G. (Trg. &HRD)UPPCL	36 Years UPSEB / UPPCL
24. Dr. Man Mohan	01-08-1946	B.E. (Elect.)	M.E. (Power System)	Ph.D. (Commercial Availability Index of Power Plant)		Member (Technical) Gujarat ERC	29.5 Years in CEA, 3 Years NTPC, 2 Years as Engr, Grade-I, Govt. of Libya, 4 Years in Gujrat ERC.

13. Illustrative bio-data of some of the candidates would indicate their academic qualifications, professional experience including the area of specialization. Appellant's qualification, experience and the fact that he was the Joint President of J.P. Power Ventures Ltd., was also indicated. The Selection Committee has put an asterisk against his name and then left it to the government to ensure the compliance of sub-section (5) of Section 85 of the Act.

14. We will examine the meaning and content of Section 85(5) and whether it calls for any interpretation. Lord Brougham in *Crowford v. Spooner* (1846) 6 Moore PC 1 has stated that "one has to take the words as the Legislature has given them, and to take the meaning which the words given naturally imply, unless where the construction of those words is, either by the preamble or by the context of the words in question controlled or altered". Viscount Haldane in *Attorney General v. Milne* (1914-15) All England Report 1061 has held that the language used "has a natural meaning, we cannot depart from that meaning unless, reading the statute as a whole, the context directs us to do so". Viscount Simon, L.C. in *Nokes v. Dancaster Amalgamated Collieries Ltd.* (1940) 3 All England Report 549 has held "the golden rule is that the words of a statute must prima facie be given their ordinary meaning". Above principles have been repeated umpteen times by the House of Lords and this Court and hence, calls for no further elucidation.

15. We are clear in our mind about the language used in sub-section (5) of Section 85 of the Act, which calls for no interpretation. Words are crystal clear, unambiguous and when read literally, we have no doubt that the powers conferred under sub-section (5) of Section 85 of the Act has to be exercised by the Selection Committee and the Committee alone and not by the Government. Some of the words used in sub-section (5) of Section 85 are of considerable importance, hence, we give some emphasis to those words such as "<u>before recommending</u>", "<u>the Selection Committee shall satisfy</u>" and

"itself". The Legislature has emphasized the fact that 'the Selection Committee itself has to satisfy', meaning thereby, it is not the satisfaction of the government what is envisaged in sub-section (5) of Section 85 of the Act, but the satisfaction of the Selection Committee. The question as to whether the persons who have been named in the panel have got any financial or other interest which is likely to affect prejudicially his functions as Chairperson, is a matter which depends upon the satisfaction of the Selection Committee and that satisfaction has to be arrived at before recommending any person for appointment as Chairperson to the State Government. The government could exercise its powers only after getting the recommendations of the Selection Committee after due compliance of sub-section (5) of Section 85 of the Act. The Selection Committee has given a complete go-by to that provision and entrusted that function to the State Government which is legally impermissible. The State Government also, without application of mind and overlooking that statutory provision, appointed the appellant.

16. A writ of quo warranto will lie when the appointment is made contrary to the statutory provisions. This Court in *Mor Modern Coop. Transport Coop. Transport Society Ltd. v. Govt. of Haryana* (2002) 6 SCC 269 held that a writ of quo warranto can be issued when appointment is contrary to the statutory provisions. In *B. Srinivasa Reddy* (supra), this Court has reiterated the legal position that the jurisdiction of the High Court to issue a writ of quo warranto is limited to one which can only be issued if the appointment is contrary to the statutory rules. The said position has been reiterated by this Court in *Hari Bans Lal* (supra) wherein this Court has held that for the issuance of writ of quo warranto, the High Court has to satisfy that the appointment is contrary to the statutory rules.

17. We are of the view that the principle laid down by this Court in the above-mentioned judgment squarely applies to the facts of this case. The appointment of the first respondent, in our considered view, is in clear violation of sub-section (5) of

Section 85 of the Act. Consequently, he has no authority to hold the post of Chairperson of the U.P. State Electricity Regulatory Commission.

18. We express no opinion with regard to the contentions raised by the first respondent that the appellant had links with J.P. Power Ventures Ltd. According to the first respondent, the appellant had approved the higher tariff right to favour M/s J.P. Power Ventures Ltd., vide his order dated 27.8.2010. We have already found that the question as to whether, being Vice President of the J.P. Power, the appellant had any financial or other interest which would prejudicially affect his function as chairperson was an issue which the Selection Committee ought to have considered. We may point out that when the Selection Committee was constituted, 1999 Rules were in force and the present 2008 Rules came into force only on 1.1.2009. By virtue of Section 85 of the Act, the then existing Rules 1999 were also safeguarded. Section 3 of the 1999 Rules deals with the selection process for the post of Chairperson, which is almost *pari-materia* to the 2008 Rules. Sub-section (3) of Rule 3 is of some relevance, hence we extract the same:

> "3 (3) The convener shall sand requisition for the selection of any member for the aforesaid posts to different departments of State Governments and Central Govt., Public and Private Undertakings, Industrial Enterprises and to Organisation engaged in generation, distribution and supply of electricity, financial institutions, educational institutions and to the High Court and shall also invite applications directly from eligible persons by notifying the vacancy in the Government Gazette. The eligible persons may send their applications directly or through an officer or authority under whom he is for the time being working."

19. The above-mentioned statutory requirements were also not followed in the instant case, over and above, the non-compliance of sub-section (5) of Section 85 of the Act.

20. We fully agree with the learned senior counsel for the

appellant that suitability of a candidate for appointment does not fall within the realm of writ of quo warranto and there cannot be any quarrel with that legal proposition. Learned senior counsel also submitted that, assuming that the Selection Committee had not discharged its functions under sub-section (5) of Section 85 of the Act, it was only an omission which could be cured by giving a direction to the Selection Committee to comply with the requirement of sub-section (5) of Section 85 of the Act. Learned senior counsel submitted that since it is a curable irregularity, a writ of quo warranto be not issued since issuing of writ of quo warranto is within the discretion of the Court. Learned senior counsel made reference to the judgment of Court in *R. v. Speyer* (1916) 1 K.B. 595.

21. We are of the view that non-compliance of sub-section (5) of Section 85 of the Act is not a procedural violation, as it affects the very substratum of the appointment, being a mandatory requirement to be complied with, by the Selection Committee before recommending a person for the post of Chairperson. We are of the view that non-compliance of sub-section (5) of Section 85 of the Act will vitiate the entire selection process since it is intended to be followed before making the recommendation to the State Government. Non-compliance of mandatory requirements results in nullification of the process of selection unless it is shown that performance of that requirement was impossible or it could be statutorily waived. The expression "before recommending any person" clearly indicates that it is a mandatory requirement to be followed by the Selection Committee before recommending the name of any person for the post of Chairperson. The expression "before" clearly indicates the intention of the Legislature. The meaning of the expression "before" came for consideration before this Court in *State Bank of Travancore v. Mohammad* (1981) 4 SCC 82 where the words "any debt due at and before the commencement of this Act to any banking company" as occurring in section 4(1) of the Kerala Agriculturist Debt Relief Act, 1970, were construed by the Supreme Court to mean "any debt due at and before the

commencement of this Act". We, therefore, find it difficult to accept the contention of learned senior counsel that this, being a procedural provision and non-compliance of sub-section (5) of Section 85 of the Act, is a defect curable by sending the recommendation back to the Selection Committee for compliance of sub-section (5) of Section 85 of the Act.

22. We are, therefore, in agreement with the High Court that the appointment of the appellant was in clear violation of sub-section (5) of Section 85 of the Act and, consequently, he has no authority to hold the post of the Chairperson of the Commission and the High Court has rightly held so. This appeal, therefore, lacks merits and the same is dismissed with no order as to costs.

DIPAK MISRA, J. 1. I have my respectful concurrence with the conclusion and the views expressed by my learned Brother Radhakrishnan, J. However, regard being had to the importance of the matter, I propose to record my views in addition.

2. As is evincible from the factual exposition, a writ of quo warranto has been issued by the High Court of Allahabad, Bench at Lucknow declaring that the appellant is not entitled to continue as the Chairperson of U.P. State Electricity Regulatory Commission (for short 'the State Commission') on the foundation that there had been total non-compliance of the statutory provision enshrined under sub-section (5) of Section 85 of the Electricity Act, 2003 (for brevity 'the Act').

3. As the facts have been stated in detail by my learned Brother, it is not necessary to repeat the same. Suffice it to state that the pleas of locus standi and delay and laches have not been accepted and a finding has been returned by the High Court that the selection of the appellant was in flagrant violation of the provisions of the Act and, therefore, his continuance in law is impermissible.

4. Before I proceed to deal with the justifiability of the order passed by the High Court, it is thought apposite to refer to

certain authorities that fundamentally deal with the concept of writ of quo warranto. In *B.R. Kapur v. State of Tamil Nadu and another*[1], in the concurring opinion Brijesh Kumar,J., while dealing with the concept of writ of quo warranto, has referred to a passage from Words and Phrases Permanent Edition, Volume 35, at page 647, which is reproduced below: -

> "The writ of "quo warranto" is not a substitute for mandamus or injunction nor for an appeal or writ of error, and is not to be used to prevent an improper exercise of power lawfully possessed, and its purpose is solely to prevent an officer or corporation or persons purporting to act as such from usurping a power which they do not have. State ex inf. *Mc. Kittrick v. Murphy,* 148 SW 2d 527, 529, 530, 347 Mo. 484.
>
> (emphasis supplied)
>
> Information in nature of "quo warranto" does not command performance of official functions by any officer to whom it may run, since it is not directed to officer as such, but to person holding office or exercising franchise, and not for purpose of dictating or prescribing official duties, but only to ascertain whether he is rightfully entitled to exercise functions claimed. *State Ex. Inf. Walsh v. Thactcher,* 102 SW 2d 937, 938, 340 Mo. 865."
>
> (Emphasis supplied)

5. In *The University of Mysore v. C.D. Govinda Rao and another*[2], while dealing with the nature of the writ of quo warranto, Gajendragadkar,J. has stated thus: -

> "Broadly stated, the quo warranto proceeding affords a judicial enquiry in which any person holding an independent substantive public office, or franchise, or liberty, is called upon to show by what right he holds the said office, franchise or liberty; if the inquiry leads to the finding that the holder of the office has no valid title to it, the issue of the writ of quo warranto ousts him from that office. In other words, the procedure of quo warranto confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions; it also protects a citizen from being deprived of public office to which he may have a right. It would thus be seen that if these proceedings are adopted subject to the conditions recognised in that behalf, they tend to protect the public from usurpers of public office; in some cases, persons not entitled to public office may be allowed to occupy them and to continue to hold them as a result of the connivance of the executive or with its active help, and in such cases, if the jurisdiction of the courts to issue writ of quo warranto is properly invoked, the usurper can be ousted and the person entitled to the post allowed to occupy it. It is thus clear that before a citizen can claim a writ of quo warranto, he must satisfy the court, inter alia, that the office in question is a public office and is held by usurper without legal authority, and that necessarily leads to the enquiry as to whether the appointment of the said alleged usurper has been made in accordance with law or not."

1. AIR 2001 SC 3435.
2. AIR 196 SC 491.

6. From the aforesaid pronouncements it is graphically clear that a citizen can claim a writ of quo warranto and he stands in the position of a relater. He need not have any special interest or personal interest. The real test is to see whether the person holding the office is authorised to hold the same as per law. Delay and laches do not constitute any impediment to deal with the lis on merits and it has been so stated in *Dr. Kashinath G. Jalmi and another v. The Speaker and others*[3].

7. In *High Court of Gujarat v. Gujarat Kishan Mazdoor Panchayat*[4] it has been laid down by this Court that a writ of quo warranto can be issued when there is violation of statutory

3. AIR 1993 SC 1873.
4. (2003) 4 SCC 712.

provisions/rules. The said principle has been reiterated in Retd. *Armed Forces Medical Association and others v. Union of India and others*[5].

8. In the case of *Centre for PIL and another v. Union of India and another*[6] a three-Judge Bench, after referring to the decision in *R.K. Jain v. Union of India,*[7] has opined thus: -

> "Even in R.K. Jain case, this Court observed vide para 73 that judicial review is concerned with whether the incumbent possessed qualifications for the appointment and the manner in which the appointment came to be made or whether the procedure adopted was fair, just and reasonable. We reiterate that the Government is not accountable to the courts for the choice made but the Government is accountable to the courts in respect of the lawfulness/legality of its decisions when impugned under the judicial review jurisdiction."

It is also worth noting that in the said case a view has been expressed that the judicial determination can be confined to the integrity of the decision making process in terms of the statutory provisions.

9. Regard being had to the aforesaid conception of quo warranto I may proceed to scrutinize the statutory provisions. Section 84 of the Act deals with qualifications for appointment of Chairperson and Members of State Commission. Section 85 provides for constitution of Selection Committee to select Members of the State Commission. Sub-sections (4) and (5) of Section 85 which are relevant for the present purpose read as follows: -

> "(4) The Selection Committee shall recommend a panel of two names for every vacancy referred to it.
>
> (5) Before recommending any person for appointment as the Chairperson or other Member of the State Commission, the Selection Committee shall satisfy itself that such person does not have any financial or other interest which is likely to affect prejudicially his functions as such Chairperson or Member, as the case may be."

5. (2006) 11 SCC 731 (I).

6. (2011) 4 SCC 1.

7. (1993) 4 SCC 119.

10. On a perusal of the report of the Selection Committee it is manifest that the Committee has not recorded its satisfaction with regard to ingredients contained in Section 85(5) of the Act and left it to the total discretion of the State Government.

11. On a scanning of the anatomy of Section 85(5) it is limpid that the Selection Committee before recommending any person for appointment as a Chairperson or a Member of the State Commission shall satisfy itself that the person does not have any financial or other interest which is likely to affect prejudicially his functions as such Chairperson or Member, as the case may be. As the proceedings of the Selection Committee would reveal, it had not recorded its satisfaction prior to recommending the names of the two candidates. It is vivid that the Selection Committee abandoned its function and simply sent the file to the State Government. It has been argued with vehemence by Mr. Nageswara Rao, learned senior counsel for the appellant that when two names were chosen from amongst certain persons it has to be inferred that there was recommendation after due satisfaction as per statutory requirement.

12. On a plain reading of the provision it is clear as crystal that the Selection Committee is obliged in law to satisfy itself with regard to various aspects as has been stipulated under sub-section (5) of Section 85 of the Act. It is perceptible that the said exercise has not been undertaken. It is worthy to note that the Act has a purpose. It has been enacted to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply

of electricity to all areas, rationalization of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto. Ergo, the provisions engrafted in the Act have their sacrosanctity.

13. Presently, it is requisite to survey some of the statutory provisions. Section 82 of the Act provides for constitution of the State Commission. Section 2(64) defines the State Commission. It is as follows: -

> "(64) "State Commission" means the State Electricity Regulatory Commission constituted under sub-section (1) of section 82 and includes a Joint Commission constituted under sub-section (1) of section 83;"

Section 86 deals with the functions of the State Commission. Keeping in view the functions attributed to the State Commission by the legislature I think it condign to reproduce the said provision in entirety: -

> **"86. Functions of State Commission.** – (1) The State Commission shall discharge the following functions, namely: -
>
> (a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:
>
> Provided that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;
>
> (b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other

> sources through agreements for purchase of power for distribution and supply within the State;
>
> (c) facilitate intra-State transmission and wheeling of electricity;
>
> (d) issue licences to persons seeking to act as transmission licensees, distribution licensees and electricity traders with respect to their operations within the State;
>
> (e) promote cogeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee;
>
> (f) adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration;
>
> (g) levy fee for the purposes of this Act;
>
> (h) specify State Grid Code consistent with the Grid Code specified under clause (h) of sub-section (1) of section 79;
>
> (i) specify or enforce standards with respect to quality, continuity and reliability of service by licensees;
>
> (j) fix the trading margin in the intra-State trading of electricity, if considered, necessary;
>
> (k) discharge such other functions as may be assigned to it under this Act.
>
> (2) The State Commission shall advise the State Government on all or any of the following matters, namely: -
>
> (i) promotion of competition, efficiency and economy

in activities of the electricity industry;

(ii) promotion of investment in electricity industry;

(iii) reorganization and restructuring of electricity industry in the State;

(iv) matters concerning generation, transmission, distribution and trading of electricity or any other matter referred to the State Commission by that Government;

(3) The State Commission shall ensure transparency while exercising its powers and discharging its functions.

(4) In discharge of its functions, the State Commission shall be guided by the National Electricity Policy, National Electricity Plan and Tariff Policy published under section 3."

14. On an x-ray of the Preamble of the Act and the important functions ascribed to the State Commission I have no scintilla of doubt that the selection of Chairperson or a member is extremely important, more so, when there is a statutory prescription about the manner in which the Selection Committee is required to act. I may state here that though the language is plain, unambiguous, clear and leads to a singular construction, yet I think it apt to reproduce a passage from *Utkal Contractors Joinery Pvt. Ltd. and others etc. v. State of Orissa and others*[8] wherein Chinnappa Reddy, J. has observed thus:-

"A statute is best understood if we know the reason for it. The reason for a statute is the safest guide to its interpretation. The words of a statute take their colour from the reason for it. How do we discover the reason for a statute? There are external and internal aids. The external aids are Statement of Objects and Reasons when the Bill is presented to Parliament, the reports of Committees which preceded the Bill and the reports of Parliamentary

8. AIR 1987 SC 1454.

Committees. Occasional excursions into the debates of Parliament are permitted. Internal aids are the preamble, the scheme and the provisions of the Act. *Having discovered the reason for the statute and so having set the sail to the wind, the interpreter may proceed ahead. No provision in the statute and no word of the statute may be construed in isolation. Every provision and every word must be looked at generally before any provision or word is attempted to be construed. The setting and the pattern are important*."

(emphasis supplied)

15. In *Atma Ram Mittal v. Ishwar Singh Punia*[9], Sabyasachi Mukherji, J. (as his Lordship then was) emphasizing on the intention of the legislature, stated thus: -

"Blackstone tells us that the fairest and most rational method to interpret the will of the legislator is by exploring his intentions at the time when the law was made, by signs most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law."

16. In the said case reference was made to the decision in *Popatlal Shah v. State of Madras*[10] wherein it has been laid down that each word, phrase or sentence is to be construed in the light of purpose of the Act itself. A reference was made to the observations of Lord Reid in *Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A G*[11] wherein the Law Lord has observed as under: -

"We often say that we are looking for the intention of the Parliament, but this is not quite accurate. We are seeking the meaning of the words which Parliament used. We are seeking not what Parliament meant but the true meaning

9. (1988) 4 SCC 284.

10. 1953 SCR 677: AIR 1953SC 274.

11. 1975 AC 591.

of what they said."

17. In *Sangeeta Singh v. Union of India and others*[12] emphasis was laid on the language employed in the statute and in that context it has been opined as follows: -

> "5. It is well-settled principle in law that the court cannot read anything into a statutory provision or a stipulated condition which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. Similar is the position for conditions stipulated in advertisements."

18. I have referred to the aforesaid pronouncements only to highlight that Section 85(5) of the Act has inherent inviolability and every word used therein has to be understood in the context regard being had to the legislative intendment. There has to be concentrated focus on the purpose of legislation and the text of the language, for any deviation is likely to bring in hazardous results.

19. At this juncture I may profitably refer to *Uttar Pradesh Power Corporation Limited v. National Thermal Power Corporation Limited and others*[13] wherein, after referring to the decision in *W.B. Electricity Regulatory Commission v. CESC Ltd.*[14], this Court has stated thus: -

> "12. Looking to the observations made by this Court to the effect that the Central Commission constituted under Section 3 of the Act is an expert body which has been entrusted with the task of determination of tariff and as determination of tariff involves highly technical procedure requiring not only working knowledge of law but also of engineering, finance, commerce, economics and management, this Court was firmly of the view that the issues with regard to determination of tariff should be left

12. (2005) 7 SCC 484.

13. (2005) 7 SCC 484.

14. (2002) 8 SCC 715.

> to the said expert body and ordinarily the High Court and even this Court should not interfere with the determination of tariff."

20. Be it noted, emphasis has also been laid on functioning of regulatory bodies in *ITC Limited v. State of Uttar Pradesh and others*[15].

21. I have referred to the aforesaid authorities singularly for the purpose that regulatory commission is an expert body and in such a situation the selection has to be absolutely in accord with the mandatory procedure as enshrined under Section 85 of the Act.

22. In the present context, it has become necessitous to dwell upon the role of the Selection Committee. Section 85(1) of the Act provides for constitution of Selection Committee to select Members of the State Commission. The said Committee, as the composition would show, is a high powered committee, which has been authorised to adjudge all aspects. I may hasten to add that I am not at all delving into the sphere of suitability of a candidate or the eligibility, for in the case at hand the issue in singularity pertains to total non-compliance of the statutory command as envisaged under Section 85(5).

23. It is seemly to state the aforementioned provision employs the term "recommendation". While dealing with the concept of recommendation, a three-Judge Bench of this Court in *A. Pandurangam Rao v. State of Andhra Pradesh and others*[16] has stated that the literal meaning of the word "recommend" is quite simple and it means "suggest as fit for employment". In the present case the Selection Committee as per the provision was obliged to satisfy itself when the legislature has used the word "satisfied". It has mandated the Committee to perform an affirmative act. There has to be recording of reasons indicating satisfaction, may be a

15. (2011) 7 SCC 493.

16. AIR 1975 SC 1922

reasonable one. Absence of recording of satisfaction is contrary to the mandate/command of the law and that makes the decision sensitively susceptible. It has to be borne in mind that in view of the power conferred on the State Commission, responsibility of selection has been conferred on a high powered Selection Committee. The Selection Committee is legally obliged to record that it has been satisfied that the candidate does not have any financial or other interest which is likely to affect prejudicially his functions as Chairman or Member, as the case may be. The said satisfaction has to be reached before recommending any person for appointment. It would not be an exaggeration to state that the abdication of said power tantamounts to breach of Rule of Law because it not only gives a go by to the warrant of law but also creates a dent in the basic index of law. Therefore, the selection is vitiated and it can never come within the realm of curability, for there has been statutory non-compliance from the very inception of selection.

24. It is necessary to state here that in many an enactment the legislature has created regulatory bodies. No one can be oblivious of the fact that in a global economy the trust on the regulators has been accentuated. Credibility of governance to a great extent depends on the functioning of such regulatory bodies and, therefore, their selection has to be in total consonance with the statutory provisions. The same inspires public confidence and helps in systematic growth of economy. Trust in such institutions helps in progress and distrust corrodes it like an incurable malignancy. Progress is achieved when there is good governance and good governance depends on how law is implemented. Keeping in view the objects and reasons and preamble of the Act and the functions of the Commission, it can be stated with certitude that no latitude can be given and laxity can have no allowance when there is total violation of the statutory provision pertaining to selection. It has been said long back "a society is well governed when the people who are in the helm of affairs obey the command of the

law". But, in the case at hand the Selection Committee has failed to obey the mandate of the law as a consequence of which the appellant has been selected and, therefore, in the ultimate eventuate the selection becomes unsustainable.

25. It is manifest in the selection of the appellant that there is absence of "intellectual objectivity" in the decision making process. It is to be kept in mind a constructive intellect brings in good rationale and reflects conscious exercise of conferred power. A selection process of this nature has to reflect a combined effect of intellect and industry. It is because when there is a combination of the two, the recommendations as used in the provision not only serves the purpose of a "lamp in the study" but also as a "light house" which is shining, clear and transparent.

26. I emphasize on the decision making process because in such a case there is exercise of power of judicial review. In *Chief Constable of the North Wales Police v. Evans,*[17] Lord Brightman observed thus: -

> "....Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made...."

27. In view of the aforesaid analysis, I conclude that there has been total non-compliance of the statutory provision by the Selection Committee which makes the decision making process vulnerable warranting interference by the constitutional courts and, therefore, the High Court is justified in holding that the appointment is non est in law.

28. Consequently, the appeal, being sans substratum, stands dismissed without any order as to costs.

R.P. Appeal dismissed.

17. (1982) 1 W.L.R. 1155.

NATIONAL COUNCIL FOR TEACHER EDUCATION AND ANOTHER
v.
VENUS PUBLIC EDUCATION SOCIETY AND OTHERS
(Civil Appeal No. 7749 of 2012)

NOVEMBER 1, 2012

[K.S. RADHAKRISHNAN AND DIPAK MISRA, JJ.]

Educational institution – Seeking recognition from National Council for Teacher Education (NCTE) – For academic session 2010-11 – Council asking the institution to remove deficiencies – The institution moving the Court for direction to grant recognition – High Court directing to consider the case for grant of recognition – NCTE issuing 'letter of intent' to the institution – The institution, instead of complying with the same, moved court for grant of recognition for academic session 2011-12 – High Court directing to consider the case – NCTE issuing order of recognition for the academic session 2012-13 with direction to comply with post-recognition conditions and directing to give admission to students only after obtaining affiliation from the examining body – The institution giving admission to students for academic session 2011-12 and approaching the court for direction to treat the recognition granted for the academic session 2012-13 as recognition for academic Session 2011-12 – High Court directing to grant recognition for academic session 2011-12 with annual intake of 50 students – On appeal, held: Direction of the High Court is contrary to the provisions of law and interpretation of 1993 Act and 2009 Regulations – The recognition granted for academic session 2012-13 could not have been directed to be retrospectively operative as certain formalities remained to be complied with – The institution could not have given admission without recognition and affiliation with examining body – NCTE also

should have acted in promptitude and not to create a feeling that educational institutions are harassed – National Council for Teacher Education Act, 1993 – s. 14 – National Council for Teacher Education (Recognition, Norms and Procedure) Regulations, 2009 – Regulations 5(5), 7(9), 7(11), 8(1) and 8(12).

The respondent-Society made an application in October 2009 to the Western Regional Committee (WRC) of National Council for Teacher Education (NCTE) for grant of recognition for the purpose of conducting D.El.Ed. course from the academic session 2010-11. WRC asked the Society to remove certain deficiencies. On the basis of the report of the inspection of the Society, WRC refused recognition. The appellate authority, directed inspection by NCTE headquarters. As per the order, inspection was conducted. After the submission of the report, appellate authority allowed the appeal, reversing the order of WRC and directing to process the case on merits.

The society filed writ petition No. 4541/2011 seeking direction for NCTE to grant recognition for the academic session 2010-11. During pendency of the petition, WRC intended to conduct further inspection. High Court quashed the decision of inspection by WRC and directed to consider the case, for grant of recognition in accordance with order passed by appellate authority. As the order passed by High Court was not complied with, the society filed another writ petition. High Court observed that the society was at liberty to file a contempt petition.

WRC then issued 'letter of intent' under Clause 7(9) of National Council for Teacher Education (Recognition, Norms and Procedure) Regulations, 2009. In the meantime the society filed contempt petition for non-compliance of order passed in writ petition No. 4541/2011.

The High Court directed to consider the case of the Society.

During pendency of the contempt petition, the Society filed still another writ petition for direction for grant of recognition for academic session 2011-12. WRC on 27-1-2011 issued an order of recognition of the session 2012-13 and directed the Society to comply with all post-recognition conditions enumerated under clause 8(11) to 8(16) of 2009 Regulations. It was stated that the Society to make admission only after it obtained affiliation from examining body. The Society again filed writ petition for direction to grant the recognition from academic session 2011-12 or to treat the recognition dated 27-10-12 as the recognition for the session 2011-12. The High Court decided the writ petition alongwith the contempt petition and held that the Society was entitled to recognition for academic session 2011-12 with an annual intake of 50 students. Hence the present appeal.

The appellant contended that direction of the High Court in the impugned judgment is legally impermissible as the Society had not fulfilled the NCTE norms and also the recognition could not have been made effective retrospectively.

The Society contended that after the order of the High Court, it was obligatory on the part of WRC to confer recognition; and that the Society was compelled to admit students under the circumstances of the case and therefore the students admitted for the session 2011-12 should be allowed to undertake the examinations.

Allowing the appeal, the Court

HELD: 1.1 In view of Section 14 of National Council for Teacher Education Act, 1998 and Regulations 5(5), 7(9), 7(11), 8(1) and 8(12) of National Council for Teacher

Education (Recognition, Norms and Procedure) Regulations, 2009, it is vivid that the university or examining body is required to issue letter of affiliation after formal recognition under sub-regulation (11) of Regulation 7 of the 2009 Regulations is issued. It is also clear that certain obligations are to be carried out by the institution after letter of intent is received. The letter of intent was communicated to the institution as well as to the affiliating body with a request that the process of appointment of qualified staff as per the policy of the State Government or University Grants Commission or University may be initiated and the institution may be provided all assistance to ensure that the staff or faculty is appointed as per the norms of the NCTE within two months. It was obligatory on the part of the institution to submit the list of the faculty, as approved by the affiliating body, to the Regional Committee. Thus understood, the letter of intent laid down the conditions which were to be fulfilled by the institution. The said letter was issued on 22.9.2011 and the formal order of recognition was issued on 27.10.2011. Clause 6 of the same, clearly stipulates that the institution shall make admission only after it obtains its affiliation from the examining body in terms of clause 8(12) of the 2009 Regulations. [Para 26] [942-E-H; 943-A-B]

1.2 The High Court has erred in misconstruing its earlier order passed in Writ Petition 4541 of 2011. True it is, there was some delay and, therefore, the High Court was moved in another writ petition wherein it had granted liberty to file a contempt petition expecting that the directions in the earlier order would be duly complied with. Thereafter, letter of intent was issued, but the institution instead of complying with the same, moved the High Court for grant of recognition. The High Court, in the initial order had directed to consider the case of the respondent-institution for grant of recognition without

further inspection. Issuance of letter of intent was necessary prior to grant of formal letter of recognition. However, the High Court being moved, directed for issuance of formal letter of recognition which was issued with a postulate that the institution shall only grant admission after obtaining affiliation from the examining body in terms of clause 8(12) of 2009 Regulations. The order of recognition clearly mentioned that it was meant for the academic session 2012-13. [Para 33] [947-D-G]

1.3 The High Court could not have directed the recognition to be retrospectively operative because certain formalities remained to be complied with. The High Court did not keep itself alive to the conceptual difference between "letter of intent" and "formal recognition". Though there was delay, but that could not have enabled the High Court to issue a writ for treating the recognition to be effective for the year 2011-12 with intake of fifty students. That apart, the respondent-institution had not obtained affiliation from the university. Therefore, the direction of the High Court is contrary to the provisions of law and the interpretation of the Act and the Regulations. [Para 34] [947-H; 948-A-C]

1.4 Without recognition from the NCTE and affiliation from the university/examining body, the educational institution cannot admit the students. An educational institution is expected to be aware of the law. The students who take admission are not young in age. They are graduates. They are expected to enquire whether the institution has recognition and affiliation. The institution had given admission in a nonchalant manner. The institution betrayed the trust of the students and the students, in a way, atrophied their intelligence. [Para 35] [948-D-F; 949-A]

Chairman, Bhartia Education Society and Anr. v. State ofHimachal Pradesh and Ors. **(2011) 4 SCC 527: 2011**

(2) SCR 461;*Adarsh Shiksha Mahavidyalaya v. Subhsh Rahangdale and Ors.***2012 (2) SCC 425;** *Andhra Kesari Educational Society v.Director of School Education* **(1989) 1 SCC 392: 1988 (3) Suppl. SCR 893;** *A.P. Christian Medical Educational Society v. Govt. of A.P.* **(1986) 2 SCC 667: 1986 (2) SCR 749 ;** *N.M.Nageshwaramma v. State of A.P.* **1986 Supp SCC 166;** *State of Maharashtra v Vikas Sahebrao Roundale* **(1992) 4 SCC 435:1992 (3) SCR 792 ;** *St. John's Teachers Training Institute (for Women) v. State of T.N.* **(1993) 3 SCC 595: 1993 (3) SCR 985 – relied on.**

Ahmedabad St. Xavier's College Society v. State of Gujarat **(1974)1 SCC 717: 1975 (1) SCR 173;** *Shri Morvi Sarvajanik KelavniMandal Sachalit MSKM BEd College v. National Council forTeachers' Education and Ors.* **(2012) 2 SCC 16: 2011 (13)SCR 555;** *State of T.N. v. St. Joseph Teachers TrainingInstitute* **(1991) 3 SCC 87: 1991 (2) SCR 231 – referred to.**

2. NCTE should have acted in quite promptitude, for a statutory authority which is conferred with the power, is required to act within the parameters of law and the directions given by the court and further not to create a feeling among the educational institutions that they are harassed. Its actions neither should show arbitrariness nor should it reflect any indulgence. Objectivity, reliability and trust are to be the motto of the NCTE and the committees working under it. [Para 36] [949-C-E]

Case Law Reference:

1975 (1) SCR 173	Referred to	Para 3
1988 (3) Suppl. SCR 893	Referred to	Para 3
2011 (2) SCR 461	Relied on	Para 27
2011 (13) SCR 555	Referred to	Para 28

1986 Supp SCC 166	**Referred to**	**Para 28**
1991 (2) SCR 231	**Referred to**	**Para 28**
1992 (3) SCR 792	**Relied on**	**Para 28**
2012 (2) SCC 425	**Relied on**	**Para 29**
1986 (2) SCR 749	**Relied on**	**Para 31**
1986 Supp SCC 166	**Relied on**	**Para 31**
1993 (3) SCR 985	**Relied on**	**Para 31**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7749 of 2012.

From the Judgment & Order dated 7.12.2011 of the High Court of Madhya Pradesh at Gwalior in Writ Petition (C) No. 7664 of 2011.

Amitesh Kumar, Ravi Kant, Preeti Kumari, Chandra Shakher, Navin Prakash for the Appellants.

Ranjit Kumar, Varun Thakur, Brajesh Pandey, Varinder Kumar Sharma, Vibha Datta Makhija for the Respondents.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted.

2. Acquisition of knowledge and obtaining of necessary training for imparting education have their immense signification. As C. Simmons would like to put it "The secret of successful teaching is to teach accurately, thoroughly, and earnestly" and one may fruitfully add that accuracy and thoroughness can be achieved by cultivated education, matured training and keen intellect. That is why teaching becomes a teacher's passion and religion. A good teacher, in a way, represents country's orderly civilization. A teacher is expected to kindle interest in the taught by method of investigation,

incessant implantation of knowledge and demonstration of experience that is replete with intellectual pragmatism. A student who is keen on getting training has to keep in mind the concept of reason, conception of logic and sanctity of rationality. He is expected to distance himself from habitual disobedience and unfettered feeling, for a civilized society which is governed by Rule of Law does not countenance such characteristics. The aspiration to become a teacher after obtaining training requires these qualities as they constitute the base on which the superstructure is built.

3. Importance of teachers and their training, significance of qualified teachers in schools and colleges and their centripodal role in building of the nation have been highlighted in *Ahmedabad St. Xavier's College Society v. State of Gujarat*[1], *Andhra Kesari Educational Society v. Director of School Education*[2], *State of Maharashtra v Vikas Sahebrao Roundale*[3], *St. John's Teachers Training Institute (for Women) v. State of T.N.*[4] and *N.M. Nageshwaramma v. State of A.P.*[5], and recently reiterated in *Adarsh Shiksha Mahavidyalaya and others v. Subhash Rahangdale and others*[6].

4. It is to be clearly stated that an institution that is engaged or interested in getting involved in imparting a course for training has to obey the command of law in letter and spirit. There cannot be any deviation. But, unfortunately, some of the institutions flagrantly violate the norms with adamantine audacity and seek indulgence of the court either in the name of mercy or sympathy for the students or financial constraint of the institution or they have been inappropriately treated by the statutory regulatory

1. (1974) 1 SCC 717.
2. (1989) 1 SCC 392.
3. (1992) 4 SCC 435.
4. (1993) 3 SCC 595.
5. 1986 Supp SCC 166.
6. (2012) 2 SCC 425.

bodies. None of these grounds justify deviation. The case at hand graphically depicts deviations but the High Court putting the blame on the statutory authority has granted relief to the respondent-institution which is impermissible.

5. The factual exposition of the present litigation demonstrably reflects the combat between the truth and falsehood, battle between justice and injustice, the contestation between the accord and discord, the collision between fairness and manipulation, the scuffle betwixt the sacrosanctity of the majesty of law and its abuses and the clash between the mandated principles and invocation of sympathy. Such a controversy emerges because majesty, sanctity and purity of law have been corroded and truth, however, relative it may be in the mundane world, has its own command and the same has been deliberately guillotined forgetting the fundamental fact that none can afford to build a castle in Spain in the realm of truth. It is worthy to note that justice in its connotative expanse engulfs the liberalism of an ocean, the magnanimity of the Sun, the sternness of a mountain, the simplicity of a saint, the austerity of a Spartan and the humility of a river. The concept of justice has to remain embedded in spite of adversities. It should remain unshaken, unterrified, unperturbed and loyal to the Rule of Law. In the case at hand, as a maladroit effort has been made to give an indecent burial to the command of law and pave the path of injustice, the same has to be dealt with sternly sans sympathy.

6. Presently to the factual narration. The respondent-society submitted an application on 27.10.2009 to the Western Regional Committee (for short "the WRC") of National Council for Teacher Education (for brevity "the NCTE") for grant of recognition for the purpose of conducting D.El.Ed. course from the academic session 2010-11. On receipt of the said application the WRC, after scrutiny of the same, issued a communication dated 10.2.2010 to remove certain deficiencies, namely, the institution had submitted the lease

deed issued by Gwalior Development Authority in favour of the Society for a period of thirty years but the same was not certified by the competent authority; that it had submitted copy of the building plan approved by Nagar Nigam, Gwalior meant for school purposes and not for the college; that the land use certificate issued by the competent Government authority was not submitted; that the building completion certification from the competent Government authority was not filed; that the encumbrance certificate from the competent Government authority was not submitted; and that necessary undertaking in the prescribed format was not enclosed. The respondent institution was advised to remove the deficiencies within a span of sixty days. It was also required to submit a reply pertaining to the deficiencies pointed out by the WRC. The respondent submitted its reply on 20.3.2010 and the same was considered in the 133rd meeting of the WRC held on 20-21.04.2010. On 11.5.2010 the WRC informed the respondent that it would conduct an inspection for D.El.Ed. course for the academic session 2010-11 on a date between 21.5.2010 to 30.5.2010. The visiting team carried out the inspection and submitted its report to the WRC which, in its 136th meeting held on 5-7.6.2010, decided to issue a show cause notice under Section 14(3)(b) of the National Council for Teacher Education Act, 1993 (for brevity 'the 1993 Act') and, accordingly, a show cause notice was issued on 19.6.2010 requiring the respondent to file its representation within twenty one days. The reply to show cause notice was received on 7.7.2010 and the WRC considered the same and took the decision on 20-21.7.2010 to refuse recognition on the ground that the approved building plan submitted by the college showed a square building with ground and two floors, whereas the videograph showed the building was rectangular and having ground and one floor. The said decision was communicated vide order dated 3.8.2010 whereunder the WRC refused recognition in exercise of power under Section 14(3)(b) of the 1993 Act.

7. As the factual matrix further gets unfolded, the

respondent preferred an appeal on 29.9.2010 under Section 18 of the 1993 Act and the appellate authority by order dated 10.11.2010 opined as follows: -

"**AND WHEREAS** Shri Vivek Gupta, President, Venus Public Education Society, Gwalior, Madhya Pradesh presented the case of the appellant institution on 20.10.2010. In the appeal and during personal presentation, it was submitted that there was not at all any mismatch between the approved plan and videography. The building with Ground and two floors was constructed in the same shape according to the building plan which was also proved by the completion certificate. The similarity was also proved with the relevant clip of the videography which was submitted wherein the building was visible with ground and two floors with the visiting team. The position of the existing building with ground plus two floors was also proved by the photographs of the building taken from different angles. The ground taken by the WRC that the building was square and rectangular was an after thought which was totally unlawful. The WRC did not communicate such type of objection earlier. The building was more than sufficient and fulfills the norms and standards of the NCTE.

AND WHEREAS the Council noted that the VT report did not indicate the dimensions of the rooms as well as the total built up area available for the proposed course. The report also did not contain an essential data sheet in which the particulars with regard to land and built up area details are to be filled. It merely stated the infrastructural facilities were as per the NCTE norms. Further the photographs annexed with the appeal do not confirm to the VCD available in the WRC's file. In view of this the Council came to the conclusion that an inspection of the institution may be conducted by the NCTE Hqrs. for taking a final decision in the appeal."

On the basis of the aforesaid order a team was constituted which submitted the report and eventually, after perusal of the report, the NCTE, on 11.3.2011, passed the following order: -

"**AND WHEREAS** the Council noting that the report of the visiting team from the Hqrs. of the Council has clarified the position, came to the conclusion that the appeal deserves to be accepted and the order of the WRC reversed with a direction to process the case further on merits.

AND WHEREAS after perusal of documents, memorandum of appeal, affidavit and after considering oral arguments advanced during the hearing, the Council reached the conclusion that there was adequate ground to accept the appeal and reverse the WRC's order dated 03.08.2010 with the direction to the WRC to process the case further on merits. Accordingly, the appeal was accepted and the order of the WRC dated 03.08.2010 reversed."

8. After the appeal was disposed of, the WRC decided to constitute a visiting team. In the meantime the respondent preferred Writ Petition No. 4541 of 2011 for issue of writ of mandamus to the NCTE to grant recognition for the academic session 2010-11 for D.El.Ed. course. During the pendency of the writ petition, on 22.7.2011 the WRC decided to conduct further inspection between 22.7.2011 to 30.7.2011. The inspecting team visited the respondent institution on 27.7.2011 and submitted its report to the WRC. The report indicated that a functionary of the Society told the team that as the matter was subjudice, the WRC had no authority to inspect. However, the team went to the institution and took photographs of the building. When the matter came up before the High Court on 28.7.2011, it, after narrating the chronological events and the order passed by the appellate authority, issued the following directions: -

"(i) That the decision of the Respondent No. 1 for inspection of the petitioner institution vide letter dated 22.7.2011 is hereby quashed;

(ii) The respondent is directed to consider the case of the petitioner for grant of recognition in accordance with the order passed by Appellate Authority dated 11.3.2011.

(iii) The case of the petitioner shall be considered for grant of recognition within a period of two weeks from the date of receipt of a copy of this order."

9. As the order was not complied with within the stipulated time, the respondent preferred Writ Petition No. 5776 of 2011. The High Court disposed of the same by observing that the grievance of the petitioner was that in spite of direction issued by the court in the earlier writ petition, the respondents had yet not complied with the direction and for the aforesaid purpose, the petitioner was at liberty to file a contempt petition. The High Court further observed that it was expected that the respondents shall obey the direction issued by the court in W.P. C No. 4541/ 2011.

10. As is perceptible, the WRC in its 154th meeting held on 11-12.9.2011 considered the matter and vide order dated 22.9.2011 issued a "letter of intent" for grant of recognition for D.El.Ed. course under clause 7(9) of National Council for Teacher Education (Recognition, Norms and Procedure) Regulations, 2009 (for short "2009 Regulations"). The relevant part of the said letter of intent reads as follows: -

"3. Before grant of formal recognition under Regulation 7(11) of the NCTE Regulations 2009, is considered, you are requested to submit the following:

(i) The institution shall initiate the process of appointments of qualified staff as per Policy of State Government or University Grants

Commission or University and ensure that the staff or faculty is appointed as per the NCTE norms within two months. (in case of M.Ed. six months). The Institute shall submit the list of faculty as approved by the affiliating body to the Western Regional Committee. An affidavit on the enclosed format of Rs.100/- Non-Judicial Stamp Paper from each faculty member appointed are to be submitted.

(ii) The institute shall launch its own website covering interalia, the details of the institution, its location, name of the course applied for with intake, availability of physical infrastructural (land, building, office, class rooms and other facilities/amenities), infrastructural facilities (laboratory, photographs, Permanent Account Number (PAN) or Unique Identity Number (UIN) of the teacher educator whenever issued by the NCTE), for information of all concerned. *The institution shall also make available on its website information relating to*:

i. Sanctioned programmes along with annual intake in the institution.

j. *Name of faculty and staff in full as mentioned in school certificate along with their qualification, scale of pay and photograph.*

k. Name of faculty Members who left or joined during the last quarter.

l. Names of students admitted during the current session alongwith qualification, percentage of marks in the qualifying examination and in the entrance test, if any, date of admission etc.

m. Fee charged from students

n. Facilities added during the last summer.

o. *Number of books in the library, journals subscribed to and addition, if any, in the last quarter.*

p. The institution shall be free to post additional relevant information, if it so desires.

(iii) The institution shall submit FDR of Rs.500 Lakhs towards Endowment Fund and Rs.300 Lakhs towards reserve fund in the joint name of authorised representative of the management and the Regional Director, WRC, NCTE and the same shall be maintained perpetually by way of renewal of FDR's at the intervals of every five years. The FDRs submitted by the institution are returned herewith for conversion/renewal (this time to be added in case FDRs are not in the office).

4. Any wrong or incomplete information on website shall render the institution liable for withdrawal of recognition, under the Act of NCTE.

5. *Admission should not be made until formal recognition order under Clause 7(11) of the NCTE (Recognition, Norms and Procedures) Regulation, 2009 is issued by Western Regional Committee, NCTE and affiliation is obtained from the University/examining body concerned.*

6. You are advised to comply the above requirement before formal recognition is considered under regulation 7(11) of NCTE (Recognition, Norms and Procedures) Regulation, 2009 under section 14(3)(a) of the Act."

[emphasis supplied]

11. Be it noted, in the meantime the respondent had filed Contempt Petition No. 677 of 2011 for non-compliance of order dated 28.7.2011 passed in Writ Petition No. 4541 of 2011. On 28.9.2011 a submission was put forth that as the court had decided to grant recognition to the respondent-institution, an interim direction should be issued to admit the students for D.Ed. course because after 30.9.2011 it would not be able to admit the students. The High Court, dealing with the said submission, opined as follows: -

"In our opinion, no such interim direction can be issued in favour of the petitioner vide clause 3 of the letter, the petitioner has been directed to submit certain information and documents and that has to be verified by the NCTE. Even apart, in a contempt matter, by way of interim direction, a relief could not be granted. However, we observe that if the petitioner is eligible, the authority shall consider the case of the petitioner on 30th September, 2011."

12. It is worthy to note that the WRC was to file the reply within three weeks. During the pendency of the contempt petition, the respondent preferred Writ Petition No. 6674 of 2011 for grant of recognition for academic session 2011-12 for D.El.Ed. course. The High Court, vide order dated 30.9.2011, directed the Regional Director of the WRC to remain present and explain as to why the decision had not been taken in regard to grant of recognition of the respondent institution. As is perceived, the WRC vide order dated 27.10.2011 issued an order of recognition. The relevant portion of the same is reproduced hereinbelow: -

"4. .....*the institution is required to comply with all post-recognition conditions enumerated from clause 8 (11) to Clause 8(16) of NCTE (Recognition, Norms and Procedures) Regulations 2009*.

6. *The institution shall make admission only after it*

obtains affiliation from the examining body in terms of clause 8(12) of the NCTE (Recognition Norms and Procedures) Regulation, 2009 for the academic session .....

7. The institution/permission will operate for 2012-13 only if the requirement of 200 teaching days in the session is fulfilled as per calendar of the university/affiliating body."

[emphasis supplied]

13. Being grieved by the aforesaid order the respondent preferred Writ Petition No. 7664 of 2011 with a prayer to command the NCTE to grant recognition from the academic session 2011-12 for D.El.Ed. course or to treat the recognition dated 27.10.2011 for the academic session 2011-12 instead of 2012-13. The High Court dealt with the said writ petition along with the contempt petition and, after referring to its earlier order passed in Writ Petition No. 4541 of 2011, the chronology of events, the issue of "letter of intent" and eventual grant of recognition, concluded as under: -

"8. In this view of the matter, in our opinion, the petitioner is entitled to have recognition for the academic session 2011-12 also because the case of the petitioner was pending before the Western Regional Committee and in pursuance to the directions of the Court dated 28.07.2010 passed in writ petition No. 4541/2010, it was obligatory on the part of the respondents to include the claim of the petitioner for recognition from the academic session 2011-12 also. In our opinion, the respondents have deliberately not included the same due to pendency of the Contempt Proceeding and other proceedings."

14. After so stating the Bench disposed of the contempt petition and the writ petition by directing that in the recognition order dated 27.10.2011 it shall be added that the institution was entitled for recognition for the D.El.Ed. course with an annual

intake of 50 students for academic session 2011-12 also. The said order is the subject-matter of assail in this appeal.

15. The thrust of the matter is whether the High Court by the impugned order passed on 7.12.2011 could have issued a direction as has been stated hereinabove.

16. It is submitted by Mr. Amitesh Kumar, learned counsel for the appellants that the order of recognition passed in favour of the respondent was conditional and there was a clear stipulation that admission should not be made until formal recognition under clause 7(11) of the 2009 regulations is issued by the WRC and affiliation is obtained from the University/examining body. That apart, the order of recognition dated 27.10.2011 clearly laid a postulate that the institution shall make admission only after it obtains affiliation from the examining body in terms of clause 8(12) of 2009 Regulations for the academic session and, therefore, the High Court has fallen into error by holding that it was obligatory on the part of the NCTE to include the aim of the respondent for recognition for the academic session 2011-12 as the same was not deliberately done. The learned counsel would submit the direction given by the High Court that the institution was entitled for recognition with annual intake of 50 students for academic session of 2011-12 also is legally impermissible inasmuch as the institution had not fulfilled the NCTE norms and further the recognition could not have been made retrospectively effective.

17. Mr. Varun Thakur, learned counsel appearing for the respondents, per contra, would contend that the WRC had acted mala fide in constituting the inspection team and after the High Court quashed the same it was obligatory on its part to confer recognition without any delay. It is canvassed by him that the appellant under the circumstances was compelled to admit the students and, therefore, the students who have been admitted for the academic session 2010-11 should be allowed to undertake the examinations in respect of added intake seats as directed by the High Court. It is vehemently proponed by him

that the educational institutions cannot remain at the total mercy of the WRC and such an attitude on the part of the WRC is likely to lead to anarchy and a state of uncertainty which would corrode the financial backbone of the educational societies that are devoted to imparting education. It is also urged by him that such a situation would smother the legitimate expectations of the students.

18. Mrs. Vibha Datta Makhija, learned counsel appearing for respondent No. 2, M.P. Board of Secondary Education, has contended that it is obligatory on the part of the Board to verify whether an educational institution has obtained recognition from the NCTE and affiliation from the Board and then only the said institution can admit the students, but in the case at hand as the respondent No. 1 has admitted the students without recognition and affiliation, they cannot be permitted to appear in the examination and conferment of such privilege would destroy the fundamental fibre of the education system.

19. At this juncture, we may fruitfully refer to Section 14 of the 1993 Act which deals with recognition of institutions offering course or training in teacher education. It reads as follows: -

> ***"14. Recognition of institutions offering course or training in teacher education.*** – (1) Every institution offering or intending to offer a course or training in teacher education on or after the appointed day, may, for grant of recognition under this Act, make an application to the Regional Committee concerned in such form and in such manner as may be determined by regulations:
>
> Provided that an institution offering a course or training in teacher education immediately before the appointed day, shall be entitled to continue such course or training for a period of six months, if it has made an application for recognition within the said period and until the disposal of the application by the Regional Committee.

> (2) The fee to be paid along with the application under sub-section (1) shall be such as may be prescribed.
>
> (3) On receipt of an application by the Regional Committee from any institution under sub-section (1), and after obtaining from the institution concerned such other particulars as it may consider necessary, it shall –
>
> (a) if it is satisfied that such institution has adequate financial resources, accommodation, library, qualified staff, laboratory and that it fulfills such other conditions required for proper functioning of the institution for a course or training in teacher education, as may be determined by regulations, pass an order granting recognition to such institution, subject to such conditions as may be determined by regulations; or
>
> (b) if it is of the opinion that such institution does not fulfill the requirements laid down in sub-clause (a), pass an order refusing recognition to such institution for reasons to be recorded in writing:
>
> Provided that before passing an order under sub-clause (b), the Regional Committee shall provide a reasonable opportunity to the institution concerned for making a written representation.
>
> (4) Every order granting or refusing recognition to an institution for a course or training in teacher education under sub-section (3) shall be published in the Official Gazette and communicated in writing for appropriate action to such institution and to the concerned examining body, the local authority or the State Government and the Central Government.
>
> (5) Every institution, in respect of which recognition has been refused shall discontinue the course or training in

teacher education from the end of the academic session next following the date of receipt of the order refusing recognition passed under clause (b) of sub-section (3).

(6) Every examining body shall, on receipt of the order under sub-section (4) –

(a) grant affiliation to the institution, where recognition has been granted; or

(b) cancel the affiliation of the institution, where recognition has been refused."

20. Section 32 of the Act empowers the council to make regulations not inconsistent with the provisions of the Act and rules framed thereunder generally to carry out under the provisions of the Act. Sub-section (2)(d) provides for the norms, guidelines and standards in respect of certain categories of employees who are to be employed in the institution. The said provision reads as follows:-

"(2) In particular and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely—

(*a*) .....

(*b*) .....

(*c*) .....

(*d*) the norms, guidelines and standards in respect of —

(*i*) the minimum qualifications for a person to be employed as a teacher under clause (*d*) of Section 12;

(*ii*) the specified category of courses or training in teacher education under clause (*e*) of Section 12;

(*iii*) starting of new courses or training in recognised institutions under clause (*f*) of Section 12;

(*iv*) standards in respect of examinations leading to teacher education qualifications referred to in clause (*g*) of Section 12;

(*v*) the tuition fees and other fees chargeable by institution under clause (*h*) of Section 12;

(*vi*) the schemes for various levels of teachers education, and identification of institutions for offering teacher development programmes under clause (*l*) of Section 12;"

21. It is apt to note that in exercise of the aforesaid power, the NCTE has, from time to time, framed certain regulations. Initially, regulations were framed in the year 1995. Thereafter in 2002, 2005, 2007, and the latest one in 2009 have been framed.

22. The lis in the present case is governed by 2009 Regulations. Clause 5(5) of 2009 Regulations provides as follows: -

"5(5) All applications received on-line on or before the 31st day of the October of the year shall be processed for the next academic session and final decision, either recognition granted or refused, shall be communicated to the applicant on or before the 15th day of May of the succeeding year."

23. On a perusal of the said Regulation, it is clear as noon day that recognition can only be granted for the next academic session. Regulation 7(9) provides for issue of "letter of intent". The said regulation is as follows: -

"7(9) The Institution concerned shall be informed through a letter of intent, regarding the decision for grant of

recognition or permission subject to appointment of qualified faculty members before the commencement of the academic session. The letter of intent issued under this clause shall not be notified in the Gazette but would be sent to the Institution and the affiliating body with the request that the process of appointment of qualified staff as per policy of State Govt. or University Grants Commission or University may be initiated and the Institution may be provided all assistance to ensure that the staff or faculty is appointed as per National Council for Teacher Education Norms within two months. The Institution shall submit the list of the faculty, as approved by the affiliating Body, to the Regional Committee."

24. Regulation 7(9) stipulates what the institution is required to do after receipt of the "letter of intent". Regulation 7(11) of the 2009 Regulations provides when a formal order of recognition is to be issued. The said Regulation is as follows: -

"7(11) The institution concerned, after appointing the requisite faculty or staff as per the provisions of sub-regulation (9) and after fulfilling the conditions under sub-regulation (10), shall formally inform the Regional Committee concerned that the faculty has been appointed as per National Council for Teacher Education Norms and has been approved by the affiliating body. The letter granting approval for the selection or appointment of faculty shall also be provided by the institution to the Regional Committee with the document establishing that the Fixed Deposit Receipt of Endowment Fund and Reserve Fund have been converted into a joint account. *The Regional Committee concerned shall then issue a formal order of recognition which shall be notified as per provision of the National Council for Teacher Education Act.*"

[emphasis added]

25. Regulations 8(1) and 8(12) of the 2009 Regulations which deal with norms and standards being in a composite compartment are quoted below:-

"8(1) An institution must fulfill all the prescribed conditions pertaining to norms and standards as prescribed by National Council for Teacher Education for conducting course or training in teacher education. These norms, inter-alia, cover conditions relating to financial resources, accommodation, library, laboratory, other physical infrastructure, qualified staff including teaching and non-teaching personnel etc.

(12) *The University or Examining Body shall grant affiliation only after issue of the formal recognition order under sub-regulation (11) of Regulation 7 of these Regulations. Further, admissions by the institution shall be made only after affiliation by the University or Affiliating body and as per the State policy*."

[emphasis supplied]

26. On a keen scrutiny of Section 14 and the aforesaid Regulations it is vivid that the university or examining body is required to issue letter of affiliation after formal recognition under sub-regulation (11) of Regulation 7 of the 2009 Regulations is issued. It is also clear that certain obligations are to be carried out by the institution after letter of intent is received. It is clear as a cloudless sky that the letter of intent was communicated to the institution as well as to the affiliating body with a request that the process of appointment of qualified staff as per the policy of the State Government or University Grants Commission or university may be initiated and the institution may be provided all assistance to ensure that the staff or faculty is appointed as per the norms of the NCTE within two months. It was obligatory on the part of the institution to submit the list of the faculty, as approved by the affiliating body, to the Regional Committee. Thus understood, the letter of intent

laid down the conditions which were to be fulfilled by the institution. The said letter was issued on 22.9.2011 and the formal order of recognition was issued on 27.10.2011. Clause 6 of the same clearly stipulates that the institution shall make admission only after it obtains its affiliation from the examining body in terms of clause 8(12) of the 2009 Regulations. Clause 8(12), which has been reproduced hereinabove, clearly lays a postulate that the university or the examining body shall grant affiliation only after issue of formal recognition order under sub-clause (11) of Regulation 7 and thereafter the institution shall make the admissions.

27. In *Chairman, Bhartia Education Society and another v. State of Himachal Pradesh and others*[7] this Court in the context of 1993 Act after drawing a distinction between "recognition" and "affiliation" proceeded to state as follows: -

> "The examining body can therefore impose its own requirements in regard to eligibility of students for admission to a course in addition to those prescribed by NCTE. The State Government and the examining body may also regulate the manner of admissions. As a consequence, if there is any irregularity in admissions or violation of the eligibility criteria prescribed by the examining body or any irregularity with reference to any of the matters regulated and governed by the examining body, the examining body may cancel the affiliation irrespective of the fact that the institution continues to enjoy the recognition of NCTE. Sub-section (6) of Section 14 cannot be interpreted in a manner so as to make the process of affiliation, an automatic rubber-stamping consequent upon recognition, without any kind of discretion in the examining body to examine whether the institution deserves affiliation or not, independent of the recognition. An institution requires the recognition of NCTE as well as affiliation with the examining body, before it can offer a course or training in teacher education or admit students to such course or training."

7. (2011) 4 SCC 527.

28. In *Shri Morvi Sarvajanik Kelavni Mandal Sachalit MSKM BEd College v. National Council for Teachers' Education and others*[8] a two-Judge Bench, after referring to the decisions in *N.M. Nageshwaramma* (supra), *State of T.N. v. St. Joseph Teachers Training Institute*[9], *Vikas Sahebrao Roundale* (supra) and Bhartiya Education Society case (supra), eventually opined that there was no justification to strike a discordant note.

29. In *Adarsh Shiksha Mahavidyalaya* (supra) this Court, after referring to Sections 12, 14 to 16, 17, 17-A, 18, 20, 29 and 32 of the 1993 Act, Regulations 3, 5, 7 and 8 of the 2005 Regulations and further referring to paras 1.0, 2.0, 3.0, 3.1, 3.2 and 3.3 of the amended Regulations made by notification dated 12.7.2006, has categorically laid down thus:-

> "What needs to be emphasised is that no recognition/ permission can be granted to any institution desirous of conducting teacher training course unless the mandatory conditions enshrined in Sections 14(3) or 15(3) read with the relevant clauses of Regulations 7 and 8 are fulfilled and that in view of the negative mandate contained in Section 17-A read with Regulation 8(10), no institution can admit any student unless it has obtained unconditional recognition from the Regional Committee and affiliation from the examining body."

30. After laying down the aforesaid principle the Bench proceeded to deal with the cases of students who had taken admission in unrecognized educational institutions. The question posed by the Bench is as follows:-

"The question which remains to be considered is, whether

8. (2012) 2 SCC 16.

9. (1991) 3 SCC 87.

the students who had taken admission in unrecognised institutions or the institutions which had not been granted affiliation by the examining body have the right to appear in the examination and whether the Court can issue a mandamus for declaration of the result of such students simply because they were allowed to provisionally appear in the examination in compliance with the interim orders passed by the High Court and/or this Court. An ancillary question, which would require consideration is, whether the students who had not completed the requirement of minimum teaching days were entitled to appear in the examination and a direction can be given for declaration of their result."

31. Thereafter, the Bench referred to the pronouncements in *A.P. Christian Medical Educational Society v. Govt. of A.P.*[10], *N.M. Nageshwaramma* (supra), *Vikas Sahebrao Roundale* (supra) and *St. John's Teachers Training Institute (for Women)* (supra) and eventually recorded its conclusions in paragraph 87 by reiterating certain conclusions some of which are apposite to be reproduced regard being had to the fact situation of the present case: -

"**87.** .....

(*iv*) The recognition granted by the Regional Committees under Section 14(3)(*a*) of the 1993 Act read with Regulations 7 and 8 of the Regulations and permission granted under Section 15(3)(*a*) read with the relevant Regulations shall operate prospectively i.e. from the date of communication of the order of recognition or permission, as the case may be.

xxx xxx xxx

(*x*) In view of the mandate of Section 16, no examining body, as defined in Section 2(*d*) of the 1993 Act, shall grant

10. (1986) 2 SCC 667.

affiliation unless the applicant has obtained recognition from the Regional Committee under Section 14 or permission for starting a new course or training under Section 15.

(*xi*) *While granting affiliation, the examining body shall be free to demand rigorous compliance with the conditions contained in the statute like the University Act or the State Education Board Act under which it was established or the guidelines/norms which may have been laid down by the examining body concerned*.

(*xii*) *No institution shall admit any student to a teacher training course or programme unless it has obtained recognition under Section 14 or permission under Section 15, as the case may be*.

(*xiii*) While making admissions, every recognised institution is duty-bound to strictly adhere to Paras 3.1 to 3.3 of the Norms and Standards for Secondary/Pre-School Teacher Education Programme contained in Appendix 1 to the Regulations.

(xiv) .....

(xv) *The students admitted by unrecognised institution and institutions which are not affiliated to any examining body are not entitled to appear in the examination conducted by the examining body or any other authorised agency*."

[emphasis supplied]

32. The direction contained in paragraph 88(ii), being relevant for the present purpose, is reproduced hereinbelow: -

"(*ii*) *The result of the students admitted by an unrecognised institution or by an institution which had not been granted affiliation by the examining body shall not*

be declared. The result of the students who were admitted without qualifying the entrance examination shall also not be declared. In other words, the students admitted by the private institutions on their own shall not be entitled to declaration of their result. If any private institution had not complied with the requirements of completing the prescribed training, then the result of students of such institution shall also not be declared."

[underlining is ours]

33. On a studied scrutiny of the statutory provisions, the relevant Regulations of 2009 Regulations framed under section 32 of the 1993 Act and the pronouncements in the field, we are disposed to think that the High Court has clearly erred in misconstruing its earlier order passed in Writ Petition 4541 of 2011. True it is, there was some delay and, therefore, the High Court was moved in another writ petition wherein the it had granted liberty to file a contempt petition expecting that the directions in the earlier order would be duly complied with. Thereafter, as is manifest, letter of intent was issued but the institution instead of complying with the same moved the High Court for grant of recognition. As has been stated earlier, the High Court in the initial order had directed to consider the case of the respondent-institution for grant of recognition without further inspection. Issuance of letter of intent was necessary prior to grant of formal letter of recognition. However, the High Court being moved directed for issuance of formal letter of recognition which was issued with a postulate that the institution shall only grant admission after obtaining affiliation from the examining body in terms of clause 8(12) of 2009 Regulations. The order of recognition clearly mentioned that it was meant for the academic session 2012-13.

34. Adjudged in the aforesaid perspective the High Court could not have directed the recognition to be retrospectively operative because certain formalities remained to be complied with. It could not have put the clock back. It needs no special

emphasis to state that the High Court did not keep itself alive to the conceptual difference between "letter of intent" and "formal recognition". True it is, there was delay but that could not have enabled the High Court to issue a writ for treating the recognition to be effective for the year 2011-12 with intake of fifty students. That apart, the respondent-institution had not obtained affiliation from the university. Therefore, the direction of the High Court is contrary to the provisions of law and the interpretation of the Act and the Regulations made by this Court and, accordingly we are compelled to set aside the same, and we so direct.

35. Now, to the last plank of submission of the learned counsel for the appellant. It is urged by him that the NCTE had procrastinated its decision at every stage and such delay was deliberate and, therefore, the society was compelled to admit the students and impart education, regard being had to the fact that there were really no deficiencies. As has been laid down in many a pronouncement of this Court that without recognition from the NCTE and affiliation from the university/examining body, the educational institution cannot admit the students. An educational institution is expected to be aware of the law. The students who take admission are not young in age. They are graduates. They are expected to enquire whether the institution has recognition and affiliation. If we allow ourselves to say so, the institution had given admission in a nonchalant manner. Possibly, its functionaries harboured the idea that they had incomparable fertile mind. The students who had taken admission possibly immersed with the idea that ignorance is a bliss. It is also necessary to state that the institution had the anxious enthusiasm to commercialize education and earn money forgetting the factum that such an attitude leads to a disaster. The students exhibited tremendous anxiety to get a degree without bothering for a moment whether their effort, if any, had the sanctity of law. Such attitudes only bring nemesis. It would not be wrong to say that this is not a case which put the institution or the students to choose between Scylla and

charybdis. On the contrary, both of them were expected to be Argus-eyed. The basic motto should have been "transparency". Unfortunately, the institution betrayed the trust of the students and the students, in a way, atrophied their intelligence. The institution decidedly exhibited characteristics of carelessness. It seems that they had forgotten that they are accountable to law. The students, while thinking "vision of hope", chose to play possum. The law does not countenance either of the ideas. Hence, the plea propounded with anxiety, vehemence and desperation on behalf of the appellant is not acceptable and, accordingly we unhesitatingly repel the same.

36. Before parting with the case, we are obliged to state that the NCTE should have acted in quite promptitude, for a statutory authority which is conferred with the power, is required to act within the parameters of law and the directions given by the court and further not to create a feeling among the educational institutions that they are harassed. This Court expects that the NCTE shall function with propriety regard being had to the statutory responsibility bestowed on it by the Parliament. Its actions neither should show arbitrariness nor should it reflect any indulgence. Objectivity, reliability and trust are to be the motto of the NCTE and the committees working under it. We say no more on this score.

37. In view of our aforesaid premised reasons, the appeal is allowed, the order passed by the High Court is set aside and that of the NCTE is restored. There shall be no order as to costs.

K.K.T. Appeal allowed.

SATHYA NARAYANAN

v.

STATE REP. BY INSPECTOR OF POLICE

(Criminal Appeal No. 1539 of 2008 etc.)

NOVEMBER 2, 2012

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

Penal Code, 1860 – ss. 302/149 and 201 – Murder – 12 accused – Circumstantial evidence – Deceased last seen together with the accused – Motive – Witnesses turning hostile – Delay in lodging FIR – Trial court acquitting 6 accused, and convicting rest 6 accused – Appeal by the 6 convicts – During pendency thereof, 2 convicts died, hence appeal abated against them – High Court confirming the conviction of the other 4 convicts (appellants) – On appeal, held: Conviction justified – The circumstances complete the chain of link and establish that in all probability the act must have been done by the appellants-accused – As the deceased was last seen with the accused, burden to prove as to what happened to the deceased was on the accused, which they failed – Case cannot be rejected on the ground of delay in lodging FIR as the same has been explained – Reliance placed on certain statements of hostile witnesses by courts below is acceptable.

Witness – Hostile witness – Evidentiary value and reliance on – Held: Evidence of hostile witness cannot be rejected in toto – It can be relied upon to the extent it supports the prosecution case.

The appellants-accused alongwith 11 others were prosecuted for having killed one woman. The prosecution case was that accused No. 1 (appellant No. 1 in Criminal Appeal No. 1573), in order to lead a spiritual life, deserted her husband and started running an Ashram and lived there with her son (accused No. 4). Accused No. 2

became a member of the Ashram and started living there with his son (accused No.3) and daughter (accused No.7). Accused No. 1 and accused No. 2 developed illicit intimacy. The deceased who had initially come to take tuitions of the children of accused Nos. 1 and 2, later became member of the Trust and started looking after the accounts of the Ashram. The deceased also developed illicit intimacy with accused No.2. The deceased was demanding share in the property of the Ashram from accused No. 1 or else she would disclose her illicit intimacy with accused No. 2. On the day of the incident, accused No. 1 alongwith other accused, assembled at the back side of the temple and started beating the deceased. Accused No. 1 strangulated the deceased which resulted in her death. FIR was lodged by PW-1, nine days after the day of the incident. Trial court acquitted accused Nos. 6 to 11, convicted accused Nos. 1 to 5 u/ss. 302 r/w. s.149 and 201 IPC and convicted accused No. 12 u/s. 201 IPC. The convicted accused filed appeal. During pendency of the appeal accused Nos. 2 and 12 died and the appeal abated against them. High Court dismissed the appeal, confirming the conviction.

In appeals to this Court, appellants-accused contended that there was no eye-witness to the incident; that there was delay in lodging FIR; that prosecution witnesses turned hostile and evidence of PWs 1 and 2 were not accepted in toto by courts below and hence their evidence was not acceptable. Therefore, the appellants could not have been convicted.

Dismissing the appeals, the Court

HELD: 1. When in the absence of eye-witness, if various circumstances relied on by the prosecution relating to the guilt are fully established beyond doubt, the court is free to award conviction. Further, the chain of events must be complete in order to sustain the conviction on the basis of circumstantial evidence. Though there is no direct evidence about the cause of death, various circumstances projected by the prosecution complete the chain of link and establish that, in all probability, the act must have been done by the appellants. [Paras 13 and 33] [961-C; 973-F]

Hanumant vs. State of Madhya Pradesh **1952 SCR 1091;** *Sharad Birdhichand Sarda vs. State of Maharashtra* **(1984) 4 SCC 116: 1985 (1) SCR 88 – relied on.**

2. Though the High Court disbelieved the version of PW-1 as to the illegal intimacy between A-1 and A-2 and A-2 and the deceased, the reasons furnished by him for the delay in lodging the complaint after 9 days are acceptable. Inasmuch as the entire episode has took place within the Ashram, PW-1 who worked in the Ashram 9 months ago along with his wife and was residing at the backside of the temple, after getting full information about the incident, made a complaint to the police. In such circumstance, the prosecution case cannot be rejected merely on the ground of delay since the complainant (PW-1) has reasonably explained the reasons for the delay. [Para 14] [962-H; 963-A-B]

3. Though both PWs 1 and 2 are not eye-witnesses to the occurrence, in view of the fact that they worked in the Ashram for 9 months prior to the incident and were residing behind the temple, PW-1 lodged a complaint Ext. P/1 about the death of the deceased after getting all the details and the circumstances highlighted by them support the case of the prosecution. [Paras 17 and 24] [964-G-H; 965-A]

4. Merely because a witness was declared as hostile, there is no need to reject his evidence in *toto*. The evidence of hostile witness can be relied upon at least to the extent, it supported the case of the prosecution.

In view of the same, reliance placed on certain statements made by hostile witnesses by the trial court and the High Court are acceptable. PW4, though turned hostile, in his chief examination, he stated that he heard a commotion in the Ashram at the relevant time and the date of the occurrence which is also another circumstance which supports the case of the prosecution. [Paras 16 and 25] [964-C-D; 969-B-C]

Mrinal Das and Ors. vs. State of Tripura **(2011) 9 SCC 479: 2011 (14) SCR 411 – relied on.**

5. The evidence of PWs 6 and 7 (the doctors) prove the death of the deceased occurred on the morning of the date of the incident in the Ashram which is also one of the reliable circumstance which supports the case of the prosecution. It is also relevant to point out that the doctor, PW-7, admitted that when he visited the Ashram, he found a body lying beneath the sofa. It also creates a suspicion about the cause of her death. [Para 28] [971-F-G]

6. The fact that PW-8, who used to help the devotees all the time was asked not to attend in the afternoon in the month of April, 2000, is also one of the circumstance which supports the prosecution case. [Para 29] [971-B]

7. PWs 35 and 36, brother and sister of the deceased respectively, residing in the same town, were not informed about the death of the deceased by any person in the Ashram, particularly, A-1 and A-2. PWs 15 and 16 (*vettiyan*) who were attending the work of cremating the dead bodies, before commencement of their work, asked about the relatives of the deceased. A-2 informed them that the deceased is an orphan and had no relatives. The statements of PWs 15 and 16, persons in charge of cremation of dead bodies, answers given by A-2 about their query relating to the relatives of the deceased and

their reply that the deceased was an orphan are relevant circumstances which prove the case of the prosecution. [Para 30] [971-C-F]

8. In the case of circumstantial evidence, motive also assumes significance for the reason that the absence of motive would put the court on its guard and cause it to scrutinize each piece of evidence closely in order to ensure that suspicion, omission or conjecture do not take the place of proof. In the instant case, the prosecution has demonstrated that initially the deceased entered the Ashram in order to assist the devotees and subsequently became one of the Trustees of the Trust and slowly developed grudge with the appellants. PWs 35 and 36, sister and brother of the deceased deposed that since the time, the deceased became a Trustee, there was a dispute with regard to the Management of the said Trust. [Para 31] [971-G-H; 972-A]

9. The appellants-accused having been seen last with the deceased, the burden of proof rests upon them to prove what had happened thereafter since those facts were within their special knowledge. In the absence of any explanation, it must be held that they failed to discharge the burden cast upon them by Section 106 of the Evidence Act, 1872. Admittedly, none of the appellants explained what had happened to the deceased even in their statements under Section 313 Cr.P.C. [Para 23] [968-C-E]

State of Rajasthan vs. Kashi Ram **(2006) 12 SCC 254: 2006 (8) Suppl. SCR 501 – relied on.**

Case Law Reference:

1952 SCR 1091	**Relied on**	**Para 11**
1985 (1) SCR 88	**Relied on**	**Para 12**
2011 (14) SCR 411	**Relied on**	**Para 15**

2006 (8) Suppl. SCR 501 Relied on Para 22

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1539 of 2008.

From the Judgment & Order dated 17.04.2008 of the High Court of Madras, Bench at Madurai in Criminal Appeal No. 1108 of 2000.

WITH

Crl. Appeal No. 1573 of 2009.

R. Balasubramanian, V. Giri, Guru Krishna Kumar, AAG, A. Radhakrishnan, V.J. Francis, Anupam Mishra, D. Selvan, R. Murugesan, P. Ramesh, G. Ravi Kumar, V. Santhana Lakshmi, A. Venayagam Balan, B. Balaji, A. Prasanna Venkat, Muthuvel Palani for the Appearing Parties.

The Judgment of the Court was delivered by

P. SATHASIVAM,J. 1. These appeals are directed against the judgment and order dated 17.04.2008 passed by the Madurai Bench of the Madras High Court in Criminal Appeal No.1108 of 2000 whereby the Division Bench of the High Court dismissed the appeal filed by the appellants herein and confirmed the order of conviction and sentence dated 14.11.2000 passed by the Ist Additional Sessions Judge-cum-Chief Judicial Magistrate, Trichy in Sessions Case No.139/2000.

2. **Brief facts:**

(a) Jayanthi (A-1) (Appellant No.1 herein in Criminal Appeal No. 1573 of 2009) was married to one Rajendran (PW-34) and they were residing at Trichy along with their children. After the death of their daughter, Jayanthi intended to lead a spiritual life and Rajendran started living separately whereas their son Sathya Narayanan (A-4) was living with her.

(b) Jayanthi (A-1) was actually running an Ashram in the name of Sri Devi Maha Sannathi at Govardhan Garden, K.K. Nagar, Trichy. The other accused persons, viz., A-2 to A-11 therein were assisting her in the affairs of the Ashram whereas A-12 was working as a Watchman in the said Ashram.

(c) One Sriputhra (A-2) used to visit the said Ashram and became a Member and stayed there along with his son Sathya Narayanan (A-3) and daughter Sadhana (A-7) leaving his wife. According to the prosecution, during the course of time, A-1 and A-2 developed illicit intimacy. One Leelavathi (since deceased), who was originally taking tuition for the children of A-1 and A-2, has also became a Member and she was looking after the accounts of the said Ashram. During her continuation in the Ashram, A-2 and Leelavathi also developed illicit intimacy with each other.

(d) On account of the above, there was a quarrel between Jayanthi (A-1) and Leelavathi (deceased) and Leelavathi threatened her that she would disclose about her illicit intimacy with A-2 to the outside public which would cause disgrace and shame to her and that she should be given a share in the property of the Ashram.

(e) On 08.04.2000, between 6-7 a.m., Jayanthi (A-1) along with other accused persons assembled at the backside of the Temple and started beating Leelavathi causing grievous injuries to her and Jayanthi strangulated her neck which resulted into her death. Sivasanmugam (PW-1), who was residing in the house situated nearby the Temple, heard the cries of Leelavathi and after two days, he came to know that Leelavathi was beaten to death and the dead body was burnt in the burial ground.

(f) On 17.04.2000, PW-1 lodged a complaint at K.K. Nagar Police Station, Trichy which came to be registered as C.S. No. 78 of 2000 mentioning the suspicion over the death of Leelavathi. After investigation, the case was committed to the

Court of Sessions and numbered as Sessions Case No. 139 of 2000 and the charges were framed against 12 accused persons for the offences punishable under Sections 147, 302 read with 149 and 201 of the Indian Penal Code, 1860 (in short 'IPC').

(g) By judgment dated 14.11.2000, the trial Court while acquitting A-6 to A-11, convicted A-1 to A-5 under Sections 302 read with Section 149 and 201 of IPC and sentenced them to undergo rigorous imprisonment (RI) for life along with a fine of Rs. 2,000/- each, in default, to further undergo RI for 6 months for the offence punishable under Section 302. A-12 was convicted under Section 201 of IPC and sentenced to undergo RI for 4 years along with a fine of Rs.1,000/-, in default, to further undergo RI for 3 months.

(h) Challenging the said judgment, A-1 to A-5 and A-12 filed an appeal being Criminal Appeal No. 1108 of 2000 before the Madurai Bench of the Madras High Court. During the pendency of the appeal before the High Court, A-2 and A-12 died and appeal against them stood abated. The High Court, by impugned judgment dated 17.04.2008, dismissed the appeal and confirmed their conviction and sentence.

(i) Aggrieved by the said judgment, Sathya Narayanan (A-3) filed Criminal appeal No. 1539 of 2008 and Jayanthi (A-1), Chinna Sathya Narayanan (A-4) and Dinakaran (A-5) filed Criminal Appeal No. 1573 of 2009 before this Court.

3. Heard Mr. R. Balasubramanian, learned senior counsel for A-3 – appellant in Crl. A. No. 1539 of 2008, Mr. V. Giri, learned senior counsel for A-1, A-4 and A-5 appellants in Crl. A.No. 1573 of 2009 and Mr. Guru Krishnakumar, learned Additional Advocate General for the State of Tamil Nadu.

4. The case of the prosecution is that Jayanthi (A-1) and Sriputhra (A-2) were staying at No.11, Govardhan Garden, K.K. Nagar leaving the company of their spouses. Sathya

Narayananan (A-4) – son of A-1 and Sadhana (A-7) – daughter of A-2 were also living with them at the above-mentioned address. Before coming to Govardhan Garden, A-1 was living with her husband Rajendran (PW-34) at Kalla Street, Trichy along with their children. In the year 1987, after the death of her daughter-Sridevi, she completely devoted herself to spirituality which resulted into separation with her husband. It is the case of the defence that as the place was very small, A-1 shifted to the above-mentioned address at K.K. Nagar along with Sriputhra (A-2) for the purpose of continuing the spiritual works.

5. Further, it is the case of the prosecution that while leading a spiritual life, A-1 came into contact with A-2 who used to visit the Temple and they developed illicit intimacy which resulted into desertion of the husband and wife of A-1 and A-2 respectively whereas it is the claim of the defence that A-1 and A-2 deserted their spouses for the sole object of attaining spirituality. While so, on 08.04.2000 between 6 to 7 a.m. Jayanthi (A-1) along with other accused persons assembled at the back side of the Temple and beat Leelavathi causing grievous injuires to her and A-1 strangulated her neck which resulted into her death.

6. On the side of the prosecution, 46 witnesses were examined and documents (Exh. No. P-1 to Exh. No. P-48) and the material object Nos. 1 to 4 were marked. It is not in dispute that all the prosecution witnesses except police officers turned hostile. The evidence of PWs 1 and 2 were disbelieved to a certain extent. The trial Judge, based on various circumstances, which clinchingly proved the prosecution case, convicted the appellants which was affirmed by the High Court.

Contentions:

7. Mr. R. Balasubramanian, learned senior counsel for A-3, submitted that in the absence of any evidence in support of the prosecution and delay in lodging of the complaint, conviction solely on the basis of the circumstantial evidence cannot be

sustained. In any event, according to him, absolutely there is no discussion by the High Court about the alleged role of A-3, hence, prayed for setting aside the conviction and sentence.

8. Mr. V. Giri, learned senior counsel for A-1, A-4 and A-5 submitted that the High Court having disbelieved all the witnesses ought to have acquitted the appellants only on the basis of presumption of certain facts. He further contended that the High Court has also grossly erred in partly believing the evidence of PWs 1 & 2 for the purpose of convicting the appellants. The conduct of the appellants, who brought the doctor to the place where the deceased was lying instead of taking her to the hospital as the same was essential for the safety and the physical condition of the deceased, cannot form any link in the chain of circumstances. He further submitted that the High Court ought not to have convicted the appellants-accused only on the basis of the doubts arose without there being any continuity of incriminating circumstances. According to him, the High Court ought to have seen that to convict a person on the basis of circumstantial evidence, the circumstances must form a complete chain and all the circumstances should point out that the accused is the only person who committed the offence and further exclude the entire reasonable hypothesis that the accused is innocent. According to him, the High Court, having disbelieved the case of the prosecution to the extent that there was illicit relationship between A-1 and A-2 and also that there was no evidence that A-2 was having illicit relationship with the deceased, confirmed the conviction merely on the surmises. He further pointed out that there was no eye witness to the occurrence and the case is purely based on circumstantial evidence. Further, learned senior counsel contended that the date of occurrence was 08.04.2000 at about 10.30 a.m. and the FIR authored by PW-1 was lodged on 17.04.2000, after a gap of 9 days which itself is sufficient to reject the story of the prosecution.

9. Mr. Guru Krishnakumar, learned Additional Advocate

General for the State of Tamil Nadu while supporting the decision of the trial Court and the High Court submitted that various circumstances relied on by the prosecution are acceptable and, in fact, both the courts rightly convicted the appellants and prayed for confirmation of the same.

10. It is not in dispute that the basis of conviction is solely on the circumstances relied on by the prosecution. In view of the same, it is relevant to understand the nature and various aspects relating to circumstantial evidence.

11. In *Hanumant vs. State of Madhya Pradesh,* 1952 SCR 1091 the nature, character and essential proof required in a criminal case that rests on circumstantial evidence alone has been laid down. This case has been uniformly followed and applied by this Court in a large number of later decisions up to this date.

12. In *Sharad Birdhichand Sarda vs. State of Maharashtra,* (1984) 4 SCC 116, a Bench of three Judges of this Court, after analyzing various aspects, laid down certain cardinal principles for conviction on the basis of circumstantial evidence. This Court laid down the following conditions must be fulfilled before a case against an accused can be said to be fully established:

> "153…..(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. …. …
>
> (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,
>
> (3) the circumstances should be of a conclusive nature and tendency,
>
> (4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

13. It is clear that even in the absence of eye-witness, if various circumstances relied on by the prosecution relating to the guilt are fully established beyond doubt, the Court is free to award conviction. Further, the chain of events must be complete in order to sustain the conviction on the basis of circumstantial evidence.

Delay in filing the complaint:

14. Both the learned senior counsel for the appellants commented the delay in filing the complaint which, according to them, has not been properly explained by the prosecution. It is true that the incident occurred on 08.04.2000 between 6-7 a.m., and a formal complaint was lodged by PW-1 on 17.04.2000, that is, after nine days of the occurrence. Though the High Court has disbelieved the version of PW-1 on certain aspects, particularly, the claim of illegal intimacy with A-1 and A-2 and A-2 and the deceased, other aspects of his evidence cannot be rejected. Since it was PW-1 who filed the complaint, in his evidence, he explained the reason for the delay. According to him, at the relevant time, he was residing at 15, Govardhan Garden, 9, K.K. Nagar for the last 15 years along with his wife S. Balambal (PW-2). He stated that the Temple run by A-1 is located behind his house. He further deposed that he is well acquainted with all the accused persons because he along with his wife used to visit the Temple regularly. In his evidence, he described about the details of all the accused persons. According to him, Leelavathi- the deceased was looking after the Accounts and Postal Transactions of the

Temple. She was appointed as a Member in the Educational Trust of the temple. Around 20 days before the incident, when PW-1 was going along with his wife, Leelavathi stopped them and apprised about the ill-treatment meted out to her by A-1 and A-2. He further deposed that on 08.04.2000, about 6-7 a.m., when he was in his house, he heard the shoutings of Leelavathi as "don't beat, don't beat" and also heard the voice of A-1 saying "beat, beat" and also saying "will you go out". According to PW-1, after some time, there was no noise. In the same morning, at around 9 a.m., again he heard the cries of Leelavathi. On hearing the same, he along with his wife (PW-2) came out of their house and noticed that Leelavathi was running out of the house. They also heard the voice of A-2 asking others "catch her" "catch her". They further noticed A-1 asking Sasikala (A-10) to bring a wood in order to beat her. A-10 handed it over to Dinakaran (A-5) who, in turn, assaulted Leelavathi in the back side of her head using that wood. On seeing their presence, the accused persons dragged her inside the house. After two days, when he went to the nearby chicken shop, the owner of the shop told him that Leelavathi was beaten to death and she was burnt in the burial ground. According to him, the chicken shop owner came to know all these details through Karuppaiah (A-12). After enquiring about the death from several persons, PW-1 deposed that he came to know about the truth and then he gave a complaint to the Police on 17.04.2000 which Exh. P/1. PW-1 gave the same reasoning in regard to an answer to a specific question relating to delay in filing of the complaint for the incident that had happened on 08.04.2000. It is pertinent to mention here that the very same facts mentioned above have been narrated by PW-2 in her deposition dated 16.10.2000. In cross-examination, he denied the suggestion that A-2, A-5 and A-9 were behind the termination of his and his wife's job and that he made a false complaint against them. As mentioned earlier, though the High Court disbelieved his version as to the illegal intimacy between A-1 and A-2 and A-2 and the deceased, the reasons furnished by him for the delay in lodging the complaint

after 9 days are acceptable. Inasmuch as the entire episode has taken place within the Ashram, PW-1 who worked in the Ashram 9 months ago along with his wife and was residing at the backside of the Temple, after getting full information about the incident, made a complaint to the police. In such circumstance, the prosecution case cannot be rejected merely on the ground of delay since the complainant (PW-1) has reasonably explained the reasons for the delay. Accordingly, we reject the argument of the learned senior counsel for the appellants.

Reliance on the hostile witness:

15. It is the contention of Mr. Giri, learned senior counsel that in view of the fact that all the prosecution witnesses turned hostile and even the evidence of PWs 1 and 2 are not acceptable in toto, the conviction based on certain statements cannot be accepted. In this regard, it is relevant to refer a decision of this Court in *Mrinal Das and Others vs. State of Tripura,* (2011) 9 SCC 479. In the said decision, the main prosecution witnesses, viz., PWs 2, 9, 10 and 12 were declared as hostile witnesses. While reiterating that corroborated part of evidence of hostile witness regarding commission of offence is admissible, this Court held:

> **"67.** It is settled law that corroborated part of evidence of hostile witness regarding commission of offence is admissible. The fact that the witness was declared hostile at the instance of the Public Prosecutor and he was allowed to cross-examine the witness furnishes no justification for rejecting en bloc the evidence of the witness. However, the court has to be very careful, as prima facie, a witness who makes different statements at different times, has no regard for the truth. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to it. The court should be slow to act on the testimony of such a witness, normally, it should look for corroboration with other

> witnesses. Merely because a witness deviates from his statement made in the FIR, his evidence cannot be held to be totally unreliable. To make it clear that evidence of hostile witness can be relied upon at least up to the extent, he supported the case of the prosecution. The evidence of a person does not become effaced from the record merely because he has turned hostile and his deposition must be examined more cautiously to find out as to what extent he has supported the case of the prosecution."

16. We reiterate that merely because the witness was declared as hostile, there is no need to reject his evidence in toto. In other words, the evidence of hostile witness can be relied upon at least to the extent, it supported the case of the prosecution. In view of the same, reliance placed on certain statements made by hostile witnesses by the trial Court and the High Court are acceptable. Now, let us consider hereunder how far those statements supported the case of the prosecution.

Evidence of PWs 1 and 2:

17. We have already referred to the evidence of PW-1 at length and PW-2 who is none else than wife of PW-1. Admittedly, they were residing behind the Temple and it was PW-1 who made a complaint (Exh. P/1) to the police after enquiring about the incident from various persons/sources. Balambal (PW-2) also explained the case of the prosecution similar to as narrated by PW-1. She denied the suggestion that she came to know the details about the death of Leelavathi on 10.04.2000. She also denied the suggestion that even though she knew that Leelavathi had a natural death because of the chest pain and her husband in order to grab money from the accused persons made a false complaint to the police. Though both PWs 1 and 2 are not eye witnesses to the occurrence, in view of the fact that they worked in the Ashram for 9 months prior to the incident and were residing behind the Temple, PW-1 lodged a complaint Ext. P/1 about the death of Leelavathi after getting all the details and the circumstances highlighted by them

support the case of the prosecution.

Deceased was a Member of the Trust:

18. It is not in dispute that Leelavathi (deceased) was originally taking tuition for the children of A-1 and A-2, who were residing in the Ashram after leaving their spouses. It is also not disputed that Leelavathi has also became a Member of the Trust of the Ashram and she was actually staying in the Ashram. Through the evidence of Subramanian (PW-40), a xerox copy of the Trust Deed had been marked as Exh. P-27. On perusal of the same, it can be seen that Jayanthi (A-1) had established a Trust in the name of Sridevi Sewa Trust and Sriputhra (A-2), Peria Sathya Narayanan, (A-3), Chinna Sathya Narayanan (A-4), Sadhana (A-5) and Leelavathi (deceased) were appointed as Trustees. These aspects have been stated by A-1 in her statement recorded under Section 313 of the Code of Criminal Procedure, 1973 (in short 'the Code'). Though there is no acceptable evidence as to the fact that an attempt was made for her removal from the Trust, the fact remains that Leelavathi (deceased) was a Member of the said Trust.

Death occurred in the Ashram:

19. It is the definite case of the prosecution that Leelavathi (deceased) was a Trustee in the above said Trust, looking after the accounts of the Ashram and was staying in the Ashram. Selvi Mythili (PW-35) and Thiru Ananda Padhmanaban (PW-36), sister and brother of the deceased respectively, had deposed in their evidence that Leelavathi was staying in the Ashram itself leaving them and her parents and that she had given some assignment there. Both of them deposed that since then she became a Trustee, there was a dispute with regard to the management of the said Trust. The very same fact has also been stated in the evidence of PWs 1 & 2 that about 20 days prior to the occurrence, Leelavathi (deceased) was subjected to torture and harassment with regard to her removal from the said Trust. The evidence of Dr. Thirugnanasundaram (PW-6) and Dr. Sathyavenkatesh (PW-7) –the local doctors are

also relevant as to the death of the deceased which occurred in the Ashram. PW-6, in his evidence, had deposed that on 08.04.2000, at about 11 a.m., he received a phone call from a person from Sridevi Temple stating that one lady has become fainted and requested him to see her in the Ashram on which he replied in the negative and advised the caller to take her to his Clinic. After 5 minutes, Sriputhra (A-2) came to his Clinic and again requested him to attend the patient in the Ashram but he refused to accede to his request. From the above, it is clear that PW-6 was requested to attend a lady patient at the Ashram.

20. Likewise, PW-7 was requested to attend a lady lying unconscious in the Ashram. In his evidence, he deposed that on 08.04.2000, at about 11.30 a.m. Sriputhra (A-2) came to his Clinic and stated that one lady was fainted in the Ashram and requested him to attend her in the Ashram. PW-7 went to the Temple in order to see her in the car of A-2 and found one lady lying in the house adjacent to the said Temple beneath the sofa in the front hall. He further explained that after checking the pulse and heart beat, he declared her 'dead'.

21. From the evidence of Doctors and the statement of A-2 made to them regarding the condition of the lady, it is clear that the death occurred in the Ashram.

Failure of accused to give satisfactory explanation to an incriminate circumstance which was within their special knowledge

22. Section 106 of the Indian Evidence Act, 1872 reads as under:

"106. **Burden of proving fact especially within knowledge.-** When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Illustrations

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with traveling on a railway without a ticket. The burden of proving that he had a ticket is on him."

The applicability of the above provision has been explained by this Court in *State of Rajasthan vs. Kashi Ram,* (2006) 12 SCC 254 which held as under:

"23. ……The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in *Naina Mohd.,* Re. AIR 1960 Mad 218.

24. There is considerable force in the argument of counsel for the State that in the facts of this case as well it should be held that the respondent having been seen last with the deceased, the burden was upon him to prove what happened thereafter, since those facts were within his special knowledge. Since, the respondent failed to do so, it must be held that he failed to discharge the burden cast upon him by Section 106 of the Evidence Act. This circumstance, therefore, provides the missing link in the chain of circumstances which prove his guilt beyond reasonable doubt."

23. The appellants-accused having been seen last with the deceased, the burden of proof rests upon them to prove what had happened thereafter since those facts were within their special knowledge. In the absence of any explanation, it must be held that they failed to discharge the burden cast upon them by Section 106 of the Indian Evidence Act, 1872. Admittedly, none of the appellants explained what had happened to the deceased even in their statements under Section 313 of the Code.

Distress cry of the deceased

24. We have already stated that at the relevant time, PWs 1 & 2, who are husband and wife, were residing at the back side of the Ashram. It was PW-1, who after thorough enquiry, made a complaint to the police on 17.04.2000 (Exh. P/1). In the complaint, PW-1 has specifically stated that on 08.04.2000, around 6-7 a.m., while he was in his house, he heard the shouting of Leelavathi saying "don't beat, don't beat" and also heard A-1 saying "beat, beat". In Exh. P/1, PW-1 also stated that at that time, A-2 shouted by saying "catch her" "catch her". All these events, particularly, the distress cry of the deceased was heard by PW-1 and he mentioned the same in his complaint (Exh. P/1). It is also a relevant circumstance which supports the case of the prosecution.

Commotion in the Ashram

25. Mohan (PW-4), whose house is situated next to Sridevi Temple in the eastern side stated that he is well acquainted with A-1 to A-4 and A-7. According to him, in April 2000, when he was studying in the top floor of his house, he heard a sound coming from Sridevi Temple. Though he turned hostile, in his chief examination, he stated that he heard a commotion in the Ashram at the relevant time and the date of the occurrence which is also another circumstance which supports the case of the prosecution.

The statements of Doctors - PW-6 and PW-7

26. Dr. Thirugnanasundaram (PW-6), deposed that on 08.04.2000, between 11.00 and 11.15 a.m., he received a phone call from Sridevi Temple stating that one woman had fallen down on account of dizziness and requested him to come and see her. He replied in the negative and advised them to take her to his Clinic. There was no response from the other end. After 5-10 minutes, A-2 came to his Clinic in a car and requested him to see the patient in the Ashram but he did not accede to his request. He further deposed that the distance between his Clinic and Sridevi Temple might be of 3 furlong and he also admitted that he knows A-1 and A-2.

27. Dr. Sathyavenkatesh, who was examined as (PW-7), deposed that on 08.04.2000, around 11.30 a.m., A-2 came to his Clinic and informed that a woman had become unconscious and requested him to come to the Ashram for treatment and on his request, he went to see her in his car. He further deposed that when he reached there, a woman was found lying in the main hall beneath the sofa. He checked her pulse and heart beat and found that the woman was dead. He further stated that on the same day, after 8.00 p.m., A-2 came to his Clinic and sought for the Death Certificate. He informed him that since he had not given any treatment to her, he could not issue the same. Since A-2 compelled him to issue such Certificate on the

ground that the deceased was a Member of the Trust and the Auditor has sought the same, he issued a Death Certificate. The Xerox copy of the Death Certificate is marked as Exh. P-2. He also stated that he had not seen any injury on the body. He fairly admitted that without doing post mortem, it would not be possible to mention the cause of death and certificate cannot be issued. He reiterated that only on the insistence of A-2, he issued a Death Certificate.

28. The analysis of the evidence of PWs 6 and 7 shows that in the morning of 08.04.2000, both the Doctors, initially PW-6, was requested to attend a lady lying unconscious in the Ashram and when PW-6 declined, PW-7 was taken to the Ashram. It is further clear that on preliminary examination by PW-7, the woman was found dead. The statements of PWs 6 and 7 prove that the deceased died in the Ashram on 08.04.2000. It is also clear that though PW-7 has stated that he did not notice any injury on the body of the deceased, he admitted that the whole body was covered with a blue colour saree. He issued the Death Certificate mentioning that the deceased would have died due to heart attack without any examination, particularly, when the patient did not come to him at any point of time that too at the insistence of A-2, there is no need to give importance to the same. However, the evidence of PWs 6 and 7 prove the death of the deceased occurred on the morning of 08.04.2000 in the Ashram which is also one of the reliable circumstance which supports the case of the prosecution. It is also relevant to point out that the doctor, PW-7, admitted that when he visited the Ashram, he found a body lying beneath the sofa. It also creates a suspicion about the cause of her death.

Sudha (PW-8) servant maid was told not to report for work in the afternoon:

29. Though Sudha (PW-8) turned hostile, in her deposition, it was stated that she was working in Sridevi Temple from January to March, 2000 and was distributing Saffron powder,

turmeric and holy ashes to the devotees of the Temple. She further deposed that in April, 2000, when she went for work in the morning and was returning to her house for lunch at about 1.00 p.m., A-2 asked her not to come for work in the afternoon, therefore, on his instruction, she did not go for work in the afternoon. The fact that PW-8, who used to help the devotees all the time was asked not to attend in the afternoon in the month of April, 2000 is also one of the circumstance which supports the prosecution case.

PWs 35 and 36 brother and sister of the deceased were not informed about the death of the deceased:

30. Though PWs 35 and 36, brother and sister of the deceased respectively, were residing in the same town were not informed about the death of Leelavathi by any person in the Ashram, particularly, A-1 and A-2. As a matter of fact, PWs 15 and 16 (*vettiyan*) who were attending the work of cremating the dead bodies, before commencement of their work, asked about the relatives of the deceased. A-2 informed them that the deceased is an orphan and had no relatives. As rightly observed by both the Courts, it would indicate that the appellants were not only responsible for committing murder but also screened the evidence. The statements of PWs 15 and 16, persons in charge of cremation of dead bodies, answers given by A-2 about their query relating to the relatives of the deceased and their reply that the deceased was an orphan are relevant circumstances which prove the case of the prosecution.

Motive:

31. In the case of circumstantial evidence, motive also assumes significance for the reason that the absence of motive would put the court on its guard and cause it to scrutinize each piece of evidence closely in order to ensure that suspicion, omission or conjecture do not take the place of proof. In the case on hand, the prosecution has demonstrated that initially, the deceased entered the Ashram in order to assist the devotees and subsequently became one of the Trustees of the

Trust and slowly developed grudge with the appellants. PWs 35 and 36, sister and brother of the deceased Leelavathi deposed that since then she became a Trustee, there was a dispute with regard to the Management of the said Trust.

32. From the above materials, we noted the following circumstances relied on by the prosecution, accepted by the trial Court and the High Court :

(i) The deceased was a member of the Trust.

(ii) On 08.04.2000, the date of incident, there was some kind of commotion in the Ashram.

(iii) The death occurred in the Ashram.

(iv) In the complaint to police (Exh. P-1), it was stated that there was distress cry of the deceased.

(v) PW-4 heard a commotion in the Ashram.

(vi) A-2 approached PW-6 (Doctor) stating that a lady was lying unconscious.

(vii) PW-7 (another Doctor) was requested to attend a lady lying unconscious.

(viii) The accused failed to take the deceased to the hospital rather they preferred to treat her in the Ashram itself with the help of known doctors (PWs 6 & 7).

(ix) PW-7 visited the Ashram and found a body lying beneath the Sofa.

(x) The dead body was covered with a Saree and, therefore, PW-7 could not have seen any external injury.

(xi) The accused have chosen not to conduct post mortem hence, the real cause of the death was completely suppressed.

(xii) PW-8 was told not to report for work in the afternoon.

(xiii) The accused have failed to inform any of the relatives of the deceased (PWs 35 & 36) though they lived in the same town.

(xiv) A-2 visited PW-15's place for arranging for the cremation.

(xv) PWs 15 & 16 asked about the availability of relatives and the accused answered in the negative.

(xvi) PWs 15 to 18 identified A-3 as being present at the time of cremation.

(xvii) The time of cremation of the deceased was late in the evening, though the death occurred in the forenoon itself.

(xviii) The accused had voluntarily lied to the persons who were cremating the body (vettiyan) that the deceased was an orphan and has no relatives.

Conclusion:

33. The above analysis clearly shows that though there is no direct evidence about the cause of death, various circumstances projected by the prosecution complete the chain of link and established that, in all probability, the act must have been done by the appellants. All the circumstances have been clearly discussed by the trial Court and it rightly convicted and awarded appropriate sentence. The High Court, as an appellate Court, once again marshaled all the materials leading to the death of the deceased Leelavathi and confirmed the same. We fully concur with the said conclusion. Consequently, the appeals fail and are accordingly dismissed.

K.K.T. Appeals dismissed.

TARA CHAND & ORS.

v.

GRAM PANCHAYAT JHUPA KHURD & ORS.

(Civil Appeal Nos. 8845-8850 of 2003)

NOVEMBER 6, 2012

[DR. B.S. CHAUHAN AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

Land Laws – Punjab Tenancy Act, 1887 – ss.5, 8 and 10 – Suit filed in 1989 for declaration of occupancy rights u/ss.5 and 8 of the Act, in relation to the land in dispute – The plaintiffs-appellants and their ancestors were hisedars/joint owners/co-sharers in the shamilat deh from a period prior to even 1935-36 – High Court found the appellants non-suited on the anvil of s.10, observing that the expression 'any person', contained in s.8, does not include a joint-owner (hisedar) – On appeal, held: s.10 puts a complete embargo on a hisedar/joint-owner to claim occupancy rights – There was no agreement between the appellants and Gram Panchyat creating any tenancy in their favour – Granting relief to the appellants would amount to ignoring the existence of s.10 itself and it would be against all norms of interpretation which requires that statutory provisions must be interpreted in such a manner as not to render any of its provision otiose unless there are compelling reasons for the court to resort to that extreme contingent – No cogent reason to interfere with the well-reasoned judgment of the High Court – Punjab Village Common Lands (Regulation) Act, 1961 – ss. 4(3)(ii) and 7.

Words and Phrases – "any person" – Meaning of.

In the year 1989, the appellants/their predecessors-in-interest filed suit for declaration of their occupancy rights, under Sections 5 and 8 of the Punjab Tenancy Act, 1887 in relation to the land in dispute. The Court of First

Instance i.e. the Assistant Collector allowed the suit holding that the appellants/plaintiffs fulfilled all the conditions of Sections 5 and 8 of the Tenancy Act, owing to the fact that they had been in uninterrupted possession of the land for a very long time and had also been cultivating the said land continuously, paying nominal rent to the Gram Panchayat, much before the commencement of the Punjab Village Common Lands (Regulation) Act, 1961, and hence, the provisions of Section 7 of the Act 1961 were not attracted and that they were, therefore, in fact entitled to the declaration as sought by them. Aggrieved, the Gram Panchayat-defendant, filed appeal before the District Collector, which allowed the same on the ground that the predecessors-in-interest of the appellants were in possession of the land for a period of more than 60 years which was always shown as '*shamilat deh*', **and all revenue records showed the status of the appellants/their predecessors-in-interest as co-sharers, owing to which, they could not be termed as tenants.**

The appellants/their predecessors-in-interest filed further appeal before the Divisional Commissioner which held that in view of the provisions of Section 4(3)(ii) of the Act, 1961, no distinction can be made between a tenant or co-owner of the '*shamilat deh*' **and therefore, the right of occupancy would be available to the tenants, as well as to the co-sharers. The respondent-Gram Panchayat thereafter filed revision application before the Financial Commissioner which allowed the same holding that the appellants were recorded in the revenue record, as joint owners, to whom the land was never leased out by the Gram Panchayat, and thus, the provisions of the Act 1961 were not attracted, and that occupancy rights cannot be acquired in** *shamilat deh* **by a joint-owner.**

Aggrieved, the appellants filed writ petitions which

were dismissed by the High Court on the ground that the expression, 'any person' in Section 8 of the Tenancy Act, referred only to the person mentioned in Section 5, which was a tenant and that as the appellants had never been tenants, the question of granting them occupancy rights could, therefore, not arise; that the appellants had been joint-owners prior to the year 1953 and till date, the revenue record depicts them as joint-owners and that Section 10 of the Tenancy Act puts an embargo on joint-owners to claim occupancy rights. Hence the present appeals.

Dismissing the appeals, the Court

HELD: 1. There is no cogent reason to interfere with the well-reasoned judgment of the High Court. [Para 19] [993-D]

2.1. The word, 'any person' has to be understood in the context that was intended by the legislature with respect to the tenancy Act, keeping in mind the purpose for which, the statute was enacted. The provisions of the Act, thus, have to be construed to achieve the purpose of its enactment. The Court has to adopt a constructive approach not contrary to attempted objective of the enactment. The Court must examine and give meaning to the said words, in view of the statute of which it is a part, considering the context and the subject of the said statute. [Para 10] [988-F-G]

2.2. Generally, the phrase, 'any person' should be given the widest possible import, and the words may cover persons other than those mentioned in various other provisions of the statute. But, if the statutory provisions suggest, that the legislature itself has intended to give a restricted meaning to the phrase, 'any person', then it is not open to the court to give a wide or un-restricted meaning to the words, 'any person'. [Para 12] [989-E, F]

Kailash Nath Agarwal & Ors. v. Pradeshiya Industrial & Investment Corporation of U.P. Ltd. & Anr. ***AIR 2003 SC 1886: 2003 (1) SCR 1159;*** *Tej Mohammed Hussainkhan Pathan v. V.J. Raghuvanshi & Anr.* **AIR 1993 SC 365: 1993 (2) Suppl. SCC 493;** *Bipin Chandra Parshottamdas Patel v. State of Gujarat* **(2003) 4 SCC 642: 2003 (3) SCR 533;** *D.L.F Qutab Enclave Complex Educational Charitable Trust v. State of Haryana* **(2003) 5 SCC 622: 2003 (2) SCR 1;** *K.S.L Industries Ltd. v. Arihant Threads Ltd. & Ors.* **(2008) 9 SCC 763: 2008 (12) SCR 702;** *Pallawi Resources Ltd. v. Protos Engineering Company Pvt. Ltd.* **(2010) 5 SCC 196: 2010 (3) SCR 847;** *Grasim Industries Ltd. v. Collector of Customs, Bombay* **AIR 2002 SC 1706: 2002 (2) SCR 945;** *Shri Balaganesan Metal v. M.N. Shanmugham Chetty & Ors.* **AIR 1987 SC 1668: 1987 (2) SCR 1173;** *Sahakari Sakhar Karkhana Ltd. v. Collector of Central Excise, Pune* **(2003) 3 SCC 506: 2003 (2) SCR 310;** *Union of India & Ors v. Brigadier P.S Gill* **(2012) 4 SCC 497;** *Sri Ram Saha v. State of West Bengal* **(2004) 11 SCC 497: 2004 (5) Suppl. SCR 459;** *Central Bank of India v. State of Kerala* **(2009) 4 SCC 94: 2009 (3) SCR 735;** *Offshore Holdings Pvt. Ltd. v. Bangalore Development Authority & Ors.* **(2011) 3 SCC 139: 2011 (1) SCR 453;** *Afjal Imam v. State of Bihar* **(2011) 5 SCC 729: 2011 (5) SCR 771;** *Head Master, Lawrence School, Lovedale v. Jayanthi Raghu & Anr.* **(2012) 4 SCC 793;** *Sita Ram v. State of Madhya Pradesh* **AIR 1962 SC 1146: 1962 Suppl. SCR 21;** *Sri Vedagiri Lakshmi Narasimha Swami Temple v. Induru Pattabhirami Reddi* **AIR 1967 SC 781: 1967 SCR 280;** *New India Assurance Co. Ltd. v. Asha Rani & Ors.* **AIR 2003 SC 607: 2002 (4) Suppl. SCR 543;** *National Insurance Co. Ltd. v. Baljit Kaur & Ors.* **(2004) 2 SCC 1: 2004 (1) SCR 274;** *Commissioner of Income-Tax, Bhubaneshwar & Anr. v. Parmeshwari Devi Sultania & Ors.* **AIR 1998 SC 1276: 1998 (2) SCR 253;** *Balkrishna Chhaganlal Soni v. State of West Bengal* **AIR 1974 SC 120: 1974 (2) SCR 107 and** *The Trustees of the Port of Bombay v. The Premier Automobiles Ltd.* **AIR 1981 SC 1982: 1981 (1) SCR 532 – referred to.**

3. In the instant case, the High Court found the plaintiffs-appellants non-suited on the anvil of Section 10 of the Tenancy Act, observing that the expression 'any person', contained in Section 8, does not include a joint-owner (hisedar). It has been admitted by the parties that the appellants and their ancestors were hisedars/joint owners/co-sharers in the *shamilat deh* from a period prior to even 1935-36. The pleadings of the appellants, in fact, begin with such admission by them. Provisions of Section 10 of the Tenancy Act put a complete embargo on a hisedar/joint-owner to claim occupancy rights. There is no agreement between the appellants and Gram Panchyat creating any tenancy in their favour. Granting the relief to the appellants would amount to ignoring the existence of Section 10 itself and it would be against all norms of interpretation which requires that statutory provisions must be interpreted in such a manner as not to render any of its provision otiose unless there are compelling reasons for the court to resort to that extreme contingent. [Paras 17, 18] [992-G-H; 993-A-C]

Puran & Ors. v. Gram Panchayat, Faridabad **(2006) 2 SCC 433– distinguished.**

Case Law Reference:

2003 (1) SCR 1159	**referred to**	**Para 7**
1993 (2) Suppl. SCC 493	**referred to**	**Para 7**
2003 (3) SCR 533	**referred to**	**Para 7**
2003 (2) SCR 1	**referred to**	**Para 7**
2008 (12) SCR 702	**referred to**	**Para 7**
2010 (3) SCR 847	**referred to**	**Para 8**
2002 (2) SCR 945	**referred to**	**Para 9**
1987 (2) SCR 1173	**referred to**	**Para 10**

2003 (2) SCR 310	**referred to**	**Para 10**
(2012) 4 SCC 497	**referred to**	**Para 11**
2004 (5) Suppl. SCR 459	**referred to**	**Para 11**
2009 (3) SCR 735	**referred to**	**Para 11**
2011 (1) SCR 453	**referred to**	**Para 11**
2011 (5) SCR 771	**referred to**	**Para 11**
(2012) 4 SCC 793	**referred to**	**Para 11**
1962 Suppl. SCR 21	**referred to**	**Para 12**
1967 SCR 280	**referred to**	**Para 12**
2002 (4) Suppl. SCR 543	**referred to**	**Para 12**
2004 (1) SCR 274	**referred to**	**Para 12**
1998 (2) SCR 253	**referred to**	**Para 13**
1974 (2) SCR 107	**referred to**	**Para 14**
1981 (1) SCR 532	**referred to**	**Para 14**
(2006) 2 SCC 433	**distinguished**	**Para 15**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 8845-8850 of 2003.

From the Judgment & Order dated 18.09.2002 of the High Court of Punjab and Haryana at Chandigarh in C.W.P. Nos. 13985 to 13990 of 2001.

Amarendra Sharan, R.C. Gubrele, Vivek Sharma, Preeti Bhardwaj for the Appellants.

Manjit Singh, AAG, Kamal Mohan Gutpa, Nanita Sharma for the Respondents.

The Judgment of the Court was delivered by

DR. B. S. CHAUHAN, J. 1. These appeals have been preferred against the judgments and orders dated 18.9.2002, passed by the High Court of Punjab and Haryana at Chandigarh in Civil Writ Petition Nos.13985 to 13990 of 2001, by way of which, the High Court has dismissed the said writ petitions, concurring with the judgment and order of the Financial Commissioner dated 29.11.2000, by which while allowing the Revision Petition filed by the respondent-Gram Panchayat, claims of the appellants for occupancy rights in the land in dispute were rejected.

2. The facts and circumstances giving rise to these appeals are as follows:

A. The appellants/their predecessors-in-interest had been in cultivatory possession of the land in dispute, measuring 78 kanal 5 marlas situated in the village of Jhupa Khurd, Tehsil Loharu Distt. Bhiwani, prior to 1935-36. Until the year 1954, the said land was recorded as Shamilat deh in the revenue records. In the cultivation column, the appellants/their predecessors-in-interest were shown as co-sharers. The appellants/their predecessors-in-interest, filed a suit on 4.7.1989 in the Court of the Assistant Collector, First Grade Loharu, District Bhiwani, Haryana for declaration of their occupancy rights, under Sections 5 and 8 of the Punjab Tenancy Act, 1887 (hereinafter referred to as, 'the Tenancy Act') in relation to the land in dispute. The suit was contested by the State, as well as by the Gram Panchayat and after the conclusion of the trial, the same stood as dismissed, vide judgment and order dated 28.8.1992.

B. Aggrieved, the appellants/their predecessors-in-interest preferred an appeal before the District Collector, which was allowed vide order dated 28.6.1993, by way of which the appellate authority set aside the judgment and order of the Assistant Collector, and remanded back the case so that the same could be decided afresh.

C. The Court of First Instance, i.e. the Assistant Collector,

after remand, allowed the case vide judgment and order dated 18.11.1993, observing :

> "Plaintiff has paid the rent to the Gram Panchayat from time to time and when the Panchayat refused to take the rent the same was deposited in the court, on courts' order. Receipts of which are on the file. The plaintiff has been paying the nominal rent since before 12 years before the commencement of Punjab village common lands Act,1961and therefore there is relationship between the parties as land lord and tenant."

It was further held that, as the appellants/plaintiffs fulfilled all the conditions of Sections 5 and 8 of the Tenancy Act, owing to the fact that they had been in uninterrupted possession of the land for a very long time and had also been cultivating the said land continuously, paying nominal rent to the Gram Panchayat, much before the commencement of the Punjab Village Common Lands (Regulation) Act, 1961, (hereinafter referred to as Act 1961), and hence, the provisions of Section 7 of the Act 1961 were not attracted and that they were, therefore, in fact entitled to the declaration as sought by them.

D. Aggrieved, the Gram Panchayat-defendant, filed an appeal before the District Collector, Bhiwani, which was allowed vide judgment and order dated 26.2.1996, taking into consideration the fact that the Predecessors-in-interest of the appellants, were in possession of the land for a period of more than 60 years upon the payment of nominal rent of 34 paise, however, the disputed land was always shown as 'shamilat deh', and all revenue records showed the status of the appellants/their predecessors-in-interest as **co-sharers,** owing to which, they could not be termed as tenants. To create a relationship of tenancy, there must be an agreement between the parties, which was not in existence in the instant case. The possession of the appellants as regards the land in dispute, remained unauthorised and illegal and thus, they could not claim occupancy rights. In the event that the land was in illegal

possession of any person, prior to the commencement of the Act, 1961, the same would be deemed to be illegal, and no occupancy rights over it would be allowed.

E. The appellants/their predecessors-in-interest filed an appeal against the said order, before the Divisional Commissioner, Hisar. The Divisional Commissioner, while deciding further appeals vide judgment and order dated 22.8.1996, held that the predecessors-in-interest of the appellants, had been in cultivatory possession of the land before 1935-1936 as **share holders/joint owners,** upon the payment of nominal rent. As the appellants had been in cultivatory possession for more than 12 years, from the date of commencement of the Act 1961, without the payment of rent, or by payment of charges not exceeding the land revenue and cesses payable thereon, thus in view of the provisions of Section 4(3)(ii) of the Act, 1961, it cannot now, make any distinction between a tenant or co-owner of the 'shamilat deh' and therefore, the right of occupancy would be available to the tenants, as well as to the co-sharers for the reason that co-sharers must have a superior claim as compared to that of a tenant.

F. The said judgment dated 22.8.1996 was challenged by the respondent-Gram Panchayat by filing a revision application before the Financial Commissioner of the State of Haryana. The Financial Commissioner vide its judgment and order dated 29.11.2000, held that the provisions of 4(3)(ii) of the Act, l961 which provide that the rights of persons who have been in continuous cultivatory possession of 'shamilat deh', for a period of more than 12 years from the date of commencement of the said Act, without payment of rent, or upon payment of nominal rent, were not applicable as the appellants were recorded in the revenue record, as joint owners, to whom the land was never leased out by the Gram Panchayat, and thus, the provisions of the Act 1961 were not attracted, and as it is a settled legal proposition that occupancy rights cannot be acquired in shamilat deh by a joint-owner, the revision was accepted.

G. Aggrieved, the appellants challenged the said judgment and order dated 29.11.2000, by filing writ petitions which have been dismissed by the impugned judgments and orders. The High Court held that the expression, 'any person' contained in Section 8 of the Tenancy Act, referred only to the person mentioned in Section 5, which was a tenant. This section only provides that any person can establish a right of occupancy on any ground other than the one's specified in Section 5, and that as the appellants had never been tenants, the question of granting them occupancy rights could, therefore, not arise. The relationship of a landlord and tenant could not exist between the parties. The appellants had been joint-owners prior to the year 1953. Till date, the revenue record depicts them as joint-owners. Section 10 of the Tenancy Act puts an embargo on joint-owners to claim occupancy rights.

Hence, these present appeals.

3. Shri Amrendra Sharan, learned Senior counsel appearing for the appellants, has submitted that the suit was filed under Sections 5 and 8 of the Tenancy Act and that, as the appellants were tenants, they were entitled to declaration of their occupancy rights as regards the land in dispute. Even otherwise, Section 8 of the Tenancy Act enables the appellants to attain the said declaration. The statutory authorities committed a grave error in holding that the appellants were joint-owners in the shamilat deh, and not tenants. Therefore, the present appeals deserve to be allowed.

4. Per contra, Shri Manjit Singh, learned AAG appearing for the respondents, has vehemently opposed the appeals contending that the appellants/their predecessors-in-interest were in cultivatory possession of the land as joint-owners/ 'hisedars' (village proprietors), prior to 1935-36, and continued to be so, as per the revenue records even after the year 1954. Moreover, the appellants have claimed occupancy rights as provided under Section 2(f) of the Punjab Occupancy Tenants (Vesting of Proprietary Rights) Act, 1952, (hereinafter referred

to as the Act, 1952) and therefore, they cannot be allowed to claim any benefit under the provisions of Sections 5 and 8 of the Tenancy Act. They can claim relief only under Section 11 of the Act 1961. The suit under the Tenancy Act itself, is not maintainable and the present appeals are therefore, liable to be dismissed.

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

Relevant statutory provisions applicable in the case.

(a) **The Tenancy Act** :

"5. **Tenants having right of occupancy.** – (1) A tenant –

(a) who at the commencement of this Act has for more than two generations in the male line of descent through a grandfather or grand-uncle and for a period of not less than twenty years, been occupying land paying no rent therefore beyond the amount of the land-revenue thereof and the rates and cesses for the time being chargeable thereon; or

(2) If a tenant proves that he has continuously occupied land for thirty years and paid no rent therefore beyond the amount of the land-revenue thereof and the rates and cesses for the time being chargeable thereon, it may be presumed that he had fulfilled the conditions of clause (a) of sub-section (1).

xx xx xx

8. **Establishment of right of occupancy on grounds other than those expressly stated in Act** - Nothing in the foregoing sections of this Chapter shall preclude any person from establishing a right of occupancy on any ground other than the grounds specified in those sections."

10. **Rights of occupancy not to be acquired by joint owner in land held in joint ownership** – In the absence of a custom to the contrary, no one of several joint owners of land shall acquire a right of occupancy under the Chapter in land jointly owned by them.

(b) **The Act 1952 :**

Section 2(f) of the Act, 1952 defines "Occupancy Tenancy" as under:-

"occupancy tenant" means a tenant who, immediately before the commencement of this Act, is recorded as an occupancy tenant in the revenue records and includes a tenant who, after such commencement, obtains a right of occupancy in respect of the land held by him whether by agreement with the landlord or through a court of competent jurisdiction or otherwise, and includes also the predecessors and successors in interest of an occupancy tenant."

Section 3- **Vesting of proprietary rights in occupancy tenants and extinguishment of corresponding rights of landlords:-**

(a) all rights, title and interest (including the contingent interest, if any, recognised by any law, custom or usage for the time being in force and including the share in the Shamilat with respect to the land concerned) of the landlord in the land held under him by an occupancy tenant, shall be extinguished, and such rights, title and interest shall be deemed to vest in the occupancy tenant free from all encumbrances, if any, created by the landlord.

(c) **Act 1961:**

"Section 4 -**Vesting of rights in Panchayats and Non-Proprietors:**

xx xx xx

(3)(ii) rights of persons in cultivating possession of *Shamilat deh*, for more than twelve years [immediately preceding the commencement of this Act] [Inserted by the Punjab Act No.19 of 1976, Section 3] without payment of rent or by payment of charges not exceeding the land revenue and cesses payable thereon.

xx xx xx

7. **Power to put panchayat in possession of *Shamilat deh*-**

(1) The collector shall, on an application made to him by a panchayat, or by an officer, duly authorised in this behalf by the state government by a general or special order, after making such enquiry, as he may think fit and in accordance with such procedure as may be prescribed put the panchayat in possession of the land or other immovable property in the *Shamilat deh* of that village which vests or is deemed to have been vested in it under this Act and for so doing the collector may exercise the powers of a revenue court in relation to execution of a decree for possession of land under the Punjab Tenancy Act,1887.

Section 11 **– Decision of claims of right, title or interest in Shamilat Deh**_- (1) [Any person or a Panchayat] [Substituted by Act No. 25 of 1993] claiming right, title or interest in any land vested or deemed to have been vested in a Panchayat under this Act, or claiming that any land has not so vested in a Panchayat, may submit to the Collector, within such time as may be prescribed, statement of his claim in writing and signed and verified in the prescribed manner and the Collector shall have jurisdiction to decide such claim in such manner as may be prescribed.

xx xx xx"

6. It has been canvassed on behalf of the appellants that Section 8 of the Tenancy Act contains the expression, 'any person' and not, the 'tenant'. Therefore, the expression 'any person' cannot be restricted to mean a 'tenant', for the reason that had this been the intention of the legislature, the expression 'tenant' itself could have been used under Section 8. Therefore, all together, a different meaning is to be given to the said expression.

7. This Court in *Kailash Nath Agarwal & Ors. v. Pradeshiya Industrial & Investment Corporation of U.P. Ltd. & Anr.,* AIR 2003 SC 1886, held that :

> "As a general rule when two different words are used by a statute, prima facie one has to construe different words as carrying different meanings. But sometimes two different words are used in one and the same statute to convey the same meaning, but that is exception rather than the rule"
>
> (See also: *Tej Mohammed Hussainkhan Pathan v. V.J. Raghuvanshi & Anr.* AIR 1993 SC 365; *Bipin Chandra Parshottamdas Patel v. State of Gujarat* (2003) 4 SCC 642; *D.L.F Qutab Enclave Complex Educational Charitable Trust v. State of Haryana* (2003) 5 SCC 622; and *K.S.L Industries Ltd. v. Arihant Threads Ltd. & Ors.* (2008) 9 SCC 763).

8. In *Pallawi Resources Ltd. v. Protos Engineering Company Pvt. Ltd.,* (2010) 5 SCC 196, it was held by this Court:

> "Further, it is a well established principle of statutory interpretation that the legislature is specially precise and careful in its choice of language. Thus, if a statutory provision is enacted by the legislature in a certain manner, the only reasonable interpretation which can be resorted to by the courts is that such was the intention of the legislature and that the provision was consciously enacted in that manner."

9. In *Grasim Industries Ltd. v. Collector of Customs, Bombay* AIR 2002 SC 1706, this court observed:

> "That different expressions like 'similar' and 'other' have not been used without any basis. No words or expressions used in any statute can be said to be redundant or superfluous. Every provision and every word must be looked at generally and in the context in which it is used. It is said that every statute is an edict of the legislature. The elementary principle of interpreting any word while considering a statute is to gather the mens or sentential legis of the legislature. Where the words arc clear and there is no obscurity, and there is no ambiguity and the intention of the legislature is clearly conveyed, there is no scope for the Court to take upon itself the task of amending or alternating the statutory provisions. Wherever the language is clear the intention of the legislature is to be gathered from the language used. While doing so what has been said in the statute as also what has not been said has to be noted. The construction which requires for its support addition or substitution of words or which results in rejection of words has to be avoided".

10. The word, 'any person' has to be understood in the context that was intended by the legislature with respect to the tenancy Act, keeping in mind the purpose for which, the statute was enacted. The provisions of the Act, thus, have to be construed to achieve the purpose of its enactment. The Court has to adopt a constructive approach not contrary to attempted objective of the enactment. The Court must examine and give meaning to the said words, in view of the statute of which it is a part, considering the context and the subject of the said statute. (Vide: *Shri Balaganesan Metal v. M.N. Shanmugham Chetty & Ors.,* AIR 1987 SC 1668; and *Sahakari Sakhar Karkhana Ltd. v. Collector of Central Excise, Pune,* (2003) 3 SCC 506).

11. In *Union of India & Ors v. Brigadier P.S Gill,* (2012) 4 SCC 497, this Court following its earlier decisions held:

> "Every clause of a statute is to be construed with reference to the context and other provisions of the Act to make a consistent and harmonious meaning of the statute relating to the subject-matter. The interpretation of the words will be by looking at the context, the collocation of the words and the object of the words relating to the mattes……..It is an elementary rule of construction that no provision of a statute should be construed in isolation but it should be construed with reference to the context and in the light of other provisions of the Statute so as, as far as possible, to make a consistent enactment of the whole statute..."
>
> (See also: *Sri Ram Saha v. State of West Bengal* (2004) 11 SCC 497; *Central Bank of India v. State of Kerala* (2009) 4 SCC 94; *Offshore Holdings Pvt. Ltd. v. Bangalore Development Authority & Ors.* (2011) 3 SCC 139; Afjal Imam *v.* State of Bihar (2011) 5 SCC 729; *Head Master, Lawrence School, Lovedale v. Jayanthi Raghu & Anr.* (2012) 4 SCC 793)

12. Generally, the phrase, 'any person' should be given the widest possible import, and the words may cover persons other than those mentioned in various other provisions of the statute. But, if the statutory provisions suggest, that the legislature itself has intended to give a restricted meaning to the phrase, 'any person', then it is not open to the court to give a wide or un-restricted meaning to the words, 'any person'. (Vide: *Sita Ram v. State of Madhya Pradesh,* AIR 1962 SC 1146; *Sri Vedagiri Lakshmi Narasimha Swami Temple v. Induru Pattabhirami Reddi,* AIR 1967 SC 781; *New India Assurance Co. Ltd. v. Asha Rani & Ors.,* AIR 2003 SC 607; and *National Insurance Co. Ltd. v. Baljit Kaur & Ors.,* (2004) 2 SCC 1).

13. In *Commissioner of Income-Tax, Bhubaneshwar & Anr. v. Parmeshwari Devi Sultania & Ors.,* AIR 1998 SC 1276,

while interpreting the provisions of Section 132(11) of the Income Tax Act, 1961, this Court interpreted the expression, 'any person', as not confined to a person searched, or against whom an order is passed, but such expression would include, even a third party giving reasons for its objections to an order and, hence, seeking appropriate relief in the matter.

14. A similar view was re-iterated in *Balkrishna Chhaganlal Soni v. State of West Bengal,* AIR 1974 SC 120, by this Court, interpreting the provisions of Sections 107 and 135 (b) of the Customs Act, 1962, observing that the words, 'any person' as contained in Section 107 cannot be given a restricted meaning so as to exclude from their ambit, persons who may subsequently be put up for trial. (See also: *The Trustees of the Port of Bombay v. The Premier Automobiles Ltd.,* AIR 1981 SC 1982).

15. The instant case is required to be examined in light of the aforesaid statutory provisions and settled legal propositions.

This Court in *Puran & Ors. v. Gram Panchayat, Faridabad,* (2006) 2 SCC 433, dealt with an identical case and examined most of the statutory provisions involved in this case. The court held that Section 4(3)(ii) of the Act, 1961 would be attracted only if the following three conditions are satisfied:

> (i) The person must be cultivating land which is part of the shamilat deh of a village;
>
> (ii) He should be cultivating such land for a period of 12 years immediately preceding the commencement of the Act; and
>
> (iii) He should be cultivating such land without payment of rent or payment of charges in excess of the land revenue and cess.

While dealing with the provisions of Section 8 of the Tenancy Act, the court held that nothing contained in Sections

5 to 7, shall preclude any person from establishing a right of occupancy on any ground other than the grounds that have been specified in these sections.

The contention of the appellants therein, that their right of occupancy was based on a ground other than the ones mentioned in Section 5 of the Tenancy Act, was based on Section 3(a) of the Act, 1952. However, while dealing with the same, the Court held as under:

> *"Section 3 of the Act relates to vesting of proprietary rights in occupancy tenants and extinguishment of corresponding rights of landlords. It is evident therefrom that the right, title and interest shall be deemed to vest only in an "occupancy tenant". Occupancy tenant is defined under Section 2(f) as meaning a tenant who, immediately before the commencement of the Proprietary Rights Act, is recorded as an occupancy tenant in the revenue records and includes a tenant who, after such commencement, obtains a right of occupancy in respect of the land held by him whether by agreement with the landlord or through a court of competent jurisdiction or otherwise, and includes also the predecessors and successors-in-interest of an occupancy tenant. Admittedly, neither the appellants nor their predecessors were recorded as occupancy tenants in the revenue records immediately before the commencement of the Proprietary Rights Act, nor did they obtain a right of occupancy in respect of the said land either by agreement with the landlord or through a court of competent jurisdiction or otherwise after the commencement of the Act. The appellants, therefore, do not answer the definition of "occupancy tenant" under the Proprietary Rights Act. Consequently, they cannot derive any benefit under Section 3 of the said Act.*
>
> *If Section 3 of the Proprietary Rights Act is inapplicable, the question that remains for consideration is whether they are entitled to the relief sought merely because the names of Sarjeet and Jivan Lal (father of Appellants 1 to 3 and father of Appellants 4 and 5 respectively) were shown as cultivating the lands for some years from 1966-67. To get excluded from the vesting under Section 4(1) of the Common Lands Act, by relying on Section 4(3)(ii), the appellants should prove that they and their ancestors were cultivating such land for a period of at least 12 years prior to the commencement of the Common Lands Act…."*.

16. If the aforesaid test laid down by this Court, is applied to the case at hand, then undoubtedly, all the conditions specified therein have been satisfied by the appellants, and their case is also fully supported by the Gram Panchayat. The contents of its counter affidavit filed before this Court, read:

> *"It is, however, not denied that the petitioners have been in cultivating possession of the lands as per entries in the revenue records from the time of their forefathers for the past over seventy years or so and paying nominal rent to the Gram Panchayat from time to time and when the Panchayat refused to take rent the same was deposited in the court. Their possession has remained uninterrupted. Though the possession has been unauthorised, the Panchayat never admitted the petitioners as its tenants."*

17. In view of the above, the appellants may have a valid case. But in the said case, the provisions of Section 10 of the Tenancy Act, not attracted and thus, the facts herein become distinguishable. However, the High Court found them non-suited on the anvil of Section 10 of the Tenancy Act, observing that the expression 'any person', contained in Section 8, does not include a joint-owner (hisedar). It has been admitted by the parties that the appellants and their ancestors were hisedars/ joint owners/co-sharers in the shamilat deh from a period prior

to even 1935-36. The pleadings of the appellants, in fact, begin with such admission by them.

18. Provisions of Section 10 of the Tenancy Act put a complete embargo on a hisedar/joint-owner to claim occupancy rights. There is no agreement between the appellants and Gram Panchyat creating any tenancy in their favour. Granting the relief to the appellants would amount to ignoring the existence of Section 10 itself and it would be against all norms of interpretation which requires that statutory provisions must be interpreted in such a manner as not to render any of its provision otiose unless there are compelling reasons for the court to resort to that extreme contingent.

19. Thus, in view thereof, we do not see any cogent reason to interfere with the well-reasoned judgment of the High Court impugned before us. The appeals lack merit and are dismissed accordingly. However, in the facts and circumstances of the case, there shall be no order as to costs.

B.B.B. Appeals dismissed.

AYAAUBKHAN NOORKHAN PATHAN

v.

THE STATE OF MAHARASHTRA & ORS.

(Civil Appeal No. 7728 of 2012)

NOVEMBER 8, 2012

[DR. B.S. CHAUHAN AND JAGDISH SINGH KHEHAR, JJ.]

Maharashtra Scheduled Castes, Scheduled Tribes, De-Notified Tribes, (Vimukta Jatis), Nomadic Tribes, Other Backward Category (Regulation of Issuance and Verification of) Caste Certificate Act, 2000:

Caste certificate – Appellant given employment on the basis of a caste certificate showing that he belonged to Bhil Tadvi (Scheduled Tribe) – Validity certificate issued by Caste Scrutinity Committee – Complaint by respondent no. 5 that appellant obtained employment by misrepresentation – High Court, in writ petition, directing Scrutinity Committee to hold de novo inquiry with respect to appellant's caste certificate – Held: Caste certificates issued by holding proper enquiry, in accordance with duly prescribed procedure, would not require any further verification by the Scrutiny Committee – However, in the instant case, considering the seriousness of the allegations, as the Scrutiny Committee has already conducted an inquiry and the only grievance of the appellant is that there has been non-compliance with the principles of natural justice, it is directed that before the submission of any report by the Scrutiny Committee, application of appellant for calling the witnesses for cross-examination must be disposed of, and he must be given a fair opportunity to cross-examine the witnesses, who have been examined before the Committee – Further, as respondent no. 5 has not been pursuing the matter in a bonafide manner, and has not raised any public

interest, rather he abused the process of the court only to harass the appellant, he is restrained from intervening in the matter any further, and also from remaining a party to it, and he is also liable to pay costs to the tune of Rs. one lakh – Evidence Act, 1872 – s.114, Ilustration(e) – Maxim "Omnia praesumuntur rite esse acta".

Constitution of India, 1950:

Art. 226 – Writ petition in public interest – Maintainaility of – Held: There must be a judicially enforceable right available for enforcement, on the basis of which writ jurisdiction is resorted to – The ***legal right that can be enforced*** *must ordinarily be the right of the petitioner himself, who complains of infraction of such right and approaches the court – Whenever any public interest is invoked, the court must examine the case to ensure that there is, in fact, genuine public interest involved – Court must maintain strict vigilance to ensure that there is no abuse of the process of court – Supreme Court has consistently held that filing of public interest litigation is not permissible so far as service matters are concerned – In the instant case, respondent no.5 does not belong to Scheduled Tribes category, but he has been pursuing the matter from one court to another – His conduct is found to be reprehensible, and without any sense of responsibility – Therefore, the Court is highly doubtful as regards his bonafides – He has, therefore, disentitled himself from appearing before any court, or Committee, so far as the instant matter is concerned – Locus standi – Party – "Person aggrieved"- Public interest litigation – Service law.*

Evidence Act, 1872:

s.3 – 'Evidence' – Affidavit – Held: An affidavit is not evidence within the meaning of s. 3 and the same can be used as "evidence" only if, for sufficient reasons, court passes an order under O. 19 CPC – Thus, the filing of an affidavit of one's own statement, in one's own favour, cannot be regarded as

sufficient evidence for any court or tribunal, on the basis of which it can come to a conclusion as regards a particular fact-situation – Code of Civil Procedure, 1908 – O.19 and O. 18, rr. 4 and 5 – Affidavits.

Natural Justice:

Cross-examination – Held: Is part of principles of natural justice - Not only should the opportunity of cross-examination be made available, but it should be one of effective cross-examination, so as to meet the requirement of principles of natural justice.

The appellant was appointed in 1990 as a Senior Clerk in the Municipal Corporation against the vacancy reserved for Scheduled Tribes, on the basis of a caste certificate issued by the competent authority in his favour that he belonged to Bhil Tadvi (Scheduled Tribe). The sad caste certificate was referred to the Caste Certificate Scrutiny Committee, which issued a validity certificate stating that the appellant belonged to Bhil Tadvi (Scheduled Tribe). In 2009, respondent no. 5 filed a complaint before the Scrutiny Committee for recalling the validity certificate on the ground that the appellant professed the religion of Islam and, as such, he could not be a Scheduled Tribe and he obtained the employment by way of misrepresentation. The Scrutiny Committee rejected the application by order dated 13.3.2009 observing that it had no power to recall or review a caste validity certificate. Respondent no. 5 filed a writ petition before the High Court seeking to quash the order dated 13.3.2009 and to direct the Scrutiny Committee to hold de novo inquiry with respect to appellant's caste certificate. The High Court set aside the order dated 13.3.2009 passed by Scrutiny Committee and remitted the matter to it.

In the instant appeal, it was contended for the appellant that respondent no. 5, being member of General category, had no locus to challenge appellant's caste certificate and, therefore, the High Court erred in directing the Scrutiny Committee to entertain the complaint of respondent no. 5; that despite the directions given by the Supreme Court, the Scrutiny Committee failed to comply with the principles of natural justice, as the appellant was denied the opportunity to cross-examine the witnesses and no order was passed on his application for recalling the witnesses for the purpose of cross-examination.

Disposing of the appeal, the Court

HELD:

'Person aggrieved:'

1.1. A writ petition under Art. 226 of the Constitution is maintainable either for the purpose of enforcing a statutory or legal right, or when there is a complaint by the petitioner that there has been a breach of statutory duty on the part of the Authorities. Therefore, there must be a judicially enforceable right available for enforcement, on the basis of which writ jurisdiction is resorted to. Court can of course, enforce the performance of a statutory duty by a public body, using its writ jurisdiction at the behest of a person, provided that such person satisfies the court that he has a legal right to insist on such performance. The existence of such right is a condition precedent for invoking the writ jurisdiction of the courts. It is implicit in the exercise of such extraordinary jurisdiction that the relief prayed for must be one to enforce a legal right. Infact, the existence of such right is the foundation of the exercise of the said jurisdiction by the court. The legal right that can be enforced must ordinarily be the right of the petitioner himself, who complains of infraction of such right and

approaches the court for relief as regards the same. [para 7] [1013-A-E]

State of Orissa v. Madan Gopal Rungta, **1952 SCR 28 = AIR 1952 SC 12;** *Saghir Ahmad & Anr. v. State of U.P.,* **1955 SCR 707 = AIR 1954 SC 728;** *Calcutta Gas Company (Proprietary) Ltd. v. State of West Bengal & Ors.,* **1962 Suppl. SCR 1 = AIR 1962 SC 1044;** *Rajendra Singh v. State of Madhya Pradesh,* **1996 (4) Suppl. SCR 393 = AIR 1996 SC 2736; and** *Tamilnad Mercantile Bank Shareholders Welfare* Association (2) v. S.C. Sekar & Ors., **2008 (17) SCR 85 = (2009) 2 SCC 784 – referred to.**

1.2. The expression, "person aggrieved" does not include a person who suffers from a psychological or an imaginary injury; a person aggrieved must, therefore, necessarily be one, whose right or interest has been adversely affected or jeopardised. It is a settled legal proposition that a stranger cannot be permitted to meddle in any proceeding, unless he satisfies the Authority/Court that he falls within the category of aggrieved persons. Only a person who has suffered, or suffers from legal injury can challenge the act/action/order etc. in a court of law. [para 7-8] [1012-G-H; 1013-G-H]

Shanti Kumar R. Chanji v. Home Insurance Co. of New York, **1975 (1) SCR 550 =AIR 1974 SC 1719; and** *State of Rajasthan & Ors. v. Union of India & Ors*., **1978 (1) SCR 1 = AIR 1977 SC 1361;** *Anand Sharadchandra Oka v. University of Mumbai*, **2008 (2) SCR 297 = AIR 2008 SC 1289;** *Subhash Babu v. State of A. P.* **2011 (9) SCR 453 =AIR 2011 SC 3031;** *Charanjit Lal Chowdhury v. The Union of India & Ors.,* **1950 SCR 869 =AIR 1951 SC 41;** *Sunil Batra (II) v. Delhi Administration,* **1980 (2) SCR 557 = AIR 1980 SC 1579;** *Mrs. Neelima Priyadarshini v. State of Bihar,* **AIR 1987 SC 2021;** *Simranjit Singh Mann v. Union of India*, **1992 Suppl. SCR 592 = AIR 1993 SC 280;** *Karamjeet Singh v. Union of India*, **1992 (1) Suppl. SCR 898 = AIR 1993 SC**

284; *and* *Kishore Samrite v. State of U.P. & Ors.*, JT (2012) 10 SC 393 – referred to.

1.3. Whenever any public interest is invoked, the court must examine the case to ensure that there is, in fact, genuine public interest involved. The court must maintain strict vigilance to ensure that there is no abuse of the process of court, and should make an earnest endeavour to take up those cases, where the subjective purpose of the lis justifies the need for it. Even as regards the filing of a public interest litigation, this Court has consistently held that such a course of action is not permissible so far as service matters are concerned. In view of the decisions of the Court, the law on the point can be summarised to the effect that a person who raises a grievance, must show how he has suffered legal injury. Generally, a stranger having no right whatsoever to any post or property, cannot be permitted to intervene in the affairs of others.[para 12-13 and 15] [1015-B-E; 1016-D]

P.S.R. Sadhanantham v. Arunachalam & Anr., **2009 (16) SCR 111 = AIR 1980 SC 856;** *Dalip Singh v. State of U.P. & Ors.*, **2011 (6) SCR 403 = (2010) 2 SCC 114;** *State of Uttaranchal v. Balwant Singh Chaufal & Ors*., **2010 (1) SCR 678 = (2010) 3 SCC 402;** *Amar Singh v. Union of India & Ors*. **2011 (6) SCR 403 = (2011) 7 SCC 69;** *Dr. Duryodhan Sahu & Ors. v. Jitendra Kumar Mishra & Ors.*, **1998 (1) Suppl. SCR 77 = AIR 1999 SC 114;** *Dattaraj Natthuji Thaware v. State of Maharashtra,* **2004 (6) Suppl. SCR 900 = AIR 2005 SC 540;** *Neetu v. State of Punjab & Ors.*, **2007 (1) SCR 223 = AIR 2007 SC 758; and** *Ghulam Qadir v. Special Tribunal & Ors.*, **2001 (3) Suppl. SCR 504 = (2002) 1 SCC 33 – referred to.**

Locus standi:

2.1. It is evident that under ordinary circumstances, a third person, having no concern with the case at hand,

cannot claim to have any *locus-standi* to raise any grievance whatsoever. However, in the exceptional circumstances if the actual persons aggrieved, because of ignorance, illiteracy, inarticulation or poverty, are unable to approach the court, and a public spirited person approaches the court, then the court may examine the issue and even if his bonafides are doubted, but the issue raised by him, in the opinion of the court, requires consideration, the court may proceed *suo-motu,* in such respect. [para 22] [1019-C-E]

Vinoy Kumar v. State of U.P., **2001 (2) SCR 1196 = AIR 2001 SC 1739;** *Ravi Yashwant Bhoir v. District Collector, Raigad & Ors*., **(2012) 4 SCC 407;** *K. Manjusree v. State of Andhra Pradesh & Anr.*, **2008 (2) SCR 1025 = (2008) 3 SCC 512 – relied on**

Balbir Kaur & Anr. v. Uttar Pradesh Secondary Education Services Selection Board, Allahabad & Ors., **2008 (9) SCR 130 = (2008) 12 SCC 1;** *Raju Ramsingh Vasave v. Mahesh Deorao Bhiavapurkar & Ors.*, **2008 (12) SCR 992 = (2008) 9 SCC 54; and** *Manohar Joshi v. State of Maharashtra & Ors*., **(2012) 3 SCC 619 – referred to.**

2.2. In the instant case, as respondent no.5 does not belong to the Scheduled Tribes category, the garb adopted by him, of serving the cause of Scheduled Tribes candidates who might have been deprived of their legitimate right to be considered for the post, must be considered in order to determine whether he is, in fact, in a legitimate position to lay any claim before any forum, whatsoever. The conduct of respondent no. 5, who has been pursuing the said matter from one court to another, is found to be reprehensible, and without any sense of responsibility, as he could not submit any satisfactory response to the directions issued by this Court on 29.10.2012. Therefore, this Court is highly doubtful as

regards his bonafides. He has, therefore, disentitled himself from appearing either before this Court, or any other court, or Committee, so far as the instant case is concerned. [para 16 and 44] [1016-E-F; 1031-B-D]

Cross-examination as part of the principles of natural justice:

3.1. A Constitution Bench of this Court in *Chintaman Sadashiva Vaishampayan's* ***case*****, held that the rules of natural justice, require that a party must be given the opportunity to adduce all relevant evidence upon which he relies and further that the evidence of the opposite party should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party. Not providing the said opportunity to cross-examine witnesses, would violate the principles of natural justice. This Court is of the considered opinion that the right of cross-examination is an integral part of the principles of natural justice. [para 23 and 25] [1019-G-H; 1020-A, H]**

State of M.P. v. Chintaman Sadashiva Vaishampayan, **AIR 1961 SC 1623;** *Union of India v. T.R. Varma*, **1958 SCR 499 = AIR 1957 SC 882;** *Meenglas Tea Estate v. Workmen,* **1964 SCR 165 = AIR 1963 SC 1719;** *M/s. Kesoram Cotton Mills Ltd. v. Gangadhar & Ors.,* **1964 SCR 809 = AIR 1964 SC 708;** *New India Assurance Company Ltd . v . Nusli Neville Wadia and Anr.,* **2007 (13) SCR 598 = AIR 2008 SC 876;** *Rachpal Singh & Ors. v. Gurmit Singh & Ors*., **AIR 2009 SC 2448;** *Biecco Lawrie & Anr. v. State of West Bengal & Anr*., **2009 (11) SCR 972 = AIR 2010 SC 142;** *State of Uttar Pradesh v. Saroj Kumar Sinha,* **2010 (2) SCR 326 = AIR 2010 SC 3131; and** *Lakshman Exports Ltd. v. Collector of Central Excise* **(2005) 10 SCC 634 – relied on**

K.L. Tripathi v. State Bank of India & Ors., **AIR 1984 SC 273;** *Union of India v. P.K. Roy* **AIR 1968 SC 850; and**

Channabasappa Basappa Happali v. State of Mysore, **AIR 1972 SC 32;** *Transmission Corpn. of A.P. Ltd. v. Sri Rama Krishna Rice Mill,* **AIR 2006 SC 1445 ;** *Rajiv Arora v. Union of India & Ors*., **AIR 2009 SC 1100 – referred to.**

3.2. In the instant case, the appellant raised the grievance that, the evidence of a large number of persons had been recorded by the Scrutiny Committee behind his back, and that he had not been given an opportunity to cross-examine the witnesses that were examined by the other side and, therefore, he was unable to lead a proper defence. He filed an application for the purpose of recalling 3 witnesses named therein so that he may cross-examine them. He also filed another application on the same day, seeking a period of 30 days time, to file his reply as is required within the provisions of r.12(8) of the Rules 2003, and yet another application for the purpose of calling of records from the office of the Tehsildar, to ascertain the genuineness of the certificate impugned. None of the said applications have been decided. In pursuance of the order of this Court, the original record was produced, but it does not indicate that the appellant was, in fact, given an opportunity to cross-examine the witnesses, or that all the said witnesses were examined in the presence of the appellant. [para 40 and 42] [1029-B-E-G-H]

Affidavit - whether evidence within the meaning of Section 3 of the Evidence Act, 1872:

4.1. It is a settled legal proposition that an affidavit is not evidence within the meaning of s. 3 of the Evidence Act, 1872. Affidavits are, therefore, not included within the purview of the definition of "evidence" as has been given in s.3 of the Evidence Act, and the same can be used as "evidence" only if, for sufficient reasons, the court passes an order under Order XIX of the Code of Civil Procedure, 1908. Thus, the filing of an affidavit of one's own

statement, in one's own favour, cannot be regarded as sufficient evidence for any court or tribunal, on the basis of which it can come to a conclusion as regards a particular fact-situation. [para 31] [1023-B-D]

Sudha Devi v. M.P. Narayanan & Ors., **1988 (3) SCR 756 = AIR 1988 SC 1381; and** *Range Forest Officer v. S.T. Hadimani*, **2002 (1) SCR 1080 = AIR 2002 SC 1147;** *M/s Bareilly Electricity Supply Co. Ltd. v. The Workmen & Ors.*, **1972 (1) SCR 241 = AIR 1972 SC 330;** *Needle Industries (India) Ltd. & Ors. v. N.I.N.I.H. Ltd. & Ors.*, **1981 (3) SCR 698 = AIR 1981 SC 1298;** *Ramesh Kumar v. Kesho Ram,* AIR 1992 SC 700; *Standard Chartered Bank v. Andhra Bank Financial Services Ltd. & Ors.,* **2006 (2) Suppl. SCR 1 = (2006) 6 SCC 94 – referred to**

4.2. However, in a case where the deponent is available for cross-examination, and opportunity is given to the other side to cross-examine him, the affidavit can be relied upon. Such view stands fully affirmed particularly, in view of the amended provisions of Order XVIII, Rules 4 and 5 CPC. In certain other circumstances, in order to avoid technicalities of procedure, the legislature, or a court/tribunal, can even lay down a procedure to meet the requirement of compliance with the principles of natural justice and, thus, the case will be examined in the light of those statutory rules etc. [para 36] [1025-D-F]

5.1. It is evident from the judgment in *Daya Ram*, that the purpose of issuing directions in *Km. Madhuri Patil*, **was only to examine those cases, where caste certificates had been issued without conducting any prior enquiry, on the basis of self- affidavits regarding one's caste alone, and that the said directions were not at all applicable where a legislation governing or regulating the grant of caste certificates exists, and where caste**

certificates are issued after due and proper enquiry. Caste certificates issued by holding proper enquiry, in accordance with duly prescribed procedure, would not require any further verification by the scrutiny committee. [para 39] [1028-F-H; 1029-A]

Km. Madhuri Patil v. Addl. Commissioner, Tribal Development, **1994 (3) Suppl. SCR 50 = (1994) 6 SCC 241; and** *Daya Ram v. Sudhir Batham & Ors*., **(2012) 1 SCC 333 – referred to.**

5.2. In the instant case, the Scrutiny Committee in ordinary circumstances examined the matter and after investigation through its Vigilance Cell and considering all the documentary evidence on record and after being satisfied, granted the caste verification certificate in 2000. Section 114 Ill.(e) of the Evidence Act provided for the court to pronounce that the decision taken by the Scrutiny Committee has been done in regular course and the caste certificate has been issued after due verification. Such a presumption is based on legal maxim *"Omnia praesumuntur rite esse acta"* i.e. all acts are presumed to have rightly and regularly been done, and it can be rebutted by adducing appropriate evidence. Mere statement made in the written statement/petition is not enough to rebut the presumption. The onus of rebuttal lies upon the person who alleges that the act had not been regularly performed or the procedure required under the law had not been followed. A very strong material/evidence is required to rebut the presumption. Once respondent no. 5 had challenged the caste certificate, he must have acted seriously and brought the material before the Scrutiny Committee to show that the earlier decision was improbable or factually incorrect. [para 45] [1031-D-H; 1032-A-B]

Gopal Narain v. State of U.P. & Anr., **1964 SCR 869 =**

AIR 1964 SC 370; *Narayan Govind Gavate & Ors. v. State of Maharashtra & Ors*., **1977 (1) SCR 763 =AIR 1977 SC 183;** *Karewwa & Ors.v. Hussensab Khansaheb Wajantri & Ors.,* **AIR 2002 SC 504;** *Engineering Kamgar Union v. Electro Steels Castings Ltd. & Anr.,* **2004 (1) Suppl. SCR 301 = (2004) 6 SCC 36;** *Mohd. Shahabuddin v. State of Bihar,* **2010 (3) SCR 911 = (2010) 4 SCC 653;** *Punjab State Electricity Board & Anr. v. Ashwani Kumar,* **2010 (7) SCR 1158 = (2010) 7 SCC 569;** *M. Chandra v. M. Thangmuthu & Anr.*, **AIR 2010 (11) SCR 38 = 2011 SC 146; and** *R. Ramachandran Nair v. Deputy Superintendent, Vigilance Police* **2011 (3) SCR 1054 = (2011) 4 SCC 395 – referred to.**

5.3. Considering the seriousness of the allegations, as the Scrutiny Committee has already conducted an inquiry in relation to this matter, and the only grievance of the appellant is that there has been non-compliance with the principles of natural justice, and the fact that the applications filed by him, were not decided upon, it is directed that before the submission of any report by the Scrutiny Committee, the application filed by the appellant for calling the witnesses for cross-examination must be disposed of, and he must be given a fair opportunity to cross-examine the witnesses, who have been examined before the Committee. The Scrutiny Committee is further directed to pass appropriate orders in accordance with the law thereafter. In case, the Scrutiny Committee has already taken a decision, the same being violative of the principles of natural justice, would stand vitiated. [para 46] [1032-E-G]

5.4. However, considering the fact that respondent no. 5 has not been pursuing the matter in a bonafide manner, and has not raised any public interest, rather he abused the process of the court only to harass the appellant, he is restrained from intervening in the matter

any further, and also from remaining a party to it, and he is also liable to pay costs to the tune of Rs. one lakh, to the District Collector, who would deposit the said amount in the account of the Supreme Court Legal Services Committee. [para 47] [1032-H; 1033-A-C]

Case Law Reference:

1952 SCR 28	referred to	para 7
1955 SCR 707	referred to	para 7
1962 Suppl. SCR 1	referred to	para 7
1996 (4) Suppl. SCR 393	referred to	para 7
2008 (17) SCR 85	referred to	para 7
1975 (1) SCR 550	referred to	para 8
1978 (1) SCR 1	referred to	para 8
2008 (2) SCR 297	referred to	para 9
2011 (9) SCR 453	referred to	para 10
1950 SCR 869	referred to	para 11
1980 (2) SCR 557	referred to	para 11
AIR 1987 SC 2021	referred to	para 11
1992 Suppl. SCR 592	referred to	para 11
1992 (1) Suppl. SCR 898	referred to	para 11
2012 (10) JT 393	referred to	para 11
AIR 1980 SC 856	referred to	para 12
2009 (16) SCR 111	referred to	para 12
2010 (1) SCR 678	referred to	para 12
2011 (6) SCR 403	referred to	para 12

1998 (1) Suppl. SCR 77	**referred to**	**para 13**
2004 (6) Suppl. SCR 900	**referred to**	**para 13**
2007 (1) SCR 223	**referred to**	**para 13**
2001 (3) Suppl. SCR 504	**referred to**	**para 14**
(2012) 4 SCC 407	**referred to**	**para 16**
2008 (2) SCR 1025	**relied on**	**para 18**
2008 (9) SCR 130	**referred to**	**para 19**
2008 (12) SCR 992	**referred to**	**para 20**
(2012) 3 SCC 619	**referred to**	**para 20**
2001 (2) SCR 1196	**relied on**	**para 21**
AIR 1961 SC 1623	**relied on**	**para 23**
1958 SCR 499	**relied on**	**para 23**
1964 SCR 809	**relied on**	**para 23**
1964 SCR 165	**relied on**	**para 23**
2009 AIR 2448	**relied on**	**para 23**
2009 (11) SCR 972	**relied on**	**para23**
2010 (2) SCR 326	**relied on**	**para 23**
2005 (10) SCC 634	**relied on**	**para 24**
2007 (13) SCR 598	**relied on**	**para 25**
AIR 1984 SC 273	**referred to**	**para 26**
AIR 1968 SC 850	**referred to**	**para 26**
AIR 1972 SC 32	**referred to**	**para 26**
AIR 2006 SC 1445	**referred to**	**para 27**
AIR 2009 SC 1100	**referred to**	**para 29**

1988 (3) SCR 756	**referred to**	**para 31**
2002 (1) SCR 1080	**referred to**	**para 31**
1972 (1) SCR 241	**referred to**	**para 32**
1981 (3) SCR 698	**referred to**	**para 33**
1992 AIR 700	**referred to**	**para 34**
2006 (2) Suppl. SCR 1	**referred to**	**para 35**
1994 (3) Suppl. SCR 50	**referred to**	**para 37**
(2012) 1 SCC 333	**referred to**	**para 38**
1964 SCR 869	**referred to**	**para 45**
1977 (1) SCR 763	**referred to**	**para 45**
2002 AIR 504	**referred to**	**para 45**
2004 (1) Suppl. SCR 301	**referred to**	**para 45**
2010 (3) SCR 911	**referred to**	**para 45**
2010 (7) SCR 1158	**referred to**	**para 45**
2010 (11) SCR 38	**referred to**	**para 45**
2011 (3) SCR 1054	**referred to**	**para 45**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7728 of 2012.

From the Judgment & Order dated 22.09.2009 of the High Court of Judicature of Bombay, Bench at Aurangabad in Writ Petition No. 3129 of 2009.

A.V. Savant, Sudhanshu S. Choudhari, Mahesh Deshmukh, Rajshri Dubey for the Appellant.

Anant Bhushan Kanade, Kailash Pandey, Dharam Bir Raj Vohra, Shankar Chillarge, Asha Gopalan Nair, Aniruddha P.

Mayee, Charudatta M., Lawyer's Knit & Co. for the Respondents.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This appeal has been preferred against the impugned judgment and order dated 22.9.2009, passed by the High Court of Bombay (Aurangabad Bench) in Writ Petition No.3129 of 2009, filed by respondent no.5, challenging the caste certificate of the appellant.

2. The facts and circumstances giving rise to this appeal are as follows:

A. The competent authority in the present case, issued a caste certificate dated 19.10.1989, after following due procedure, in favour of the appellant stating that he does in fact, belong to Bhil Tadvi (Scheduled Tribes). On the basis of the said certificate, the appellant was appointed as Senior Clerk in the Municipal Corporation of Aurangabad (hereinafter referred to as the, 'Corporation') on 6.2.1990, against the vacancy reserved for persons under the Scheduled Tribes category. The Corporation referred the caste certificate of the appellant for the purpose of verification, to the Caste Certificate Scrutiny Committee (hereinafter referred to as the, "Scrutiny Committee"). The Vigilance Cell attached to the Scrutiny Committee, upon conducting vigilance enquiry, vide order dated 29.12.1998, found that the appellant did, in fact, belong to Bhil Tadvi (Scheduled Tribes) and thus, the said certificate was verified. The Scrutiny Committee, on the basis of the said report and also other documents filed by the appellant in support of his case, issued a validity certificate, dated 23.5.2000 to the appellant belonging to Bhil Tadvi (Scheduled Tribes). After the lapse of a period of 9 years, respondent no.5 filed complaint dated 9.1.2009, through an advocate before the Scrutiny Committee, for the purpose of recalling the said validity certificate, on the ground that the appellant had obtained employment by way of misrepresentation, and that he does not actually belong to the Scheduled Tribes category. In fact, the appellant professed the religion of Islam and therefore, could not be a Scheduled Tribe.

B. The Scrutiny Committee rejected the said application vide order dated 13.3.2009, observing that it had no power to recall or to review a caste validity certificate, as there is no statutory provision that provides for the same.

C. Aggrieved, respondent no.5 challenged the order dated 13.3.2009, by filing Writ Petition No.3129 of 2009 before the High Court of Bombay (Aurangabad Bench), praying for quashing of the order dated 13.3.2009, and directing the Scrutiny Committee to hold *de novo* enquiry, with respect to the appellant's caste certificate. The appellant contested the said petition, denying all the allegations made by respondent no.5. Vide its impugned judgment and order dated 22.9.2009, the High Court disposed of the said writ petition without going into the merits of the case. However, while doing so, the High Court set aside the order dated 13.3.2009, and remitted the matter to the Scrutiny Committee, directing it to hear all the parties concerned in accordance with law, as regards the allegations made by respondent no.5 in the complaint. It further directed the Committee to decide the said matter within a period of 6 months.

Hence, this present appeal.

3. Before proceeding further, it may also be pertinent to refer to certain subsequent developments.

During the pendency of this appeal, this Court vide order dated 20.11.2009, granted a stay with respect to the operation of the aforementioned impugned judgment. Vide order dated 6.1.2012, the said interim order was modified, to the extent that the Scrutiny Committee would re-examine the case on merit, without being influenced by earlier proceedings before it, and by giving adequate opportunity to the parties to lead evidence

in support of their respective cases after which, the Scrutiny Committee would submit its report to this Court within a period of 3 months.

4. Shri A.V. Savant, learned Senior counsel, appearing for the appellant has submitted that respondent no.5 does not belong to any reserved category, infact, he belongs to the General category, and hence, he has no right or *locus standi,* to challenge the appellant's certificate. Thus, the High Court committed an error by directing the Scrutiny Committee to entertain the complaint filed by respondent no.5. It has further been submitted that, despite the directions given by this Court, the Scrutiny Committee failed to ensure compliance with the principles of natural justice, as the appellant was denied the opportunity to cross-examine witnesses, and no order was passed with respect to his application for recalling such witnesses for the purpose of cross-examination, which has no doubt, resulted in the grave miscarriage of justice. The affidavit filed by the Scrutiny Committee did not clarify, or make any specific statement with respect to whether or not the appellant was permitted to cross-examine witnesses. It further, did not clarify whether the application dated 28.2.2012, filed by the appellant to re-call witnesses for the purpose of cross-examination, has been disposed of. Moreover, the procedure adopted by the Scrutiny Committee is in contravention of the statutory requirements, as have been specified under the Maharashtra Scheduled Castes, Scheduled Tribes, De-Notified Tribes, (Vimukta Jatis), Nomadic Tribes, Other Backward Category (Regulation of Issuance and Verification of) Caste Certificate Act, 2000 (Maharashtra Act No. XXIII of 2001 (hereinafter referred to as the, 'Act 2001'), and the Rules, 2003 which are framed under the Act 2001 and therefore, all proceedings hereby stand vitiated. The appellant placed reliance upon several documents which are all very old and therefore, their authenticity should not have been doubted. The earlier report submitted by the Vigilance Cell dated 29.12.1998, clearly stated that the traits and characteristics of

the appellant's family, matched with those of Bhil Tadvi (Scheduled Tribes). The action of respondent no.5 is therefore, completely malifide and is intended, solely to harass the appellant, and the High Court committed grave error in not deciding the issue related to the *locus standi* of respondent no.5 in relation to him filing a complaint in the first place, as the said issue was specifically raised by the appellant. Therefore, the present appeal deserves to be allowed.

5. Per contra, Shri Shankar Chillarge, learned counsel appearing for the Scrutiny Committee, has made elaborate submissions, in support of the impugned judgment and subsequent proceedings. Mr. Udaya Kumar Sagar and Ms. Bina Madhavan, learned counsel appearing for respondent no.5, have also supported the impugned judgment of the High Court and has further submitted that even though respondent no.5, does not belong to the Scheduled Tribes category, he most certainly could file a complaint against the appellant, at such a belated stage, as the appellant had obtained employment in 1989, by way of mis-representation and fraud. Respondent no.5, being a public spirited person has espoused the cause of the real persons who have been deprived of their right to be considered for the said post occupied by the appellant. Respondent No. 5 has also filed affidavits of relevant persons before the Scrutiny Committee, to prove his allegations. Thus, the present appeal lacks merit and is liable to be dismissed.

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

Person aggrieved :

7. It is a settled legal proposition that a stranger cannot be permitted to meddle in any proceeding, unless he satisfies the Authority/Court, that he falls within the category of aggrieved persons.

Only a person who has suffered, or suffers from **legal injury** can challenge the act/action/order etc. in a court of law. A writ petition under Article 226 of the Constitution is maintainable either for the purpose of enforcing a statutory or legal right, or when there is a complaint by the appellant that there has been a breach of statutory duty on the part of the Authorities. Therefore, there must be a judicially enforceable right available for enforcement, on the basis of which writ jurisdiction is resorted to. The Court can of course, enforce the performance of a statutory duty by a public body, using its writ jurisdiction at the behest of a person, provided that such person satisfies the Court that he has a legal right to insist on such performance. The existence of such right is a condition precedent for invoking the writ jurisdiction of the courts. It is implicit in the exercise of such extraordinary jurisdiction that, the relief prayed for must be one to **enforce a legal right**. Infact, the **existence of such right, is the foundation of the exercise of the said jurisdiction by the Court.** The **legal right that can be enforced** must ordinarily be the right of the appellant himself, who complains of infraction of such right and approaches the Court for relief as regards the same. (Vide : *State of Orissa v. Madan Gopal Rungta,* AIR 1952 SC 12; *Saghir Ahmad & Anr. v. State of U.P.,* AIR 1954 SC 728; *Calcutta Gas Company (Proprietary) Ltd. v. State of West Bengal & Ors.,* AIR 1962 SC 1044; *Rajendra Singh v. State of Madhya Pradesh,* AIR 1996 SC 2736; and *Tamilnad Mercantile Bank Shareholders Welfare Association (2) v. S.C. Sekar & Ors.,* (2009) 2 SCC 784).

8. A "legal right", means an entitlement arising out of legal rules. Thus, it may be defined as an advantage, or a benefit conferred upon a person by the rule of law. The expression, "person aggrieved" does not include a person who suffers from a psychological or an imaginary injury; a person aggrieved must therefore, necessarily be one, whose right or interest has been adversely affected or jeopardised. (Vide: *Shanti Kumar R. Chanji v. Home Insurance Co. of New York,* AIR 1974 SC

1719; and *State of Rajasthan & Ors. v. Union of India & Ors.,* AIR 1977 SC 1361).

9. In *Anand Sharadchandra Oka v. University of Mumbai,* AIR 2008 SC 1289, a similar view was taken by this Court, observing that, if a person claiming relief is not eligible as per requirement, then he cannot be said to be a person aggrieved regarding the election or the selection of other persons.

10. In *A. Subhash Babu v. State of A. P.*, AIR 2011 SC 3031, this Court held:

> *"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."*

11. This Court, even as regards the filing of a habeas corpus petition, has explained that the expression, 'next friend' means a person who is not a total stranger. Such a petition cannot be filed by one who is a complete stranger to the person who is in alleged illegal custody. (Vide: *Charanjit Lal Chowdhury v. The Union of India & Ors.,* AIR 1951 SC 41; *Sunil Batra (II) v. Delhi Administration,* AIR 1980 SC 1579**;** *Mrs. Neelima Priyadarshini v. State of Bihar,* AIR 1987 SC 2021; *Simranjit Singh Mann v. Union of India,* AIR 1993 SC 280**;** *Karamjeet Singh v. Union of India,* AIR 1993 SC 284; and *Kishore Samrite v. State of U.P. & Ors.,* JT (2012) 10 SC 393)**.**

12. This Court has consistently cautioned the courts against entertaining public interest litigation filed by unscrupulous persons, as such meddlers do not hesitate to abuse the

process of the court. The right of effective access to justice, which has emerged with the new social rights regime, must be used to serve basic human rights, which purport to guarantee legal rights and, therefore, a workable remedy within the framework of the judicial system must be provided. Whenever any public interest is invoked, the court must examine the case to ensure that there is in fact, genuine public interest involved. The court must maintain strict vigilance to ensure that there is no abuse of the process of court and that, "ordinarily meddlesome bystanders are not granted a Visa". Many societal pollutants create new problems of non-redressed grievances, and the court should make an earnest endeavour to take up those cases, where the subjective purpose of the lis justifies the need for it. (Vide: *P.S.R. Sadhanantham v. Arunachalam & Anr.,* AIR 1980 SC 856; *Dalip Singh v. State of U.P. & Ors.,* (2010) 2 SCC 114; *State of Uttaranchal v. Balwant Singh Chaufal & Ors.,* (2010) 3 SCC 402; and *Amar Singh v. Union of India & Ors.,* (2011) 7 SCC 69)

13. Even as regards the filing of a Public Interest Litigation, this Court has consistently held that such a course of action is not permissible so far as service matters are concerned. (Vide: *Dr. Duryodhan Sahu & Ors. v. Jitendra Kumar Mishra & Ors.,* AIR 1999 SC 114; *Dattaraj Natthuji Thaware v. State of Maharashtra,* AIR 2005 SC 540; and *Neetu v. State of Punjab & Ors.,* AIR 2007 SC 758)

14. In *Ghulam Qadir v. Special Tribunal & Ors.,* (2002) 1 SCC 33, this Court considered a similar issue and observed as under:–

> *"There is no dispute regarding the legal proposition that the rights under Article 226 of the Constitution of India can be enforced only by an aggrieved person except in the case where the writ prayed for is for habeas corpus or quo warranto. Another exception in the general rule is the filing of a writ petition in public interest. The existence of the legal right of the petitioner which is alleged to have*

> *been violated is the foundation for invoking the jurisdiction of the High Court under the aforesaid article.* ***The orthodox rule of interpretation regarding the locus standi of a person to reach the Court has undergone a sea change*** *with the development of constitutional law in our country and the constitutional Courts have been adopting a liberal approach in dealing with the cases or dislodging the claim of a litigant merely on hyper-technical grounds.————In other words, if the person is found to be not* ***merely a stranger having no right*** *whatsoever to any post or property, he cannot be non-suited on the ground of his not having the locus standi." (Emphasis added)*

15. In view of the above, the law on the said point can be summarised to the effect that a person who raises a grievance, must show how he has suffered legal injury. Generally, a stranger having no right whatsoever to any post or property, cannot be permitted to intervene in the affairs of others.

Locus standi of respondent no.5 :

16. As respondent no.5 does not belong to the Scheduled Tribes category, the garb adopted by him, of serving the cause of Scheduled Tribes candidates who might have been deprived of their legitimate right to be considered for the post, must be considered by this Court in order to determine whether respondent no. 5, is in fact, in a legitimate position to lay any claim before any forum, whatsoever.

17. This Court in *Ravi Yashwant Bhoir v. District Collector, Raigad & Ors.,* (2012) 4 SCC 407, held as under:

> *"Shri Chintaman Raghunath Gharat, ex-President was the complainant, thus, at the most, he could lead evidence as a witness. He could not claim the status of an adversarial litigant. The complainant cannot be the party to the lis. A legal right is an averment of entitlement*

arising out of law. In fact, it is a benefit conferred upon a person by the rule of law. Thus, a person who suffers from legal injury can only challenge the act or omission. There may be some harm or loss that may not be wrongful in the eye of the law because it may not result in injury to a legal right or legally protected interest of the complainant but juridically harm of this description is called damnum sine injuria.

The complainant has to establish that he has been deprived of or denied of a legal right and he has sustained injury to any legally protected interest. In case he has no legal peg for a justiciable claim to hang on, he cannot be heard as a party in a lis. A fanciful or sentimental grievance may not be sufficient to confer a locus standi to sue upon the individual. There must be injuria or a legal grievance which can be appreciated and not a stat pro ratione voluntas reasons i.e. a claim devoid of reasons.

Under the garb of being a necessary party, a person cannot be permitted to make a case as that of general public interest. A person having a remote interest cannot be permitted to become a party in the lis, as the person who wants to become a party in a case, has to establish that he has a proprietary right which has been or is threatened to be violated, for the reason that a legal injury creates a remedial right in the injured person. A person cannot be heard as a party unless he answers the description of aggrieved party."

18. A similar view has been re-iterated by this Court in *K. Manjusree v. State of Andhra Pradesh & Anr.,* (2008) 3 SCC 512, wherein it was held that, the applicant before the High Court could not challenge the appointment of a person as she was in no way aggrieved, for she herself could not have been selected by adopting either method. Morever, the appointment cannot be challenged at a belated stage and, hence, the petition

should have been rejected by the High Court, on the grounds of delay and non-maintainability, alone.

19. In *Balbir Kaur & Anr. v. Uttar Pradesh Secondary Education Services Selection Board, Allahabad & Ors.,* (2008) 12 SCC 1, it has been held that a violation of the equality clauses, enshrined in Articles 14 and 16 of the Constitution, or discrimination in any form, can be alleged, provided that, the writ petitioner demonstrates a certain appreciable disadvantage qua other similarly situated persons.

20. While dealing with the similar issue, this Court in *Raju Ramsingh Vasave v. Mahesh Deorao Bhiavapurkar & Ors.,* (2008) 9 SCC 54 held:

"*We must now deal with the question of locus standi. A special leave petition ordinarily would not have been entertained at the instance of the appellant. Validity of appointment or otherwise on the basis of a caste certificate granted by a committee is ordinarily a matter between the employer and the employee. This Court, however, when a question is raised, can take cognizance of a matter of such grave importance suo motu. It may not treat the special leave petition as a public interest litigation, but, as a public law litigation. It is, in a proceeding of that nature, permissible for the court to make a detailed enquiry with regard to the broader aspects of the matter although it was initiated at the instance of a person having a private interest. A deeper scrutiny can be made so as to enable the court to find out as to whether a party to a lis is guilty of commission of fraud on the Constitution. If such an enquiry subserves the greater public interest and has a far-reaching effect on the society, in our opinion, this Court will not shirk its responsibilities from doing so."*

(See also: *Manohar Joshi v. State of Maharashtra & Ors.,* (2012) 3 SCC 619)

21. In *Vinoy Kumar v. State of U.P.,* AIR 2001 SC 1739, this Court held:

> *"Even in cases filed in public interest, the court can exercise the writ jurisdiction at the instance of a third party only when it is shown that the legal wrong or legal injury or illegal burden is threatened and such person or determined class of person is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief."*

22. Thus, from the above it is evident that under ordinary circumstances, a third person, having no concern with the case at hand, cannot claim to have any *locus-standi* to raise any grievance whatsoever. However, in the exceptional circumstances as referred to above, if the actual persons aggrieved, because of ignorance, illiteracy, inarticulation or poverty, are unable to approach the court, and a person, who has no personal agenda, or object, in relation to which, he can grind his own axe, approaches the court, then the court may examine the issue and in exceptional circumstances, even if his bonafides are doubted, but the issue raised by him, in the opinion of the court, requires consideration, the court may proceed *suo-motu,* in such respect.

Cross-examination is one part of the principles of natural justice:

23. A Constitution Bench of this Court in *State of M.P. v. Chintaman Sadashiva Vaishampayan,* AIR 1961 SC 1623, held that the rules of natural justice, require that a party must be given the opportunity to adduce all relevant evidence upon which he relies, and further that, the evidence of the opposite party should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party. Not providing the said opportunity to cross-examine witnesses, would violate the principles of natural

justice. (See also: *Union of India v.T.R. Varma,* AIR 1957 SC 882; *Meenglas Tea Estate v. Workmen,* AIR 1963 SC 1719; *M/s. Kesoram Cotton Mills Ltd. v. Gangadhar & Ors.,* AIR 1964 SC 708; *New India Assurance Company Ltd . v . Nusli Neville Wadia and Anr.,* AIR 2008 SC 876**;** *Rachpal Singh & Ors. v. Gurmit Singh & Ors.,* AIR 2009 SC 2448**;** *Biecco Lawrie & Anr. v. State of West Bengal & Anr.,* AIR 2010 SC 142; and *State of Uttar Pradesh v. Saroj Kumar Sinha,* AIR 2010 SC 3131).

24. In *Lakshman Exports Ltd. v. Collector of Central Excise,* (2005) 10 SCC 634, this Court, while dealing with a case under the Central Excise Act, 1944, considered a similar issue i.e. permission with respect to the cross-examination of a witness. In the said case, the assessee had specifically asked to be allowed to cross-examine the representatives of the firms concern, to establish that the goods in question had been accounted for in their books of accounts, and that excise duty had been paid. The Court held that such a request could not be turned down, as the denial of the right to cross-examine, would amount to a denial of the right to be heard i.e. *audi alteram partem.*

25. In *New India Assurance Company Ltd., v. Nusli Neville Wadia & Anr.,* AIR 2008 SC 876; this Court considered a case under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 and held as follows :-

> "If some facts are to be proved by the landlord, indisputably the occupant should get an opportunity to cross-examine. The witness who intends to prove the said fact has the **right to cross-examine** the witness. This may not be provided by under the statute, but it being a part of the principle of natural justice should be held to be indefeasible right." (Emphasis added)

In view of the above, we are of the considered opinion that the right of cross-examination is an integral part of the principles of natural justice.

26. In *K.L. Tripathi v. State Bank of India & Ors.,* AIR 1984 SC 273, this Court held that, in order to sustain a complaint of the violation of the principles of natural justice on the ground of absence of opportunity of cross-examination, it must be established that some prejudice has been caused to the appellant by the procedure followed. A party, who does not want to controvert the veracity of the evidence on record, or of the testimony gathered behind his back, cannot expect to succeed in any subsequent grievance raised by him, stating that no opportunity of cross-examination was provided to him, specially when the same was not requested, and there was no dispute regarding the veracity of the statement. (See also: *Union of India v. P.K. Roy,* AIR 1968 SC 850; and *Channabasappa Basappa Happali v. State of Mysore,* AIR 1972 SC 32).

27. In *Transmission Corpn. of A.P. Ltd. v. Sri Rama Krishna Rice Mill,* AIR 2006 SC 1445, this Court held:

> *"In order to establish that the cross-examination is necessary, the consumer has to make out a case for the same. Merely stating that the statement of an officer is being utilised for the purpose of adjudication would not be sufficient in all cases. If an application is made requesting for grant of an opportunity to cross-examine any official, the same has to be considered by the adjudicating authority who shall have to either grant the request or pass a reasoned order if he chooses to reject the application. In that event an adjudication being concluded, it shall be certainly open to the consumer to establish before the Appellate Authority as to how he has been prejudiced by the refusal to grant an opportunity to cross-examine any official".*

28. The meaning of providing a reasonable opportunity to show cause against an action proposed to be taken by the government, is that the government servant is afforded a reasonable opportunity to defend himself against the charges, on the basis of which an inquiry is held. The government

servant should be given an opportunity to deny his guilt and establish his innocence. He can do so only when he is told what the charges against him are. **He can therefore, do so by cross-examining the witnesses produced against him.** The object of supplying statements is that, the government servant will be able to refer to the previous statements of the witnesses proposed to be examined against him. Unless the said statements are provided to the government servant, he will not be able to conduct an effective and useful cross-examination.

29. In *Rajiv Arora v. Union of India & Ors.,* AIR 2009 SC 1100, this Court held:

> *"Effective cross-examination could have been done as regards the correctness or otherwise of the report, if the contents of them were proved. The principles analogous to the provisions of the Indian Evidence Act as also the principles of natural justice demand that the maker of the report should be examined, save and except in cases where the facts are admitted or the witnesses are not available for cross-examination or similar situation. The High Court in its impugned judgment proceeded to consider the issue on a technical plea, namely, no prejudice has been caused to the appellant by such non-examination. If the basic principles of law have not been complied with or there has been a gross violation of the principles of natural justice, the High Court should have exercised its jurisdiction of judicial review."*

30. The aforesaid discussion makes it evident that, not only should the opportunity of cross-examination be made available, but it should be one of effective cross-examination, so as to meet the requirement of the principles of natural justice. In the absence of such an opportunity, it cannot be held that the matter has been decided in accordance with law, as cross-examination is an integral part and parcel of the principles of natural justice.

31. **Affidavit - whether evidence within the meaning of Section 3 of the Evidence Act, 1872**:

It is a settled legal proposition that an affidavit is not evidence within the meaning of Section 3 of the Indian Evidence Act, 1872 (hereinafter referred to as the 'Evidence Act').

Affidavits are therefore, not included within the purview of the definition of "evidence" as has been given in Section 3 of the Evidence Act, and the same can be used as "evidence" only if, for sufficient reasons, the Court passes an order under Order XIX of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC'). Thus, the filing of an affidavit of one's own statement, in one's own favour, cannot be regarded as sufficient evidence for any Court or Tribunal, on the basis of which it can come to a conclusion as regards a particular fact-situation. (Vide: *Sudha Devi v. M.P. Narayanan & Ors.,* AIR 1988 SC 1381; and *Range Forest Officer v. S.T. Hadimani,* AIR 2002 SC 1147).

32. While examining a case under the provisions of the Industrial Disputes Act, 1947, this Court, in *M/s Bareilly Electricity Supply Co. Ltd. v. The Workmen & Ors.,* AIR 1972 SC 330, considered the application of Order XIX, Rules 1 and 2 CPC, and observed as under:-

> *"But the application of principles of natural justice does not imply that what is not evidence, can be acted upon. On the other hand, what it means is that no material can be relied upon to establish a contested fact which are not spoken to by the persons who are competent to speak about them and are subject to cross-examination by the party against whom they are sought to be used. When a document is produced in a Court or a Tribunal, the question that naturally arises is: is it a genuine document, what are its contents and are the statements contained therein true..... If a letter or other document is produced to establish some fact which is relevant to the inquiry, the*

> *writer must be produced or his affidavit in respect thereof be filed and opportunity afforded to the opposite party who challenges this fact. This is both in accordance with the principles of natural justice as also according to the procedure under O. 19 of the Code and the Evidence Act, both of which incorporate the general principles."*

33. In *Needle Industries (India) Ltd. & Ors. v. N.I.N.I.H. Ltd. & Ors.,* AIR 1981 SC 1298, this Court considered a case under the Indian Companies Act, and observed that, "it is generally unsatisfactory to record a finding involving grave consequences with respect to a person, on the basis of affidavits and documents alone, without asking that person to submit to cross-examination". However, the conduct of the parties may be an important factor, with regard to determining whether they showed their willingness to get the said issue determined on the basis of affidavits, correspondence and other documents, on the basis of which proper and necessary inferences can safely and legitimately be drawn.

34. In *Ramesh Kumar v. Kesho Ram,* AIR 1992 SC 700, this Court considered the scope of application of the provisions of O. XIX, Rr. 1 and 2 CPC in a Rent Control matter, observing as under:-

> *"The Court may also treat any affidavit filed in support of the pleadings itself as one under the said provisions and call upon the opposite side to traverse it. The Court, if it finds that having regard to the nature of the allegations, it is necessary to record oral evidence tested by oral cross-examination, may have recourse to that procedure."*

35. In *Standard Chartered Bank v. Andhra Bank Financial Services Ltd. & Ors.,* (2006) 6 SCC 94, this Court while dealing with a case under the provisions of Companies Act, 1956, while considering complex issues regarding the Markets,

Exchanges and Securities, and the procedure to be followed by special Tribunals, held as under :

> *"While it may be true that the Special Court has been given a certain amount of latitude in the matter of procedure, it surely cannot fly away from established legal principles while deciding the cases before it. As to what inference arises from a document, is always a matter of evidence unless the document is self-explanatory…….In the absence of any such explanation, it was not open to the Special Court to come up with its own explanations and decide the fate of the suit on the basis of its inference based on such assumed explanations."*

36. Therefore, affidavits in the light of the aforesaid discussion are not considered to be evidence, within the meaning of Section 3 of the Evidence Act. However, in a case where the deponent is available for cross-examination, and opportunity is given to the other side to cross-examine him, the same can be relied upon. Such view, stands fully affirmed particularly, in view of the amended provisions of Order XVIII, Rules 4 & 5 CPC. In certain other circumstances, in order to avoid technicalities of procedure, the legislature, or a court/ tribunal, can even lay down a procedure to meet the requirement of compliance with the principles of natural justice, and thus, the case will be examined in the light of those statutory rules etc. as framed by the aforementioned authorities.

37. The instant case is required to be examined in the light of the aforesaid legal propositions. This Court examined this matter in detail in *Km. Madhuri Patil v. Addl. Commissioner, Tribal Development,* (1994) 6 SCC 241, and upon realising that spurious tribes and persons not belonging to the Scheduled Tribes category, were snatching away the reservation benefits that have been made available to genuine tribals, and that they were being wrongly deprived of their rights on the basis of false caste certificates, and that further, at a subsequent stage such unscrupulous persons, after getting admission/employment,

were adopting dilatory tactics, the court issued a large number of directions to investigate such cases of false claims. The directions *inter-alia* included:

> (1) Each Directorate should constitute a vigilance cell consisting of Senior Deputy Superintendent of Police in over all charge and such number of Police Inspectors to investigate into the social status claims.
>
> (2) The Director concerned, on receipt of the report from the vigilance officer if he found the claim for social status to be "not genuine'' or "doubtful'' or spurious or falsely or wrongly claimed, the Director concerned should issue show cause notice supplying a copy of the report of the vigilance officer to the candidate by a registered post with acknowledgement due or through the head of the concerned educational institution in which the candidate is studying or employed..... After giving such opportunity either in person or through counsel, the Committee may make such inquiry as it deems expedient and consider the claims vis-a-vis the objections raised by the candidate or opponent and pass an appropriate order with brief reasons in support thereof.
>
> (3) In case the report is in favour of the candidate and found to be genuine and true, no further action need be taken except where the report or the particulars given are procured or found to be false or fraudulently obtained and in the latter event the same procedure as is envisaged in para 6 be followed.
>
> (4) The inquiry should be completed as expeditiously as possible preferably by day-to-day proceedings within such period not exceeding two months. If after inquiry, the caste Scrutiny Committee finds the claim to be false or spurious, they should pass an order cancelling the certificate issued and confiscate the same. It should communicate within one month from the date of the conclusion of the proceedings

the result of enquiry to the parent/guardian and the applicant.

(5) In case, the certificate obtained or social status claimed is found to be false, the parent/guardian/the candidate should be prosecuted for making false claim. If the prosecution ends in a conviction and sentence of the accused, it could be regarded as an offence involving moral turpitude, disqualification for elective posts or offices under the State or the Union or elections to any local body, legislature or the Parliament.

(6) As soon as the finding is recorded by the Scrutiny Committee holding that the certificate obtained was false, on its cancellation and confiscation simultaneously, it should be communicated to the concerned educational institution or the appointing authority by registered post with acknowledgement due with a request to cancel the admission or the appointment. The principal etc. of the educational institution responsible for making the admission or the appointing authority, should cancel the admission/appointment without any further notice to the candidate and debar the candidate for further study or continue in office in a post.

The court further issued directions to all States to give effect to the aforesaid directions, in order to ensure that the constitutional objectives that were intended for the benefit and the advancement of persons genuinely belonging to the Scheduled Castes and Scheduled Tribes category, are not defeated by such unscrupulous persons.

The Act 2000 and the Rules 2003 are based on the directions issued by this Court in *Km. Madhuri Patil* (supra) as the same have been incorporated therein.

38. The correctness of the said judgment in *Km. Madhuri Patil* (supra), was doubted, and the matter was referred to and

decided by a larger bench of this Court in *Daya Ram v. Sudhir Batham & Ors.,* (2012) 1 SCC 333, wherein, while deciding the various issues involved, including the competence of this Court to legislate in this regard, it was held as under:

> *"The scrutiny committee is not an adjudicating authority like a Court or Tribunal, but an administrative body which verifies the facts, investigates into a specific claim (of caste status) and ascertains whether the caste/tribal status claimed is correct or not……*
>
> *Having regard to the scheme for verification formulated by this Court in Madhuri Patil, the scrutiny committees carry out verification of caste certificates issued without prior enquiry, as for example the caste certificates issued by Tehsildars or other officers of the departments of Revenue/Social Welfare/Tribal Welfare, without any enquiry or on the basis of self- affidavits about caste.* ***If there were to be a legislation governing or regulating grant of caste certificates, and if caste certificates are issued after due and proper inquiry, such caste certificates will not call for verification by the scrutiny committees.*** *Madhuri Patil provides for verification only to avoid false and bogus claims….."*
>
> *(Emphasis added)*

39. Thus, it is evident from the aforesaid judgment in *Daya Ram* (supra), that the purpose of issuing directions in *Km. Madhuri Patil* (supra), was only to examine those cases, where caste certificates had been issued without conducting any prior enquiry, on the basis of self- affidavits regarding one's caste alone, and that the said directions were not at all applicable, where a legislation governing or regulating the grant of caste certificates exists, and where caste certificates are issued after due and proper enquiry. Caste certificates issued by holding proper enquiry, in accordance with duly prescribed procedure,

would not require any further verification by the scrutiny committee.

40. In pursuance of the said order issued by the High Court, the Scrutiny Committee examined the case of the parties. However, with respect to this, the appellant raised the grievance that, the evidence of a large number of persons had been recorded by the Scrutiny Committee behind his back, and that he had not been given an opportunity to cross-examine the witnesses that were examined by the other side and therefore, he was unable to lead a proper defence. The appellant filed an application dated 28.2.2012, for the purpose of recalling 3 witnesses, namely, Sikandar Gulab Tadvi, Bhagchand Ganpatsing Pardeshi and Bahadursing Mukhtarsing Patil, so that he may cross-examine them. The appellant also filed another application on the same day, seeking a period of 30 days time, to file his reply as is required within the provisions of Rule 12(8) of the Rules 2003, and also another application for the purpose of calling of records from the office of the Tehsildar, to ascertain the genuineness of the certificate impugned. None of the said applications have been decided till now.

41. In view thereof, this Court vide order dated 11.5.2012, directed the learned counsel appearing for the Scrutiny Committee, to produce the original record of the matter and to file an affidavit with respect to whether the appellant had been given an opportunity to cross-examine the witnesses that were examined by the other side, and also with respect to whether the other applications filed by the appellant, were decided upon.

42. In pursuance of the said order, the original record was produced. However, the learned counsel remained unable to point out from the original record, any proceeding or event, by way of which, it could be ascertained that the appellant was in fact, given an opportunity to cross-examine the witnesses, or to show that all the said witnesses were examined in the presence of the appellant. Further, he was also unable to satisfy

this Court, with respect to the circumstances under which, the applications filed by the appellant on 28.2.2012, including the one to recall witnesses and permit him to cross-examine them, have been kept pending, without passing any order in relation to either one of them.

43. In order to determine the genuineness and sincerity of respondent no. 5, this Court on 29.10.2012 adjourned the matter until 5.11.2012, directing respondent no. 5 to act as under:

> *"Meanwhile, respondent No. 5 may file the affidavit as on what date he appeared before the Scrutiny Committee and what was the material produced by him and as to whether on that petitioner had a notice of his appearance before the Scrutiny Committee and whether the Committee has allowed the petitioner to cross examine the respondent No. 5."*

In response to the said order, respondent no. 5 filed an affidavit in Court on 5.11.2012. The contents of the affidavit reveal that respondent no.5 claims that his **occupation** is that of a **social worker**. The allegations against the appellant stating that he obtained the said caste certificate fraudulently, have been repeated. Respondent no. 5 has not mentioned in the affidavit, the date on which he appeared before the Scrutiny Committee, nor has he responded to the query raised with respect to whether he had produced any evidence to support his allegations, or whether the appellant was allowed to cross-examine any of the witnesses, or if in fact, he simply examined all of them himself.

The relevant part of the abovementioned affidavit, has been re-produced hereunder:

> *"That it is submitted that on 28.2.2012 the Respondent No. 5 submitted copy of Affidavit of Mr. Supdu Musa Tadvi and by way of an application prayed for personal*

presence of Mr. Supdu Musa Tadvi. Scrutiny Committee finding contradictions in the two statement of Mr. Supdu Musa Tadvi, issued notice to him requesting his personal presence on 17.3.2012. However, Mr. Supdu Musa Tadri never appeared before the Committee."

44. The affidavit of Mr. Supdu Musa Tadri referred to hereinabove cannot be relied upon, as the said deponent never appeared before the Scrutiny Committee. The conduct of respondent no. 5, who has been pursuing the said matter from one court to another, is found to be reprehensible, and without any sense of responsibility whatsoever, as he could not submit any satisfactory response to the directions issued by this Court on 29.10.2012. In view of the above, we are highly doubtful as regards his bonafides. He has therefore, disentitled himself from appearing either before this Court, or any other court, or Committee, so far as the instant case is concerned.

45. The Scrutiny Committee in ordinary circumstances examined the matter and after investigation through its Vigilance Cell and considering all the documentary evidence on record and after being satisfied, granted the caste verification certificate in 2000. Section 114 Ill.(e) of the Evidence Act provided for the court to pronounce that the decision taken by the Scrutiny Committee has been done in regular course and the caste certificate has been issued after due verification. A very strong material/evidence is required to rebut the presumption. In fact, respondent no. 5 has no legal peg for a justifiable claim to hang upon. Once the respondent no. 5, for the reasons best known to him, had challenged caste certificate under the garb of acting as a public spirited person espousing the cause of legitimate persons who had been deprived of their right of being considered for appointment, the respondent no. 5 must have acted seriously and brought the material before the Scrutiny Committee to show that the earlier decision was improbable or factually incorrect. Such a view stands fortified by a catena of decisions rendered by this Court where it has been held that presumption is based on legal maxim *"Omnia*

praesumuntur rite esse acta" i.e. all acts are presumed to have rightly and regularly been done.

Such a presumption can be rebutted by adducing appropriate evidence. Mere statement made in the written statement/petition is not enough to rebut the presumption. The onus of rebuttal lies upon the person who alleges that the act had not been regularly performed or the procedure required under the law had not been followed. (Vide: *Gopal Narain v. State of U.P. & Anr.,* AIR 1964 SC 370; *Narayan Govind Gavate & Ors. v. State of Maharashtra & Ors.,* AIR 1977 SC 183; *Karewwa & Ors.v. Hussensab Khansaheb Wajantri & Ors.,* AIR 2002 SC 504; *Engineering Kamgar Union v. Electro Steels Castings Ltd. & Anr.,* (2004) 6 SCC 36; *Mohd. Shahabuddin v. State of Bihar,* (2010) 4 SCC 653; *Punjab State Electricity Board & Anr. v. Ashwani Kumar,* (2010) 7 SCC 569; *M. Chandra v. M. Thangmuthu & Anr.,* AIR 2011 SC 146; and *R. Ramachandran Nair v. Deputy Superintendent, Vigilance Police,* (2011) 4 SCC 395)

46. In view of the above discussion and considering the seriousness of the allegations, as the Scrutiny Committee has already conducted an inquiry in relation to this matter, and the only grievance of the appellant is that there has been non-compliance with the principles of natural justice, and the fact that the applications filed by him, were not decided upon, we direct that before the submission of any report by the Scrutiny Committee, his application for calling the witnesses for cross-examination must be disposed of, and appellant must be given a fair opportunity to cross-examine the witnesses, who have been examined before the Committee. We further direct the Scrutiny Committee to pass appropriate orders in accordance with the law thereafter. In case, the Scrutiny Committee has already taken a decision, the same being violative of the principles of natural justice, would stand vitiated.

47. The appeal is disposed of accordingly, however, considering the fact that respondent no. 5 has not been

pursuing the matter in a bonafide manner, and has not raised any public interest, rather he abused the process of the court only to harass the appellant, the respondent no. 5 is restrained from intervening in the matter any further, and also from remaining a party to it, and he is also liable to pay costs to the tune of Rs. one lakh, within a period of 4 weeks to the District Collector, Aurangabad. The District Collector, Aurangabad, would deposit the said amount in the account of the Supreme Court Legal Services Committee. In the event that, the cost imposed is not deposited by respondent no. 5 within the period stipulated, we request the District Collector, Aurangabad, to recover the same as arrears of land revenue and deposit the same, accordingly.

A copy of the judgment be sent by the Registry of this Court to the District Collector, Aurangabad (Maharashtra) for compliance.

R.P. Appeal disposed of.

SHEORAJ SINGH AHLAWAT & ORS.

v.

STATE OF UTTAR PRADESH & ANR.

(Criminal Appeal No.1803 of 2012)

NOVEMBER 9, 2012

[T.S. THAKUR AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

Code of Criminal Procedure, 1973 – s.239 – Ambit of – Approach to be adopted by the Court while exercising the powers vested in it u/s.239 CrPC – Discussed – Matrimonial case – Allegations of harassment for dowry and mental and physical torture by wife against husband (appellant no.3) and parents-in-law (appellant nos.1 and 2) – Cognizance by Court u/s.498A – Application by appellants for discharge u/s.239 CrPC – Dismissed by trial Court – Justification of – Held: Justified – Whether or not the allegations were true is a matter which could not be determined at the stage of framing of charges – Any such determination can take place only at the conclusion of the trial – Nature of the allegations against the appellants too specific to be ignored at least at the stage of framing of charges – Courts below therefore justified in refusing to discharge the appellants.

Appellant No.3 is the husband and appellants No.1 and 2 are the parents-in-law of respondent no.2. Respondent no.2 alleged that the appellants were harassing her for dowry and subjecting her to physical and mental torture. Respondent No.2's further case is that on 10th December, 2006 she was forced into a car by the appellants who then abandoned her at a deserted place on a lonely road at night and threatened to kill her if she returned to her matrimonial home. The jurisdictional police filed closure report to which respondent no.2 filed a protest petition. On the basis of the protest petition, the

Judicial Magistrate took cognizance against the appellants under Section 498A IPC.

The appellants thereafter filed application for discharge under Section 239 CrPC contending that the accusations of dowry harassment as also the alleged incident of 10th December, 2006 were false. The application for discharge was dismissed by the trial Court holding that the grounds urged for discharge could be considered only after evidence was adduced in the case. Aggrieved, the appellants preferred Criminal Revision which was dismissed by the High Court and therefore the instant appeal.

Dismissing the appeal, the Court

HELD:1.1. The case at hand being a warrant case is governed by Section 239 Cr.P.C. for purposes of determining whether the accused or any one of them deserved to be discharged. A plain reading of Section 239 CrPC would show that the Court trying the case can direct discharge only for reasons to be recorded by it and only if it considers the charge against the accused to be groundless. Section 240 CrPC provides for framing of a charge if, upon consideration of the police report and the documents sent therewith and making such examination, if any, of the accused as the Magistrate thinks necessary, the Magistrate is of the opinion that there is ground for presuming that the accused has committed an offence triable under Chapter XIX, which such Magistrate is competent to try and which can be adequately punished by him. [Paras 10, 11] [1043-B-E-G]

1.2. It is trite that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, taken at their face value, disclosed the existence of all the ingredients constituting the alleged

offence. At that stage, the court is not expected to go deep into the probative value of the material on record. What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out. At that stage, even strong suspicion founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence. [Para 11] [1044-C-F]

1.3. It is well-settled that at the stage of framing of charge the defence of the accused cannot be put forth. The submissions of the accused has to be confined to the material produced by the police. Clearly the law is that at the time of framing charge or taking cognizance the accused has no right to produce any material. [Para 14] [1046-B-G-H; 1047-A]

Onkar Nath Mishra and Ors. v. State (NCT of Delhi) and Anr. **(2008) 2 SCC 561: 2007 (13) SCR 716;** *State of Karnataka v. L. Muniswamy* **1977 Cri.LJ 1125;** *State of Maharashtra & Ors. v. Som Nath Thapa and Ors.* **1996 Cri.LJ 2448;** *State of M.P. v. Mohanlal Soni* **2000 Cri.LJ 3504;** *State of Orissa v. Debendra Nath Pandhi* **(2005) 1 SCC 568: 2004 (6) Suppl. SCR 460;** *Smt. Rumi Dhar v. State of West Bengal & Anr.* **(2009) 6 SCC 364: 2009 (5) SCR 553 and** *Union of India v. Prafulla Kumar Samal and Anr. v.* **(1979) 3 SCC 4: 1979 (2) SCR 229 – relied on.**

Preeti Gupta and Anr. v. State of Jharkhand & Anr. **(2010) 7 SCC 667: 2010 (9) SCR 1168;** *Sajjan Kumar v. Central Bureau of Investigation* **(2010) 9 SCC 368: 2010 (11) SCR 669;** *Shakson Belthissor v. State of Kerala and Anr.* **(2009) 14 SCC 466 – cited.**

2. In the case at hand, the allegations made are

specific not only against the husband-appellant no.3 but also against the parents-in-law (appellant nos. 1 and 2) of the complainant-wife. Whether or not those allegations are true is a matter which cannot be determined at the stage of framing of charges. Any such determination can take place only at the conclusion of the trial. This may at times put an innocent party, falsely accused of commission of an offence to avoidable harassment but so long as the legal requirement and the settled principles do not permit a discharge the Court would find it difficult to do much, conceding that legal process at times is abused by unscrupulous litigants especially in matrimonial cases where the tendency has been to involve as many members of the family of the opposite party as possible. While such tendency needs to be curbed, the Court will not be able to speculate whether the allegations made against the accused are true or false at the preliminary stage to be able to direct a discharge. Two of the appellants in this case happen to be parents-in-law of the complainant who are senior citizens. Appellant No.1 who happens to be the father-in-law of the complainant-wife has been a Major General, by all means, a respectable position in the Army. But the nature of the allegations made against the couple and those against the husband, appear to be much too specific to be ignored at least at the stage of framing of charges. The Courts below, therefore, did not commit any mistake in refusing a discharge. [Para 17] [1048-F-H; 1049-A-C]

3. Keeping, however, in view the facts and circumstances of the case, it is directed that appellant Nos. 1 and 2 shall stand exempted from personal appearance before the trial Court except when the trial Court considers it necessary to direct their presence. The said appellants shall, however, make sure that they are duly represented by a counsel on all dates of hearing and that they cooperate with the progress of the case failing

which the trial Court shall be free to direct their personal appearance. [Para 18] [1049-D-E]

Case Law Reference:

2010 (9) SCR 1168	**cited**	**Para 8**
2010 (11) SCR 669	**cited**	**Para 8**
2004 (6) Suppl. SCR 460	**relied on**	**Paras 8, 14**
2007 (13) SCR 716	**relied on**	**Paras 8, 11**
(2009) 14 SCC 466	**cited**	**Para 8**
2009 (5) SCR 553	**relied on**	**Paras 8, 15**
1979 (2) SCR 229	**relied on**	**Paras 9, 16**
1977 Cri.LJ 1125	**relied on**	**Para 12**
1996 Cri.LJ 2448	**relied on**	**Para 12**
2000 Cri.LJ 3504	**relied on**	**Para 12, 13**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1803 of 2012.

From the Judgment & Order dated 06.05.2010 of the High Court of Judicature at Allahabad in Criminal Revision No. 1241 of 2010.

Geeta Luthra, Sridhar Potaraju, Sudhanshu Pandey, Gaichangpou Gangmei, Abhishek R. Shukla for the Appellant.

Pramod Swarup, Alok Shukla, Sweta Rani, Adrash Upadhayay, Abisth Kumar for the Respondent.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. Leave granted.

2. This appeal is directed against a judgement and order

dated 6th May, 2010, passed by the High Court of Judicature at Allahabad whereby Criminal Revision No.1241 of 2010 filed by the appellants has been dismissed and order dated 9th March, 2010 passed by the Additional Judicial Magistrate, Bulandshahar dismissing an application for discharge affirmed. The factual backdrop in which the matter arises may be summarised as under:

3. Appellant No.3-Naveen Ahlawat and respondent no.2-Smt. Renu Ahlawat tied the matrimonial knot on 28th September, 1998. Appellant No.3 was, at that time, serving in Indian Army as a Captain. The couple were blessed with a daughter three years after marriage. According to the wife-Smt. Renu Ahlawat, the addition to the family did not make much of a difference in terms of cordiality of her relations with her husband Captain Naveen Ahlawat and appellants No.1 and 2 who happen to be her parents in-law as they kept harassing her for dowry ever since the marriage was solemnised. These demands, according to her, continued even after her father had paid a sum of rupees four lakhs to the appellants. Physical and mental torture of respondent No.2-Renu Ahlawat, it is alleged, also did not stop even after the said payment, for the sake of a luxury car as an additional item of dowry. Respondent No.2-Smt. Renu Ahlawat's further case is that on 10th December, 2006 she was forced into a car by the appellants who then abandoned her at a deserted place on a lonely road near Sihi village at around 8 p.m. and threatened to kill her if she returned to her matrimonial home. When Jitendar Singh and Brijvir Singh two villagers saw respondent No.2-Renu Ahlawat weeping by the side of the road, besides the car they tried to confront the appellants whereupon appellant No.3-Naveen is alleged to have pulled out a revolver and threatened to shoot them.

4. A complaint about the incident was lodged on 13th December, 2006, by respondent No.2-Renu Ahlawat with SSP, Bulandshahar in which she gave details regarding her marriage with the appellant No.3-Naveen Ahlawat and the mental and

physical harassment faced by her at their hands as also repeated demands for dowry. She also accused her sisters-in-law, Neena and Meghna for indulging in such harassment along with the appellants.

5. The jurisdictional police started investigation into the incident, in the course whereof complainant-Smt. Renu Ahlawat came to know about her husband-Naveen Ahlawat having obtained an ex parte decree for divorce against her. A copy of the said judgment and decree was collected by Smt. Renu Ahlawat on 28th November, 2006 and steps taken to have the same set aside. The decree was eventually set aside by the Court concerned.

6. The police, in the meantime, filed a closure report to which Renu Ahlawat filed a protest petition. It was on the basis of the protest petition that Judicial Magistrate, Bulandshahar, took cognizance of an offence punishable under Section 498-A of the I.P.C. against the appellants as also against Neena and Meghna sisters-in-law of the complainant. By an order dated 13th February, 2009 Neena and Meghna were discharged by the High Court of Allahabad on the ground that no specific allegations were made against them. The appellants then filed an application for discharge under Section 239 of the Code of Criminal Procedure, 1973 before learned Additional Chief Judicial Magistrate, Bulandshahar in which they alleged that the accusations of dowry harassment levelled against them were false and so was the incident alleged to have taken place on 10th December, 2006 on which date both appellants No.1 and his son appellant No.3 claimed to be otherwise engaged which according to them belied Renu Ahlawat's story of their having abandoned her on a deserted road as alleged by her. The application for discharge was, however, dismissed by the Court by order dated 9th March, 2010 holding that the grounds urged for discharge could be considered only after evidence was adduced in the case and that appellant No.2 could not be discharged on the basis of minor contradictions in the depositions recorded in the course of the investigation.

7. Aggrieved by the order passed by the Trial Court the appellants preferred Criminal Revision No.1241 of 2010 which was dismissed by the High Court on the ground that the same did not make out a case for quashing of the proceedings against the appellants. The present appeal assails the correctness of the said order of dismissal.

8. On behalf of the appellant it was argued on the authority of the decisions of this Court in *Preeti Gupta and Anr. v. State of Jharkhand & Anr.* (2010) 7 SCC 667, *Union of India v. Prafulla Kumar Samal and Anr.* (1979) 3 SCC 4, *Sajjan Kumar v. Central Bureau of Investigation* (2010) 9 SCC 368, *State of Orissa v. Debendra Nath Pandhi* (2005) 1 SCC 568, *Onkar Nath Mishra and Ors. v. State (NCT of Delhi) and Anr.* (2008) 2 SCC 561, *Shakson Belthissor v. State of Kerala and Anr.* (2009) 14 SCC 466, and *Rumi Dhar (Smt.) v. State of West Bengal and Anr.* (2009) 6 SCC 364, that while considering an application for discharge the Court can examine the evidence on record and discharge the accused persons if there is no possibility of the accused being found guilty on the basis of such evidence specially in cases where the accused produces unimpeachable evidence in support of his defence. It was also contended that while examining whether the Court should or should not discharge the accused, it must be remembered, that Section 498-A of the IPC is a much abused provision and that exaggerated versions of small incidents are often presented to falsely implicate, harass and humiliate the husband and his relatives. Applying the principles set out in the above decisions the appellants were, according to Ms. Geeta Luthra, learned counsel appearing for them, entitled to a discharge not only because there was an inordinate delay in the filing of the complaint by respondent No.1 but also because the statements made under Section 161 Cr.P.C. by the witnesses who were either planted or merely chance witnesses were contradictory in nature. It was argued that two Investigating Officers having investigated the matter and found the allegations to be false, there was no reason for the Court to believe the

story set up by the wife who had suffered a decree for divorce in regard to which she had written to the Army Authorities a letter dated 2nd October, 2006 stating that she was not pursuing the matter in any Court. Appellant No.3-Naveen Ahlawat having got re-married on 30th October, 2006 the incident referred in the complaint was a fabrication which aspect the Courts below had failed to consider thus failing to protect the appellants against harassment and the ignominy of a criminal trial.

9. On behalf of respondent No.2, it was per contra argued that her husband had filed a divorce petition against her in the Family Court, Meerut showing respondent No.2 to be residing with her parents at 327, Prabhat Nagar, Meerut, whereas she was actually residing with the appellants along with her daughter at No. 9, Tigris Road, Delhi Cantt, Delhi. It was further argued that appellant No.3 had obtained an ex parte decree order of divorce by fraudulent means and by forging signatures of respondent No.2, acknowledging receipt of the notice which she had never received from the concerned Court. This was conclusively established by the fact that the ex parte decree dated 31st May, 2006 had been eventually set aside by the Court in terms of order dated 28th July, 2007. Allegations regarding physical torture of respondent No.2 and her being abandoned on the road on the date of incident in question as also the allegation about dowry harassment were factually correct and made out a clear case for prosecuting the appellants. Appellant No.3 had, according to the counsel for the respondent, married one Aditi on 30th October, 2006. It was also argued that letter referred to by appellant No.3 as also letter dated 2nd November, 2006 allegedly written by respondent No.2 were forgeries committed by the appellants. The trial Court was, in the light of the available material, justified in refusing to discharge the accused persons and that the grounds for discharge set up by the appellants could be examined only after the case had gone through full-fledged trial. Reliance was

placed upon a decision of this Court in *Union of India v. Prafulla Kumar Samala and Anr.* (1979) 3 SCC 5.

10. The case at hand being a warrant case is governed by Section 239 of the Cr.P.C. for purposes of determining whether the accused or any one of them deserved to be discharged. Section 239 is as under:

"239. When accused shall be discharged.

If, upon considering the police report and the documents sent with it under section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing."

11. A plain reading of the above would show that the Court trying the case can direct discharge only for reasons to be recorded by it and only if it considers the charge against the accused to be groundless. Section 240 of the Code provides for framing of a charge if, upon consideration of the police report and the documents sent therewith and making such examination, if any, of the accused as the Magistrate thinks necessary, the Magistrate is of the opinion that there is ground for presuming that the accused has committed an offence triable under Chapter XIX, which such Magistrate is competent to try and which can be adequately punished by him. The ambit of Section 239 Cr.P.C. and the approach to be adopted by the Court while exercising the powers vested in it under the said provision fell for consideration of this Court in *Onkar Nath Mishra and Ors. v. State (NCT of Delhi) and Anr.* (2008) 2 SCC 561. That too was a case in which a complaint under Sections 498-A and 406 read with Section 34 of the I.P.C. was filed against the husband and parents-in-law of the complainant-wife. The Magistrate had in that case discharged

the accused under Section 239 of the Cr.P.C, holding that the charge was groundless. The complainant questioned that order before the Revisional Court which directed the trial Court to frame charges against the accused persons. The High Court having affirmed that order, the matter was brought up to this Court. This Court partly allowed the appeal qua the parents-in-law while dismissing the same qua the husband. This Court explained the legal position and the approach to be adopted by the Court at the stage of framing of charges or directing discharge in the following words:

"11. It is trite that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, taken at their face value, disclosed the existence of all the ingredients constituting the alleged offence. At that stage, the court is not expected to go deep into the probative value of the material on record. What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out. At that stage, even strong suspicion founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence."

(emphasis supplied)

12. Support for the above view was drawn by this Court from earlier decisions rendered in *State of Karnataka v. L. Muniswamy* 1977 Cri.LJ 1125, *State of Maharashtra & Ors. v. Som Nath Thapa and Ors.* 1996 Cri.LJ 2448 and *State of M.P. v. Mohanlal Soni* 2000 Cri.LJ 3504. In *Som Nath's* case (supra) the legal position was summed up as under:

"if on the basis of materials on record, a court could come

to the conclusion that commission of the offence is a probable consequence, a case for framing of charge exists. To put it differently, if the court were to think that the accused might have committed the offence it can frame the charge, though for conviction the conclusion is required to be that the accused has committed the offence. It is apparent that at the stage of framing of a charge, probative value of the materials on record cannot be gone into; the materials brought on record by the prosecution has to be accepted as true at that stage."

(emphasis supplied)

13. So also in *Mohanlal's* case (supra) this Court referred to several previous decisions and held that the judicial opinion regarding the approach to be adopted for framing of charge is that such charges should be framed if the Court prima facie finds that there is sufficient ground for proceeding against the accused. The Court is not required to appreciate evidence as if to determine whether the material produced was sufficient to convict the accused. The following passage from the decision in *Mohanlal's* case (supra) is in this regard apposite:

"8. The crystallized judicial view is that at the stage of framing charge, the court has to prima facie consider whether there is sufficient ground for proceeding against the accused. The court is not required to appreciate evidence to conclude whether the materials produced are sufficient or not for convicting the accused."

14. In *State of Orissa v. Debendra Nath Pandhi* (2005) 1 SCC 568, this Court was considering whether the trial Court can at the time of framing of charges consider material filed by the accused. The question was answered in the negative by this Court in the following words:

"18. We are unable to accept the aforesaid contention. The reliance on Articles 14 and 21 is misplaced...Further,

at the stage of framing of charge roving and fishing inquiry is impermissible. If the contention of the accused is accepted, there would be a mini trial at the stage of framing of charge. That would defeat the object of the Code. It is well-settled that at the stage of framing of charge the defence of the accused cannot be put forth. The acceptance of the contention of the learned counsel for the accused would mean permitting the accused to adduce his defence at the stage of framing of charge and for examination thereof at that stage which is against the criminal jurisprudence. By way of illustration, it may be noted that the plea of alibi taken by the accused may have to be examined at the stage of framing of charge if the contention of the accused is accepted despite the well settled proposition that it is for the accused to lead evidence at the trial to sustain such a plea. The accused would be entitled to produce materials and documents in proof of such a plea at the stage of framing of the charge, in case we accept the contention put forth on behalf of the accused. That has never been the intention of the law well settled for over one hundred years now. It is in this light that the provision about hearing the submissions of the accused as postulated by Section 227 is to be understood. It only means hearing the submissions of the accused on the record of the case as filed by the prosecution and documents submitted therewith and nothing more. The expression 'hearing the submissions of the accused' cannot mean opportunity to file material to be granted to the accused and thereby changing the settled law. At the state of framing of charge hearing the submissions of the accused has to be confined to the material produced by the police...

xx xx xx xx

23. As a result of aforesaid discussion, in our view, clearly the law is that at the time of framing charge or taking

cognizance the accused has no right to produce any material..."

(emphasis supplied)

15. Even in *Smt. Rumi Dhar v. State of West Bengal & Anr.* (2009) 6 SCC 364, reliance whereupon was placed by counsel for the appellants the tests to be applied at the stage of discharge of the accused person under Section 239 of the Cr.P.C., were found to be no different. Far from readily encouraging discharge, the Court held that even a strong suspicion in regard to the commission of the offence would be sufficient to justify framing of charges. The Court observed:

"...While considering an application for discharge filed in terms of Section 239 of the Code, it was for the learned Judge to go into the details of the allegations made against each of the accused persons so as to form an opinion as to whether any case at all has been made out or not as a strong suspicion in regard thereto shall subserve the requirements of law...

16. To the same effect is the decision of this Court in *Union of India v. Prafulla Kumar Samal and Anr. v.* (1979) 3 SCC 4, where this Court was examining a similar question in the context of Section 227 of the Code of Criminal Procedure. The legal position was summed up as under:

"10. Thus, on a consideration of the authorities mentioned above, the following principles emerge :

(1) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out:

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been

properly explained the Court will be fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced Judge cannot act merely as a Post Office or a mouth-piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."

17. Coming then to the case at hand, the allegations made against the appellants are specific not only against the husband but also against the parents-in-law of the complainant-wife. Whether or not those allegations are true is a matter which cannot be determined at the stage of framing of charges. Any such determination can take place only at the conclusion of the trial. This may at times put an innocent party, falsely accused of commission of an offence to avoidable harassment but so long as the legal requirement and the settled principles do not permit a discharge the Court would find it difficult to do much, conceding that legal process at times is abused by unscrupulous litigants especially in matrimonial cases where the tendency has been to involve as many members of the family of the opposite party as possible. While such tendency needs

to be curbed, the Court will not be able to speculate whether the allegations made against the accused are true or false at the preliminary stage to be able to direct a discharge. Two of the appellants in this case happen to be parents-in-law of the complainant who are senior citizens. Appellant No.1 who happens to be the father-in-law of the complainant-wife has been a Major General, by all means, a respectable position in the Army. But the nature of the allegations made against the couple and those against the husband, appear to be much too specific to be ignored at least at the stage of framing of charges. The Courts below, therefore, did not commit any mistake in refusing a discharge.

18. In the result, this appeal fails and is hereby dismissed. Keeping, however, in view the facts and circumstances of the case, we direct that appellant Nos. 1 and 2 shall stand exempted from personal appearance before the trial Court except when the trial Court considers it necessary to direct their presence. The said appellants shall, however, make sure that they are duly represented by a counsel on all dates of hearing and that they cooperate with the progress of the case failing which the trial Court shall be free to direct their personal appearance. No costs.

B.B.B. Appeal dismissed.

RAM CHANDRA BHAGAT

v.

STATE OF JHARKHAND

(Criminal Appeal No. 439 of 2006)

NOVEMBER 9, 2012

[R.M. LODHA, ANIL R. DAVE AND SUDHANSU JYOTI MUKHOPADHYAY, JJ.]

Penal Code, 1860 – s. 493 – Prosecution under – Accused and complainant living as husband and wife for nine years – Having two children out of this relation – Forms regarding marriage registration signed by accused as well as complainant – In the voter's list complainant mentioned as wife of the accused – The persons related to the complainant and the accused also made to believe that the complainant was wife of the accused – Courts below convicted the accused u/s. 493 – On appeal to Supreme Court, difference of opinion between the two Judges of Division Bench as regards applicability of s. 493 – Matter referred to Bench of Three Judges – Held: There is sufficient evidence to show that the accused deceived the complainant which resulted in belief in the mind of the complainant that she was lawfully married to the accused, and made her cohabit with him – Thus, the ingredients of Section 493 have been fully established.

Words and Phrases – 'Deceit' – Meaning of, in the context of s.493 IPC.

As per the prosecution, appellant-accused developed intimate relationship with the complainant. The accused made the complainant believe that she had become his wife, and they stayed together as husband and wife for 9 years. They also had two children out of this relation. Thereafter, the accused turned the complainant out of the house. On the complaint, the

accused was prosecuted. The courts below convicted the accused u/s. 493 IPC.

In appeal, the case was decided by Division Bench. One of the Judges was of the view that no offence u/s. 493 IPC was committed. The other Judge was of the view that offence u/s. 493 IPC was made out. In view of the difference of opinion, the case was referred to Three Judges Bench.

Dismissing the appeal, the Court

HELD:

Per Anil R. Dave, J. (for himself and Sudhanshu Jyoti Mukhopadhyay, J.):

1. Upon perusal of Section 493 IPC, to establish that a person has committed an offence u/s. 493 IPC, it must be established that a person had deceitfully induced a belief to a woman, who is not lawfully married to him, to believe that he is married to her and as a result of the afore-stated representation, the woman should believe that she was lawfully married to him and there should be cohabitation or sexual intercourse as a result of the deception. [Para 9] [1056-G-H; 1057-A]

2.1. The accused-appellant had got a form, with regard to marriage registration, signed by the complainant. The form was signed by the accused and he also induced the complainant to sign the form so as to get married. The form duly signed by both the persons had been exhibited and the signature of the appellant had been identified. The afore-stated fact made the complainant to believe that the accused-appellant had married her and, therefore, she had started residing with him as his wife. In fact, the appellant did not marry the complainant. The persons related to the complainant and the accused were also made to believe that the

complainant was the wife of the appellant, though rituals necessary for Hindu marriage had never been performed. It is an admitted fact that no marriage had taken place between the complainant and the appellant, but only on the basis of the documents signed by the complainant at the instance of the accused-appellant, the complainant was made to believe that she was a lawfully married wife of the accused-appellant. [Para 12] [1057-G-H; 1058-A-C]

2.2. As a result of the afore-stated deceitful act of the accused-appellant, the complainant started residing with him as she believed that she had lawfully married the accused-appellant. The afore-stated fact was also reflected in the voters' list. In the voters' list the name of the complainant was shown as the wife of the appellant. As a result of the cohabitation, the complainant had given birth to two children. The accused-appellant had acknowledged the fact that the said two children were his children. Several ceremonies in relation to the birth of the children had also been performed by the accused-appellant. [Para 13] [1058-D-F]

2.3. Thus, upon perusal of the evidence, there was sufficient evidence to the effect that the accused-appellant has deceived the complainant, which ultimately resulted into a belief in the mind of the complainant that she was a lawfully married wife of the accused-appellant, though she was not, and thereafter, there was cohabitation and sexual intercourse as a result of the deception. [Paras 11 and 15] [1057-F; 1058-G]

Per R.M. Lodha, J. (Concurring):

1.1. The essence of an offence u/s. 493 IPC is, practice of deception by a man on a woman as a consequence of which the woman is led to believe that she is lawfully married to him although she is not, and then make her cohabit with him. [Para 2] [1059-G]

1.2. 'Deceit', in the law, has a broad significance. Any device or false representation by which one man misleads another to his injury and fraudulent misrepresentations by which one man deceives another to the injury of the latter, are deceit. Deceit is a false statement of fact made by a person knowingly or recklessly with intent that it shall be acted upon by another who does act upon it and thereby suffers an injury. It is always a personal act and is intermediate when compared with fraud. Deceit is sort of a trick or contrivance to defraud another. It is an attempt to deceive and includes any declaration that misleads another or causes him to believe what is false. [Para 6] [1060-F-H; 1061-A]

Stroud's Judicial Dictionary [Fifth Edition]; Black's Law Dictionary **[Eighth Edition];** *Law Lexicon by P. Ramanatha Aiyar* **[2nd Edition,Reprint 2000] – referred to.**

1.3. Inducement by a person deceitfully to a woman to change her status from unmarried woman to a lawfully married woman and on that inducement making her cohabit with him in the belief that she is lawfully married to him is what constitutes an offence under Section 493 IPC. The victim woman has been induced to do that which, but for the false practice, she would not have done and has been led to change her social and domestic status. The ingredients of Section 493 can be said to be fully satisfied when it is proved – (a) deceit causing a false belief of existence of a lawful marriage and (b) cohabitation or sexual intercourse with the person causing such belief. It is not necessary to establish the factum of marriage according to personal law but the proof of inducement by a man deceitfully to a woman to change her status from that of an unmarried to that of a lawful married woman and then make that woman cohabit with him establishes an offence under Section 493 IPC. [Para 6] [1061-B-E]

2. The prosecution has been able to prove – (i) the appellant and the victim woman had been living for a period of nine years like a husband and wife, (ii) the accused and the victim woman had two children from that relationship, (iii) an application (Exhibit 3) was made by the accused/appellant for information to the Special Marriage Officer, regarding his marriage with the victim woman, (iv) an agreement (Exhibit 2) was executed for marriage certificate wherein the accused admitted that he was living a normal family life as a married couple with the complainant for the last one year and she was his wife, (v) voters' list (Exhibit 6) of the assembly electoral list for the year 1984; Voters' List (Exhibit 6/1) for the year 1988 and another Voters' List (Exhibit 6/2) for the year 1993 indicated that victim woman was shown as wife of the accused, (vi) the appellant and the victim lived together as a normal couple at different places of posting in course of service and (vii) the appellant had practiced deception on the complainant causing a false belief of existence of lawful marriage and making her cohabit with him in that belief. Thus, the ingredients of Section 493 IPC have been fully established by the prosecution. The offence under the said Section is made out beyond any reasonable doubt. [Para 9] [1062-G-H; 1063-A-D]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 439 of 2006.

From the Judgment & Order dated 8.9.2005 of the High Court of Jharkhand at Ranchi in Cr. Rev.No. 788 of 2005.

Deba Prasad Mukherjee, Ratan Kumar Choudhury, Brahmajeet Mishra, Annwesha Deb, Jyotika Kalra for the Appearing Parties.

The Judgments of the Court was delivered by

ANIL R. DAVE, J. 1. Being aggrieved by an order dated

8th September, 2005 passed by the High Court of Jharkhand at Ranchi in Criminal Revision No.788 of 2005, whereby the order of conviction of the appellant was confirmed by the High Court, the appellant has filed this appeal. By virtue of the impugned order, the appellant was sentenced to undergo rigorous imprisonment for a period of three months and to pay a fine of Rs.500/-, in default to undergo rigorous imprisonment for a period of two months has been confirmed.

2. This appeal was initially heard by this court but after hearing the appeal, one of the learned judges was of the view that the appellant could not have been convicted for committing an offence under Section 493 of the Indian Penal Code (for short 'the IPC'), whereas the said view was not accepted by another learned judge.

3. In the afore-stated circumstances, the appeal was placed before the Hon'ble Chief Justice, who referred it to a three-judge Bench and, therefore, it had been placed before us.

4. As the facts have been duly discussed by both the learned judges in their respective orders, we narrate the same in a nutshell. According to the case of the prosecution, the appellant had acquaintance with the complainant and upon developing intimate relationship with her, by his actions he made the complainant to believe that she had become the wife of the appellant herein and thereby they had stayed together for nine years as husband and wife and during that period the complainant had given birth to two children ? a son and a daughter. Thereafter, the allegation is that the appellant had turned the complainant out of his house.

5. In the afore-stated circumstances, a complaint was filed by the complainant and in pursuance of the said complaint the appellant was prosecuted. After a full-fledged trial, the appellant was convicted by an order dated 20th December, 2003 passed in G.R. Case No.27 of 1992 (Lohardaga P.S. case No.12/92)

by the Judicial Magistrate First Class, Lohardaga. An appeal filed against the order of conviction, being Criminal Appeal No.1 of 2004, was dismissed by the learned Additional District and Sessions Judge, Lohardage. Being aggrieved by the order of dismissal of the appeal, the appellant had filed Criminal Revision No.788/2005 before the High Court of Jharkhand at Ranchi and the same was rejected by an order dated 8th September, 2005, which lead to the filing of this appeal.

6. We heard the learned counsel and also meticulously perused the impugned judgments and the record pertaining to the case.

7. Before dealing with the case in hand, let us see as to how and why the learned judges of this Court had come to different conclusions.

8. As we are concerned with the provisions of Section 493 of the IPC, it would be just and proper to look at the said section before we deal with the subject.

> "Section 493: Cohabitation caused by a man deceitfully inducing a belief of lawful marriage – Every man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

9. Upon perusal of Section 493 of the IPC, to establish that a person has committed an offence under the said Section, it must be established that a person had deceitfully induced a belief to a woman, who is not lawfully married to him, that she is a lawfully married wife of that person and thereupon she should cohabit or should have had sexual intercourse with that person. Looking at the afore-stated section, it is clear that the accused must induce a woman, who is not lawfully married to

him, to believe that he is married to her and as a result of the afore-stated representation, the woman should believe that she was lawfully married to him and there should be cohabitation or sexual intercourse as a result of the deception.

10. One of the learned judges was of the view that no deception was practised by the appellant and, therefore, no offence under the provisions of Section 493 of the IPC had been committed. It was the view of the learned judge that though the appellant had acted in an immoral manner which might not be approved by the society but he had not committed any offence in the eyes of law by staying with the complainant for about nine years. On the other hand, on appreciation of the evidence, another learned judge had confirmed the concurrent findings of the courts below and had come to the conclusion that the appellant had in fact practised deception, which led the complainant woman to believe that she was a lawfully married wife of the appellant though in reality she was not a lawfully married wife of the appellant and thereupon she had cohabited with the appellant. In these circumstances, another learned judge wanted to confirm the concurrent findings of the courts below.

11. Upon perusal of the evidence, we also are of the view, like the courts below that the appellant had practised deception and as a result thereof the complainant believed that she was a lawfully married wife of the accused and thereafter there was cohabitation and sexual intercourse as a result of the deception.

12. Upon perusal of the evidence we find that upon being acquainted with the complainant, the accused had developed a close relationship with the complainant. He used to visit the complainant from time to time and he had promised the complainant to marry her. Upon perusal of the evidence, we further find that the accused-appellant had got a form, with regard to marriage registration, signed by the complainant. The form was signed by the accused-appellant and he also induced the complainant to sign the form so as to get married. The form

duly signed by both the persons had been exhibited and the signature of the appellant had been identified. The afore-stated fact made the complainant to believe that the accused-appellant had married her and, therefore, she had started residing with him as his wife. In fact, the appellant did not marry the complainant. The persons related to the complainant and the accused were also made to believe that the complainant was the wife of the appellant, though rituals necessary for Hindu marriage had never been performed. It is an admitted fact that no marriage had taken place between the complainant and the appellant but only on the basis of the documents signed by the complainant at the instance of the accused-appellant, the complainant was made to believe that she was a lawfully married wife of the accused-appellant.

13. As a result of the afore-stated deceitful act of the accused-appellant, the complainant started residing with him as she believed that she had lawfully married the accused-appellant. There is sufficient evidence on record to show that the complainant had resided with the accused-appellant and the afore-stated fact was also reflected in the voters' list. In the voters' list the name of the complainant was shown as the wife of the appellant. As a result of the cohabitation, the complainant had given birth to two children. The accused-appellant had acknowledged the fact that the said two children were his children. Several ceremonies in relation to the birth of the children had also been performed by the accused-appellant.

15. Thus, upon perusal of the evidence, we find that there was sufficient evidence to the effect that the accused-appellant has deceived the complainant, which ultimately resulted into a belief in the mind of the complainant that she was a lawfully married wife of the accused-appellant, though she was not.

16. The afore-stated evidence which has been found by all the courts below is sufficient to show that the complainant was made to believe by the deceitful act of the accused-appellant that she was lawfully married to the accused-

appellant. The complainant had also cohabited with the appellant and had sexual intercourse with the accused-appellant and thereby she had given birth to two children also.

17. In the afore-stated set of circumstances, when there is ample evidence to the effect that only on the deceitful representation of the accused-appellant the complainant believed herself to be a lawfully married wife of the accused-appellant and as she had cohabited with the accused-appellant, there cannot be any doubt with regard to commission of an offence under the provisions of Section 493 of the IPC. Moreover, we do not find any error committed by the courts below in coming to the final conclusion with regard to commission of the offence by the appellant and, therefore, we confirm the order passed by the High Court.

18. In these circumstances, we dismiss the appeal. The bail bonds shall stand cancelled and the accused-appellant is directed to surrender to undergo the remaining period of sentence with immediate effect.

R.M. LODHA, J. 1. I have had the benefit of going through the judgment proposed by my esteemed brother Anil R. Dave, J. I entirely agree with his view, however, I wish to add few lines of my own.

2. Section 493 IPC does not need to be reproduced by me as the text of Section 493 has already been quoted in the lead judgment. When a man deceitfully induces a woman to have sexual intercourse with him causing her to believe that she is lawfully married to him, such man commits an offence under Section 493 IPC. The essence of an offence under Section 493 IPC is, therefore, practice of deception by a man on a woman as a consequence of which the woman is led to believe that she is lawfully married to him although she is not and then make her cohabit with him.

3. Stroud's Judicial Dictionary [Fifth Edition] explains 'deceit' as follows:

> "'Deceit, ' deceptio, fraus, dolus, is a subtle, wily shift or device, having no other name; hereto may be drawn all manner of craft, subtilly, guile, fraud, wilinesse, slight, cunning, covin, collusion, practice, and offence used to deceive another man by any means, which hath none other proper or particular name but offence".

4. Black's Law Dictionary [Eighth Edition] explains 'deceit' thus :

> "The act of intentionally giving a false impression ?the juror's deceit led the lawyer to believe that she was not biased?. 2. A false statement of fact made by a person knowingly or recklessly (i.e., not caring whether it is true or false) with the intent that someone else will act upon it……"

5. In the Law Lexicon by P. Ramanatha Aiyar [2nd Edition, Reprint 2000], 'deceit' is described as follows :

> "Fraud; false representation made with intent to deceive; 'Deceit, 'deception of fraud' is a subtle, wily shift or device, having no other name, In this may be included all manner of craft, subtlety, guile, fraud, wiliness, slight, cunning, covin, collusion, practice and offence used to deceive another may by any means, which hath none other proper or particular name but offence'.

6. 'Deceit', in the law, has a broad significance. Any device or false representation by which one man misleads another to his injury and fraudulent misrepresentations by which one man deceives another to the injury of the latter, are deceit. Deceit is a false statement of fact made by a person knowingly or recklessly with intent that it shall be acted upon by another who does act upon it and thereby suffers an injury. It is always a personal act and is intermediate when compared with fraud. Deceit is sort of a trick or contrivance to defraud another. It is an attempt to deceive and includes any declaration that

misleads another or causes him to believe what is false. If a woman is induced to change her status from that of an unmarried to that of a married woman with all the duties and obligations pertaining to the changed relationship and that result is accomplished by deceit, such woman within the law can be said to have been deceived and the offence under Section 493 IPC is brought home. Inducement by a person deceitfully to a woman to change her status from unmarried woman to a lawfully married woman and on that inducement making her cohabit with him in the belief that she is lawfully married to him is what constitutes an offence under Section 493. The victim woman has been induced to do that which, but for the false practice, she would not have done and has been led to change her social and domestic status. The ingredients of Section 493 can be said to be fully satisfied when it is proved – (a) deceit causing a false belief of existence of a lawful marriage and (b) cohabitation or sexual intercourse with the person causing such belief. It is not necessary to establish the factum of marriage according to personal law but the proof of inducement by a man deceitfully to a woman to change her status from that of an unmarried to that of a lawful married woman and then make that woman cohabit with him establishes an offence under Section 493 IPC.

7. When the criminal appeal came up for hearing before a two-Judge Bench, the Judges differed in their views. One of the Judges, Markandey Katju, J., held that Section 493 IPC was not attracted as there was no proof of lawful marriage although the appellant lived with the complainant for nine years and had two children by her. On the other hand, the other Judge, Gyan Sudha Misra, J. was of the view that for an offence under Section 493 there should be an inducement of belief in the woman that she was lawfully married to the accused and the inducement of belief of a lawful marriage cannot be interpreted so as to mean or infer that the marriage necessarily had to be in accordance with any custom or ritual or under Special Marriage Act. She observed as follows :

> "9. Section 493 IPC in my opinion do not presuppose a marriage between the accused and the victim necessarily by following a ritual or marriage by customary ceremony. What has been clearly laid down and emphasized is that there should be an inducement of belief in the woman that she is lawfully married to the accused/appellant and the inducement of belief of a lawful marriage cannot be interpreted so as to mean or infer that the marriage necessarily had to be in accordance with any custom or ritual or under Special Marriage Act. If the evidence on record indicate inducement of a belief in any manner in the woman which cannot possibly be enlisted but from which it can reasonably be inferred by ordinary prudence that she is a lawfully married wife of the man accused of an offence under Section 493 IPC, the same will have to be treated as sufficient material to bring home the guilt under Section 493 IPC. Interpretation of the Section in any other manner including an assertion that the marriage should have been performed by customary rituals or in similar manner only in order to establish that a belief of marriage had been induced, is bound to frustrate the very object and purpose of the provision for which it has been incorporated in the Indian Penal Code which is clearly to prevent the deceitful act of a man inducing the belief of a lawful marriage for the purpose of cohabitation merely to satisfy his lust for sexual pleasure."

8. We find ourselves in complete agreement with the position stated above.

9. The prosecution has been able to prove – (i) the appellant and the victim woman had been living for a period of nine years like a husband and wife, (ii) the accused and the victim woman had two children from that relationship, (iii) an application (Exhibit 3) was made by the accused/appellant for information to the Special Marriage Officer, Lohardaga regarding his marriage with the victim woman on 13.4.1982,

(iv) an agreement (Exhibit 2) was executed for marriage certificate on 4.6.1982 wherein the accused admitted that he was living a normal family life as a married couple with Sunita Kumari (complainant) for the last one year and Sunita Kumari was his wife, (v) voters' list (Exhibit 6) of the assembly electoral list of Lohardaga for the year 1984; Voters' List (Exhibit 6/1) for the year 1988 and another Voters' List (Exhibit 6/2) for the year 1993 indicated that victim woman was shown as wife of the accused, (vi) the appellant and the victim lived together as a normal couple at different places of posting in course of service and (vii) the appellant had practiced deception on the complainant causing a false belief of existence of lawful marriage and making her cohabit with him in that belief. Thus, the ingredients of Section 493 IPC have been fully established by the prosecution. The offence under the said Section is made out beyond any reasonable doubt.

10. In view of the above, the appeal is liable to be dismissed and is dismissed.

K.K.T. Appeal dismissed.

M/S. NAGARJUNA CONSTN. CO. LTD.
v.
GOVERNMENT OF INDIA & ANR.
(Civil Appeal No. 7933 of 2012)

NOVEMBER 09, 2012

[D.K. JAIN AND ANIL R. DAVE, JJ.]

Taxation – Service Tax – On works contract – Assessee paying service tax prior to 1.6.2007 under the categories falling under Clauses (zzd), (zzq) and (zzzh) of s. 65 (105) of Finance Act, 1994 – Amendment of s. 65 (105) w.e.f. 1.6.2007 introducing clause (zzzza) – Works Contracts Rules, 2007 introduced giving an option for Composition Scheme @ 2% of the gross amount charged on the works contract – Circular No. 98/1/2008 – ST dated 4.1.2008 clarified rule 3(3) of 2007 Rules whereby the assessee who had already paid tax under the old provisions i.e. prior to 1.6.2007, was not entitled to the Scheme under 2007 Rules – Vires of the Circular challenged by the assessee, in a writ petition – High Court upheld the validity of the Circular – On appeal, held: High Court rightly upheld the validity of the Circular – The Circular merely explains r. 3(3) of 2007 Rules, so as to provide guidelines – Sub-rule (3) of Rule 3 provides that in order to avail benefit of Rule 3, the assessee must opt for it, before payment of service tax – The appellant-assessee having already paid the service tax and opting for the benefit under r. 3 thereafter, not entitled for the benefit – The Circular is neither contrary to the Finance Act nor to the rules made thereunder – The Circular or r. 3(3) also cannot be said to be discriminatory – Finance Act, 1994 – s. 65(105) (zzd), (zzq), (zzzh) and (zzzza) – Works Contracts (Composition Scheme for Payment of Service Tax) Rules, 2007 – r. 3(3) – Circular No. 98/1/2008-ST dated 4.1.2008.

Appellant executed various contracts which were in the nature of Composite Construction Contracts. Prior to 1.6.2007, it paid service tax under the categories of taxable services falling under Clauses (zzd), (zzq) and (zzzh) of Section 65 (105) of Finance Act, 1994. Sub-section (105) of s. 65 was amended introducing Clause (zzza) w.e.f. 1.6.2007 vide Notification No. 23/2007 dated 22.5.2007.

Works Contracts (Composition Scheme for Payment of Service Tax) Rules, 2007 was introduced. Under the Scheme, an option of composition was offered @ 2% of the gross amount charged on the works contract. Prior to the composition, the effective tax rate under the other category of Services would work out to be approximately 3.96% of the gross amount.

The appellant wanted to opt for the scheme, but the Department through the Circular No. 98/1/2008-ST, dated 4.1.2208, clarified Rule 3(3) of 2007 Rules. In view of the clarification, the appellant, who had paid the service tax prior to 1.6.2007, was not entitled to change the classification of the single composite service under the Composition Scheme.

As the appellant had classified the contracts entered prior to 1.6.2007 under the category of 'works contract service' and had started discharging the service tax liability at the rates specified under 2007 Rules, Show Cause Notices were issued to the appellant for recovery of difference of service tax payable by it alongwith interest and penalty.

The appellant filed writ Petition, challenging the vires of the Circular dated 4.1.2008. The High Court dismissed the petition. Hence, the present appeal.

Dismissing the appeal, the Court

HELD: 1. The High Court did not commit any mistake while upholding validity of the Impugned Circular. The Impugned Circular has only explained the contents of Rule 3 (3) of Works Contracts (Composition Scheme for Payment of Service Tax) Rules, 2007 so as to provide guidelines to the Revenue Officers.On perusal of Rule 3 (3) of the 2007 Rules, it is very clear that the assessee who wants to avail of the benefit under Rule 3 of the 2007 Rules must opt to pay service tax in respect of a works contract before payment of service tax in respect thereof and the option so exercised is to be applied to the entire works contract and the assessee is not permitted to change the option till the said works contract is completed. [Paras 25, 26 and 27] [1077-D-G]

2. In the instant case it is an admitted fact that the appellant-assessee had already paid service tax on the basis of classification of works contract which was in force prior to 1st June, 2007. In the circumstances, it cannot be said that the appellant had exercised a particular option with regard to the mode of payment of tax after 1st June, 2007 with regard to reclassified works contract. Not availing of CENVAT credit is absolutely irrelevant in the instant case. [Para 28] [1077-G-H; 1078-A-B]

3. It cannot be said that the Impugned Circular or the provisions of Rule 3(3) of the 2007 Rules are discriminatory. Those who had paid tax as per the provisions and classification existing prior to Ist June, 2007 and those who opted for payment of tax under the provisions of Rule 3 of the 2007 Rules and paid tax before exercising the option belong to different classes. [Para 29] [1078-C-D]

4. The appellant has not challenged the validity of Rule 3 (3) of the 2007 Rules, therefore, the issue is not dealt with. The Impugned Circular is not contrary to the

Finance Act, 1994 or the statutory rules made thereunder and the Impugned Circular only provides guidelines as to how the provisions of Rule 3 (3) of the 2007 Rules are to be interpreted. Even if the Impugned Circular is set aside, the provisions of Rule 3 (3) of the 2007 Rules would remain and that would not benefit the appellant. [Para 30] [1078-D-E]

Tata Teleservices Ltd. v. Commissioner of Customs **2006 (1) SCC 746;** *Commissioner of Central Excise, Bolpur v. Ratan Melting and Wire Industries* **(2008) 231 ELT 22 – cited.**

Case Law Reference:

2006 (1) SCC 746	**Cited**	**Para 20**
(2008) 231 ELT 22	**Cited**	**Para 20**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7933 of 2012.

From the Judgment & Order dated 07.06.2010 of the High Court of Judicature of Andhra Pradesh at Hyderabad in Writ Petition No. 6558 of 2008.

Arvind P. Datar, G. Natarajan, T.V.S. Raghavendra Sreyas, Nikhil Nayyar for the Appellant.

B. Bhattacharya, ASG, Harish Chandra, Arti Singh, Judy James, Ajay Singh, Nimisha Swaroop, B. Krishna Prasad for the Respondents.

The Judgment of the Court was delivered by

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

2. This appeal arises from the judgment and final order dated 7th June, 2010, passed by the High Court of Andhra Pradesh in Writ Petition No. 6558/2008, whereby the High Court dismissed the petition filed by the appellant and upheld

the validity of the Circular No. 98/1/2008-ST, dated 4.1.2008 (hereinafter referred to as 'the Impugned Circular') issued by respondent no. 1 herein.

3. The appellant had executed various contracts which were in the nature of composite construction contracts. The appellant had paid Sales Tax/ VAT on those contracts under the Andhra Pradesh General Sales Tax Act, 1957, Andhra Pradesh Value Added Tax Act, 2005 and other State enactments. Service tax was imposed on various services which had come into effect from different dates. Prior to 1.6.07, the appellant had paid service tax under the following categories of taxable services, namely:

(a) Erection, commissioning or installation service under Section 65(105) (zzd) of the Finance Act, 1994 (hereinafter referred to as 'the Act'),

(b) Commercial or industrial construction service under Section 65(105) (zzq) of the Act,

(c) Construction of complex (residential complex) service under Section 65(105) (zzzh) of the Act.

4. Sub-sections 39(a), 25(b) and 30(a) of Section 65 of the Act define the above mentioned services as under:

"39(a): erection, commissioning or installation; means any service provided by a commissioning and installation agency, in relation to,— (i) erection, commissioning or installation of plant machinery, equipment or structures whether pre-fabricated or otherwise; or

(ii) installation of -

(a) electrical and electronic devices, including wirings or fittings therefore; or

(b) plumbing, drain laying or other installations for transport of fluids; or

(c) heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work; or

(d) thermal insulation, sound insulation, fire proofing or water proofing; or

(e) lift and escalator, fire escape staircases or travelators; or

(f) such other similar services;"

This definition, with reference to the taxable service, is dealt with by Clause (zzd).

5. The taxable services covered by Clause (zzq) (commercial or industrial construction services) are defined in sub-section 25(b) of Section 65 of the Act, which reads as under:

"(25b): commercial or industrial construction service means-

(a) construction of a new building or a civil structure or a part thereof; or

(b) construction of pipeline or conduit; or

(c) completion and finishing services such as glazing, plastering, painting, floor or wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services, in relation to building or civil structure; or

(d) repair, alteration, renovation or restoration of, or similar services in relation to, building or civil structure, pipeline or conduit, which is-

(i) used, or to be used, primarily for; or

(ii) occupied, or to be occupied, primarily with; or

(iii) engaged, or to be engaged, primarily in,

commerce or industry, or work intended for commerce or industry, but does not include such services provided in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams;"

6. The taxable services covered by Clause (zzzh) (construction of complex) are defined in sub-section 30 (a) of Section 65 of the Act, which reads as under:

"30(a): "construction of complex" means –

(a) construction of a new residential complex or a part thereof; or

(b) completion and finishing services in relation to residential complex such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services; or

(c) repair, alteration, renovation or restoration of, or similar services in relation to, residential complex."

7. The appellant, while paying service tax prior to 1.6.07 under the above mentioned categories of taxable services, instead of paying full rate of service tax after availing of CENVAT credit of excise duties paid on inputs, had opted to claim the benefit of Notification No. 1/2006 –ST dated 1.3.06, whereby service tax was required to be paid only on 33% of the total value, subject to the condition of non availment of CENVAT credit on inputs, capital goods and input services.

8. With effect from 01.06.2007, vide Notification No. 23/2007 dated 22.05.2007, sub-section (105) of Section 65 of the

Act was amended and Clause (zzzza) was introduced. This clause reads as follows:

"(zzzza) Taxable service means any service provided or to be provided to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.

Explanation:— For the purposes of this sub-clause, "works contract" means a contract wherein, —

(i) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and

(ii) such contract is for the purposes of carrying out, —

(a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or

(b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or

(c) construction of a new residential complex or a part thereof; or

(d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or

(e) turnkey projects including engineering, procurement and construction or commissioning (EPC) projects;"

9. Section 65A of the Act provides that the classification of taxable services shall be determined according to the terms of the sub-clauses of Clause (105) of Section 65 of the Act and when, for any reason, a taxable service is, prima facie, classifiable under two or more sub-clauses of Clause (105) of Section 65 of the Act, the classification shall be effected as follows:

"(a) the sub-clause which provides the most specific description shall be preferred to sub-clauses providing a more general description;

(b) composite services consisting of a combination of different services which cannot be classified in the manner specified in clause (a), shall be classified as if they consisted of a service which gives them their essential character, in so far as this criterion is applicable;

(c) When a service cannot be classified in the manner specified in clause (a) or clause (b) it shall be classified under the sub-clause which occurs first among the sub-clauses which equally merit consideration."

10. In exercise of the powers conferred under Sections 93 and 94 of the Act, the Central Government introduced the Works Contracts (Composition Scheme for Payment of Service Tax) Rules, 2007 (hereinafter referred to as 'the 2007 Rules'). Under this scheme, an option of composition was offered @ 2% of the gross amount charged on the works contract. Prior to the composition, the effective tax rate under the other category of services would work out to be approximately 3.96% of the gross amount.

11. Rule 3 of the 2007 Rules, being relevant, is extracted below:

> "3. (1) Notwithstanding anything contained in Section 67 of the Act and Rule 2A of the Service Tax (Determination of Value) Rules, 2006, the person liable to pay service tax in relation to works contract service shall have the option to discharge his service tax liability on the works contract service provided or to be provided, instead of paying service tax at the rate specified in Section 66 of the Act, by paying an amount equivalent to four per cent of the gross amount charged for the works contract.
>
> Explanation:— For the purpose of this rule, gross amount charged for the works contract shall not include Value Added Tax (VAT) or sales tax, as the case may be, paid on transfer of property in goods involved in the execution of the said works contract.
>
> (2) The provider of taxable service shall not take CENVAT credit of duties or cess paid on any inputs, used in or in relation to the said works contract, under the provisions of CENVAT Credit Rules, 2004.
>
> (3) The provider of taxable service who opts to pay service tax under these rules shall exercise such option in respect of a works contract prior to payment of service tax in respect of the said works contract and the option so exercised shall be applicable for the entire works contract and shall not be withdrawn until the completion of the said works contract."

12. The appellant wanted to opt for the afore-stated scheme but the department, through the Impugned Circular had clarified that "Classification of a taxable service is determined based on the nature of service provided whereas liability to pay service tax is related to receipt of consideration. Vivisecting a single composite service and classifying the same under two

different taxable services depending upon the time of receipt of the consideration is not legally sustainable."

13. In view of the above, the appellant, who had paid service tax prior to 01.06.07 for the taxable services, namely, erection, commissioning or installation service, commercial or industrial construction service or construction of complex service, was not entitled to change the classification of the single composite service for the purpose of payment of service tax on or after 01.06.07 and hence, was not entitled to avail of the Composition Scheme.

14. In view of the fact that the appellant had classified the ongoing contracts entered into prior to 1.6.2007 under the category of 'works contract service' and had started discharging the service tax liability at the rates specified in the 2007 Rules, show cause notices were issued to the appellant for recovery of difference of service tax payable by it alongwith applicable interest and penalty.

15. Aggrieved by the same, the appellant filed a Writ Petition before the High Court challenging the vires of the Impugned Circular. The High Court, while dismissing the petition, held that in respect of a works contract, where service tax had already been paid, no option to pay service tax under the Composition Scheme could be exercised. The High Court also held that the Impugned Circular (to the extent it was challenged i.e., in relation to Reference Code 097.03) was wholly in conformity with the provisions of Rule 3(3) of the 2007 Rules and that the Impugned Circular merely reiterated the eligibility criterion specified in Rule 3(3) of the 2007 Rules. As per the provisions of the afore-stated Rule, for claiming benefit of paying service tax at the rate of 4% of the gross amount charged for the works contract instead of paying service tax at the rate specified in Section 66 of the Act, the appellant ought to have exercised its option before payment of service tax in respect of the works contract. The appellant had not exercised its option before payment of service tax and the taxable

services, which were falling within Clauses (zzd), (zzq) and (zzzh) of Section 65 (105) of the Act, were falling within the newly introduced Clause (zzzza) of Section 65(105) of the Act. In these circumstances, the petition was dismissed by the High Court.

16. It is against the dismissal of the said petition that the present appeal has been filed by the appellant. The learned counsel for the appellant submitted before us that upholding the view taken by the High Court would result in gross discrimination between assessees who had paid tax @3.96% prior to 1.6.2007, as opposed to the contractors who are similarly placed but did not pay any tax prior to 1.6.2007 and who would now be paying tax at a lower rate.

17. The learned counsel appearing for the appellant submitted that the Impugned Circular is contrary to the provisions of Rule 3 (3) of the 2007 Rules and Section 65 (105) (zzzza) of the Act. He submitted that by virtue of the Impugned Circular, the appellant and other similarly situated persons would be deprived of the benefit under the Rules. He submitted that under Rule 3 (3) of the 2007 Rules, the appellant is entitled to opt for payment of 4% of the gross amount charged for the works contract but by virtue of the Impugned Circular, the appellant would not get an opportunity to avail of the option provided under Rule 3 (3) of the 2007 Rules.

18. Thereafter he submitted that by virtue of the Impugned Circular, the respondent authorities cannot take away the benefit given to the appellant under Rule 3 (3) of the 2007 Rules and therefore, the Impugned Circular is bad in law.

19. He thereafter submitted that Rule 3 (3) of the 2007 Rules cannot be interpreted in a way so as to deprive the persons who had already paid tax under the old provisions. He submitted that the appellant had already started making payment @ 2% of the gross amount charged for the works contract at the relevant time and, therefore, the appellant cannot

be constrained to change the method of payment of tax after 1st June, 2007.

20. In order to substantiate his submission that a circular cannot override a statutory provision, he relied on the judgments delivered in the cases of *Tata Teleservices Ltd. v. Commissioner of Customs* 2006 (1) SCC 746 and *Commissioner of Central Excise, Bolpur v. Ratan Melting & Wire Industries* (2008) 231 ELT 22. He, therefore, submitted that the Impugned Circular is bad in law and the High Court committed an error by not quashing the same and, therefore, the appeal deserves to be allowed and the Impugned Circular should be quashed.

21. On the other hand, the learned Additional Solicitor General appearing for the respondents submitted that the view expressed by the High Court is just and proper. He submitted that reclassification is always permitted and he further submitted that by virtue of the amended legal provisions, after 1st July, 2007, the classification had been amended and by virtue of the Impugned Circular the provisions of Rule 3(3) of the 2007 Rules have been explained.

22. He submitted that the Impugned Circular is explanatory in nature and the appellant had preferred to challenge the Impugned Circular and not the provisions of Rule 3 (3) of the 2007 Rules. Even without giving effect to the Impugned Circular, the provisions of the amended Rules would remain and force which would not permit the appellant to change the method with regard to payment of tax which was in vogue prior to 1st July, 2007. He submitted that there was no dispute to the fact that the agreement with regard to the works contract had been entered into before 1st June, 2007 i.e. when the amended provision of Rule 3 (3) of the 2007 Rules was not in force. As the appellant had already paid service tax before 1st June, 2007 on the basis which was applicable at the relevant time i.e. before 1st June, 2007, the appellant is not entitled to opt for

the scheme provided under the provisions of Rule 3 of the 2007 Rules.

23. He lastly emphasized on the fact that reclassification is always permitted and the State has a right to reclassify services and only in pursuance of the said reclassification, the provisions of Rule 3 (3) of the 2007 Rules would not apply to the case of the appellant. He further added that not availing CENVAT credit is not a relevant issue. He emphasized on the fact that because of the reclassification, in the light of Rule 3 (3) of the 2007 Rules, the appellant cannot be permitted to avail of the benefit of paying tax as per an option given under Rule 3 of the 2007 Rules.

24. We have heard the learned advocates and have considered the contents of the impugned judgment and the provisions of the relevant rules.

25. In our opinion the High Court did not commit any mistake while upholding validity of the Impugned Circular.

26. In our opinion the Impugned Circular has only explained the contents of Rule 3 (3) of the 2007 Rules so as to provide guidelines to the Revenue Officers.

27. On perusal of Rule 3 (3) of the 2007 Rules it is very clear that the assessee who wants to avail of the benefit under Rule 3 of the 2007 Rules must opt to pay service tax in respect of a works contract before payment of service tax in respect of the works contract and the option so exercised is to be applied to the entire works contract and the assessee is not permitted to change the option till the said works contract is completed.

28. In the instant case it is an admitted fact that the appellant-assessee had already paid service tax on the basis of classification of works contract which was in force prior to 1st July, 2007. In the circumstances, it cannot be said that the appellant had exercised a particular option with regard to the

mode of payment of tax after 1st July, 2007 with regard to reclassified works contract. We are in agreement with the submissions made by the learned counsel appearing for the respondents that not availing of CENVAT credit is absolutely irrelevant in the instant case.

29. We do not accept the submission of the learned counsel appearing for the appellant that the Impugned Circular is discriminatory in nature. Those who had paid tax as per the provisions and classification existing prior to Ist June, 2007 and those who opted for payment of tax under the provisions of Rule 3 of the 2007 Rules and paid tax before exercising the option belong to different classes and, therefore, it cannot be said that the Impugned Circular or the provisions of Rule 3(3) of the 2007 Rules are discriminatory.

30. The appellant has not challenged the validity of Rule 3 (3) of the 2007 Rules and, therefore, we do not go into the said issue. In our opinion, the Impugned Circular is not contrary to the Act or the statutory rules made thereunder and the Impugned Circular only provides guidelines as to how the provisions of Rule 3 (3) of the 2007 Rules are to be interpreted. Even if the Impugned Circular is set aside, the provisions of Rule 3 (3) of the 2007 Rules would remain and that would not benefit the appellant. In view of the above facts, we are of the view that the High Court did not commit any error while upholding the Impugned Circular and, therefore, we dismiss the appeal with no order as to costs.

K.K.T. Appeal dismissed.

C.K. JAFFER SHARIEF

v.

STATE (THROUGH CBI)

(Criminal Appeal No. 1804 of 2012)

NOVEMBER 09, 2012

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

PREVENTION OF CORRUPTION ACT, 1988:

ss. 13 (1) (d) and 13 (2) – Criminal proceedings against appellant on the allegation that while he was holding the office of Minister, he compelled approval of journey of four persons to London in connection with his medical treatment – Held: Record indicates that the four persons while in London had assisted the appellant in performing certain tasks connected with the discharge of his duties as a Minister – It was for the Minister to decide on the number and identity of the officials and supporting staff to accompany him to London if it was anticipated that he would be required to perform his official duties while in London – The action of the Minister cannot be said to have been actuated by a dishonest intention to obtain an undue pecuniary advantage – In the totality of facts, there is no reason to allow the prosecution to continue against appellant – Criminal proceedings quashed – Constitution of India, 1950 – Art. 226 – Code of Criminal Procedure, 1973 – s. 482.

On the basis of an FIR filed by the Central Bureau of Investigation (CBI), a case was registered against the appellant, the then Railway Minister, for offences punishable u/s 13 (2) read with s. 13 (1) (d) of the Prevention of Corruption Act, 1988, on the allegations that he had dishonestly made the Managing Directors of Rail India Technical & Economic Services Ltd (RITES) and Indian Railway Construction Co. Ltd. (IRCON) to approve

the journeys of four persons (one Addl. P.S. to Railway Minister, two Stenographers and one domestic help), to London in connection with his medical treatment. The investigating agency submitted its report. The trial court took cognizance of the offences. The application filed by the accused seeking discharge was rejected by the trial court by its order dated 27.1.2010. He the moved the High Court under Art. 226 of the Constitution read with s. 482 Cr.P.C. for setting aside the order dated 27.1.2010 and for quashing the criminal proceedings. The High Court declined to interfere.

Allowing the appeal, the Court

HELD: 1.1. It cannot be said that the only issue raised by the appellant before the High Court was with regard to the absence of sanction for the impugned prosecution. Before the High Court two reliefs had been prayed for by the appellant, namely, interference with the order of the trial court passed on 27.01.2010 as well as for quashing of the criminal proceeding. Therefore, this Court is of the view that the appellant having raised issues concerning the validity of the proceeding as a whole on the ground that *ex facie* no offence is disclosed, it is open for the appellant to raise the said question in the instant appeal. [Para 12] [1086-C-D-E-F]

1.2. A bare reading of the provisions of s.13(i)(d) the Prevention of Corruption Act, 1988 would go to show that the offence contemplated therein is committed, if a public servant obtains for himself or any other person any valuable thing or pecuniary advantage by corrupt or illegal means; by abusing his position as public servant or without any public interest. In the instant case, the appellant besides working as the Minister of Railways was the Head of the two PSUs in question at the relevant time. The record indicates that the four persons while in London had performed certain tasks to assist the Minister

in the discharge of his public duties. Therefore, the appellant cannot be construed to have adopted corrupt or illegal means or to have abused his position as a public servant to obtain any valuable thing or pecuniary advantage either for himself or for any of the said four persons. As a Minister, it was for the appellant to decide on the number and identity of the officials and supporting staff who should accompany him to London if it was anticipated that he would be required to perform his official duties while in London. The said decision cannot be said to be actuated by a dishonest intention to obtain an undue pecuniary advantage. That dishonest intention is the gist of the offence u/s. 13(1)(d) is implicit in the words used i.e. corrupt or illegal means and abuse of position as a public servant. [Para 14 and 17] [1087-E-F; 1088-F-G; 1089-B-C-D-E]

M. Narayanan Nambiar vs. State of Kerala **(1963) Supp. (2) SCR 724 - relied on**

1.3. In the totality of the materials on record, there is no reason to allow the prosecution to continue against the appellant. Such continuance would be an abuse of the process of court and, therefore, it will be the plain duty of the court to interdict the same. Therefore, the proceedings registered against the appellant are quashed. [Para 17-18] [1089-E-G]

Case Law Reference:

(1963) Supp. (2) SCR 724 relied on Para 17

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1804 of 2012.

From the Judgment & Order dated 11.4.2012 of the High Court of Delhi at New Delhi in Writ Petition (Criminal) No. 262 of 2010.

P.P. Rao, Rajiv Datta, Gopal Singh for the Appellant.

Mohan Jain, ASG, D.K. Thakur, M. Tatia, B.V.B. Das, Arvind Kumar Sharma for the Respondent.

The Judgment of the Court was delivered by

RANJAN GOGOI, J. Leave granted.

2. The judgment and order of High Court of Delhi dated 11.4.2012 affirming the order of the learned trial court rejecting the application filed by the appellant for discharge in the criminal prosecution initiated against him has been challenged in the present appeal.

3. The above order of the High Court challenged in the present proceeding came to be passed in the following facts :

An FIR dated 03.06.1998 was filed by the Superintendent of Police, CBI/ACU.XX/New Delhi alleging commission of the offence under Section 13(2) read with 13(1)(d) of the Prevention of Corruption Act, 1988 (hereinafter referred to as 'the Act') by the appellant during his tenure as the Union Railway Minister from 21.06.1991 to 13.10.1995. Commission of the offence under the aforesaid provision of the Act was alleged on the basis that the appellant had dishonestly made the Managing Directors of RITES (Rail India Technical & Economics Services Ltd.) and IRCON (Indian Railway Construction Co. Ltd.) to approve the journeys of S/Shri B.N. Nagesh, the then Additional PS to Railway Minister, S.M. Mastan and Murlidharan, Stenographers in the railway cell and one Shri Samaullah (domestic help of the appellant) to London in connection with the medical treatment of the appellant. It was alleged in the FIR that the two Public Sector Undertakings did not have any pending business in London at the relevant point of time and the journeys undertaken by the aforesaid four persons were solely at the behest of the appellant who had compelled the services of the concerned employees to be placed in the two undertakings in question. Pecuniary loss to

the Public Sector Undertakings was, therefore, caused by the wrongful acts of the appellant.

4. On the basis of the aforesaid FIR, Case no. RC.2(A)/98-ACU.IX was registered and investigated upon. Final report of such investigation was submitted in the court of learned Special Judge, Patiala House, New Delhi on 22.10.2005. In the said final report it was, inter-alia, stated that there was "ample documentary and oral evidence to prove the facts and circumstances of the case, as stated above, which constitute offences punishable under Section 13(2) read with 13(1) (d) of the Prevention of Corruption Act, 1988". Sanction for prosecution, under Section 19 of the Act was however refused by the competent authority. Accordingly, in the final report it was mentioned that the proceedings against the accused appellant be dropped.

5. The learned trial court by its order dated 25.08.2006 declined to accept the closure report filed by the investigating agency and observed that there appears to be prima facie evidence with regard to commission of offence under Section 13(2) read with 13 (1)(d) of the Act and, possibly, the entire material collected in the course of investigation had not been placed before the sanctioning authority.

6. Pursuant to the order of the learned trial court the matter was once again looked into by the investigating agency who submitted another report dated 01.08.2007 stating that all materials collected during investigation had been placed before the authority competent to grant sanction including such clarifications as were sought from time to time.

7. On receipt of the aforesaid report dated 01.08.2007, the learned trial court by its order dated 26.07.2008 took cognizance of the offence punishable under Section 13 (2) read with Section 13(1)(d) of the Act.

8. Thereafter, the accused appeared before the learned

trial court and filed an application seeking discharge which being refused by the order of the trial court dated 27.01.2010, the appellant moved the High Court of Delhi under Article 226 of the Constitution read with Section 482 of the Code of Criminal Procedure for setting aside the order dated 27.01.2010 passed by the learned Special Judge, CBI, Rohini, New Delhi and for quashing of the criminal proceeding pending before the said court. The aforesaid application having been dismissed by the impugned judgment and order dated 11.04.2012 of the High Court of Delhi the present appeal has been filed.

9. We have heard Shri P.P. Rao, learned senior counsel for the appellant and Shri Mohan Jain, learned ASG for the State.

10. Shri Rao, learned senior counsel for the appellant has submitted that he would not assail the impugned order of the High Court on the ground of absence of requisite sanction either under the provisions of the Act or under the provisions of the Cr.P.C. Shri Rao has submitted that the aforesaid issue need not be gone into in the present appeal in as much as the allegations made in the FIR and facts appearing from the reports of the investigating agency, ex facie, do not make out the commission of any offence by accused-appellant under Section 13(1)(d) of the Act so as to warrant the continuance of the prosecution against him. Drawing the attention of the court to the consideration of the statements of the witnesses, examined in the course of investigation, by the High Court, particularly, Shri B.N. Nagesh (PW 33), Shri Murlidharan (PW 34) and Shri S.M. Mastan it is contended that from the statements of the aforesaid persons it is crystal clear that while in London the persons accompanying the appellant had performed various official duties. It is submitted that the accused-appellant, while undergoing medical treatment in London, did not cease to be the Railway Minister and during the period of his treatment the appellant had attended to the

work and duties connected with the Ministry as well as the RITES and IRCON of which bodies, as the Railway Minister, the appellant was the Head. The persons who accompanied the appellant to London thereby causing alleged pecuniary loss to the Public Sector Undertakings had actually assisted the Minister in due discharge of his duties while abroad. The said fact having appeared from the statements of the persons recorded by the investigating authority under Section 161 Cr.P.C., according to Shri Rao, ex facie, the ingredients necessary to constitute the offence under Section 13(1)(d) are not present. It is therefore contended that the High Court has grossly erred in not quashing the criminal proceeding against the appellant and in permitting the same to continue.

11. Opposing the contentions advanced on behalf of the accused-appellant, Shri Jain, learned ASG has urged that the sole issue agitated by the accused-appellant before the learned trial court was with regard to the inherent lack of jurisdiction to continue with the prosecution in the absence of sanction either under the provisions of the Act or under the provisions of the Cr.P.C. Before the High Court the validity of the order dated 27.1.2010 of the learned trial court refusing to discharge the accused was the only issue raised. It is, therefore not open to the appellant to widen the ambit of the challenge to the validity of the impugned criminal proceeding as a whole. In this regard the learned ASG has placed before us the application filed by the accused-appellant for discharge; the trial court's order dated 27.01.2010 as well as the relevant part of the order dated 11.04.2012 of the High Court. Shri Jain has further submitted that in the present case the requirement of obtaining sanction under Section 197 Cr.P.C. does not arise in view of the specific allegations in the FIR which pertain to commission of the offence under section 13(2) read with section 13(1)(d) of the Act. Admittedly, the accused-appellant having ceased to be a Minister as well as a Member of Parliament w.e.f. 10.11.2000 no question of obtaining sanction under Section 19 can arise in the present case, it is argued. Shri Jain has also submitted

that in any case, the materials brought on record, at this stage, cannot conclusively prove that the offence as alleged has not been committed by the accused-appellant. The matter has to be determined in the course of the trial which may be permitted to commence and be brought to its logical conclusion.

12. At the very outset we wish to make it clear that we do not agree with the contention advanced by the learned ASG to the effect that the only issue raised by the appellant before the High Court was with regard to the absence of sanction for the impugned prosecution. While the above may have the complexion of the proceeding before the learned trial court, in the application filed by the accused-appellant before the High Court the validity of the continuance of the criminal proceeding as a whole was called into question, inter-alia, on the ground that ex-facie the ingredients of the offence under Section 13 (1)(d) are not made out on the allegations levelled. We have already noticed that before the High Court two reliefs had been prayed for by the appellant, namely, interference with the order of the learned trial court dated 27.01.2010 as well as for quashing of the criminal proceeding. In view of the aforesaid position demonstrated by the relevant records we do not find any reason to confine the scope of the present appeal to the issue of sanction and test the legal validity of the order of the learned trial court dated 27.1.2010 and the impugned order of the High Court dated 11.04.2012 only on that basis. Rather we are of the view that the accused-appellant having raised issues concerning the validity of the proceeding as a whole on the ground that, ex facie no offence is disclosed, it is open for the appellant to raise the said question in the present appeal.

13. Section 13(1)(d) of the Act may now be extracted below :

"Section 13 : Criminal misconduct by a public servant – (1) a public servant is said to commit the offence of criminal misconduct,-

(a)……

(b)……

(c) …..

(d) if he,-

(i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(iii) while holding office as a public servant, obtains for any persons any valuable thing or pecuniary advantage without any public interest. Or

(e)……."

14. A bare reading of the aforesaid provision of the Act would go to show that the offence contemplated therein is committed if a public servant obtains for himself or any other person any valuable thing or pecuniary advantage by corrupt or illegal means; by abusing his position as public servant or without any public interest. The aforesaid provision of the Act, i.e, Section 13(1)(d) are some what similar to the offence under Section 5(1)(d) of the Prevention of Corruption Act, 1947.

15. Adverting to the facts of the present case it has already been noticed that the only allegation against the appellant is that he had prevailed upon RITES and IRCON to take the four employees in question on "deputation" for the sole purpose of sending them to London in connection with the medical treatment of the appellant. It is also alleged that neither RITES nor IRCON had any pending business in London and that none of the four persons had not performed any duty pertaining to RITES or IRCON while they were in London; yet the to and fro

air fare of all the four persons was paid by the above two Public Sector Undertakings. On the said basis it has been alleged that the accused appellant had abused his office and caused pecuniary loss to the two Public Sector Undertakings by arranging the visits of the four persons in question to London without any public interest. This, in essence, is the case against the accused-appellant.

16. A fundamental principle of criminal jurisprudence with regard to the liability of an accused which may have application to the present case is to be found in the work "Criminal Law" by K.D. Gaur. The relevant passage from the above work may be extracted below:

> "Criminal guilt would attach to a man for violations of criminal law. However, the rule is not absolute and is subject to limitations indicated in the Latin maxim, actus non facit reum, nisi mens sit rea. It signifies that their can be no crime without a guilty mind. To make a person criminally accountable it must be proved that an act, which is forbidden by law, has been caused by his conduct, and that the conduct was accompanied by a legally blameworthy attitude of mind. Thus, there are two components of every crime, a physical element and a mental element, usually called actus reus and mens rea respectively."

17. It has already been noticed that the appellant besides working as the Minister of Railways was the Head of the two Public Sector Undertakings in question at the relevant time. It also appears from the materials on record that the four persons while in London had assisted the appellant in performing certain tasks connected with the discharge of duties as a Minister. It is difficult to visualise as to how in the light of the above facts, demonstrated by the materials revealed in the course of investigation, the appellant can be construed to have adopted corrupt or illegal means or to have abused his position as a public servant to obtain any valuable thing or pecuniary

advantage either for himself or for any of the aforesaid four persons. If the statements of the witnesses examined under Section 161 show that the aforesaid four persons had performed certain tasks to assist the Minister in the discharge of his public duties, however insignificant such tasks may have been, no question of obtaining any pecuniary advantage by any corrupt or illegal means or by abuse of the position of the appellant as a public servant can arise. As a Minister it was for the appellant to decide on the number and identity of the officials and supporting staff who should accompany him to London if it was anticipated that he would be required to perform his official duties while in London. If in the process, the Rules or Norms applicable were violated or the decision taken shows an extravagant display of redundance it is the conduct and action of the appellant which may have been improper or contrary to departmental norms. But to say that the same was actuated by a dishonest intention to obtain an undue pecuniary advantage will not be correct. That dishonest intention is the gist of the offence under section 13(1)(d) is implicit in the words used i.e. corrupt or illegal means and abuse of position as a public servant. A similar view has also been expressed by this Court in *M. Narayanan Nambiar vs. State of Kerala*[1] while considering the provisions of section 5 of Act of 1947. If the totality of the materials on record indicate the above position, we do not find any reason to allow the prosecution to continue against the appellant. Such continuance, in our view, would be an abuse of the process of court and therefore it will be the plain duty of the court to interdict the same.

18. For the aforesaid reasons we allow this appeal, set aside the judgment and order dated 11.04.2012 of the High Court and the order dated 27.01.2010 of the learned trial court and quash the proceedings registered against the accused-appellant.

R.P. Appeal allowed.

1 (1963) Supp. (2) SCR 724

R.K. ANAND
v.
REGISTRAR, DELHI HIGH COURT
(Criminal Appeal No. 1393 of 2008)

NOVEMBER 21, 2012

[G.S. SINGHVI, AFTAB ALAM AND CHANDRAMAULI KR. PRASAD, JJ.]

Contempt of Courts Act, 1971 – s. 2(c) clauses (ii) and (iii) – Contempt proceedings – Initiated suo motu by High Court – Against senior advocate-contemnor – For suborning the court witness in a criminal trial, in which he represented the accused – High Court held him guilty of contempt and as a punishment prohibited him from appearing in the Delhi High Court and the courts subordinate to it for a period of four months – However, he was left free to carry on his other professional work e.g. consultation, advices, conferences and opinions etc. – Further the court recommended the full court to divest him of the honour as a senior advocate and imposed fine of Rs. 2000/- – On appeal, Supreme Court confirmed the finding of High Court as to his guilt, but opined that the punishment was inadequate – Notice of enhancement of punishment issued – The contemnor tendered unconditional apology and in addition proposed to take certain steps to atone his guilt i.e. (1) would donate Rs. 21 lakhs to Bar Council of India, (2) would not make any earning out of the legal profession for a period of one year and (3) would offer his services as lawyer for the period of one year for rendering legal aid to the poor and needy – Held: The action of contemnor struck at the root of the administration of criminal justice – Therefore, normally punishment for such act should be a term of imprisonment – But in view of the facts and circumstances of the case viz. the age of the contemnor; that his wife is confined to bed and wheel chair for over 20 years;

that the contempt proceedings were initiated five years ago; that the criminal trial from which the present proceedings arose, has attained finality, lenient view taken – The offer given by contemnor accepted – The Court directed the contemnor to exclusively devote his professional services to help the accused pro bono; to place his professional services at the disposal of Delhi Legal Services Authority, which would frame a scheme to avail contemnor's services and to appear in court only in cases assigned by the Leal Services Authority – Legal Services Authority to keep a record of the cases assigned – After one year, the contemnor permitted to start his private law practice, but not to leave the cases, assigned through Legal Services Authority, incomplete – The contemnor to pay Rs. 21 lakhs through a demand draft to the Bar Council of India – Bar Council to give the money to a Law College preferably situated at a muffassil place for development of the infrastructure of the College – Punishment.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1393 of 2008.

From the Judgment & Order dated 21.8.2008 of the High Court of Delhi at New Delhi in W.P.(Crl.) No. 796 of 2007.

L.N. Rao, Gopal Subramanium, Anand Varma, Yakshay Chhada for the Appellant.

M.R. Calla, Uday Gupta, Shivani, M. Lal, M.K. Tripathi, Pratiksha Sharma, Sarthak Guru, Ankit Acharya, Dharmendra Kumar Singh, Subramonium Prasad for the Respondent.

The Order of the Court was delivered by

AFTAB ALAM, J. 1. In a proceeding initiated *suo motu* [registered as Writ Petition (Criminal) No.796 of 2007], the Delhi High Court found the contemnor guilty of suborning the court witness in a criminal trial in which he represented the accused as the senior advocate. The High Court, thus, held him

guilty under clauses (ii) and (iii) of Section 2(c) of the Contempt of Courts Act, 1971 and in exercise of the power under Article 215 of the Constitution of India the High Court prohibited him, by way of punishment, from appearing in the Delhi High Court and the courts subordinate to it for a period of four months from the date of the judgment dated August 21, 2008 leaving him, however, free to carry on his other professional work e.g. consultations, advices, conferences, opinions etc. The High Court further held that the contemnor had forfeited his right to be designated as a senior advocate and recommended to the full court to divest him of the honour. In addition, the High Court also imposed on him a fine of Rs.2,000/-.

2. The contemnor brought the matter to this Court in appeal under Section 19(1) of the Contempt of Courts Act. This Court by judgment and order dated July 29, 2009 (*R.K. Anand v. Registrar, Delhi High*)[1] affirmed the finding of the High Court as to the guilt of the contemnor. But so far as the punishment is concerned, this Court took the view that in the facts and circumstances of the case, the punishment given to the contemnor was wholly inadequate. In paragraphs 272 and 273 of the judgment, this Court held and observed as follows:-

> "272. The action of the appellant in trying to suborn the court witness in a criminal trial was reprehensible enough but his conduct before the High Court aggravates the matter manifold. He does not show any remorse for his gross misdemeanour and instead tries to take on the High Court by defying its authority. We are in agreement with Mr. Salve and Mr. Subramanium that punishment given to him by the High Court was wholly inadequate and incommensurate to the seriousness of his actions and conduct. We, accordingly, propose to issue a notice to him for enhancement of punishment.
>
> 273. We also hold that by his actions and conduct the appellant has established himself as a person who needs to be kept away from the portals of the court for a longer

time. The notice would therefore require him to show cause why the punishment awarded to him should not be enhanced as provided under Section 12 of the Contempt of Courts Act. He would additionally show cause why he should not be debarred from appearing in courts for a longer period. The second part of the notice would also cure the defect in the High Court order in debarring the appellant from appearing in courts without giving any specific notice in that regard as held in the earlier part of the judgment."

3. Accordingly, this Court directed for issuing a notice of enhancement of punishment to him and directing him to file a show cause within eight weeks from the date of service of the notice.

4. In response to the notice issued by the Court, the contemnor filed his show cause on January 13, 2010. In the show cause he tendered apology to the Court and made the prayer to drop the proceedings. There were, however, certain statements made in the show cause that showed a lack of remorse for the wrong done by him. When it was pointed out to the learned counsel representing the contemnor, he filed an additional affidavit on May 4, 2011 accepting all the observations and findings recorded in the judgment of this Court and seeking to withdraw all statements made in the Court that suggested any lack of contrition on his part.

5. Here, it may be stated that the hearing of the case took place for brief periods after long gaps because we, the three members on this Bench, were sitting in different combinations and this Bench could assemble specially for this matter only when all three of us could get free from the regular combinations. As a result, the hearing was protracted till September 24, 2012 when the contemnor filed yet another additional affidavit proposing to undertake certain steps in atonement of his guilt.

6. Paragraph 2 of the affidavit which enumerates the steps which the contemnor wishes to undertake is reproduced below:-

"2. That this matter has been pending for quite some time and it has allowed the Deponent to introspect and in addition to the unconditional apologies dated January, 2010 and 04.05.2011 already tendered by the Deponent before this Hon'ble Court, the Deponent voluntarily submits before this Hon'ble Court as under:-

A. That the Deponent has decided to donate a sum of Rs.21 Lakhs (Rupees Twenty Lakhs (sic.) Only) through cheque favouring Bar Council of India for establishment of Computer Centre/ Library in any Law College / Institution/ University which the Bar Council of India may deem fit. Photostat copy of the Cheque No.010592 dated 20.09.2012 drawn on UCO Bank, High Court of Delhi, New Delhi in the sum of Rs.21 Lakhs (Rupees Twenty One Lakhs Only) favouring Bar Council of India along with a copy of covering letter dated 20.09.2012 addressed to the Secretary, Bar Council of India is enclosed herewith as ANNEXURE-A (Colly). The Deponent undertakes to send the cheque along with the covering letter to Bar Council of India immediately on passing of the final order by this Hon'ble Court in the present case on 24.09.2012.

B. That the Deponent also undertakes before this Hon'ble Court that the Deponent shall not make any earning out of the legal profession by way of Practice/ Conference/ Consultation/ Legal Opinion/ Arbitration etc. in any form whatsoever for a period of 1 year from the date of order on which the apology is accepted by this Hon'ble Court and during this period his services rendered as a Lawyer/ appearances, if any will all be *pro bono*.

C. That the Deponent also undertakes to offer his services as a lawyer for a period of 1 year as aforesaid for rendering legal aid to the poor and needy persons and

for this purpose his services can be utilized by the Delhi Legal Services Authority, Patiala House Courts/ Delhi High Court Legal Services Authority, High Court of Delhi, New Delhi/ Supreme Court Legal Services Authority, Supreme Court, New Delhi."

7. The offence committed by the contemnor was indeed odious. In the judgment, the gravity of the offence committed by him is discussed in detail and it is pointed out that the contemnor's action tended to strike at the roots of the administration of criminal justice. We reaffirm the observations and findings made in the earlier judgment. Further, we have not the slightest doubt that normally the punishment for the criminal contempt of the nature committed by the contemnor should be a term of imprisonment.

8. In a judicial proceeding, however, it is important not to lose complete objectivity and that compels us to take note of certain features of this case. The contemnor is 69 years old. His wife has suffered a stroke of multiple sclerosis in the year 1992 and she is confined to the bed and a wheel chair for over 20 years. The contempt proceeding was initiated against the contemnor in the year 2007 and he has, thus, been facing the rigours of the proceeding for five years.

9. In the meanwhile, the criminal trial from which the present proceeding arises was concluded by the trial court and the accused was found guilty under Section 304 Part II of the Penal Code. In appeal, the High Court converted his conviction to one under Section 304-A of the Penal Code. But, on further appeal by the State to this Court, the conviction of the accused was, once again, brought under Section 304 Part II of the Penal Code by judgment and order dated August 3, 2012. In other words, the criminal trial from which the present proceedings arise has also attained finality.

10. The aforesaid facts and circumstances persuade us to take a slightly lenient view of the matter. We feel that no useful

purpose will be served by sending the contemnor to jail. On the contrary, by keeping him out and making him do the things that he has undertaken to do would serve a useful social purpose. We, accordingly, accept the offer made by the contemnor.

11. In terms of his undertaking, the contemnor shall not do any kind of professional work charging any fees or for any personal considerations for one year from today. He shall exclusively devote his professional services to help *pro bono* the accused who, on account of lack of resources, are not in a position to engage any lawyer to defend themselves and have no means to have their cases effectively presented before the court. The contemnor shall place his professional services at the disposal of the Delhi Legal Services Authority which, in coordination with the Delhi High Court Legal Services Authority, will frame a scheme to avail of the contemnor's services for doing case of undefended accused either at the trial or at the appellate stage. The contemnor shall appear in court only in cases assigned to him by the Legal Services Authority.

12. The Delhi Legal Services Authority shall keep a record of all the cases assigned to the contemnor and the result/ progress made in those cases. At the end of the year, the Delhi Legal Services Authority shall submit a report to this Court in regard to all the cases done by the contemnor at its instance which shall be placed before the Judges for perusal.

13. At the end of one year it will be open to the contemnor to resume his private law practice. But he shall not leave any case assigned to him by the Legal Services Authority incomplete. He shall continue to do those cases, free of cost, till they come to a close.

14. The contemnor shall pay a sum of Rs.21,00,000/- (Rupees Twenty One Lakhs) through a demand draft to the Bar Council of India within one week from today. The Bar Council shall give the money to a law college preferably situated at a *muffassil* place and attended mostly by children from the under-

privileged and deprived sections of the society. The money may be used for developing the infrastructure of the college, such as class rooms, library, computer facilities or moot court facilities, etc. The Bar Council of India will ensure a proper utilisation of the money.

15. With the aforesaid observations and directions, the proceedings of this case are closed.

16. The criminal miscellaneous petition No.21373 of 2012 also stands disposed of.

K.K.T. Appeal disposed of.

MATHAI SAMUEL AND ORS.
v.
EAPEN EAPEN (DEAD) BY LRS. AND ORS.
(Civil Appeal No. 8197 of 2012)

NOVEMBER 21, 2012

[K.S. RADHAKRISHNAN AND DIPAK MISRA, JJ.]

Deeds and Documents – Testamentary disposition and settlement – Difference – Held: The real and the only reliable test for the purpose of finding out whether a document constitutes a Will or a gift is to find out as to what exactly is the disposition which the document has made, whether it has transferred any interest in praesenti in favour of the settlees or it intended to transfer interest in favour of the settlees only on the death of the settlors.

Deeds and Documents – Composite document – Interpretation of – Held: The composite character of a document is to be examined and interpreted in accordance with the normal and natural meaning discernible from that document – A composite document is severable and if in part clearly testamentary, such part may take effect as a Will and other part if it has the characteristics of a settlement and that part will take effect in that way.

Deeds and Documents – Composite document having characteristics of a Will as well as a gift – Registration of such document, if necessary – Held: In a composite document, which has the characteristics of a Will as well as a gift, it may be necessary to have that document registered otherwise that part of the document which has the effect of a gift cannot be given effect to – Therefore, it is not unusual to register a composite document which has the characteristics of a gift as well as a Will – Consequently, mere registration of document cannot have any determining effect in arriving at a conclusion

that it is not a Will – A 'Will' need not necessarily be registered – But the fact of registration of a 'Will' will not render the document a settlement – Registration Act, 1908 – s.17.

Deeds and Documents – Rule of construction – Intention – Golden rule – Held: The primary rule of construction of a document is the intention of the executants, which must be found in the words used in the document – The question is not what may be supposed to have been intended, but what has been said – There is a need to carry on the exercise of construction or interpretation of the document only if the document is ambiguous, or its meaning is uncertain – If the language used in the document is unambiguous and the meaning is clear, evidently, that is what is meant by the executants of the document – The expressed intentions are assumed to be actual intentions – Contemporary events and circumstances surrounding the execution of the document are not relevant in such situations.

Deeds and Documents – Subsequent events or conduct of parties – Effect – Held: Subsequent events or conduct of parties after execution of the document not to be taken into consideration in interpreting a document especially when there is no ambiguity in the language of the document – But those events also may be referred to, only to re-enforce the fact that there is no ambiguity in the language employed in the document.

Will – Essentials of – Discussed.

Will – Interpretation of – Held: In the interpretation of Will in India, regard must be had to the rules of law and construction contained in Part VI of the Indian Succession Act and not the rules of the Interpretation of Statutes – Indian Succession Act, 1925 – s.2(h) and Part VI.

Transfer of Property Act, 1882 – s.122 – Gift – Meaning of.

In the instant appeal, the question which arose for consideration was whether in the suit in question filed for partition and separate possession of various items of properties, the recitals in exhibit A1 document (written in Malayalam language) concerning item No.1 of schedule No. 8 therein (item No. 1 of the plaint schedule) disclosed a testamentary disposition or a settlement creating vested rights in favour of the plaintiffs and defendant Nos. 1 to 3, though possession and enjoyment stood deferred until the death of the executants (who were Indian Christians).

Allowing the appeal, the Court

HELD:1. Exhibit A1 is written in Malayalam language. From the English version of that document, it is clear that Exhibit A1 document is composite in character and has both the characteristics of a settlement and a testamentary disposition. [Paras 9, 10 and 11] [1112-D; 1115-H; 1116-C]

P. K. Mohans Ram v. B. N. Ananthachary and Others **(2010) 4 SCC 161: 2010 (3) SCR 401 and *R**ajes Kanta Roy v. Shanti Debi and Another* AIR 1957 SC 255: 1957 SCR 77 – cited.**

Settlement and Testamentary Disposition

2.1. There is a basic and fundamental difference between a testamentary disposition and a settlement. Will is an instrument whereunder a person makes a disposition of his properties to take effect after his death and which is in its own nature ambulatory and revocable during his lifetime. It has three essentials: (i) it must be a legal declaration of the testator's intention; (ii) that declaration must be with respect to his property; and (iii) the desire of the testator that the said declaration should be effectuated after his death. The essential quality of a

testamentary disposition is ambulatoriness of revocability during the executants' lifetime. Such a document is dependent upon executants' death for its vigour and effect. [Paras 11, 12] [1116-C-F]

2.2. Section 2(h) of the Indian Succession Act says "Will" means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death". In the instant case, the executants were Indian Christians, the rules of law and the principles of construction laid down in the Indian Succession Act govern the interpretation of Will. In the interpretation of Will in India, regard must be had to the rules of law and construction contained in Part VI of the Indian Succession Act and not the rules of the Interpretation of Statutes. [Para 13] [1116-G-H; 1117-A]

2.3. Gift/settlement is the transfer of existing property made voluntarily and without consideration by one person called the donor to another called the donee and accepted by or on behalf of the donee. Gift takes effect by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. Section 122 of the Transfer of Property Act defines the "gift" as a voluntary transfer of property in consideration of the natural love and affection to a living person. [Para 14] [1117-B]

2.4. In the case of a Will, the crucial circumstance is the existence of a provision disposing of or distributing the property of the testator to take effect on his death. On the other hand, in case of a gift, the provision becomes operative immediately and a transfer *in praesenti* is intended and comes into effect. A Will is, therefore, revocable because no interest is intended to pass during the lifetime of the owner of the property. In the case of gift, it comes into operation immediately. The nomenclature given by the parties to the transaction in

question is not decisive. A Will need not be necessarily registered. The mere registration of 'Will' will not render the document a settlement. In other words, the real and the only reliable test for the purpose of finding out whether the document constitutes a Will or a gift is to find out as to what exactly is the disposition which the document has made, whether it has transferred any interest *in praesenti* in favour of the settlees or it intended to transfer interest in favour of the settlees only on the death of the settlors. [Para 15] [1117-C-F]

Composite Document:

3.1. A composite document is severable and if in part clearly testamentary, such part may take effect as a Will and other part if it has the characteristics of a settlement and that part will take effect in that way. A document which operates to dispose of properly *in praesenti* in respect of few items of the properties is a settlement and *in future* in respect of few other items after the deeds of the executants, it is a testamentary disposition. That one part of the document has effect during the life time of the executant i.e. the gift and the other part disposing the property after the death of the executant is a Will. [Para 16] [1117-G-H; 1118-A-B]

3.2. In a composite document, which has the characteristics of a Will as well as a gift, it may be necessary to have that document registered otherwise that part of the document which has the effect of a gift cannot be given effect to. Therefore, it is not unusual to register a composite document which has the characteristics of a gift as well as a Will. Consequently, the mere registration of document cannot have any determining effect in arriving at a conclusion that it is not a Will. The document which may serve as evidence of the gift, falls within the sweep of Section 17 of the

Registration Act. Where an instrument evidences creation, declaration, assignment, limitation or extinction of any present or future right, title or interest in immovable property or where any instrument acknowledges the receipt of payment of consideration on account of creation, declaration, assignment, limitation or extinction of such right, title or interest, in those cases alone the instrument or receipt would be compulsorily registrable under Section 17(1) (b) or (c) of the Registration Act. A 'Will' need not necessarily be registered. But the fact of registration of a 'Will' will not render the document a settlement. Exhibit A1 was registered because of the composite character of the document. [Para 17] [1118-C-F]

Rev. Fr. M.S. Poulose v. Varghese and Others. **(1995) Supp 2 SCC 294: 1995 (3) SCR 126 – referred to.**

Intention – Guiding Factor:

4. The primary rule of construction of a document is the intention of the executants, which must be found in the words used in the document. The question is not what may be supposed to have been intended, but what has been said. There is a need to carry on the exercise of construction or interpretation of the document only if the document is ambiguous, or its meaning is uncertain. If the language used in the document is unambiguous and the meaning is clear, evidently, that is what is meant by the executants of the document. Contemporary events and circumstances surrounding the execution of the document are not relevant in such situations. [Para 18] [1118-G-H; 1119-A-B]

King v. Meling **(1 Vent. At p. 231);** *Doe Long v. Laming* **(2 Burr. At pp. 11-12);** *Re Stone, Baker v. Stone* **(1895) 2 Ch. 196 at p. 200;** *Shore v. Wilson* **9 Cl. & F. 355;** *Musther, Re* **(1889) 43 Ch.D. 569 and** *Sammut v. Manzxi* **[2009] 1 W.T.L.R. 1834 – referred to.**

Halsbury's Laws of England, **4th Edn., Vol.50, p.239;** *Interpretation of Wills and Settlements* – by *Underhill and Strahan* **(1900 Edn.) and *Theobald on Wills* (17th Edn. 2010) – referred to.**

Golden Rule

5. The composite character of exhibit A1 document is to be examined and interpreted in accordance with the normal and natural meaning which is discernible from that document. In order to ascertain the intention of the testator, the point for consideration is not what the testator meant but what that which he has written means. The expressed intentions are assumed to be actual intentions. [Para 23] [1120-H; 1121-A-B]

A. Sreenivasa Pai and Anr. v. Saraswathi Ammal alias G. Kamala Bai **(1985) 4 SCC 85: 1985 (2) Suppl. SCR 122 and** *C. Cheriathan v. P. Narayanan Embranthiri and Ors.* **(2009) 2 SCC 673: 2008 (17) SCR 1239 – relied on.**

Rajendra Prasad Bose and Anr. v. Gopal Prasad Sen **AIR 1930 PC 242 – referred to.**

Exhibit A1 - Meaning and Effect

6.1. Some of the expressions used in exhibit A1 need emphasis which are "absolutely settled", "our lifetime", "separately and absolutely" and the Malyalam words "*adheenadha* (control)" and "*swathanthryam* (liberty/ freedom)". The words which are used in a document have to be understood in its normal and natural meaning with reference to the language employed. The words and phrases used in a document are to be given their ordinary meaning. When the document is made, the

ordinary meaning has to be given to the document, which is relevant. Executants have used the Malyalam words '*adheendha*' **and** '*swathanthryam*' **which must be referable to the ordinary usage of Malayalam language at the time when the document was executed. Words of usage, in Malyalam language, therefore be given their usual, ordinary and natural meaning or signification according to the approved usage because primarily the language employed is the determinative factor of legislative intention. Consequently, the word** '*adheenadha*' **means control, domination, command, manage etc.** '*Swathanthryam*' **means liberty, freedom, independence etc. Those words emphasize the fact that the executants had retained the entire rights over the property in question and not parted with. [Para 24] [1121-D-H; 1122-A]**

6.2. Exhibit A1 document is divided into schedule Nos. 1 to 9. Properties described in schedule Nos. 1 to 6 as per the terms of the document stood absolutely vested *in praesenti* and undoubtedly settled in favour of the executants sons. Evidently, therefore, that part of the document has the characteristics of a settlement. Rest of the schedule Nos. 7, 8 and 9 have different characteristics in contradistinction with schedule Nos. 1 to 6. Schedule No. 7 of exhibit A1 document clearly indicates that the same is required for the marriage and dowry purposes of the daughter of the executants, by name Thankamma. The document clearly indicates that the marriage of their daughter would be conducted by the executants since it is their responsibility. Further, it is also stipulated that if the daughter does not get married during their lifetime, the property in schedule No. 7 shall after their lifetime belong absolutely to their daughter. [Para 25] [1122-B-D]

6.3. So far as schedule No. 9 is concerned, the same would be retained by the executants in their full control (*adheendha*) **and freedom** (*swathanthryam*)**. In other words,**

schedule No. 9 shall be possessed by the executants and the income therefrom be taken directly by leasing out, if need be, by executing such documents as desired. Further, it is also stated with regard to schedule No. 9 that after "our lifetime" if the property is left, "you all" (all the sons) may take it in equal shares. [Para 26] [1122-E-F]

6.4. With regard to sub-item 1 of schedule No. 8 in exhibit A1, it has been stated in the document that the executants are keeping possession and would utilize the income derived from them directly or by leasing it out to discharge the amounts due to the bank and after its clearance, the income from schedule No. 8 would be utilized for "our maintenance". Further, it is also stated that after "our lifetime", item No. 2 in schedule No. 8 will belong absolutely to third party and item Nos. 1 and 3 would belong to you "absolutely" and "separately" in equal shares and accordingly they may hold and enjoy the properties by paying tax thereof. No rights, *in praesenti*, were created, on the other hand all the rights including possession were retained by the executants. In other words, so far as item No.1 in schedule No. 8 of exhibit A1 is concerned, the executants had retained possession, full control as well as freedom to deal with it. The contention of the respondent that the executants had consciously omitted the power of alienation with regard to Schedule No.8, unlike Schedule No.7, is not correct: The question is not whether the executants had retained any right but whether the executants had conferred any right on the beneficiaries. Right, title, interest, ownership and the power of alienation of the executants were never in doubt and they had always retained those rights, the point in dispute was whether the property in question had been settled on the sons absolutely during their life time; barring possession and enjoyment. No right, title, interest, or ownership had been conferred when the document was executed or during

the life time of the executants to their sons in respect of item No.1 of Schedule 8 of exhibit A1. There is marked difference in the language used in respect of properties covered by Schedule Nos. 1 to 6 and rest of the Schedules. Admittedly, Schedule Nos. 7 and 9 are testamentary in character and in the view of this Court, Schedule 8 also, when the meaning ascribed to the various words used and the language employed is examined. [Para 27] [1122-G-H; 1123-A-G]

K. Balakrishnan v. K. Kamalam and Ors. **(2004) 1 SCC 581: 2003 (6) Suppl. SCR 1097 and** *Kale and Ors. v. Deputy Director of Consolidation and Ors.* **(1976) 3 SCC 119: 1976 (2) SCR 202 – held inapplicable.**

Subsequent events:

7.1. Subsequent events or conduct of parties after the execution of the document shall not be taken into consideration in interpreting a document especially when there is no ambiguity in the language of the document. But one may refer to those events also only to re-enforce the fact that there is no ambiguity in the language employed in the document. [Para 28] [1123-H; 1124-A]

7.2. The executants, it may be noted, had jointly executed a mortgage on 12.11.1955 (exhibit B2) to one Mathew in which they had affirmed their right to execute such a mortgage and traced it to exhibit A1 document. Further, the executants had not parted with possession of item No.1 of 8th Schedule of exhibit A1 to their sons, at any point of time and retained ownership. Exhibit B3 document was executed in favour of 3rd defendant on 18.07.1964 and later he sold the property to 4th defendant on 23.01.1978 (exhibit B1). Now from 1978 onwards, the 4th defendant, a stranger to the family, has been in exclusive possession and ownership of the property. Even though Ext.B3 was executed on 18.07.1964, the suit

was filed only on 6.2.1978, that is, after more than thirteen years. It will also be unjust to deprive him of his ownership and possession at this distance of time. [Para 29] [1124-B-E]

7.3. The right, title, interest, possession and ownership of item No.1 of 8th Schedule of Ex.A1 were with the executants and they had the full control and freedom to deal with that property as they liked unlike Schedule Nos. 1 to 6. Therefore, so far as that item is concerned, the document in question cannot be construed as a settlement or a gift because there is no provision in the document transferring any interest in immovable property *in praesenti* **in favour of settlees i.e. their sons. [Para 30] [1124-E-G]**

Case Law Reference:

2010 (3) SCR 401	cited	Para 7
1957 SCR 77	cited	Para 7
1995 (3) SCR 126	referred to	Para 16
(1 Vent. At p. 231	referred to	Para 19
(1895) 2 Ch. 196	referred to	Para 19
9 Cl. & F. 355	referred to	Para 19
(1889) 43 Ch.D. 569	referred to	Para 22
(2009) 1 W.T.L.R. 1834	referred to	Para 22
1985 (2) Suppl. SCR 122	relied on	Para 23
AIR 1930 PC 242	referred to	Para 23
2008 (17) SCR 1239	relied on	Para 23
2003 (6) Suppl. SCR 1097	held inapplicable	Para 27
1976 (2) SCR 202	held inapplicable	Para 27

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8197 of 2012.

From the Judgment & Order dated 12.3.2009 of the High Court of Kerala at Ernakulam in SA No. 686 of 1994.

T.L. Viswanatha Iyer, T.G. Narayanan, Nair, K.K. Unni, K.N. Madhusoodhanan for the Appellants.

Amit George, George Thomas, R. Sathish, Omana George, S. Geetha, Aljo K. Joseph, G.N. Reddy, Ranjan Kumar for the Respondents.

The Judgment of the Court was delivered by

K. S. RADHAKRISHNAN, J. 1. Leave granted.

2. We are, in this appeal, called upon to determine the question whether the recitals in exhibit A1 concerning item No.1 of schedule No. 8 therein (item No. 1 of the plaint schedule) discloses a testamentary disposition or a settlement creating vested rights in favour of the plaintiffs and defendant Nos. 1 to 3 though possession and enjoyment stood deferred until the death of the executants.

3. O.S. No. 169 of 1990 was instituted before the court of Subordinate Judge, Thiruvalla by the original plaintiffs and one Eapen for partition and separate possession of various items of properties, of which, we are in this appeal concerned only with item No. 1 of the plaint schedule. The trial court passed a preliminary decree giving various directions, however with regard to the above mentioned item which relates to 3 acre 40 cents, it was held that exhibit A1 document did not preclude the executants' rights for disposing the same during their lifetime. Consequently, the trial court held that so far as item No.1 in schedule No. 8 of exhibit A1 is concerned, the same has the characteristics of a testamentary disposition, therefore not available for partition. The court held that B3 sale deed executed in favour of 3rd defendant in the year 1964 by

Sosamma Eapen was valid so also B1 sale deed executed in the year 1978 by the 3rd defendant in favour of 4th defendant.

4. The plaintiffs took up the matter in appeal as A.S. No. 62 of 1991 before the court of District Judge, Pathanamthitta, which was allowed vide judgment dated 26.03.1994 and the decree and judgment of the trial court was modified and a preliminary decree was passed allowing partition and possession of 3/6th share of various items including sub-item 1 of schedule No. 8 of exhibit A1 document. The Appellate Court took the view that the above item was settled by exhibit A1 in favour of the original plaintiffs and defendant Nos. 1 to 3 jointly though its possession and enjoyment were deferred till the death of the executants. It was also held that the assignment deed, executed by one of the executants and later by 3rd defendant, was not binding on the plaintiffs.

5. Defendant Nos. 3 and 4 then filed Second Appeal No. 686/1994 before the High Court. The High Court affirmed the judgment of the lower appellate court vide judgment dated 12.03.2009. While the appeal was pending before the High Court, the 3rd defendant died and his legal heirs got themselves impleaded. The High Court took the view that disposition with regard to the above mentioned item was not ambulatory in quality or revocable in character during the lifetime of the executants and held that the disposition of the plaint item No. 1 is a settlement though possession and enjoyment were deferred. It was held that the executants had no right of disposal of that item and hence the transfer in favour of defendant No.3 and the subsequent assignment in favour of defendant No.4 were invalid. Aggrieved by the same, these appeals have been preferred.

6. Shri T. L. Viswanatha Iyer, learned senior counsel appearing for the appellants submitted that exhibit A1 does not postulate any transfer of ownership or title over 8th schedule by the executants to their sons so also schedule Nos. 7 and 9. Learned senior counsel submitted that items in schedule Nos.

7, 8 and 9 were under their absolute control of the executants and they had the full freedom to deal with those properties. Learned senior counsel referring to the various recitals in exhibit A1 agreement submitted so far as schedule Nos. 1 to 6 are concerned, the transfer of interest was absolute in character and settled on all the sons equally and rest of the three items of the schedule, the executants had retained those items to themselves and to that extent exhibit A1 operated only as a Will. Learned senior counsel pointed out that so far as schedule Nos. 7 and 9 are concerned, the courts found that they are testamentary in character and the same reasoning should have been applied in the case of items in schedule No. 8 as well. Learned senior counsel has laid considerable emphasis on the Malayalam words '*adheenadha*' (control) and '*swathanthryam*' (liberty/freedom). Learned senior counsel submitted those words clearly indicate that the intention was to keep items in schedule Nos. 7 and 9 to the executants in their control with full freedom subject to certain stipulations. Learned senior counsel also pointed out that exhibit A1 clearly indicates that items in schedule No. 8 would devolve on his sons only after the executants' lifetime, if available. Learned senior counsel submitted that in the absence of any words/ recitals of disposition/transfer of items in schedule No.8 in exhibit A1 conferring title *in praesenti* on the sons, the High Court was not justified in holding that exhibit A1 was not a Will in respect of that item.

7. Shri Aljo K. Joseph, learned counsel appearing for the respondents on the other hand contended that the recital in the document relating to schedule No.8 is in the nature of a settlement bestowing vested rights in equal shares to all the children of late Shri Eapen and late Smt. Sosamma. Learned counsel submitted that the specific language of the recital in the agreement relating to schedule No.8 itself clearly indicates that rights are created *in praesenti* and at the most the enjoyment thereof was only postponed. Learned counsel submitted that while reading the agreement as a whole, the inevitable conclusion is that the document, particularly recital

relating to schedule No.8, is in the nature of a settlement conferring vested rights on the sons of executants equally. Learned counsel submitted that the High Court was, therefore, justified in holding so, which calls for no interference by this Court in this appeal. Learned counsel also made reference to the judgments of this Court in *P. K. Mohans Ram v. B. N. Ananthachary and Others* (2010) 4 SCC 161 and *Rajes Kanta Roy v. Shanti Debi and Another* AIR 1957 SC 255.

8. We are, in this case, concerned only with the question whether the recitals in Exhibit A1 document concerning the disposition of schedule No. 8 disclosed a testamentary disposition or is a settlement of that item in favour of the original plaintiffs and defendant Nos. 1 to 3 deferring its possession and enjoyment until the death of the executants.

9. Exhibit A1 is written in Malayalam language, the English version of that document is given below:

"Agreement dated 2nd day of Thulam 1125 M.E. – Ext A1

The agreement executed on this the 2nd day of Thulam one thousand one hundred and twenty five by (1) Eapen s/o Chandapilla aged 58 years, house hold affairs of Perumbral, Vennikkulam Muri of Kallooppara Pakuthi and wife (2) Sossamma of Perumbral, Vennikkulam Muri of Kallooppara Pakuthi Christian woman, house wife aged 54 years, in favour of (1) Cheriyan, Agriculturist aged 35 years (2) Chandapilla, Bank Job aged 30 years (3) Eapen, Agriculturist aged 28 years (4) Geevargheese, Agriculturist aged 25 years, (5) Chacko, Agriculturist aged 22 years and (6) Mathai aged 18 years student.

We have only the six of you as our sons and Kunjamma, Mariyamma and Thankamma as our daughters, Kunjamma and Mariyamma have been married off as per Christian custom and had been sent to the husbands houses. Accordingly, they have become members and legal heirs of the said husband's family and are residing there.

Thankamma remains to be married off. No.2 and 3 among you are married and the dowry amounts received thereby have been used for the needs of the family.

The properties described in the schedules have been obtained as per partition deed No. 1933 of 1069 ME of the Sub Registrar Office, Thiruvalla and under other documents. They are held, possessed and enjoyed by us jointly, with absolute rights (word in Malayalam is "*Swathanthryam*") and dealing with the same with all rights and paying all taxes and duties thereon. There are some amounts to be paid off by us by way of debt, incurred for conducting the family affairs.

This agreement is executed in as much as all of you have attained majority and since we are becoming old, it was felt that it will be to the benefit of all and to avoid future family disputes and for the purpose of discharging the debt, to execute this agreement to divide the properties separately subject to the conditions specified below. The parties are to act accordingly.

The properties have been divided into schedule No. 1-9. The properties described as schedules 1, 2, 3, 4, 5, 6 are absolutely settled respectively on numbers 1 to 6 among you. Schedule 7 is required for the marriage and dowry purposes of Thankamma, schedule 8 for the purpose of discharging the debt due to Land Mortgage Bank. Schedule 9 for the purpose of meeting our needs of maintenance and they are retained by us in our full control (*adheenadha*) and freedom (*swathanthryam*). You shall separately possess and enjoy item 1 to 6 subject to the conditions specified in this agreement, paying taxes and discharging your duties acting as per our desires. Since item No.2 in schedule No. 2 property and item no. 5 in Schedule No. 3 property have been added additionally in consideration of dowry amount received from the marriage of party Nos. 2 and 3 among you, the responsibility for the

dowry amount of the wife of the 2nd party has to be borne by the 2nd party, and the responsibility for the dowry amount of the wife of 3rd party is to be borne by the 3rd party among you and if any default occurs on their part, the respective party and the respective partitioned properties shall be liable. The right and responsibility of the dowry amount that parties Nos. 1, 4, 5 and 6 might receive when they get married shall lie on them only. The marriage of the said Thankamma shall be conducted by us, in our responsibility, during our life time, by creating for the purpose any kind of transactions as we desire on the property in schedule 7. If the said Thankamma is not married off during our life time, the property in schedule 7 shall, after our life time, belong absolutely (word used in Malayalam is "*Swathanthryam*") on Thankamma with complete possession, title and right, and Thankamma shall pay taxes, redeem the mortgage and enjoy the property. We are keeping possession of schedule No.8 utilizing the income derived by us directly, or by leasing out, to discharge the amounts due to the Bank without default and after the clearance of the debt, the income from schedule 8 property shall be utilized for our maintenance. After our life time, No. 2 in schedule 8 will below separately and absolutely (word used in Malayalam is "*Swathanthryam*") to the 3rd among you and No.1 and 3 will belong to all of you absolutely (word used in Malayalam is "*Swathanthryam*") in equal shares and accordingly you may hold and enjoy the properties paying the taxes thereon. Schedule No. 9 property shall be possessed by us and income there from be taken directly or by leasing out and if need be, by executing such documents as we desire on schedule No.9 property and matters carried out, and after our life time if the property is left, you all take it in equal shares. We will have the absolute (word used in Malayalam is "*Swathanthryam*") right of residence in the house situated in schedule No.6 during our life time.

If any transaction or debt is to be generated on the properties apportioned to each of you, the same has to be done jointly with us also, and if anybody acts contrary to the aforesaid, the said transaction or debt shall not be binding on those properties, and we shall have the right and authority to act on those properties allotted to the person causing such transaction. If any one of you dies issueless, if it is during our lifetime, that apportioned property shall be in our absolute possession with all title and freedom and such property shall vest in you equally if the death is after our life time, and if any widow is alive; she shall have right only for maintenance from the profits of the property, and if the widow is remarried or if the dowry is received back by her, she shall have no right for any maintenance.

Schedule and description omitted except Schedule No.8.

Schedule No.8

(1) In the said Kavumgumprayar Mury, West of Valiyaparambu property, East of Memalpadinjattumkara property and canal and South of Memalapadi farm land and Chelakkal Canal, do type 1 acre and 64 cent in survey No. 689/1A do 'B' 1 acre and 50 cents and 26 cents in survey No. 689/2 totalling 3 acres and 40 cents of farm land.

(2) In the said Muttathukavanal farm land, that is described in the 3rd schedule, excluding those added in the said schedule one the southern side, 87 cents of farm land.

(3) In the Lakkandam Kaithapadavu land, that is described in the 4th schedule, half in the south part, measuring 47 cents of farm land.

Sd/-

Executants"

10. Exhibit A1 document is composite in character having

special features of a testamentary disposition and a settlement in respect of items and properties covered in the Schedules. Before examining those special features and characteristics, let us examine the legal principles which apply while interpreting such a composite document.

Settlement and Testamentary Disposition

11. We have already indicated that exhibit A1 document has both the characteristics of a settlement and a testamentary disposition. Let us examine the basic and fundamental difference between a testamentary disposition and a settlement. Will is an instrument whereunder a person makes a disposition of his properties to take effect after his death and which is in its own nature ambulatory and revocable during his lifetime. It has three essentials:

(1) It must be a legal declaration of the testator's intention;

(2) That declaration must be with respect to his property; and

(3) The desire of the testator that the said declaration should be effectuated after his death.

12. The essential quality of a testamentary disposition is ambulatoriness of revocability during the executants' lifetime. Such a document is dependent upon executants' death for its vigour and effect.

13. Section 2(h) of the Indian Succession Act says "Will" means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death". In the instant case, the executants were Indian Christians, the rules of law and the principles of construction laid down in the Indian Succession Act govern the interpretation of Will. In the interpretation of Will in India, regard must be had to the rules of law and construction contained in Part VI of the Indian Succession Act and not the rules of the Interpretation of

Statutes.

14. Gift/settlement is the transfer of existing property made voluntarily and without consideration by one person called the donor to another called the donee and accepted by or on behalf of the donee. Gift takes effect by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. Section 122 of the Transfer of Property Act defines the "gift" as a voluntary transfer of property in consideration of the natural love and affection to a living person.

15. We may point out that in the case of a Will, the crucial circumstance is the existence of a provision disposing of or distributing the property of the testator to take effect on his death. On the other hand, in case of a gift, the provision becomes operative immediately and a transfer *in praesenti* is intended and comes into effect. A Will is, therefore, revocable because no interest is intended to pass during the lifetime of the owner of the property. In the case of gift, it comes into operation immediately. The nomenclature given by the parties to the transaction in question, as we have already indicated, is not decisive. A Will need not be necessarily registered. The mere registration of 'Will' will not render the document a settlement. In other words, the real and the only reliable test for the purpose of finding out whether the document constitutes a Will or a gift is to find out as to what exactly is the disposition which the document has made, whether it has transferred any interest *in praesenti* in favour of the settlees or it intended to transfer interest in favour of the settlees only on the death of the settlors.

Composite Document:

16. A composite document is severable and in part clearly testamentary, such part may take effect as a Will and other part if it has the characteristics of a settlement and that part will take effect in that way. A document which operates to dispose of properly *in praesenti* in respect of few items of the properties is a settlement and *in future* in respect of few other items after

the deeds of the executants, it is a testamentary disposition. That one part of the document has effect during the life time of the executant i.e. the gift and the other part disposing the property after the death of the executant is a Will. Reference may be made in this connection to the judgment of this Court in *Rev. Fr. M.S. Poulose v. Varghese and Others.* (1995) Supp 2 SCC 294.

17. In a composite document, which has the characteristics of a Will as well as a gift, it may be necessary to have that document registered otherwise that part of the document which has the effect of a gift cannot be given effect to. Therefore, it is not unusual to register a composite document which has the characteristics of a gift as well as a Will. Consequently, the mere registration of document cannot have any determining effect in arriving at a conclusion that it is not a Will. The document which may serve as evidence of the gift, falls within the sweep of Section 17 of the Registration Act. Where an instrument evidences creation, declaration, assignment, limitation or extinction of any present or future right, title or interest in immovable property or where any instrument acknowledges the receipt of payment of consideration on account of creation, declaration, assignment, limitation or extinction of such right, title or interest, in those cases alone the instrument or receipt would be compulsorily registrable under Section 17(1) (b) or (c) of the Registration Act. A 'Will' need not necessarily be registered. But the fact of registration of a 'Will' will not render the document a settlement. Exhibit A1 was registered because of the composite character of the document.

Intention – Guiding Factor:

18. The primary rule of construction of a document is the intention of the executants, which must be found in the words used in the document. The question is not what may be supposed to have been intended, but what has been said. We need to carry on the exercise of construction or interpretation of the document only if the document is ambiguous, or its

meaning is uncertain. If the language used in the document is unambiguous and the meaning is clear, evidently, that is what is meant by the executants of the document. Contemporary events and circumstances surrounding the execution of the document are not relevant in such situations.

19. Lord Hale in *King v. Meling* (1 Vent. At p. 231), in construing a testamentary disposition as well as a settlement, pointed out that the prime governing principle is the "law of instrument" i.e. the intention of the testator is "the *law of the instrument*". Lord Wilmot, C.J. in *Doe Long v. Laming* (2 Burr. At pp. 11-12) described the intention of the testator as the "*pole star*" and is also described as the "*nectar of the instrument.* In *Re Stone, Baker v. Stone* [(1895) 2 Ch. 196 at p. 200] the Master of the Rolls said as follows: "*When I see an intention clearly expressed in a Will, and find no rule of law opposed to giving effect to it, I disregard previous cases*." Coleridge, J. in *Shore v. Wilson* [9 Cl. & F. 355, at p. 525] held as follows:

> "The intention to be sought is the intention which is expressed in the instrument, not the intention which the maker of the instrument may have had in his mind. It is unquestionable that the object of all expositions of written instruments must be to ascertain the expressed meaning or intention of the writer; the expressed meaning being equivalent to the intention … It is not allowable …. To adduce any evidence however strong, to prove an unexpressed intention, varying from that which the words used import. This may be open, no doubt, to the remark that although we profess to be explaining the intention of the writer, we may be led in many cases to decide contrary to what can scarcely be doubted to have been the intention, rejecting evidence which may be more satisfactory in the particular instance to prove it. The answer is, that the interpreters have to deal with the written expression of the writer's intention, and courts of law to carry into effect what he has written, not what it may be surmised, on however probable grounds, that he intended only to have written."

20. In Halsbury's Laws of England, 4th Edn., Vol.50, p.239, it is stated:

> "408. Leading principle of construction.- The only principle of construction which is applicable without qualification to all wills and overrides every other rule of construction, is that the testator's intention is collected from a consideration of the whole will taken in connection with any evidence properly admissible, and the meaning of the will and of every part of it is determined according to that intention."

21. Underhill and Strahan in Interpretation of Wills and Settlements (1900 Edn.), while construing a will held that "*the intention to be sought is the intention which is expressed in the instrument not the intention which the maker of the instrument may have had in his mind. It is unquestionable that the object of all expositions of written instruments must be to ascertain the expressed meaning or intention of the writer; the expressed meaning being equivalent to the intention……*."

22. Theobald on Wills (17th Edn. 2010) examined at length the characteristics of testamentary instruments. Chapter 15 of that book deals with the General Principles of Construction. Referring to Lindley L.J. in *Musther, Re* (1889) 43 Ch.D. 569 at p.572, the author stated that *the first rule of will construction is that every will is different and that prior cases are of little assistance*. Referring to *Sammut v. Manzxi* [2009] 1 W.T.L.R. 1834, the author notices that *the Privy Council had approved the approach of considering wording of the will first without initial reference to authority, and commented that "little assistance in construing a will is likely to be gained by consideration of how other judges have interpreted similar wording in other cases*.

Golden Rule

23. We, therefore, have to examine the composite

character of exhibit A1 document and interpret the same in accordance with the normal and natural meaning which is discernible from that document. In order to ascertain the intention of the testator, the point for consideration is not what the testator meant but what that which he has written means. It is often said that the expressed intentions are assumed to be actual intentions. This Court in *A. Sreenivasa Pai and Anr. v. Saraswathi Ammal alias G. Kamala Bai* (1985) 4 SCC 85 held that in construing a document, whether in English or in any Indian language, the fundamental rule to be adopted is to ascertain the intention adopted from the words employed in it. Reference may also be made to the judgment of the Privy Council in *Rajendra Prasad Bose and Anr. v. Gopal Prasad Sen* AIR 1930 PC 242 and *C. Cheriathan v. P. Narayanan Embranthiri and Ors.* (2009) 2 SCC 673.

Exhibit A1 - Meaning and Effect

24. We may now examine the meaning and effect of exhibit A1 document. Some of the expressions used in exhibit A1 need emphasis which are "absolutely settled", "our lifetime", "separately and absolutely" and the Malyalam words "*adheenadha* (control)" and "*swathanthryam* (liberty/freedom)". The words which are used in a document have to be understood in its normal and natural meaning with reference to the language employed. The words and phrases used in a document are to be given their ordinary meaning. When the document is made, the ordinary meaning has to be given to the document, which is relevant. Executants have used the Malyalam words '*adheendha*' and '*swathanthryam*' which must be referable to the ordinary usage of Malayalam language at the time when the document was executed. Words of usage, in Malyalam language, therefore be given their usual, ordinary and natural meaning or signification according to the approved usage because primarily the language employed is the determinative factor of legislative intention. Consequently, the word '*adheenadha*' means control, domination, command, manage etc. '*Swathanthryam*' means liberty, freedom, independence

etc. Those words emphasize the fact that the executants had retained the entire rights over the property in question and not parted with.

25. We have indicated that exhibit A1 document is divided into schedule Nos. 1 to 9. Properties described in schedule Nos. 1 to 6 as per the terms of the document stood absolutely vested *in praesenti* and undoubtedly settled in favour of the executants sons. Evidently, therefore, that part of the document has the characteristics of a settlement. Rest of the schedule Nos. 7, 8 and 9 have different characteristics in contradistinction with schedule Nos. 1 to 6. Schedule No. 7 of exhibit A1 document clearly indicates that the same is required for the marriage and dowry purposes of the daughter of the executants, by name Thankamma. The document clearly indicates that the marriage of their daughter would be conducted by the executants since it is their responsibility. Further, it is also stipulated that if the daughter does not get married during their lifetime, the property in schedule No. 7 shall after their lifetime belong absolutely to their daughter.

26. So far as schedule No. 9 is concerned, the same would be retained by the executants in their full control (*adheendha*) and freedom (*swathanthryam*). In other words, schedule No. 9 shall be possessed by the executants and the income therefrom be taken directly by leasing out, if need be, by executing such documents as desired. Further, it is also stated with regard to schedule No. 9 that after "our lifetime" if the property is left, "you all" (all the sons) may take it in equal shares.

27. We are now to examine the crucial issue i.e. with regard to sub-item 1 of schedule No. 8 in exhibit A1. With regard to that item, it has been stated in the document that the executants are keeping possession and would utilize the income derived from them directly or by leasing it out to discharge the amounts due to the bank and after its clearance, the income from schedule No. 8 would be utilized for "our maintenance". Further, it is also stated that after "our lifetime",

item No. 2 in schedule No. 8 will belong absolutely to third party and item Nos. 1 and 3 would belong to you "absolutely" and "separately" in equal shares and accordingly they may hold and enjoy the properties by paying tax thereof. No rights, in praesenti, were created, on the other hand all the rights including possession were retained by the executants. In other words, so far as item No.1 in schedule No. 8 of exhibit A1 is concerned, the executants had retained possession, full control as well as freedom to deal with it. The contention of the respondent that the executants had consciously omitted the power of alienation with regard to Schedule No.8, unlike Schedule No.7, is not correct: The question is not whether the executants had retained any right but whether the executants had conferred any right on the beneficiaries. Right, title, interest, ownership and the power of alienation of the executants were never in doubt and they had always retained those rights, the point in dispute was whether the property in question had been settled on the sons absolutely during their life time; barring possession and enjoyment. In our view, no right, title, interest, or ownership had been conferred when the document was executed or during the life time of the executants to their sons in respect of item No.1 of Schedule 8 of exhibit A1. We have noticed that there is marked difference in the language used in respect of properties covered by Schedule Nos. 1 to 6 and rest of the Schedules. Admittedly, Schedule Nos. 7 and 9 are testamentary in character and in our view, Schedule 8 also, when we examine the meaning ascribed to the various words used and the language employed. The judgments in *K. Balakrishnan v. K. Kamalam and Ors.* (2004) 1 SCC 581, *Kale and Ors. v. Deputy Director of Consolidation and Ors.* (1976) 3 SCC 119 are, therefore, inapplicable to the facts of this case.

Subsequent events:

28. Subsequent events or conduct of parties after the execution of the document shall not be taken into consideration in interpreting a document especially when there is no

ambiguity in the language of the document. But we may refer to those events also only to re-enforce the fact that there is no ambiguity in the language employed in the document.

29. Subsequent conduct of Eapen and Sosamma has no bearing in understanding the scope of exhibit A1 document. The executants, it may be noted, had jointly executed a mortgage on 12.11.1955 (exhibit B2) to one Mathew in which they had affirmed their right to execute such a mortgage and traced it to exhibit A1 document. Further, the executants had not parted with possession of item No.1 of 8th Schedule of exhibit A1 to their sons, at any point of time and retained ownership. Exhibit B3 document was executed in favour of 3rd defendant on 18.07.1964 and later he sold the property to 4th defendant on 23.01.1978 (exhibit B1). Now from 1978 onwards, the 4th defendant, a stranger to the family, has been in exclusive possession and ownership of the property. We may also point out even though Ext.B3 was executed on 18.07.1964, the suit was filed only on 6.2.1978, that is, after more than thirteen years. It will also be unjust to deprive him of his ownership and possession at this distance of time.

30. We, therefore, find that the right, title, interest, possession and ownership of item No.1 of 8th Schedule of Ex.A1 were with the executants and they had the full control and freedom to deal with that property as they liked unlike Schedule Nos. 1 to 6. We have, therefore, no hesitation in holding that so far as that item is concerned, the document in question cannot be construed as a settlement or a gift because there is no provision in the document transferring any interest in immovable property *in praesenti* in favour of settlees i.e. their sons.

31. The judgment and decree of the lower appellate court, confirmed by the High Court, is, therefore, set aside and the judgment and decree of the trial court is restored. The appeal is allowed as above and there will be no order as to costs.

B.B.B. Appeal allowed.

SHAILENDRA BHARDWAJ & OTHERS
v.
CHANDRA PAL & ANOTHER
(Civil Appeal No. 8196 of 2012)

NOVEMBER 21, 2012

[K.S. RADHAKRISHNAN AND DIPAK MISRA, JJ.]

COURT FEES ACT, 1870:

s.7(iv-A) and Articles 17(iii) as amended by U.P. Act, 19 of 1938 – Suit for declaration of a will and a sale deed as null and void and for cancellation thereof – Court fee payable – Held: The suit having been filed after death of testator, suit property covered by the will has to be valued – Since s. 7(iv-A) of the U.P. Amendment Act specifically provides that payment of court fee in case where the suit is for or involving cancellation or adjudging/declaring null and void decree for money or an instrument, Article 17(iii) of Schedule II of the Court Fees Act would not apply – Consequently, in terms of s. 7(iv-A) of the U.P. Amendment Act, the court fees have to be computed according to the value of the subject matter and trial court as well as High Court have correctly held so.

The appellant filed a suit for declaration of a will and a sale as null and void and to cancel the same. The suit property was valued at Rs. 30,00,000/- but the fixed court fee of Rs. 200/- was paid under Article 17(iii) of Schedule II to the Court Fees Act, 1870. The trial court held that the plaintiff should have paid the court fee as per s.17(iv-A) of the U. P. Amendment Act. The High Court upheld the said order.

In the instant appeal, the question for consideration before the Court was: whether a suit filed seeking a declaration that a will and a sale deed are void, resulting

their cancellation, will fall u/s. 7(iv-A) of the Court Fees Act, 1870, as amended by the U.P. Amendment Act (Act XIX of 1938) or Article 17(iii) of Schedule II of the Court Fees Act, 1870 for the purpose of valuation.

Dismissing the appeal, the Court

HELD: 1.1. Article 17(iii) of Schedule II of the Court Fees Act, 1870 is applicable in cases where the plaintiff seeks to obtain a declaratory decree without any consequential relief and there is no other provision under the Act for payment of fee relating to relief claimed. But if such relief is covered by any other provisions of the Court Fees Act, then Article 17(iii) of Schedule II will not be applicable. The suit, in the instant case, was filed after the death of the testator and, therefore, the suit property covered by the will has also to be valued. The plaintiff valued the suit at Rs.30 Lakhs for the purpose of pecuniary jurisdiction. However, he paid a fixed court fee of Rs.200/- under Article 17(iii) of Schedule II of the Court Fees Act. He had not noticed the fact that the said Article stood amended by the State, by adding the words "not otherwise provided by this Act". Since s. 7(iv-A) of the U.P. Amendment Act specifically provides that payment of court fee in case where the suit is for or involving cancellation or adjudging/declaring null and void decree for money or an instrument, Article 17(iii) of Schedule II of the Court Fees Act would not apply. The U.P. Amendment Act, therefore, is applicable, despite the fact that no consequential relief has been claimed. Consequently, in terms of s. 7(iv-A) of the U.P. Amendment Act, the court fees have to be computed according to the value of the subject matter and the trial court as well as the High Court have correctly held so. [Para 10-11] [1133-B-D-E-G; 1134-C-E]

Suhrid Singh v. Randhir Singh and Others **(2010) 12 SCC 12 – held inapplicable**

Case Law Reference:

(2010) 12 SCC 12 held inapplicable Para 5

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8196 of 2012.

From the Judgment & Order dated 15.12.2011 of the High Court of Judicature at Allahabad in FA No. 242 of 2011.

Viresh Kumar Yadav, Md. Farman for the Appellant.

M.R. Shamshad, Shashank Singh, Gaurav Agarwal for the Respondents.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. Leave granted.

2. The short question that has come up for consideration in this case is whether a suit filed seeking a declaration that a will and a sale deed are void, resulting their cancellation, will fall under Section 7(iv-A) of the Court Fees Act, 1870, as amended by the U.P. Amendment Act (Act XIX of 1938) [for short 'the U.P. Amendment Act'] or Article 17(iii) of Schedule II of the Court Fees Act, 1870 for the purpose of valuation.

3. Civil Suit No. 230 of 2006 was filed before the Court of the Civil Judge, Hathras, U.P. seeking the following reliefs:

> "(A) Decree may be passed in favour of the plaintiffs and against the defendants, declare null and void and invalid of the forged will dated 21.3.2003 and sale deed dated 12.1.2005 and cancel and its information sent to the office of Registrar Hathras.
>
> (B) That the cost of the Suit may be decreed in favour of the plaintiff and against the defendants.
>
> (C) That any other cost which may deem fit by the Hon'ble Court in favour of the plaintiff and against the defendants in the interest of Justice."

4. The suit property was valued and the cost of the property was fixed at Rs.30,00,000/- and the Court fee of Rs.200/- was paid under Article 17(iii) of Schedule II of the Court Fee Act. The question arose before the trial Court whether the plaintiff had properly valued the suit and the court fee paid. The trial Court took the view that the plaintiff should have paid the court fee as per Section 7(iv-A) of the U.P. Amendment Act. The matter was taken up before the High Court. The High Court concurred with the views taken by the trial Court and dismissed the appeal on 15.12.2011, against which this appeal has been preferred.

5. Shri Viresh Kumar Yadav, learned counsel appearing on behalf of the appellant, submitted that the Courts below have committed an error in holding that the suit be valued and an *ad valorem* court fee be paid under Section 7(iv-A) of the U.P. Amendment Act. Learned counsel submitted that the plaintiff had correctly valued the suit and proper court fee was paid in accordance with Article 17(iii) of Schedule II of the Court Fees Act. Considerable reliance was also placed on the judgment of this Court in *Suhrid Singh v. Randhir Singh and Others* [(2010) 12 SCC 12] and contended that the Court fee need be paid only on the plaint averments.

6. Shri M. R. Shamshad, learned counsel appearing for the respondent, on the other hand, contended that the High Court has come to the correct conclusion that even though no consequential reliefs was prayed for, still as per the U.P. Amendment Act, plaintiff will have to pay the court fee under Section 7(iv-A) of the U.P. Amendment Act. Learned counsel submitted that the plaintiff had valued the suit without noticing the fact that the State of U.P. had amended the Court Fee Act by Act XIX of 1938 and in terms of Section 7(iv-A) of the U.P. Amendment Act, the court fee has to be commuted according to the value of the subject matter and an *ad valorem* court fee

has to be paid. Learned counsel also submitted that the judgment of this Court in *Suhrid Singh* (supra) is not applicable to the facts of the present case and this Court had no occasion to consider the scope of the U.P. State amendment in that judgment.

7. We may, for proper appreciation of the various contentions raised by the parties, refer to the provisions of the Court Fees Act as well as Court Fees Act as amended by the U.P. Amendment Act, which will give a correct picture of the changes made by the U.P. Amendment Act on the Court Fees Act. An operative chart of the Court Fees Act and the U.P. Amendment Act is given below:

Court Fees Act	***As per UP Amendment Act (19 of 1938)***
"7. Computation of fees payable in certain suits:	**"7. Computation of fees payable in certain suits for money:**
The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows:	The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows:
.....	.....
.....	.....
(iv) In Suits –	**For declaratory decree with consequential relief – (iv) in Suits**-
.....	
.....	
For declaratory decree and consequent relief-	**(a)** to obtain a declaratory decree or order, where consequential relief **other than relief**

.....(a)	**specified in sub-section (iv-A) is prayed;**
.....(b).....	**For cancellation or adjudging void instruments and decrees – (iv-A)** in suit for or involving cancellation of or adjudging void or voidable a decree for money or other property having a market value, or an instrument securing money or other property having such value:
For a declaratory decree and consequential relief (c) to obtain a declaratory decree or order, where consequential relief is prayed,	(1) Where the plaintiff or his predecessor-in-title was a party to the decree or the instrument, according to the value of the subject matter, and
.....	(2) Where he or his predecessor-in-title was not party to the decree or instrument, according to one-fifth of the value of the subject-matter, and such value shall be deemed to be-
.....	If the whole decree or instrument is involved in the suit, the amount for which or value of the
According to the amount at which the relief sought is valued in the plaint or memorandum of appeal.	

	property in respect of which the decree was passed or the instrument executed, and if only a part of the decree or instrument is involved in the suit, the amount or value of the property to which such part relates. **Explanation – 'the value of the property'** for the purposes of this sub section, shall be the market-value, which in the case of immovable property shall be deemed to be the value as computed in accordance with sub-section (v), (v-A) or (v-B), as the case may be."
———————	———————
"Schedule II **Article 17** Plaint or memorandum of appeal in each of the following suits: .... (iii) To obtain a declaratory decree where no consequential relief is prayed.	**"Schedule II** **Article 17** Plaint or memorandum of appeal in each of the following suits: .... (iii) To obtain a declaratory decree where no consequential relief is prayed in any suit, **not otherwise provided for by this act;**

8.We may also indicate that the Suits Valuation Act, 1887 in terms of which the suits have to be valued for the purpose of Court Fees Act has also been amended vide U.P. Act 7 of 1939 (w.e.f. 16.7.1939) and the difference in both the Acts are given below:

Suits Valuation Act, 1887 (Central Act)	***Suits Valuation Act, 1887 [Amended provision in the State of U.P.]***
4. Valuation of relief in certain suits relating to land not to exceed the value of the land- Where a suit mentioned in the Court Fees Act, 1870 (7 of 1870), Section 7, paragraph IV, or Schedule II, Article 17, relates to land or an interest in land of which the value has been determined by rules under the last foregoing section, the amount at which for purposes of jurisdiction the relief sought in the suit is value shall not exceed the value of the land or interest as determined by those rules.	**4. Valuation of certain suits for the purposes of jurisdiction –** Suits mentioned in paragraphs IV (a), IVA, IVB, V, VA, VB, VI, VIA; VIII and X(d) of Section 7 and Articles 17, 18 and 19 of the Schedule II of the Court-Fees Act, 1870, as in force for the time being in the Uttar Pradesh, *shall be valued for the purposes of jurisdiction at the market value of the property involved in or affected by or the title to which is affected by the reliefs sought, and such value shall, in the case of land, be deemed to be the value as detgerminable in accordance with the rules framed under Section 3".* [*Vide U.P. Act 7 of 1939. Section 3 (w.e.f. 16.07.1939].*

9. On comparing the above mentioned provisions, it is clear that Article 17(iii) of Schedule II of the Court Fees Act is applicable in cases where the plaintiff seeks to obtain a declaratory decree without any consequential relief and there is no other provision under the Act for payment of fee relating to relief claimed. Article 17(iii) of Schedule II of the Court Fees Act makes it clear that this article is applicable in cases where plaintiff seeks to obtain a declaratory decree without consequential reliefs and there is no other provision under the Act for payment of fee relating to relief claimed. If there is no other provision under the Court Fees Act in case of a suit involving cancellation or adjudging/declaring void or voidable a will or sale deed on the question of payment of court fees, then Article 17(iii) of Schedule II shall be applicable. But if such relief is covered by any other provisions of the Court Fees Act, then Article 17(iii) of Schedule II will not be applicable. On a comparison between the Court Fees Act and the U.P. Amendment Act, it is clear that Section 7(iv-A) of the U.P. Amendment Act covers suits for or involving cancellation or adjudging/declaring null and void decree for money or an instrument securing money or other property having such value. The suit, in this case, was filed after the death of the testator and, therefore, the suit property covered by the will has also to be valued. Since Section 7(iv-A) of the U.P. Amendment Act specifically provides that payment of court fee in case where the suit is for or involving cancellation or adjudging/declaring null and void decree for money or an instrument, Article 17(iii) of Schedule II of the Court Fees Act would not apply. The U.P. Amendment Act, therefore, is applicable in the present case, despite the fact that no consequential relief has been claimed. Consequently, in terms of Section 7(iv-A) of the U.P. Amendment Act, the court fees have to be commuted according to the value of the subject matter and the trial Court as well as the High Court have correctly held so.

10. We are of the view that the decision of this Court in *Suhrid Singh* (supra) is not applicable to the facts of the present

case. First of all, this Court had no occasion to examine the scope of the U.P. Amendment Act. That was a case in which this Court was dealing with Section 7(iv)(c), (v) and Schedule II Article 17(iii), as amended in the State of Punjab. The position that we get in the State of Punjab is entirely different from the State of U.P. and the effect of the U.P. Amendment Act was not an issue which arose for consideration in that case. Consequently, in our view, the said judgment would not apply to the present case.

11. Plaintiff, in the instant case, valued the suit at Rs.30 Lakhs for the purpose of pecuniary jurisdiction. However, for the purpose of court fee, the plaintiff paid a fixed court fee of Rs.200/- under Article 17(iii) of Schedule II of the Court Fees Act. Plaintiff had not noticed the fact that the above mentioned article stood amended by the State, by adding the words “not otherwise provided by this Act”. Since Section 7(iv-A) of the U.P. Amended Act specifically provides for payment of court fee in case where the suit is for or involving cancellation or adjudging/declaring void or voidable an instrument securing property having money value, Article 17(iii) of Schedule II of the Court Fees Act shall not be applicable.

12. For the reasons abovementioned, the appeal lacks in merits and the same is dismissed, with no order as to costs.

R.P. Appeal dismissed.

VADLAKONDA LENIN
v.
STATE OF ANDHRA PRADESH
(Criminal Appeal No. 126 of 2009)

NOVEMBER 22, 2012

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

Penal Code, 1860 – s.302 – Allegation that appellant had murdered his wife while she was sleeping and had run away – Case resting on circumstantial evidence – Conviction of appellant by Courts below – Justification – Held: Justified – Evidence of PWs 1 and 2 (father-in-law and brother-in-law of appellant) made it clear that appellant had been persistently demanding additional dowry and ill-treating the deceased – Deceased was found lying injured in her house by PWs 3 and 5 – Nobody except appellant was in the house immediately before the occurrence – Appellant was seen fleeing away from the house by PW3 – Thereafter, whereabouts of appellant were not known until he was arrested nearly 15 days thereafter – After arrest, appellant made statement on the basis of which a knife and a blood stained shirt of the appellant were recovered – Explanation offered by appellant for his absence for nearly 15 days following the death of his wife was unnatural and opposed to all cannons of acceptable human conduct and behavior – "Five golden principles" (five conditions) enunciated by Supreme Court in Sharad Birdhichand Sarda case must be fulfilled before a case against an accused vesting on circumstantial evidence can be said to be fully established – In the instant case, circumstances proved and established by the prosecution squarely satisfied the test laid down in Sharad Birdhichand Sarda – Prosecution established beyond all reasonable doubt that it was appellant alone and nobody else who had committed the offence.

Evidence – Circumstantial evidence – Appreciation of – Held: The circumstances on which the prosecution relies must be proved beyond all reasonable doubt and such circumstances must be capable of giving rise to an inference which is inconsistent with any other hypothesis except the guilt of the accused – It is only in such an event that conviction of the accused, on the basis of the circumstantial evidence brought by the prosecution, would be permissible in law –"Five golden principles" enunciated by Supreme Court in Sharad Birdhichand Sarda case, recapitulated.

The prosecution case was that the accused-appellant had murdered his wife while she was sleeping and had run away. FIR was lodged by PW1, father-in-law of appellant, whereafter charge sheet under Sections 302 and 498A IPC was submitted against the appellant. However in the trial court, charge under section 302 IPC alone was framed. The trial ended in the conviction of appellant under Section 302 IPC who was sentenced to undergo rigorous imprisonment for life. The conviction and sentence was affirmed by the High Court, and therefore the instant appeal.

Dismissing the appeal, the Court

HELD:1.1. In the instant case, there is no direct evidence of any eye witness to the crime alleged against the accused-appellant. However, certain circumstances inimical to the accused-appellant have been proved by the prosecution. Such circumstances which have been culled out by the trial court and also by the High Court can be summarised as below: (i) The accused had been making demands for dowry and on that account was harassing, intimidating and committing atrocities on the deceased; (ii) the accused and the deceased alognwith PWs 1 and 2 had attended the betrothal function of the brother of the deceased in the evening prior to the

incident. Immediately after the incident, there was a quarrel between the accused and the deceased; (iii) in the early morning of the next day the deceased was found by PW 3, lying in a cot in her own house with injuries on her neck; (iv) the accused was found by PW 3 to be running away from the place; (v) the whereabouts of the accused was not known after the incident and he could be arrested only around 15 days thereafter; and (vi) the accused had stated in his examination under section 313 Cr.P.C. that he came to know of the incident only from the newspapers, whereafter he had explained the whole incident to his sister. The culpability of the accused-appellant, in the absence of any direct evidence, has to be judged on the basis of the circumstances enumerated above. [Paras 10, 11] [1142-D-H; 1143-A-D]

1.2. The circumstances on which the prosecution relies must be proved beyond all reasonable doubt and such circumstances must be capable of giving rise to an inference which is inconsistent with any other hypothesis except the guilt of the accused. It is only in such an event that the conviction of the accused, on the basis of the circumstantial evidence brought by the prosecution, would be permissible in law. In this regard reference may be made to the "five golden principles" (five conditions) enunciated by this Court in *Sharad Birdhichand Sarda* **case which must be fulfilled before a case against an accused vesting on circumstantial evidence can be said to be fully established. [Para 11] [1143-E-G]**

1.3. From the evidence of PWs 1 and 2, it is crystal clear that the accused-appellant had been persistently demanding additional dowry from the deceased and had been ill-treating her and also that immediately before the incident there was a quarrel between the accused and the deceased. The deceased was found lying injured on cot in her house by PW 3 as well as by PW 5. Nobody except

the accused was in the house immediately before the occurrence. The accused was seen fleeing away from the house by PW 3. Thereafter, the whereabouts of the accused were not known until he was arrested nearly 15 days thereafter. After his arrest, the accused had made a statement (Exh. P.8) on the basis of which a knife and a blood stained shirt of the accused (M.Os. 6 and 7) were recovered. The explanation offered by the accused for his absence for a period of nearly 15 days following the death of his wife is unnatural and opposed to all cannons of acceptable human conduct and behaviour. The aforesaid circumstances which have been proved and established by prosecution squarely satisfies the test laid down by this Court in *Sharad Birdhichand Sarda.* **The principles laid down in the aforesaid decision have been consistently reiterated by this court and exhaustively considered in a very recent decision in** *Sathya Narayanan***. [Para 14] [1146-B-G]**

Sharad Birdhichand Sarda v. State of Maharashtra **(1984) 4 SCC 116: 1985 (1) SCR 88 and** *Sathya Narayanan v. State Rep. by Inspector of Police* **J.T. 2012 (11) SC 57 – relied on.**

2. The prosecution established beyond all reasonable doubt that it was the accused-appellant alone and nobody else who had committed the offence. Accordingly, the conviction of the appellant under section 302 IPC and the sentence of life imprisonment imposed on him is affirmed. [Para 15] [1147-A-B]

Case Law Reference:

1985 (1) SCR 88	**relied on**	**Paras 11,14**
JT 2012 (11) SC 57	**relied on**	**Para 14**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 126 of 2009.

From the Judgment & Order dated 29.9.2006 of the High Court of Judicature of Andhra Pradesh at Hyderabad in Criminal Appeal No. 2219 of 2004.

J.M. Sharma, Sandeep Narain for the Appellant.

Mayur R. Shah, Suchitra Hrangkhawl, Amit K. Nain, M.B. Shivudu, D. Mahesh Babu for the Respondent.

The Judgment of the Court was delivered by

RANJAN GOGOI, J. 1. This appeal is directed against the judgment and order dated 29.9.2006 passed by the High Court of Andhra Pradesh affirming the conviction of the accused-appellant under Section 302 IPC and the sentence of life imprisonment imposed on him.

2. On 18.4.2003 at about 10.30 a.m. PW 1, Ponnam Pedda Sathaiah, the father of the deceased, filed a FIR in the Maripeda police station stating that he had given his daughter, Vadlakonda Radha, in marriage to the accused-appellant in the year 1999. At the time of marriage a sum of Rs.50,000 was claimed to have been given by the first informant as dowry, inspite of which, according to the first informant, the accused-appellant had been demanding more dowry and on that account committing atrocities on his daughter. In the FIR filed it was alleged that in the early morning of 18.4.2003 the accused-appellant had murdered his wife while she was sleeping and had run away. It was further alleged by the first informant that on coming to know of the incident he rushed to the appellant's house and saw his daughter taking her last breath. Thereafter, he had brought her to the Area Hospital at Mahbubabad but on the way to the hospital she died at about 8.00 a.m.

3. On the basis of the aforesaid FIR, a case under section 302 and 304B of the IPC was registered. In the course of the investigation inquest was held on the dead body and the same was sent for post mortem examination. A large number of witnesses were examined and their statements were recorded

under section 161 Cr.P.C. On 3.5.2003 the accused-appellant who was absconding was arrested from his house. On the same day at the instance of the accused-appellant PW 15, M. Laxminarayana, the Sub-Divisional Police Officer of Mahabubabad recovered a tapper knife (M.O.6) and a blood stained shirt of the accused (M.O.7).

4. Charge sheet under section 302 and 498A IPC was submitted against the accused-appellant. However in the trial court, charge under section 302 alone was framed. The trial ended in the conviction of the accused-appellant who, as already noticed, was sentenced to undergo rigorous imprisonment for life. The aforesaid conviction and sentence having been affirmed by the High Court this appeal, by special leave, has been filed.

5. We have heard Mr. J.M. Sharma, learned counsel for the appellant and Mr. Mayur R. Shah, learned counsel for the respondent-State.

6. Of the 15 witnesses examined by the prosecution, the evidence tendered by PWs 1 and 2 (father and brother of the deceased); the evidence of PW 3, Ponnam Buchamma, who is a neighbour and who had seen the deceased lying on cot in her house with bleeding injuries from the neck and the accused running away from the place; the evidence of PW 10, who was a witness to the seizure of material objects No. 6 and 7 and PW 15, the Sub-Divisional Police Officer of Mahabubabad who had recovered material objects 6 and 7 on the basis of the statement made by the accused (Exh.P8) as well as the evidence of PW 12, Dr. Vaidehi, the Medical Officer who had performed the post mortem, would be relevant, and therefore, must be noticed in some details.

7. PWs 1 and 2 have deposed in the same vein. From the evidence of the said two witnesses, it transpires that the accused, though had received a sum of Rs.50,000 at the time of his marriage, had been persistently demanding more dowry

and harassing and assaulting his wife i.e. the deceased from time to time. It also transpires from the evidence of PW 1 and 2 that in the evening before the occurrence there was a betrothal ceremony of the brother of the deceased, which was attended, amongst others, by PWs 1, 2 as well as the accused and the deceased. A plot of land measuring one and half acres and Rs.30,000 was offered as dowry to the brother of the deceased which had led to further renewed demands for additional dowry by the accused. Immediately after the ceremony a quarrel had taken place between the accused and the deceased as a result of which the deceased went to her co-sister's place (PW 5) to spend the night. In the early morning, she came to her own house and was lying in a cot when, according to PWs 1 and 2, the accused caused knife injuries on the neck of the deceased. According to the said witnesses though the deceased was taken to the hospital she died en-route.

8. PW 3 had deposed that in the early morning of the day of the occurrence while she was going to the stools side she noticed the deceased lying in the cot of her house with injuries on the neck from which she was bleeding. PW 3 had also deposed that she saw the accused running away from the house. The co-sister of the deceased to whose house the deceased had gone after the quarrel with the accused was examined as PW 5. She, however, did not support the prosecution case. PW 3 had however admitted that in the early morning of 18.4.2003 as the deceased had not come out of her house she went to the house of the deceased and found her lying in the cot with injuries on the neck. PW 10, as already noticed, had deposed to the recovery of M.O. Nos.6 and 7 on the basis of the statement made by the accused (Ex.P.8) before PW 15, the Sub-Divisional Police Officer. PW 12 is the Doctor who had performed the post mortem on the deceased. He had deposed that he found incised wound involving the whole of the neck of the deceased and also cut wounds of the hyoid bone and the trachea. Corresponding to the said external injuries, PW 12 found the carotid vessels (the major vital blood vessels

supplying blood to the brain) as well as the wind pipe of the deceased to have been cut. PW 15 is the Sub-Divisional Police Officer before whom the accused had made the statement (Exh.P8) leading to the recovery of material object No. 6 (knife) and material object No. 7 (blood stained shirt). PW 15 had also deposed that the whereabouts of the accused after the incident were not known and he could be arrested only on 3.5.2003.

9. Coupled with the above, from the examination of the accused under section 313 Cr.P.C., it transpires that the accused was not available after the incident. The absence of the accused has been sought to be explained by him by stating that he could come to know of the news of the death of his wife from the newspapers after which he had reported the incident to his sister.

10. A careful consideration of the evidence adduced by the prosecution would go to show that there is no direct evidence of any eye witness to the crime alleged against the accused. However, it transpires from the depositions of the prosecution witnesses that certain circumstances inimical to the accused have been proved by the prosecution in the present case. Such circumstances which have been culled out by the learned trial court and also by the High Court can be summarised as below:

(i) The accused had been making demands for dowry and on that account was harassing, intimidating and committing atrocities on the deceased;

(ii) the accused and the deceased alognwith PWs 1 and 2 had attended the betrothal function of the brother of the deceased in the evening prior to the incident. Immediately after the incident, there was a quarrel between the accused and the deceased;

(iii) in the early morning of the next day the deceased

was found by PW 3, lying in a cot in her own house with injuries on her neck;

(iv) the accused was found by PW 3 to be running away from the place.

(v) the whereabouts of the accused was not known after the incident and he could be arrested only on 3.5.2003; and

(vi) the accused had stated in his examination under section 313 Cr.P.C. that he came to know of the incident only from the newspapers, whereafter he had explained the whole incident to his sister.

11. The culpability of the accused-appellant, in the absence of any direct evidence, has to be judged on the basis of the circumstances enumerated above. The principles of law governing proof of a criminal charge by circumstantial evidence would hardly require any reiteration save and except that the circumstances on which the prosecution relies must be proved beyond all reasonable doubt and such circumstances must be capable of giving rise to an inference which is inconsistent with any other hypothesis except the guilt of the accused. It is only in such an event that the conviction of the accused, on the basis of the circumstantial evidence brought by the prosecution, would be permissible in law. In this regard a reference to the "five golden principles" enunciated by this Court in *Sharad Birdhichand Sarda v. State of Maharashtra* (1984) 4 SCC 116 may be recapitulated for which purpose para 153 of the judgment in the above case may be usefully extracted below:

"153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in *Shivaji Sahebrao Bobade v. State of Maharashtra* : (1973) 2 SCC 793 where the following observations were made:

certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict, and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

12. Learned counsel for the appellant has vehemently argued that in the present case the prosecution has failed to prove the most vital circumstance of the case, namely, motive of the accused for committing the alleged crime. Infact, according to the learned counsel, no charge against the accused having been framed under section 498A IPC inspite of specific allegations of demand of dowry and harassment etc.

of the deceased by the accused the motive for commission of the alleged offence remain unsubstantiated. Learned counsel has also pointed out that the prosecution case to the effect that the deceased had left her house in the evening prior to the incident and has spent the night in the house of co-sister, PW 5, has not been established. It is also urged that, in any case, if the deceased had spent night in the house of the co-sister, as claimed by the prosecution, no explanation has been forthcoming as to how she could be seen by PW 3 lying injured in the cot in her own house in the morning. Learned counsel has further submitted that PW 3 has contradicted herself on a vital part of the prosecution story, namely, the point of time when she had seen the deceased lying in the cot and the accused fleeing away from the place. While at one place PW 3 had claimed to have seen the above sequence of events while going to the stools side, in her cross-examination she had stated that she saw the same while returning.

13. In reply, the learned State Counsel has contended that prosecution case cannot fail merely on account of the absence of proof of any motive on the part of the accused to commit the crime. Learned counsel has submitted that the evidence of PWs 1 and 2 amply demonstrates that demand for dowry was made by the accused from time to time and also the ill-treatment meted out by the accused to the deceased. The incident had taken place in the house of the accused to which the deceased had returned in the early morning. It is pointed out that PW 3, who had seen the accused fleeing away from the place of occurrence, is related to both the sides and, therefore, is eminently reliable. The absence of accused for a period of nearly 15 days after the incident and the recoveries made on the basis of the statement of the accused has been pointed out by the learned counsel as sufficient proof of the involvement of the accused in the crime alleged against him. The contradictions in the evidence of PW 3, according to the learned counsel, are minor and insignificant. Learned counsel has also pointed out that though PW 5 was declared hostile,

she had, infact, supported the prosecution case to the extent that in the early morning of the day of the incident, as the deceased had not come out from her house, PW 5 had gone to the house of the deceased and found her lying on the cot with injuries on the neck.

14. We have considered the submissions advanced on behalf of the parties and the entire evidence on record. Upon such consideration we find that from the evidence of PWs 1 and 2 it is crystal clear that the accused had been persistently demanding additional dowry from the deceased and had been ill-treating her. From the evidence tendered by the said two witnesses it is also clear that immediately before the incident there was a quarrel between the accused and the deceased. In the early morning of 18.4.2003 the deceased was found lying injured in the cot in her own house by PW 3 as well as by PW 5. Nobody except the accused was in the house immediately before the occurrence. The accused was seen fleeing away from the house by PW 3. Thereafter, the whereabouts of the accused were not known until he was arrested on 3.5.2003. After his arrest, the accused had made a statement (Exh. P.8) on the basis of which a knife and a blood stained shirt of the accused (M.Os. 6 and 7) were recovered. The explanation offered by the accused for his absence for a period of nearly 15 days following the death of his wife is unnatural and opposed to all cannons of acceptable human conduct and behaviour. The aforesaid circumstances which have been proved and established by prosecution, in our considered view, squarely satisfies the test laid down by this Court in *Sharad Birdhichand Sarda* (supra). The principles laid down in the aforesaid decision have been consistently reiterated by this court and exhaustively considered in a very recent decision in *Sathya Narayanan v. State Rep. by Inspector of Police* (decided on November 2, 2012). (Reported in J.T. 2012 (11) SC 57).

15. Having considered the totality of the facts of the present case and the principles of law as above, we are left

with no doubt whatsoever that in the present case the prosecution has established beyond all reasonable doubt that it is the accused alone and nobody who had committed the offence. Accordingly, we are of the view that the conviction of the accused and the sentence imposed on him by the learned trial court as affirmed by the High Court will not justify any interference. We, therefore, dismiss the appeal and affirm the conviction of the accused under section 302 IPC and the sentence of life imprisonment imposed on him.

B.B.B. Appeal dismissed.

VASANTI BHAT

v.

PREMLATA AGARWAL & ANR. ETC.

(Civil Appeal Nos. 8202-8205 of 2012)

NOVEMBER 22, 2012

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

Interim Orders:

Interim orders in suits filed by purchasers against developer – Single Judge of High Court directing not to register any agreement in respect of the flat of appellant, which was not subject matter of the suit – Notion of Motion by appellant – Interim order recalled – Appeals – Division Bench of High Court staying operation of order of Single Judge and directing the money deposited by plaintiff and appellant with developer to the credit of one of the suits and to be invested in FD – Held: Division Bench of High Court while deciding the Notice of Motion has exceeded its power and jurisdiction in commenting on the conduct of the appellant stating that she approached the court on the basis of false and fabricated documents – When the main suits are pending, particularly, the appellant is a stranger in the pending suits, such observation is not warranted and, as such, is deleted – The developer having deposited the money as directed by High Court, it safeguards the interests of plaintiff – Trial Court directed to decide the suits on merit – Administration of justice – Strictures.

The plaintiff-respondent no. 1, on 27.1.2009, filed four suits against defendant-respondent no. 2 developer, for specific performance of agreement of sale with regard to four flats. The single Judge of the High Court by order dated 10.2.2009 appointed a Court Receiver in respect of flat No. 703, which was not shown as suit property in any

of the suits, and flat no. 801, and directed respondent no. 2 not to execute or register agreement or create third party rights in respect of the said two flats, and by order dated 20.3.2009 directed the Court Receiver to seal the suit flats and communicate the same to the appellant. The appellant filed Notice of Motion in one of the four suits before the High Court praying for setting aside the orders dated 10.2.2009 and 20.3.2009. It was the case of the appellant that out of a total sale consideration of Rs.39 lacs for flat no. 703, she had paid Rs. 38 lacs to respondent no. 2 developer pursuant to a sale agreement and had been issued a possession letter on 30.9.3008. The single Judge by order dated 18.3.2010 set aside the orders dated 10.2.2009 and 20.3.2009 and directed the Court Receiver to return the possession of flat no. 703 to the appellant. Plaintiff-respondent no. 1 filed appeals. During the pendency of the appeals, as directed by the High Court, respondent no. 2 deposited Rs.98 lacs which had been paid by the appellant and respondent no. 1. The Division Bench ultimately allowed the appeals and set aside the order dated 18.3.2010 and directed transfer of the amount deposited by respondent no. 2, to the credit of Suit no. 251 of 2009 and to be kept invested in an FD.

Disposing of the appeals, the Court

HELD: 1.1. It is significant to note that the main suits are pending and any decision in respect of the issues raised by the parties would undoubtedly affect the ultimate stand of the parties and will have bearing on the suits. The Division Bench of the High Court while deciding the Notice of Motion has exceeded its power and jurisdiction in commenting on the conduct of the appellant stating that she approached the court on the basis of false and fabricated documents. When the main suits are pending, particularly, the appellant is a stranger in the pending suits, such observation is not warranted and is, therefore, deleted. [para 6] [1155-C-F]

1.2. Pursuant to the orders of the High Court, the developer has deposited a sum of Rs. 98 lakhs which safeguards the interest of respondent No.1. It is, therefore, directed:

(i) The trial court before which the suits have been transferred from the original side of the High Court shall dispose of the suits within a period of one year.

(ii) The deposited amount of Rs.98 lakhs invested in a Nationalized Bank be renewed periodically and disbursed subject to the orders of the court concerned.

(iii) The trial court shall decide the issue on merits on the basis of the materials to be placed before it.

(iv) The trial court shall adhere to the time schedule and dispose of all the suits, after affording opportunity to all the parties including the appellant.

(v) The limited protection granted by this Court on 20.04.2012 directing all the parties to maintain status quo prevailing as on that date shall be continued till final decision in the suits. [para 7-8] [1155-F-H; 1156-A-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 8202-8205 of 2012.

From the Judgment & Order dated 29.9.2011 of the High Court of Judicature at Bombay in Appeal No. 202 of 2010 in Notice of Motion No. 3112 of 2009 in Suit No. 252 of 2009 and Appeal No. 204 of 2010 in Notice of Motion No. 3114 of 2009 in Suit No. 253 of 2009 and Appeal No. 205 of 2010 in Notice of Motion No. 3115 of 2009 in Suit No. 254 of 2009 and Appeal No. 203 in Notice of Motion No. 3113 of 2009 in Suit No. 251 of 2009.

Ravi Shankar Prasad, Praveen Samdhani, S.K. Katriar, Abhay P. Sahay, Niraj Kumar, Suchita Pokharna, Himanshu Shekhar, Anirudha Joshi, Viraj Maniar, Pramod B. Agarwala, Prashant Mehra, Ajay Amritraj, Ashish Prakash, Prabhat Kumar, Md. Shahid Anwar for the Appearing parties.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. These appeals are directed against the final judgments and orders dated 29.09.2011 passed by the High Court of Judicature at Bombay in Appeal No. 202 of 2010 in Notice of Motion No. 3112 of 2009 in Suit No. 252 of 2009, Appeal No. 204 of 2010 in Notice of Motion No. 3114 of 2009 in Suit No. 253 of 2009, Appeal No. 205 of 2010 in Notice of Motion No. 3115 of 2009 in Suit No. 254 of 2009 and Appeal No. 203 of 2010 in Notice of Motion No. 3113 of 2009 in Suit No. 251 of 2009 whereby the High Court allowed the appeals filed by respondent No.1 and set aside the order dated 18.03.2010 passed in Notices of Motions.

3. **Brief facts:**

(a) An Agreement for Sale dated 06.10.2006 was entered into between Vasanti Bhat-appellant herein and M/s Zenal Construction Private Limited-respondent No.2 herein (the Developers) wherein the appellant agreed to purchase Flat No. 703 on the 7th Floor in 'A' Wing of the Reserve Bank of India Employees Kamdhenu Co-operative Housing Society Limited (in short 'the Society') for a total consideration of Rs. 39 lacs as the Developers was having absolute right to develop and sell the flats on the said property pursuant to an agreement between the Developers and the Society. Out of the total sale consideration, a sum of Rs. 38 lacs has already been paid through account payee cheques on different dates. Pursuant to the above Agreement for Sale, respondent

No.2 issued a possession letter to the appellant on 30.09.2008.

(b) In the meantime, on 27.01.2009, Respondent No.1-Premlata A Agarwal and her son Ravi A. Agarwal filed four suits being Suit Nos. 251, 252, 253 and 254 of 2009 in the Bombay High Court against respondent No.2 for specific performance of Agreement for Sale with regard to four flats, namely, 801 and 802 in 'A' Wing and 801 and 802 in 'B' Wing in the said Society. In none of the suits, Flat No. 703 in 'A' Wing was shown as the suit property. When the matter came up for hearing, respondent No.2-herein (Defendant) informed the Court that they have sold out all the said flats. But on being asked, they informed the Court that two flats in 'A' Wing – one on the 8th Floor and the other on the 7th Floor are yet not agreed to be sold to third parties under registered deed.

(c) Learned single Judge of the High Court, vide ad-interim order dated 10.02.2009, appointed a Court Receiver in respect of Flat Nos. 703 and 801 in 'A' Wing and directed respondent No.2 not to execute or register agreement, alienate or create any third party rights in respect of the aforesaid two flats.

(d) Learned single Judge of the High Court, vide order dated 20.03.2009, after coming to know from the counsel for respondent No.1 that respondent No.2 allowed the purchasers, namely, Vasanti Bhat and Bhavik K. Shah to do furnishing in the suit flats and the construction work is yet to be completed, directed the Court Receiver to seal the suit flats and communicate the same to Vasanti Bhat and Bhavik K. Shah.

(e) Being aggrieved, on 07.08.2009, Vasanti Bhat filed Notice of Motion No. 3112 of 2009 in Suit No. 252 of 2009 before the High Court, inter alia*, praying for setting aside the orders dated 10.02.2009 and 20.03.2009.*

(f) Learned single Judge of the High Court, vide order dated 18.03.2010 set aside the two orders dated 10.02.2009 and 20.03.2009 and directed the Court Receiver to return the possession of Flat No. 703 in 'A' Wing to the applicant-therein i.e. Vasanti Bhat. Similar such orders were passed on the other Notice of Motions.

(g) Being aggrieved by and dissatisfied with the order dated 18.03.2010 passed by the single Judge of the High Court, respondent No.1 filed four appeals before the Division Bench of the Bombay High Court.

(h) The Division Bench of the High Court, vide order dated 22.04.2010, while admitting the appeals directed respondent No.2 to deposit Rs. 98 lacs which is paid by respondent No.1 and the appellant and stayed the impugned orders in the said appeals until further orders.

(i) Aggrieved by the order dated 22.04.2010, the appellant and respondent No.2 preferred separate special leave petitions before this Court. This Court, by order dated 23.07.2010 disposed of the aforesaid petitions and asked the parties to raise all objections before the High Court with a request to consider and dispose of the same at an early date. During the pendency of the appeals before the High Court, respondent No.2 deposited the entire sum of Rs. 98 lacs which had been paid by the appellant and respondent No.1 as directed by the High Court.

(j) The High Court, by impugned orders dated 29.09.2011, allowed the appeals filed by the respondents and set aside the order dated 18.03.2010 passed in Notice of Motions in the respective suits. The High Court further directed that the amount which was deposited by respondent No.2 shall be transferred to the credit of Suit No. 251 of 2009 and the amount should be kept invested in a FD in a Nationalized Bank.

(k) Against the order passed by the Division Bench of the High Court, the appellant has filed this appeal by way of special leave before this Court.

4. Heard Mr. Ravi Shankar Prasad, learned senior counsel for the appellant, Mr. Praveen Samdhani, learned senior counsel for respondent No.1 and Mr. S.K. Katriar, learned senior counsel for respondent No.2.

5. All the three senior counsel appearing for the contesting parties took us through the Agreement for Sale, averments in the plaint, reliefs sought for in Notice of Motions and the order of the learned single Judge as well as the Division Bench of the High Court. Mr. Ravi Shankar Prasad, learned senior counsel by drawing our attention to the Agreement for Sale relating to Flat No. 703 in 'A' wing supported the conclusion arrived at by the learned single Judge and argued that the Division Bench committed an error in allowing the appeal of the plaintiff by rejecting the Notice of Motion filed by the appellant herein. On the other hand, Mr. Praveen Samdhani, learned senior counsel for respondent No.1, by drawing our attention to the fact that the appellant herein is a stranger in the suits, submitted that the conclusion arrived at by the Division Bench cannot be faulted with and according to him the only remedy open to the appellant is to file a separate suit to secure relief in her favour. Mr. S.K. Katriar, learned senior counsel for respondent No.2 – the Developers submitted that there cannot be any injunction against third party and the appellant herein being not a party to the suits, no injunction can be granted against her. He further submitted that by depositing a sum of Rs.98 lakhs, the interest of respondent No.1 is fully protected, hence, the impugned order of the Division Bench is not warranted and the same is liable to be interfered with.

6. All the learned senior counsel fairly admitted that as per Section 20(1) of the Specific Relief Act, 1963 it is only discretionary relief depending upon various factual aspects to be established by the party(s) approaching the Court. All the

counsel have also relied on Section 14 of the Specific Relief Act, 1963 as well as various provisions of Maharashtra Ownership of Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963. It is also not in dispute that the main suits are still pending and it was also brought to our notice that because of the enhancement of jurisdiction, in October, 2012, the suits filed by the plaintiff in the original side of the High Court, with which we are concerned, are being transferred to the City Civil Court, Bombay. Taking note of the fact that the main suits are pending and any decision in respect of the issues raised by all the parties would undoubtedly affect the ultimate stand of the parties and will have bearing on the suits, we have decided not to analyse and arrive at a definite conclusion one way or the other. At the same time, Mr. Ravi Shankar Prasad, learned senior counsel for the appellant is fully justified in contending that the Division Bench while deciding the Notice of Motion has exceeded its power and jurisdiction in commenting the conduct of the appellant herein (respondent No.2 therein) stating that she approached the Court on the basis of false and fabricated documents. When the main suits are pending, particularly, the appellant before us is a stranger in the pending suits, we are of the view that such observation that respondent No.2 therein (appellant herein) had approached the Court on the basis of false and fabricated documents is not warranted and those observations have to be eschewed and we rightly do so.

7. As stated earlier, we also noted the fact that pursuant to the orders of the Court, the Developers (respondent No.2 herein) has deposited a sum of Rs. 98 lakhs which safeguards the interest of respondent No.1 herein (plaintiff in the suits).

8. We intend to dispose of these appeals by issuing the following directions:

(i) The Court concerned, viz., City Civil Court (we were not informed about the exact Court before which the suits have been transferred from the original side of the High Court) is directed to dispose of the suits within a period of one year from the date of the receipt of copy of this judgment.

(ii) The deposited amount of Rs.98 lakhs invested in a Nationalized Bank be renewed periodically and disbursed subject to the orders of the court concerned.

(iii) All the observations/directions, particularly, the expression of the Division Bench about the alleged conduct of respondent No.2 therein (appellant herein) that she had approached the Court on the basis of false and fabricated documents, is deleted and the trial Court is directed to decide the issue on merits on the basis of the materials to be placed before it.

(iv) The Court concerned is directed to adhere to the time schedule and dispose of all the suits, after affording opportunity to all the parties including the appellant herein, uninfluenced by any of the reasoning of the High Court and this Court.

(v) The limited protection granted by this Court on 20.04.2012 directing all the parties to maintain status quo prevailing as on that date shall be continued till final decision being taken in the suits as directed above.

9. All the appeals are disposed of on the above terms. There shall be no order as to costs.

R.P. Appeals disposed of.

SURESH & ORS.
v.
STATE OF MADHYA PRADESH
(Criminal Appeal No. 300 of 2009)

NOVEMBER 22, 2012.

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

Narcotic Drugs and Psychotropic Substances Act, 1985

s. 50, read with ss. 8 and 18 – Search of person of suspect – Procedure to be followed – Held: Sub-s. (1) of s.50 makes it imperative for the empowered officer to "inform" the suspect of his right that if he so requires, he shall be searched before a gazetted officer or a Magistrate – Failure to do so would vitiate conviction and sentence where the conviction has been recorded only on the basis of recovery of contraband from the person of the accused – The provision is mandatory and requires strict compliance – In the instant case, merely consent of appellants was sought for search of their person by police party – Therefore, recovery of opium from them is unsustainable for non-compliance of provisions of s.50(1) – If, the quantity recovered from the vehicle is excluded, the remaining would not come within the mischief of 'commercial quantity' for imposing of such conviction and sentence – Taking note of the continuous period the appellants are in prison and non-compliance of the provisions of s. 50 (1), the sentence imposed on them by courts below, set aside.

Three appellants, traveling in a car, were stopped by the police party. On their consenting to personal search, they were searched in the presence of Panchas. They were found in possession of one packet each containing 825, 820 gms and 800 gms of "opium", respectively. On search of the vehicle, six more packets of "opium" were recovered. The trial court convicted each of the three

accused u/s 8 read with s.18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and sentenced them to 10 yeas RI and a fine of Rs. 1 lakh each. Their appeals were dismissed by the High Court

In the instant appeal, it was contended for the appellants that the prosecuting authorities failed to apprise the appellants of their right to be searched before a Gazetted Officer or the nearest Magistrate and, therefore, their conviction was liable to be set aside on this ground alone.

Allowing the appeal, the Court

HELD: 1.1. A reading of the Panchnama makes it clear that the appellants were not apprised about their legal right provided u/s 50 of the NDPS Act to be searched before a gazetted officer or a Magistrate, but consent was sought for their personal search. Merely asking them as to whether they would offer their personal search to the police officer or to gazetted officer may not satisfy the protection afforded u/s 50 of the NDPS Act as interpreted in *Baldev singh's case***.* [para 11] [1173-D-F]**

******State of Punjab vs. Baldev Singh,* **1999 (3) SCR 977 = (1999) 6 SCC 172 – relied on**

1.2. It is reiterated that sub-s. (1) of s.50 makes it imperative for the empowered officer to "inform" the person concerned about the existence of his right that if he so requires, he shall be searched before a gazetted officer or a Magistrate. Failure to do so vitiates the conviction and sentence of an accused where the conviction has been recorded only on the basis of the recovery of the illicit article from the person of the accused. It is also reiterated that the said provision is mandatory and requires strict compliance. Accordingly,

in view of the language as evident from the panchnama, this Court holds that in the case on hand, the search and seizure of the contraband from the person of the appellants is bad and conviction is unsustainable in law. [para 11-12] [1174-C-E]

Vijaysinh Chandubha Jadeja vs. State of Gujarat **2010 (13) SCR 255 = (2011) 1 SCC 609 – followed.**

Joseph Fernandez vs. State of Goa, **(2000) 1 SCC 707; and** *Prabha Shankar Dubey vs. State of M.P.,* **2003 (6) Suppl. SCR 444 = (2004) 2 SCC 56 – stood disapproved.**

Krishna Kanwar (Smt.) @ Thakuraeen vs. State of Rajasthan, **2004 (1) SCR 1101 = (2004) 2 SCC 608 – referred to.**

1.3. Though a portion of the contraband (opium) was recovered from the vehicle to which s.50 is not applicable, if the quantity recovered from the vehicle is excluded, the remaining would not come within the mischief of 'commercial quantity' for imposition of such conviction and sentence. Taking note of length of continuous period in prison as on date and in view of non-compliance of sub-s. (1) of s.50 in respect of recovery of contraband from the appellants, the conviction and sentence imposed on them by the trial court and confirmed by the High Court is set aside. [para 13] [1174-F-G]

Case Law Reference:

1999 (3) SCR 977	**relied on**	**para 4**
2010 (13) SCR 255	**followed**	**para 4**
(2000) 1 SCC 707	**stood disapproved**	**para 6**
2003 (6) Suppl. SCR 444	**stood disapproved**	**para 7**
2004 (1) SCR 1101	**referred to**	**para 8**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 300 of 2009.

From the Judgment & Order dated 23.08.2007 of the High Court of Madhya Pradesh Bench at Gwalior in Criminal Appeal No. 738 and 772 of 2000.

Dr. J.N. Dubey, Anurag Dubey, Meenesh Dubey, Anu Sawhney, S.R. Setia for the Appellants.

C.D. Singh, Sakshi Kakkar for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM,J. 1. This appeal is directed against the final judgment and order dated 23.08.2007 passed by the High Court of Madhya Pradesh, Bench at Gwalior in Criminal Appeal Nos. 738 and 772 of 2000 whereby the High Court dismissed the appeals filed by the appellants herein and confirmed the order of conviction and sentence dated 04.10.2000 passed by the Special Judge, Narcotic Drugs & Psychotropic Substances Act, Guna (M.P.) in Special Case No. 7 of 1998 by which they were convicted under Section 8 read with Section 18 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as "the NDPS Act") and sentenced to undergo rigorous imprisonment for ten years with a fine of Rs.1,00,000/- with default stipulation.

2. Brief facts:

(a) On 30.07.1998, at about 1.30 p.m., Som Singh Raghuvanshi, SHO, Police Station Kumbhraj, along with the police party went from the police station to search for the accused in connection with Crime No. 151 of 1998 registered under Sections 302 and 201 of IPC. In the process of searching, when they came to Khatkya Tiraha, they saw that one Maruti Car was coming from the side of Beenaganj. When they tried to stop that car, the driver tried to run away but they stopped the car and found three

persons sitting in it. On being asked about their names, they informed their names as Pramod, Suresh and Dinesh @ Pappu.

(b) Under suspicious circumstances, Panchas Shri Lal and Rup Singh were called from the 'Tiraha' and consent of all those persons was sought for their personal search and they gave their consent. After conducting the search, Panchnama was prepared. During search, they found that each of the appellants was having polythene bag in their possession which contained white colour substance and on its physical test, it was found "opium". The SDO (P), Radhogarh was informed about the incident. On weighing, all the three bags were contained 825 gms, 820 gms and 800 gms of "Opium". Samples of 25 gms were taken separately from each of the packets and the contents were sealed. Thereafter, the vehicle was also searched and inside the front mudguard, six packets of polythene bag containing 'opium' were also recovered weighing 810 gms, 820 gms, 690 gms, 820 gms, 800 gms and 615 gms respectively. Sample of 25 gms. from each of them were also taken and sealed. Thus, a total of 7 kg. Opium valued at Rs.1,03,575/- was seized from the appellants and they were arrested.

(c) Thereafter, along with the appellants and seized articles, the police party came to Kumbhraj Police Station and FIR being Crime Case No. 165/1998 was registered against them under Section 8 read with Section 18 of the NDPS Act. After investigation, the police filed charge sheet against the accused persons and the Special Judge, NDPS Act, Guna framed charges under Section 8 read with Section 18 of the Act. After trial, the Special Judge, by order dated 04.10.2000, convicted all the three accused persons and sentenced them to undergo RI for ten years along with fine of Rs.1,00,000/- each, in default of payment of fine, each would suffer two years' additional RI.

(d) Against the said order of conviction and sentence, Suresh and Pramod preferred appeal being Criminal Appeal No. 738 of 2000 and Dinesh preferred Criminal Appeal No. 772 of 2000 before the High Court. By common impugned judgment dated 23.08.2007, the High Court dismissed both the appeals.

(e) Aggrieved by the said judgment, the appellants have filed this appeal by way of special leave.

3. Heard Dr. J.N. Dubey, learned senior counsel for the appellants and Mr. C.D. Singh, learned counsel for the respondent-State.

4. The only point urged before us is about the non-compliance of Section 50 of the NDPS Act. According to Dr. J.N. Dubey, learned senior counsel for the appellant, considering the mandates provided under Section 50 of the NDPS Act as interpreted by two Constitution Benches of this Court, viz., *State of Punjab vs. Baldev Singh,* (1999) 6 SCC 172 and *Vijaysinh Chandubha Jadeja vs. State of Gujarat* (2011) 1 SCC 609, the prosecuting authorities failed to apprise the right of the suspect provided under Section 50 of the NDPS Act, hence on this ground the conviction is to be set aside. On the other hand, Mr. C.D. Singh, learned counsel for the State by pointing out the Panchnama regarding consent for personal search submitted that the conditions prescribed in Section 50 as explained in *Baldev Singh's* case (supra) have been fully complied with and prayed for dismissal of the appeal.

5. Since the only question pertains to compliance of Section 50 of the NDPS Act, it is useful to refer the same:

> ***"50. Conditions under which search of persons shall be conducted.—*** (1) When any officer duly authorised under Section 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall, if such person so requires, take such person

without unnecessary delay to the nearest gazetted officer of any of the departments mentioned in Section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the gazetted officer or the Magistrate referred to in sub-section (1).

(3) The gazetted officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

(5) When an officer duly authorised under Section 42 has reason to believe that it is not possible to take the person to be searched to the nearest gazetted officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest gazetted officer or Magistrate, proceed to search the person as provided under Section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior."

After noticing divergence of opinion between different Benches of this Court with regard to the ambit and scope of Section 50 of the NDPS Act and, in particular with regard to the admissibility of the evidence collected by an investigating officer during search and seizure conducted in violation of the provisions of Section 50, the issue was referred to the Constitution Bench. These provisions have been interpreted by

the Constitution Bench in *Baldev Singh's* case (supra). After considering the mandate of the law as provided under Section 50 of the NDPS Act and various earlier decisions, the Constitution Bench has concluded as under:

"57. On the basis of the reasoning and discussion above, the following conclusions arise:

(1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.

(2) That failure to inform the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused.

(3) That a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a gazetted officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act.

(4) That there is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The

answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the official concerned so that the laxity on the part of the investigating authority is curbed. In every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of the judicial process may come under a cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for the law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards provided by Section 50 at the trial, would render the trial unfair.

(5) That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the court on the basis of the evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50 and, particularly, the safeguards provided therein were duly complied with, it would not be permissible to cut short a criminal trial.

(6) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but hold that failure to inform the person concerned of his right as emanating from sub-

section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law.

(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50 of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search.

(8) A presumption under Section 54 of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of Section 50. An illegal search cannot entitle the prosecution to raise a presumption under Section 54 of the Act.

(9) xxx xxxx

(10) xxx xxxx"

6. After the decision in *Baldev Singh's* case (supra), a Bench of three Judges of this Court in *Joseph Fernandez vs. State of Goa,* (2000) 1 SCC 707, has also considered the requirement of Section 50 of the NDPS Act and in para 2, observed as under:

"Even then the searching officer informed him that "if you wish you may be searched in the presence of a gazetted officer or a Magistrate". This according to us is in 'substantial compliance' with the requirement of Section 50. We do not agree with the contention that there was non-compliance with the mandatory provision contained in Section 50 of the Act."

By saying so, after finding no reason to interfere with the conviction and sentence passed on the appellant therein, dismissed his appeal.

7. In *Prabha Shankar Dubey vs. State of M.P.,* (2004) 2 SCC 56, a two Judge Bench of this Court again considered the object of Section 50 of the NDPS Act. The Bench also extracted the conclusion arrived at in *Baldev Singh's* case (supra). After adverting to those conclusions and relying on the expression "substantial compliance" as stated in *Joseph Fernandez's* case (supra) rejected the plea that there was non-compliance with the requirement of Section 50 of the NDPS Act and consequently dismissed the appeal.

8. After the decision in *Joseph Fernandez's* case and *Prabha Shankar Dubey's* case, on the one hand and *Krishna Kanwar (Smt.) @ Thakuraeen vs. State of Rajasthan,* (2004) 2 SCC 608 on the other, again the interpretation relating to Section 50 was considered by the Constitution Bench in *Vijaysinh Chandubha Jadeja's* case(supra). The question that was posed before this Constitution Bench was whether Section 50 of 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 within the mandate of the Section 50? Before going into the ultimate conclusion arrived at by the Constitution Bench, the following details mentioned in paragraph 2 are also relevant which are as under:

> **"2.** When these appeals came up for consideration before a Bench of three Judges, it was noticed that there was a divergence of opinion between the decisions of this Court in *Joseph Fernandez v. State of Goa, Prabha Shankar Dubey v. State of M.P.* on the one hand and *Krishna Kanwar v. State of Rajasthan* on the other, with regard to the dictum laid down by the Constitution Bench of this Court in *State of Punjab v. Baldev Singh,* in particular regarding the question whether before conducting search, the police officer concerned is merely required to ask the suspect whether he would like to be produced before the Magistrate or a gazetted officer for the purpose of search or is the suspect required to be made aware of the existence of his right in that behalf under the law."

In order to set the controversy raised, the Constitution Bench, at the foremost, recapitulated the decision arrived at by the Constitution Bench in *Baldev Singh's* case (supra). After considering all the earlier decisions, the latter Constitution Bench arrived at the following conclusions:

> "24. Although the Constitution Bench in *Baldev Singh* case did not decide in absolute terms the question whether or not Section 50 of the NDPS Act was directory or mandatory yet *it was held that provisions of sub-section (1) of Section 50 make it imperative for the empowered officer to "inform" the person concerned (suspect) about the existence of his right* that if he so requires, he shall be searched before a gazetted officer or a Magistrate; failure to "inform" the suspect about the existence of his said right would cause prejudice to him, and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from the person during a search conducted in violation of the provisions of Section 50 of the NDPS Act. The Court also noted that it was not necessary that the information required to be given under Section 50 should be in a prescribed form or in writing *but it was mandatory that the*

suspect was made aware of the existence of his right to be searched before a gazetted officer or a Magistrate, if so required by him. We respectfully concur with these conclusions. Any other interpretation of the provision would make the valuable right conferred on the suspect illusory and a farce.

[Emphasis supplied]

28. We shall now deal with the two decisions, referred to in the referral order, wherein "substantial compliance" with the requirement embodied in Section 50 of the NDPS Act has been held to be sufficient. In *Prabha Shankar Dubey* a two Judge Bench of this Court culled out the ratio of Baldev Singh case on the issue before us, as follows: (Prabha Shankar Dubey case, SCC p. 64, para 11)

"11. … What the officer concerned is required to do is to convey about the choice the accused has. The accused (suspect) has to be told in a way that he becomes aware that the choice is his and not of the officer concerned, even though there is no specific form. The use of the word 'right' at relevant places in the decision of *Baldev Singh* case seems to be to lay effective emphasis that it is not by the grace of the officer the choice has to be given but more by way of a right in the 'suspect' at that stage to be given such a choice and the inevitable consequences that have to follow by transgressing it."

However, while gauging whether or not the stated requirements of Section 50 had been met on facts of that case, finding similarity in the nature of evidence on this aspect between the case at hand and Joseph Fernandez the Court chose to follow the views echoed in the latter case, wherein it was held that the searching officer's information to the suspect to the effect that "if you wish you may be searched in the presence of a gazetted officer or

a Magistrate" was in substantial compliance with the requirement of Section 50 of the NDPS Act. Nevertheless, the Court indicated the reason for use of expression "substantial compliance" in the following words: (*Prabha Shankar Dubey* case, SCC p. 64, para 12)

"12. The use of the expression 'substantial compliance' was made in the background that the searching officer had Section 50 in mind and it was unaided by the interpretation placed on it by the Constitution Bench in *Baldev Singh* case[4]. A line or a word in a judgment cannot be read in isolation or as if interpreting a statutory provision, to impute a different meaning to the observations."

It is manifest from the afore-extracted paragraph that Joseph Fernandez does not notice the ratio of *Baldev Singh and in Prabha Shankar Dubey, Joseph Fernandez* is followed ignoring the dictum laid down in Baldev Singh case.

29. 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 or 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.

30. As observed in *Presidential Poll,* In re: (SCC p. 49, para 13)

"13. … It is the duty of the courts to get at the real intention of the legislature by carefully attending [to] the whole scope of the provision to be construed. 'The key to the opening of every law is the reason and spirit of the law, it is the *animus imponentis,* the intention of the law maker expressed in the law itself, taken as a whole.' "

31. We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said section in *Joseph Fernandez and Prabha Shankar Dubey* is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in Baldev Singh case. Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf."

9. From the above, it is clear that the Constitution Bench has not approved the concept of "substantial compliance" as propounded in *Joseph Fernandez* (supra) and *Prabha Shankar Dubey* (supra). Keeping the above principles, as laid down in *Vijaysinh Chandubha Jadeja's* case (supra) which considered all the earlier decisions including the decision in *Baldev Singh,* in mind, let us consider whether the mandates of Section 50 as interpreted have been fully complied with or not?

10. Since the main question roving only to "right to inform" about his choice, it is relevant to refer the Panchnama regarding consent for personal search which is as under:

"Panchnama regarding consent for personal search

P.S. Kumbhraj, District Guna

Crime Case No. 0/98

Section 8/18 of N.D.P.S. Act

Place : A.B. Road, Khatakya Tiraha

Dated: 30.7.98 at 09.30 O' Clock

Names of witnesses:

1. Sri Lal s/o Sri Narain by caste Dhobi aged 26 years 2/o Tapra Colony, Kumbhraj.

2. Bhup Singh s/o Ramnarain by caste Meena aged 25 years, r/o Kanakherhi P.S. Kumbhraj.

In the presence of aforementioned 'panchas', I, the P.S. In-charge, asked the driver of Maruti Car No. D.N.C./7211 namely, Pramod Kumar s/o Raghuvir Singh by caste Gadariya, aged 20 years, r/o Chitbhawan, P.S. Ekdil, District Etawah, Suresh, s/o Rambabu Khatik, aged 18 years, r/o Village Chitbhawan, sitting with him in the case and Dinesh @ Pappu s/o Jagannath by caste Dube, aged 25 years, r/o Tikri presently at village Ballapur, P.S. Ajitmal, District Etawah, sitting on the rear seat, regarding their personal search asking them as to whether they would offer their personal search to me or to Gazetted Officer – S.D.O.P. Sahib. At this, all the three suspects gave their consent for their personal search by me, the P.S. In-charge, and they also agreed for search of the car by me. Panchnama regarding consent for search has been prepared in the presence of the 'Panchas'.

[Emphasis supplied]

Sd/- Signature of suspects

Sri Lal Sd/- Suresh
Sd/- Pramod Kumar
T.I. of Bhup Singh Sd/- Dinesh Kumar @ Pappu
Seen Sd/- (Illegible) 30.7.98"

11. The above Panchnama indicates that the appellants were merely asked to give their consent for search by the police party and not apprised of their legal right provided under Section 50 of the NDPS Act to refuse/to allow the police party to take their search and opt for being searched before the Gazetted officer or by the Magistrate. In other words, a reading of the Panchnama makes it clear that the appellants were not apprised about their right to be searched before a gazetted officer or a Magistrate but consent was sought for their personal search. Merely asking them as to whether they would offer their personal search to him, i.e., the police officer or to gazetted officer may not satisfy the protection afforded under Section 50 of the NDPS Act as interpreted in Baldev singh's case. Further a reading of the judgments of the trial Court and the High Court also show that in the presence of Panchas, the SHO merely asked all the three appellants for their search by him and they simply agreed. This is reflected in the Panchnama. Though in Baldev Singh's case, this Court has not expressed any opinion as to whether the provisions of Section 50 are mandatory or directory but "failure to inform" the person concerned of his right as emanating from sub-section (1) of Section 50 may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law. In *Vijaysinh Chandubha Jadeja's* case (supra), recently the Constitution Bench has explained the mandate provided under sub-section (1) of Section 50 and concluded that it is mandatory and requires strict compliance. The Bench also held that 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. The concept of substantial compliance as noted in *Joseph Fernadez* (supra) and *Prabha Shankar Dubey* (supra) were not acceptable by the Constitution Bench in *Vijaysinh Chandubha Jadeja*, accordingly, in view of the language as evident from the panchnama which we have quoted earlier, we hold that, in the case on hand, the search and seizure of the suspect from the person of the appellants is bad and conviction is unsustainable in law.

12. We reiterate that sub-section (1) of Section 50 makes it imperative for the empowered officer to "inform" the person concerned about the existence of his right that if he so requires, he shall be searched before a gazetted officer or a Magistrate, failure to do so vitiate the conviction and sentence of an accused where the conviction has been recorded only on the basis of possession of the contraband. We also reiterate that the said provision is mandatory and requires strict compliance.

13. Though a portion of the contraband (opium) was recovered from the vehicle for which Section 50 is not applicable, if we exclude the quantity recovered from the vehicle, the remaining would not come within the mischief of 'commercial quantity' for imposition of such conviction and sentence. Taking note of length of period in prison and continuing as on date and in view of non-compliance of sub-section (1) of Section 50 in respect of recovery of contraband from the appellants, we set aside the conviction and sentence imposed on them by the trial Court and confirmed by the High Court.

14. As a result, the appeal is allowed and the appellants are ordered to be released forthwith, if they are not required in any other case.

R.P. Appeal allowed.