SUBRAMANIAN SWAMY

v.

A. RAJA

(Special Leave Petition (Crl.) No. 1688 of 2012 etc.)

AUGUST 24, 2012

[G.S. SINGHVI AND K.S. RADHAKRISHNAN, JJ.]

SCAM:

2G Spectrum Scam – Complaint by the appellant before Special Judge CBI to set in motion provisions of Prevention of Corruption Act, against the then Telecom Minister – During examination u/s. 200 Cr.P.C.,the appellant made allegation that the then Finance Minister and the Telecom Minister were jointly and severely responsible for the scam – Prayer for making the Finance Minister an accused and for carrying out investigation against him – Special Judge held that the Finance Minister had no role in the subversion of the process of issuance of LOI and UAS Licences and allocation of spectrum in the year 2007-2008 and that there was no evidence that he was acting pursuant to criminal conspiracy – Prayers for making him accused and initiating investigation against him rejected – Special Leave Petition – Contentions interalia that the Finance Minister conspired with the Telecom Minister and thus committed criminal misconduct and that he, by illegal means, obtained pecuniary advantage – Held: The materials available on record do not lead to the conclusion that the Finance Minister conspired with the Telecom Minister or that he attempted to hide the illegalities in the award of the licences – Meeting of two ministers by itself would not be sufficient to infer the existence of a conspiracy – Criminal conspiracy cannot be inferred on the mere fact that there were official discussions between the officers of Ministry of Finance and that of Department of Telecom and between the two

Ministers – A wrong judgment or an inaccurate or incorrect approach or poor management, by itself cannot be said to be a product of criminal conspiracy – In view of the materials on record, it cannot be said that Finance Minister had misused his position or conspired or colluded with the Telecom Minister so as to fix low entry fee by non-visiting spectrum charges fixed in the year 2001 – No materials were made available even for a prima facie conclusion that the Finance Minister had deliberately allowed dilution of equity of the two companies – There is also no material made available to conclude that the Finance Minister abused his official position or used any corrupt or illegal means for obtaining any pecuniary advantage for himself or for any other person – No case is made out against him.

Centre for Public Interest Litigation and Ors. etc. v. Union of India and Ors. **(2012) 3 SCC 1– referred to.**

Indo China Steam Navigation Co. v. Jasjeet Singh **1964 (6) SCR 594;***State of Maharashtra v. Hans George* **1965 (1) SCR 123;** *R.S. Joshi, Sales Tax Officer, Gujarat and Ors. v. Ajit Mills Ltd. and Anr.* **1977 (4) SCC 98: 1978 (1) SCR 338 – cited.**

Case Law Reference:

1964(6) SCR 594	**Cited**	**Para 7**
1965 (1) SCR 123	**Cited**	**Para 7**
1978 (1) SCR 338	**Cited**	**Para 7**
(2012) 3 SCC 1	**Referred to**	**Para 8**

CRIMINAL APPELLATE JURISDICTION : Special Leave Petition (Crl) No. 1688 of 2012.

From the Judgment & Order dated 04.02.2012 of the

Sepcial Judge CBI (04) (2G Spectrum Cases), New Delhi in CC. No. 01(A)/11.

WITH

I.A. No. 34 in Civil Appeal No. 10660 of 2010.

Subramanian Swamy (In-Person), H.P. Raval, ASG, P.P. Rao, K.K. Venugopal, S. Wasim A. Qadri, Arijit Prasad, D.S. Mahra Anirudh Sharma, Harsh N. Parekh, A.K. Sharma for the Appearing parties.

The Order of the Court was delivered by

O R D E R

K.S. RADHAKRISHNAN, J. 1. Common questions arise for consideration in both these applications, hence they are being disposed of by a common order. SLP (Crl.) 1688 of 2012 arises out of an order dated 04.02.2012 in CC No.01(A)/11 passed by the Special Judge, CBI (04) (2G Spectrum Cases), New Delhi. I.A. No. 34 of 2012 has been filed by the appellants in Civil Appeal No. 10660 of 2010 claiming almost identical reliefs.

2. Dr. Subramanian Swamy, the petitioner in special leave petition filed a criminal complaint on 15.12.2010 before the Special Judge, CBI of Central/Delhi to set in motion the provisions of Prevention of Corruption Act (for short 'the PC Act') against A. Raja, the then minister of Telecommunications and to appoint him as a prosecutor under Section 5(3) of the PC Act. The complaint was numbered as CC No.1 of 2010 and was heard on several occasions. The case was later transferred to the Special Judge, CBI (04)(2G Spectrum Cases), New Delhi. CBI, after investigation, filed a charge sheet in that complaint on 2.4.2011 regarding commission of offences during 2007-2009 punishable under Sections 120B, 420, 468, 471 IPC and also punishable under Section 13(2) read with Section 13(1)(d) of the PC Act, against A. Raja and

others. Special Judge took cognizance on 2.4.2011. CBI's further investigation disclosed that the monetary involvement was much more and charge was laid. Special Judge took cognizance of the aforesaid charge sheet on 25.4.2011. Both the charge sheets were clubbed together vide order dated 22.10.2011 under Section 120B read with Sections 409, 420, 468 and 471 IPC and day to day trial began from 11.11.2011. Dr. Subramanian Swamy's complaint case No.CC 01/2011 was also taken on file and renumbered as CC.No.1(A)/2011.

3. Dr. Subramanian Swamy, the petitioner, herein, while he was being examined under Section 200, Code of Criminal Procedure in CC No. 01(A)/11 had deposed on 17.12.2011 as well as on 07.01.2012 that Shri A Raja, the first accused, could not have alone committed the offences alleged against him, but for the active connivance of Shri P. Chidambaram, the then Finance Minister. So far as the various charges were concerned, it was alleged that both Shri A. Raja and Shri P. Chidambaram were jointly and severely responsible. Reference was also made to documents including Ext. CW 1/1 to CW 1/28 with an emphasis that all those acts were done by the accused – Shri A Raja in connivance, collusion and consent of Shri P. Chidambaram and hence Shri P. Chidambaram was also guilty of commission of the offences under the P.C. Act for which Shri A. Raja was already facing trial. Further, it was also pointed out that Shri P. Chidambaram was also guilty of breach of trust on the question of national security for not disclosing that Etisalat and Telenor were black-listed by the Home Ministry. Further, it was pointed out that there was enough incriminating materials on record for carrying out the investigation against Shri P. Chidambaram and for making him an accused in the case. Further, it was also alleged that Shri P. Chidambaram had played a vital role in the subversion of the process of issuance of Letter of Intent (for short 'LOI'), Unified Access Service (for short 'UAS') Licences and allocation of spectrum in the year 2007-08. Further, it was also alleged that Shri P. Chidambaram was also complicit in fixing

the price of the spectrum licence at 2001 level and permitting two companies, which received the licence that is Swan Tele Communication (P) Ltd. (for short 'Swan') and Unitech (T.N.) Ltd. (for short 'Unitech') and to dilute their shares even before roll-out of their services.

4. Learned Special Judge, after referring to the various documents, produced found no substance in the allegations raised against Shri P. Chidambaram and found that he had no role in the subversion of the process of issuance of the LOI, UAS Licences and allocation of spectrum in the year 2007-08. Learned Judge concluded that there was no evidence on record that he was acting in pursuant to the criminal conspiracy, while being party to the two decisions regarding non-revision of the spectrum pricing and dilution of equity by the two companies. Consequently, the prayer made for carrying out the investigation against Shri P. Chidambaram and to make him an accused was rejected vide order dated 04.02.2012, against which SLP (Crl.) No. 1688 of 2012 has been filed.

5. Dr. Swamy appeared in person and elaborately referred to Annexure P-1 Final Report dated 03.04.2011 submitted by CBI before the Special Judge especially Para E, charge dealing with "Cheating the Government Exchequer by Non-Revision of Entry Fee". Reference was also made to the summary of his arguments raised before the Special Judge for carrying out investigation against Shri P. Chidambaram and to array him as an accused in the pending criminal case. Reference was also made to the meetings that Shri P. Chidambaram had with Shri A. Raja on 30.01.2008, 29.05.2008, 12.06.2008 and later with the Prime Minister on 04.07.2008 and submitted that in those meetings both of them conspired together for a common object and purpose in fixing the pricing of spectrum at the year 2001 level and permitting distribution equally by two companies Swan and Unitech. Further, it was also pointed out that Shri P. Chidambaram was fully aware, at least, on 09.01.2008 as to what Shri A Raja was

planning to do on 10.01.2008. Referring to several documents placed on record, it was pointed out that in fact Shri P. Chidambaram did not pay heed to the opinions expressed by the officials of his own Ministry and abeted to commit various illegal acts.

6. Dr. Swamy referred to various ingredients of Section 13(1)(d)(iii) of PC Act and pointed out that a bare reading of the above mentioned provision shows that mens rea or criminal intent was not an essential ingredient of that Section. Reference was made to the judgment of this Court reported in *Indo China Steam Navigation Co*. *v. Jasjeet Singh* [1964(6) SCR 594], *State of Maharashtra v. Hans George* [1965 (1) SCR 123] and *R.S. Joshi, Sale s Tax Officer, Gujarat and Others v. Ajit Mills Ltd. and Another* [1977 (4) SCC 98] and submitted the ratio of above judgments indicate that certain criminal offences imposing punishment of incarceration need not require mens rea instead strict liability as enumerated in the statute itself. Dr. Swamy pointed out that the above mentioned statutory provision would indicate that the emphasis is on "obtains" and "public interest". Dr. Subramanian Swamy submitted that the learned trial judge had failed to notice those vital aspects and has wrongly rejected the prayer for conducting investigation against Shri P. Chidambaram and to array him as an accused.

7. Shri Prashant Bhushan, learned counsel appearing for the applicants in I.A. No. 34 of 2012 has indicated the necessity of conducting a thorough investigation by the CBI into the role of the then Finance Minister Shri P. Chidambaram in the matter of fixing the spectrum pricing and allowing the sale of equity by Swan and Unitech. Learned counsel pointed out that in that process, Shri P. Chidambaram had over-ruled the officers of his own Ministry who favoured auction / market-based pricing of spectrum and instead allowed various companies to make windfall profits. Further, it was also stated that he had allowed the above-mentioned companies to sell off their shares without charging any Government's share of its premium on account

of spectrum valuation and without enforcing his own agreement with the then Telecom Minister.

8. Learned counsel made specific reference to para 2.1.2(3) and submitted that the Group of Ministers (GoMs) had in their recommendation dated 30.10.2003 stated that the Department of Telecom (DoT) and the Ministry of Finance (MoF) would discuss and finalise spectrum pricing formula which would include incentive for efficient use of spectrum as well as disincentive for suboptimal usages. Learned counsel pointed out that the above recommendation would clearly indicate that MoF officials were fully aware that unless such 'concurrence' based on discussion and finalization of spectrum pricing formula between the DoT and the MoF had been established, the DoT could not have moved ahead and spectrum could have been allocated at 2001 rates in the year 2007-08.

9. Learned counsel also referred to the "Position Paper on Spectrum Policy" prepared by the Department of Economic Affairs (revised on 03.01.2008) which was forwarded along with covering letter dated 09.01.2008. The Telecom Commission meeting which was to take place on 09.01.2008 was postponed to 15.01.2008. Further, it was pointed out that before the scheduled meeting of the Telecom Commission on 15.01.2008, DoT had already issued 122 LOIs for UAS licenses on 10.01.2008 and that LOIs were converted into licenses during 27.02.2008 to 7.3.2008 and the spectrum allocation was started from 22.4.2008 and completed 6.5.2009. Learned counsel pointed out that, the then Finance Minister had enough time to stop the scam, since the price was not fixed by the DoT and MoF as authorized by the GoMs (2003).

10. Further, it was also stated that before the Telecom Commission could meet, then Finance minister made a note on 15.01.2008 to the Prime Minister of India pointing out that the note did not deal with the need, if any, to revise entry fee or

the rate of revenue share, and also indicated the said note dealt with spectrum charges for 2G spectrum. Further, it was also stated by Shri Prashant Bhushan that then Finance Minister and Shri A Raja had met on 30.01.2008 to discuss the issue of licensing and spectrum pricing. In that meeting, then Finance Minister had announced the issue of revising entry fee of 122 LOIs already issued by DoT and that they were not seeking to revisit the current regimes for entry fee or for revenue share.

11. Shri Bhushan also referred to the approach paper by Department of Telecom Commission, which was forwarded by the Secretary, DoT to the Finance Secretary, MoF, which would indicate that the officials of Finance Ministry were keen to stop the allocation of spectrum of 4.4 MHz and were suggesting the allocation of spectrum by way of auction.

12. Learned counsel also referred to the sequel note to the Department of Economic Affairs dated 11.02.2008 which according to the learned counsel, would indicate that the MoF had deferred from the position of DoT and stated that there was no contractual obligation to allot a start-up spectrum of 4.4 MHz to every licencee free of cost and that the entire range of the spectrum allotted should be priced and that the issue of level playing field could be addressed by charging the price even on existing operators. Learned counsel pointed out that in spite of objection raised by the officials of Ministry, the Finance Minister acted in connivance with Shri A Raja and Shri A Raja went ahead and issued 122 licences which could have been prevented by Shri P. Chidambaram, had he stood with the views of his officials.

13. Learned counsel also referred to note dated 07.04.2008 sent by the Finance Secretary after discussion with the Finance Minister wherein it was noticed that DoT was agreeable for pricing of spectrum beyond 4.4 MHz but wanted that to be deferred till auction of 3G and WIMax was completed. Reference was also made by the learned counsel to the note dated 03.04.2008 of the Additional Secretary (EA) and pointed

out that then Finance Minister had agreed that spectrum usage charge should be increased reflecting the scarcity value of spectrum as indicated in their note dated 11.02.2008. Further, the note also indicated the Finance Minister's view that they should insist, in principle, on pricing spectrum beyond 4.4 MHz although details could be worked out after the auction of 3G spectrum.

14. Shri Prashant Bhushan also referred to the Office Memorandum, MoF dated 8.4.2008 prepared by Shri Govind Mohan, Director which, according to the learned counsel reflected the MoF's original position of 11.2.2008 on the issue of subjecting the entire spectrum to specific pricing. Learned counsel alleged that the note issued was later withdrawn and the officer was reprimanded and a fresh Office Memorandum was issued by the same Director. Learned counsel compared the original Office Memorandum dated 08.04.2008 and the new Office Memorandum and submitted that the original Office Memorandum had required the entire range of spectrum to be specifically priced and the revised Office Memorandum which was prepared on 9.4. 2008 had presented with a date of 8.4.2008, specifically sought to exclude start-up spectrum upto 4.4 MHz from being specifically charged, ensuring the entry fee of 2001 that was fixed by the then Telecom Minister in 2008, was not revised. Shri Bhushan submitted that the officer had to apologize for his deeds and on 16.04.2008, the then Finance Minister accepted the apology of the officer.

15. Learned counsel also referred to letter dated 21.4. 2008 sent by the then Finance Minister to Shri A Raja and submitted that the spectrum issue "non paper" was silent on the issue of entry fee for start-up spectrum for 122 licences already issued and the discussion mainly concentrated on the charging for spectrum beyond 4.4 MHz. Reference was also made to the Finance Secretary's updated note dated 29.04.2008 which, according to the learned counsel, reflected the same position preferred by MoF. Both Shri A Raja and Shri P. Chidambaram

met on 29.05.2008 as well as on 12.06.2008. Learned counsel also pointed out that on 4.7.2008, the then Finance Minister, Shri A Raja along with Finance Secretary met the Prime Minister. By the time, LOIs were already issued which were converted to licences, allocation of start-up spectrum was started. Learned counsel also made reference to the CAG report and the pointed out the reference made to Shri P. Chidambaram. Reference was also made to the briefing made by the Prime Minister, to the Media on 16.2.2011 and also the address made by the Prime Minister in Rajya Sabha on 24.2.2011.

16. Learned counsel also pointed out that there was no justification, in any view, in allotting the start-up spectrum 4.4 MHz to every licensee free of cost and submitted that the entire range of spectrum allotted should have been priced. Learned counsel pointed out that one price of spectrum between 4.4 MHz and 6.2MHz and different price for spectrum between beyond 6.2 MHz would be non-transparent and illegal. Learned counsel pointed out that in fact the MoF had initially objected the above stand of DoT but subsequently yielded after the meeting Shri P. Chidambaram had with Shri A Raja.

17. Learned counsel pointed out all those facts which would clearly indicate that Shri P. Chidambaram the then Finance Minister was also equally responsible. Non-revision of spectrum price though specifically recommended by the GoMs in the year 2003 would indicate, according to the counsel, that Shri P. Chidambaram colluded up with Shri A Raja in non-auctioning of the spectrum and went on for allotment of first come first served basis at 2001 rates. Further, it was also pointed out that Shri P. Chidambaram had not revised his position from giving away 4.4 MHz of spectrum at 2001 prices and giving away 6.2 MHz of spectrum at 2001, thus causing huge loss to the exchequer. Further, he was also instrumental along with Shri A. Raja for allowing companies like Swan and Unitech to sell off their shares without charging any

Government's share of its premium. Counsel therefore prayed for a direction of CBI to conduct a thorough investigation / further investigation into the role of Shri P. Chidambaram in 2G spectrum scam under the close scrutiny of this court.

18. We heard Dr. Subramnian Swamy, appearing in person and Shri Prashant Bhushan, learned counsel at length. Arguments raised give rise to the following questions:

(1) Whether Shri P. Chidambaram has conspired with Shri A Raja in fixing the price of the spectrum at 2001 level thereby committed the offence of criminal misconduct.

(2) Whether Shri P. Chidambaram by corrupt and illegal means obtained for himself or for Shri Raja any valuable thing or pecuniary advantage.

(3) Whether Shri P. Chidambaram has deliberately allowed dilution of equity by Swam Telecom Pvt. Ltd. and Unitech Wireless (Tamil Nadu) Ltd. at the cost of public exchequer.

(4) Whether Shri P. Chidambaram has conspired with Shri A. Raja in fixing one price of spectrum between 4.4 MHz and 6.2 MHz and another price for spectrum beyond 6.2 MHz for unlawful gain, for benefiting the licensees.

(5) Whether the above mentioned acts fall within the scope of Section 13(1)(d)(i) to (ii) of the P.C. Act and the materials on record are sufficient to conclude so.

19. Shri P. Chidambaram was the Finance Minister of the Union of India from 22.5.2004 to 31.11.2008. Brief reference to facts prior to 22.5.2004 has already been made by this Court in its judgment in *Centre for Public Interest Litigation and Others etc. v. Union of India and Others* (2012) 3 SCC 1 and hence not repeated, but reference to few facts is necessary to

appreciate and understand the alleged involvement of Shri P. Chidambaram in the 2G Scam

20. The Telecom Regulatory Authority of India (for short 'TRAI'), a statutory authority constituted under the Telecom Regulatory Authority of India Act, 1997 (for short "1997 Act"), had made certain recommendations on 27.10.2003 on UAS Licence for the allocation of spectrum under Sections 11(1)(a)(i), (ii), (iv) and (vii) of the 1997 Act. Para 7.30 of the recommendations emphasized the necessity of efficient utilisation of spectrum by all service providers and indicated that it would make further recommendations on efficient utilisation of spectrum, spectrum pricing, availability and spectrum allocation procedure and that the DoT might issue spectrum related guidelines based on its recommendations.

21. A GoMs was constituted on 10.9.2003 with the approval of the then Prime Minister to consider various issues as to how to ensure release of adequate spectrum for the telecom sector, including the issues relating to merger and acquisition in the telecom sector and to recommend how to move forward. GoMs made detailed recommendations on 30.10.2003. Para 2.1.2(3) of the recommendations reads as follows:

> "(3) The Department of Telecom and Ministry of Finance would discuss and finalise spectrum pricing formula which will include incentive for efficient use of spectrum as well as disincentive for sub-optimal usages."

Para 2.1.2(4) stated that the allotment of additional spectrum would be transparent, fair and equitable, avoiding monopolistic situation regarding spectrum allotment usage. Para 2.4.6(ii) of the recommendations reads as follows:

> "(ii) The recommendations of TRAI with regard to implementation of the Unified Access Licensing Regime for basic and cellular services may be accepted."

22. The recommendations of the GoMs were accepted by the Council of Ministers on 31.10.2003, the meeting of which was chaired by the then Prime Minister. The then Minister of Communications on 24.11.2003 accepted the recommendations that entry fee for new UAS licensees would be the entry fee of the fourth cellular operator and where there was no fourth cellular operator, it would be the entry fee fixed by the Government for the basic operator. A decision was also taken by the then Minister for Communications for the grant of spectrum licenses on first-come-first served basis. Shri Dayanidhi Maran became the Minister for Telecommunications on 26.5.2004.

23. TRAI later made comprehensive recommendations on 13.5.2005 on various issues relating to spectrum policy i.e. efficient utilisation of spectrum, spectrum allocation, spectrum pricing, spectrum charging and allocation for other terrestrial wireless links. On 23.2.2006, the Prime Minister approved the constitution of a GoMs consisting of the Minister of Defence, Home Affairs, Finance, Parliamentary Affairs, Information and Broadcasting and Communications, to look into issues relating to vacation of spectrum. Deputy Chairman, Planning Commission was a special invitee. The Terms of Reference of GoMs, inter alia, suggested a spectrum pricing policy. Shri Dayanidhi Maran, the then Minister of Telecommunications wrote a letter dated 28.2.2006 to the Prime Minister indicating that the terms of reference of the GoMs would impinge upon the work of his Ministry since wider in scope and requested that they be modified in accordance with the draft enclosed along with his letter. The draft forwarded by the Minister, however, did not contain any formula for spectrum pricing. However, on 7.12.2006, the Cabinet Secretary conveyed the approval of the Prime Minister to the modified terms of reference which did not contain any formula for spectrum pricing.

24. DoT, later, vide its letter dated 13.4.2007 requested TRAI to furnish its recommendations under Section 11(1)(a) of

the 1997 Act on the issues of limiting the number of access providers in each service area and for the review of the terms and conditions in the access provider licence mentioned in the letter. Shri Dayanidhi Maran had by the time resigned on 14.5.2007 and Shri A. Raja became the Minister for Telecommunications on 16.5.2007.

25. TRAI made its recommendations on 28.8.2007. One of the recommendations made by TRAI was that in future all spectrums excluding the spectrum in 800, 900 and 1800 MHz bands in 2G services should be auctioned. Para 2.73 of the recommendations is of some importance and hence extracted hereunder:

> "2.73. .....The Authority in the context of 800, 900 and 1800 MHz is conscious of the legacy i.e. prevailing practice and the overriding consideration of level playing field. Though the dual charge in present form does not reflect the present value of spectrum it needed to be continued for treating already specified bands for 2G services i.e. 800, 900 and 1800 MHz. It is in this background that the Authority is not recommending the standard options pricing of spectrum, however, it has elsewhere in the recommendation made a strong case for adopting auction procedure in the allocation of all other spectrum bands except 800, 900 and 1800 MHz."

Paras 2.74, 2.75, 2.76, 2.77, 2.78 and 2.79 are also relevant for determining the various issues which arise for consideration in this case and hence given below for ready reference:

> "**2.74** Some of the existing service providers have already been allocated spectrum beyond 6.2 MHz in GSM and 5 MHz in CDMA as specified in the license agreements without charging any extra one time spectrum

charges. The maximum spectrum allocated to a service provider is 10 MHz so far. However, the spectrum usage charge is being increased with increased allocation of spectrum. The details are available at Table 8.

2.75 The Authority has noted that the allocation beyond 6.2 MHz for GSM and 5 MHz for CDMA at enhanced spectrum usage charge has already been implemented. Different licensees are at different levels of operations in terms of the quantum of spectrum. Imposition of additional acquisition fee for the quantum beyond these thresholds may not be legally feasible in view of the fact that higher levels of usage charges have been agreed to and are being collected by the Government. Further, the Authority is conscious of the fact that further penetration of wireless services is to happen in semi-urban and rural areas where affordability of services to the common man is the key to further expansion.

2.76 However, the Authority is of the view that the approach needs to be different for allocating and pricing spectrum beyond 10 MHz in these bands i.e. 800, 900 and 1800 MHz. In this matter, the Authority is guided by the need to ensure sustainable competition in the market keeping in view the fact that there are new entrants whose subscriber acquisition costs will be far higher than the incumbent wireless operators. Further, the technological progress enables the operators to adopt a number of technological solutions towards improving the efficiency of the radio spectrum assigned to them. A cost-benefit analysis of allocating additional spectrum beyond 10 MHz to existing wireless operators and the cost of deploying additional CAPEX towards technical improvements in the networks would show that there is either a need to place a cap on the maximum allocable spectrum at 10 MHz or to impose framework of pricing through additional acquisition fee beyond 10 MHz.

The Authority feels it appropriate to go in for additional acquisition fee of spectrum instead of placing a cap on the amount of spectrum that can be allocated to any wireless operator. In any case, the Authority is recommending a far stricter norm of subscriber base for allocation of additional spectrum beyond the initial allotment of spectrum. The additional acquisition fee beyond 10 MHz could be decided either administratively or through an auction method from amongst the eligible wireless service providers. In this matter, the Authority has taken note of submissions of a number of stakeholders who have cited evidences of the fulfillment of the quality of service benchmarks of the existing wireless operators at 10 MHz and even below in almost all the licensed service areas. Such an approach would also be consistent with the Recommendation of the Authority in keeping the door open for new entrant without putting a limit on the number of access service providers.

2.77 The Authority in its recommendation on "Allocation and pricing of spectrum for 3G and broadband wireless access services" had recommended certain reserve price for 5 MHz of spectrum in different service areas. The recommended price are as below:

Service areas	Price (Rs. in million) for 2 MHz x 5 MHz
Mumbai, Delhi and Category A	800
Chennai, Kolkata and Category B	400
Category C	150

The Authority recommends that any licensee who seeks to get additional spectrum beyond 10 MHz in the

existing 2G bands i.e. 800,900 and 1800 MHz after reaching the specified subscriber numbers shall have to pay a onetime spectrum charge at the above mentioned rate on prorata basis for allotment of each MHz or part thereof of spectrum beyond 10 MHz. For one MHz allotment in Mumbai, Delhi and Category A service areas, the service provider will have to pay Rs. 160 million as one time spectrum acquisition charge.

2.78 As far as a new entrant is concerned, the question arises whether there is any need for change in the pricing methodology for allocation of spectrum in the 800, 900 and 1800 MHz bands. Keeping in view the objective of growth, affordability, penetration of wireless services in semi-urban and rural areas, the Authority is not in favour of changing the spectrum fee regime for a new entrant. Opportunity for equal competition has always been one of the prime principles of the Authority in suggesting a regulatory framework in telecom services. Any differential treatment to a new entrant vis-a-vis incumbents in the wireless sector will go against the principle of level playing field. This is specific and restricted to 2G bands only i.e. 800, 900 and 1800 MHz. This approach assumes more significance particularly in the context where subscriber acquisition cost for a new entrant is likely to be much higher than for the incumbent wireless operators.

2.79 In the case of spectrum in bands other than 800, 900 and 1800 MHz i.e. bands that are yet to be allocated, the Authority examined various possible approaches for pricing and has come to the conclusion that it would be appropriate in future for a market based price discovery systems. In response to the consultation paper, a number of stakeholders have also strongly recommended that the allocation of spectrum should be immediately de-linked from the license and the future allocation should be based on auction. The Authority in its recommendation on

"Allocation and pricing of spectrum for 3G and broadband wireless access services" has also favored auction methodology for allocation of spectrum for 3G and BWA services. It is therefore recommended that in future all spectrum excluding the spectrum in 800, 900 and 1800 bands should be auctioned so as to ensure efficient utilization of this scarce resource. In the 2G bands (800 MHz/900 MHz/1800 MHz), the allocation through auction may not be possible as the service providers were allocated spectrum at different times of their license and the amount of spectrum with them varies from 2X4.4 MHz to 2X10 MHz for GSM technology and 2X2.5 MHz to 2X5 MHz in CDMA technology. Therefore, to decide the cut off after which the spectrum is auctioned will be difficult and might raise the issue of level playing field."

26. The Internal Committee of DoT considered the above recommendations made by TRAI and its report was placed before the Telecom Commission on 10.10.2007. The Finance Secretary and other three non-permanent members were not informed of that meeting, but attended only by the officials of DoT and the report of the Internal Committee was approved by the Telecom Commission. Shri A. Raja accepted the recommendations of Telecom Commission. Consequently, the recommendations of TRAI dated 28.8.2007 stood approved by the Internal Committee of DoT, Telecom Commission and DoT. DoT, it may be noted, did not get in touch with the Ministry of Finance to discuss and finalise the spectrum pricing formula which had to include incentive for efficient use of spectrum as well as disincentive for suboptimal usage in terms of the Cabinet decision of 2003.

27. Above facts would indicate that neither Shri P. Chidambaram nor the officials of MoF had any role in the various decisions taken by TRAI on 28.8.2007, decision taken by the Internal Committee of DoT and the decision of the Telecom Commission taken on 10.10.2007.

28. DoT then went ahead to process applications received for UAS licences. Between 24.9.2007 and 1.10.2007, over 300 applications were received. The Member (Technology), Telecom Commission and ex-officio Secretary to the Government of India sent a letter dated 26.10.2007 to the Secretary, Department of Legal Affairs, Ministry of Law and Justice seeking the opinion of the Attorney General of India/ Solicitor General of India for dealing with those applications for licences. The Law Secretary placed the papers before the Minister of Law and Justice on 1.11.2007 who had recommended that the entire issue be considered by an Empowered GoMs and, in that process, opinion of the Attorney General of India be obtained. When the note of the Law Minister was placed before Shri A. Raja, he recorded a note on 2.11.2007 calling for discussion. Shri A. Raja, however, on the same day, ordered the issuance of LoIs to new applicants as per the then existing policy and authorised Shri R. K. Gupta, ADG (AS-1) for signing the LoIs on behalf of the President of India. Shri A. Raja had also ordered for the issuance of LoI to the applicants whose applications had been received up to 25.9.2007 and also sent a letter bearing DO No. 20/100/2007-AS-I dated 2.11.2007 to the Prime Minister and took strong objection to the suggestion made by the Law Minister by describing his opinion as totally out of context.

29. The Prime Minister, however, vide his letter dated 2.11.2007 had requested Shri A. Raja to give urgent consideration to the various issues raised with a view to ensuring fairness and transparency and requested him to inform the Prime Minister of the position before taking any further action. On the same day, Shri A.Raja sent a reply to the Prime Minister brushing aside the suggestions made by the Prime Minister pointing out that it would be unfair, discriminatory, arbitrary and capricious to auction the spectrum to new applicants as it would not give them a level playing field. The relevant portion of Para 3 of Shri A. Raja's letter is extracted below:

"3. Processing of a large number of applications received for fresh licenses against the backdrop of inadequate spectrum to cater to overall demand

The issue of auction of spectrum was considered by the TRAI and the Telecom Commission and was not recommended as the existing licence holders who are already having spectrum upto 10 MHz per Circle have got it without any spectrum charge. It will be unfair, discriminatory, arbitrary and capricious to auction the spectrum to new applicants as it will not give them level playing field.

I would like to bring it to your notice that DoT has earmarked totally 800 MHz in 900 MHz and 1800 MHz bands for 2G mobile services. Out of this, so for a maximum of about 35 to 40 MHz per Circle has been allotted to different operators and being used by them. The remaining 60 to 65 MHz, including spectrum likely to be vacated by Defence Services, is still available for 2G services.

Therefore, there is enough scope for allotment of spectrum to few new operators even after meeting the requirements of existing operators and licensees. An increase in number of operators will certainly bring real competition which will lead to better services and increased teledensity at lower tariff. Waiting for spectrum for long after getting licence is not unknown to the Industry and even at present Aircel, Vodafone, Idea and Dishnet are waiting for initial spectrum in some Circles since December 2006."

30. Shri P. Chidambaram, it is seen, had no role in the exchange of those communications or the expression of opinions of the decisions taken between Shri A. Raja and the Prime Minister's Office, a situation created by Shri A. Raja and the officials of DoT. Neither Shri P. Chidambaram nor the

officials of the MoF did figure in those communications and hence the allegation of involvement of Shri P. Chidambaram in the 2G Scam has to be examined in that background.

31. The Secretary, DoT made a presentation of the spectrum policy on 20.11.2007 to the Cabinet Secretary. Finance Secretary, Dr. Subbarao, who had witnessed the presentation sent a letter dated 22.11.2007 to the Secretary, DoT to know whether proper procedure had been followed with regard to financial diligence. The operative portion of the letter reads as follows:

> "2. That purpose of this letter is to confirm if proper procedure has been followed with regard to financial diligence. In particular, it is not clear how the rate of Rs.1600 crore, determined as far back as in 2001, has been applied for a license given in 2007 without any indexation, let alone current valuation. Moreover, in view of the financial implications, the Ministry of Finance should have consulted in the matter before you had finalized the decision.
>
> 3. I request you to kindly review the matter and revert to us as early as possible with responses to the above issues. Meanwhile, all further action to implement the above licenses may please be stayed. Will you also kindly send us copies of the letters of permission given and the date?"

32. DoT replied to the Finance Secretary vide letter dated 29.11.2007. the operative portion of the same reads as follows:

> "As per Cabinet decision dated 31st October, 2003, accepting the recommendations of Group of Ministers (GoM) on Telecom matters, headed by the then Hon'ble Finance Minister, it was inter alia decided that "The recommendations of TRAI with regard to implementation of the Unified Access Licensing Regime for basic and

> cellular services may be accepted. DoT may be authorized to finalize the details of implementation with the approval of the Minister of Communications and IT in this regard including the calculation of the entry fee depending on the date of payment based on the principle given by TRAI in its recommendations……."

33. DoT also pointed out in that letter that the entry fee was also finalised for UAS regime in 2003 based on the decision of the Cabinet and it was decided to keep the entry fee for the UAS license the same as the entry fee of the fourth cellular operator, which was based on a bidding process in 2001. Further, it was also pointed out that the dual technology licenses were licenses based on TRAI recommendations of August 2007 and that TRAI in its recommendations dated 28.8.2007 had not recommended any changes in entry fee/ annual license fee and hence no changes were considered in the existing policy.

34. Shri A. Raja then sent a letter dated 26.12.2007 to the Prime Minister, Paras 1 and 2 of that are extracted below:

> "1. Issue of Letter of Intent (LOI): DOT follows a policy of First-cum-First Served for granting LOI to the applicants for UAS licence, which means, an application received first will be processed first and if found eligible will be granted LOI.
>
> 2. Issue of Licence: The First-cum-First Served policy is also applicable for grant of licence on compliance of LOI conditions. Therefore, any applicant who complies with the conditions of LOI first will be granted UAS licence first. This issue never arose in the past as at one point of time only one application was processed and LOI was granted and enough time was given to him for compliance of conditions of LOI. However, since the Government has adopted a policy of "No Cap" on number of UAS Licence, a large number of LOI's are proposed to be issued

simultaneously. In these circumstances, an applicant who fulfils the conditions of LOI first will be granted licence first, although several applicants will be issued LOI simultaneously. The same has been concurred by the Solicitor General of India during the discussions."

DDG (AS), DoT, after a few days, prepared a note incorporating therein the changed first-come-first-served policy to which reference was made in the letter addressed to the Prime Minister.

35. We have no information as to whether the PMO had replied to the letter dated 26.12.2007 sent by A. Raja. After brushing aside the views expressed by Dr. D. Subbarao in his letter dated 22.11.2007, views expressed by the Minister of Law and Justice on 1.11.2007, as well as the views expressed by the Prime Minister on 2.11.2007, A. Raja and the officials of DoT went ahead in implementing the policy of first-come-first-served basis for the grant of UAS licenses for which it is seen, no further objection had been raised by the Prime Minister's Office.

36. Telecom Commission meeting was then scheduled to be held on 9.1.2008 to consider two important issues i.e. performance of telecom sector and pricing of spectrum but the meeting was postponed to 15.1.2008. But, on 10.1.2008, a press release was issued by DoT stating that TRAI on 28.8.2007 had not recommended any cap on the number of access service providers in any service area. Further, it was also stated that the Government had accepted the recommendations of TRAI and that DoT had decided to issue LoIs to all the eligible applicants on the date of application who applied up to 25.9.2007. Further, it was also stated in the press release that DoT had been implementing a policy of first-come-first-served for grant of UAS licences under which initially an application which was received first would be processed first and thereafter if found eligible would be granted LoI and then whosoever complied with the conditions of LoI first would be granted UAS licence.

37. Another press release was issued on 10.1.2008 by DoT requesting the applicants to submit compliance with the terms of LoIs. Soon after obtaining the LoI, three of the successful applicants offloaded their stakes for thousands of crores in the name of infusing equity, the details are as under:

"(i) Swan Telecom Capital Pvt. Ltd. (now known as Etisalat DB Telecom Pvt. Ltd.) which was incorporated on 13.7.2006 and got UAS Licence by paying licence fee of Rs. 1537 crores offloaded its 45% (approximate) equity in favour of Etisalat of UAE for over Rs.3,544 crores.

(ii) Unitech which had obtained licence for Rs.1651 crores offloaded its stake 60% equity in favour of Telenor Asia Pte. Ltd., a part of Telenor Group (Norway) in the name of issue of fresh equity shares for Rs.6120 crores between March, 2009 and February, 2010.

(iii) Tata Tele Services transferred 27.31% of equity worth Rs. 12,924 crores in favour of NTT DOCOMO.

(iv) Tata Tele Services (Maharashtra) transferred 20.25% equity of the value of Rs. 949 crores in favour of NTT DOCOMO."

38. Materials made available would not indicate any role played by Shri P. Chidambaram on the steps taken by Shri A. Raja and DoT, reference of which have elaborately been made in the previous paragraphs of this judgment. The views expressed by Dr. D. Subbarao in his letter dated 22.11.2007 were already brushed aside by A. Raja and DoT officials and a communication dated 29.11.2007 was already sent to Dr. Subbarao followed by a letter to the Prime Minister on 26.12.2007.

39. MoF then sent a letter on 9.1.2008, following the letter of Dr. D. Subbarao dated 22.11.2007 as well as the reply

received from DoT on 29.11.2007, which was prepared and sent as instructed by Shri P. Chidambaram for presentation in the meeting of the Telecom Commission which was held on 10.1.2008. Note referred to the recommendations of GoMs for discussing and finalizing the spectrum pricing formula by DoT and Ministry of Finance. Paras 6.3 and 8.4 of the note which was prepared as instructed by Shri P. Chidambaram are relevant and hence are extracted hereunder:

> "6.3 Given the fact that there are reportedly over 575 applications pending with DoT (including 45 new applicants) there is a case for reviewing the entry fee fixed in 2001. This is an administratively fixed fee. Therefore any change should be governed by transparent and objective criteria applicable uniformly to all new entrants.
>
> 8.4 The most transparent method of allocation of spectrum would be by auction. However, there are two caveats to the auction method.
>
> (a) The ways in which the existing licensees in GSM and CDMA would be eligible to participate in the auction vis-a-vis the new entrants; and
>
> (b) The advantages and disadvantages of the method itself. A detailed table is placed at Annexure V."

40. Shri P. Chidambaram, following the views expressed by the Ministry of Finance on 9.1.2008, on his instructions, also sent a note to the Prime Minister on 15.1.2008 on spectrum charges. Noticeably, this letter was sent at a time when Finance Secretary's view was rejected by Shri A. Raja and the officers of the DoT and that Shri A. Raja's views were not overturned even by the Prime Minister's Office. Therefore, the allegation that the attempt of Shri P. Chidambaram was to hide the illegalities in the award of licences is unfounded. On the other

hand, Shri P. Chidambaram was advocating the fact that the most important method of allocating the spectrum would be through auction. Shri P. Chidambaram also made a reference in the note of the recommendations made in the year 2003 by TRAI and GoMs and stated that the recommendations note did not deal with the need, if any, to revise entry fee or the rate of revenue share, but dealt with the spectrum charges for 2G spectrum. Para 10 of the note sent by Shri P. Chidambaram reads as follows:

> "10. Spectrum is a scarce resource. The price for spectrum should be based on its scarcity value and efficiency of usage. The most transparent method of allocating spectrum would be through auction. The method of auction will face the least legal challenge, if Government is able to provide sufficient information on availability of spectrum, that would minimise the risks and, consequently, fetch better prices at the auction. The design of the auction should include a reserve price."

Further, para 13 of the note reads as follows:

> "13. This leaves the question about licensees who hold spectrum over and above the start up spectrum. In such cases, the past may be treated as a closed chapter and payments made in the past for additional spectrum (over and above the start up spectrum) may be treated as the charges for spectrum for that period. However, prospectively, licensee should pay for the additional spectrum that they hold, over and above the start-up spectrum, at the price discovered in the auction. This will place old licensees, existing licensee seeking additional spectrum and new licensees on par so far as spectrum charges are concerned."

Shri P. Chidambaram had indicated his mind in the note sent to the Prime Minister.

41. Prime Minister's Office, it is seen, had not taken any contrary view to that of Shri P. Chidambaram and, in any view, no materials were also made available when this Court was dealing with the case relating to cancellation of licences, wherein Union of India was a party. In such circumstances, it is difficult to conclude, on the materials available, that P. Chidambaram had conspired with A. Raja in subverting the process of issuance of LoI, UAS Licences and allocation of spectrum.

42. Shri P. Chidambaram met Shri A. Raja on 30.1.2008 for discussions on spectrum charges and one has to appreciate the discussions held in the light of the facts discussed above. Meeting was held at a time, it may be noted, when Shri A. Raja and DoT officials had already brushed aside the views expressed by Dr. D. Subbarao in his letter dated 22.11.2007, the views expressed by the Department of Economic Affairs in the note dated 3.1.2008 and in the absence of any response from PMO on the note dated 15.1.2008 sent by Shri P. Chidambaram. Meeting dated 30.1.2008 and subsequent meetings Shri P. Chidambaram had with Shri A. Raja on 29.5.2008, 12.6.2008 and with the Prime Minister on 4.7.2008 have to be appreciated in the light of the facts already discussed.

43. Shri P. Chidambaram, it is seen under the above-mentioned circumstances, had taken up the stand in the meeting held on 30.1.2008 that the Finance Minister was not seeking to revisit the current regimes for entry fee or for revenue share and for the regime for allocation of spectrum, however, it was urged that the following aspects had to be studied:

> "(i) The rules governing the allocation of additional spectrum and the charges thereof, including the charges to be levied for existing operators who have more than their entitled spectrum.
>
> (ii) Rules governing trade in spectrum. In particular, how can Government get a share of the premium

> in the trade?
>
> (iii) The estimate of the additional spectrum that may be available for allocation after taking into account: (a) the entitlement of entry spectrum of fresh licenses; (b) the spectrum that needs to be withdrawn from existing operators who do not have the subscriber base corresponding to the spectrum allotted to them; and (c) the spectrum that may be released by Defence.
>
> (iv) We also need to check the current rules and regulations governing withdrawal of spectrum in the event of: (a) not rolling over; (b) merger and acquisition; (c) trading away spectrum."

Salient points discussed in the meeting held on 30.1.2008 are given below:

> "2. <u>pectrum Usage Charges for Initial allotment of spectrum of 4.4 MHz.</u>
>
> 2.1 Secretary (Finance) was of the opinion that auctioning is legally possible for initial allotment of spectrum of 4.4 MHz. Secretary (DoT) explained that auction of spectrum of 4.4 MHz though may be legally possible but it would not be practical proposition to auction or fixing a price for 4.4 MHz spectrum due to following:
>
> 2.1.1 As per clause 43.5 (i) of UAS License, which provides that:
>
> "initially a cumulative maximum of up to 4.4 MHz +4.4 MHz shall be allocated in the case of GSM based systems…."
>
> It implies that when a service provider signs UAS License he understands that and contractually he is eligible for initially a cumulative maximum of 4.4 MHz subject to availability.

2.1.2 20 LoIs have been issued and the Department is contractually obliged to give them start up spectrum of 4.4. MHz under UASL.

2.1.3 As auctioning does not assure the operators to get initial spectrum of 4.4 MHz as per UAS License provision, auctioning and the clause 43.5 (i) of the UASL are contradictory.

2.1.4 If the new entrants get spectrum by auctioning, they may be paying more as compared to the existing players. Hence (a) auction will not ensure level playing; (b) also, as the cost to the new entrants would be more, they may not be able to offer competitive tariff.

2.1.5 Also 4.4. MHz is a part of the license agreement; no spectrum acquisition charge is proposed to be levied. Even if it is priced, it will also disturb the level playing field and the present LOI holders, who have already paid entry fee, are likely to go for litigation. Initial entry fee for license may be construed as the defector price of initial spectrum i.e. Rs.1650 crore approximately for pan-India license."

Para 3 of the Approach Letter deals with the spectrum usage charges for additional spectrum of 1.8 MHz beyond 4.4. MHz. The relevant portion of para 3 is extracted below:

"3. <u>Spectrum Usage Charges for additional spectrum of 1.8 MHz beyond 4.4 MHz</u>

The issue of levying price for additional spectrum of 1.8 MHz beyond 4.4 MHz including auctioning was also discussed. Secretary (Finance) desired to know whether this additional spectrum can be priced / auctioned and if not then why.

3.1 The issue of levying price for additional spectrum

of 1.8 MHz would not be practical due to following:

3.1.1 As per clause 43.5(ii) of UAS License which provided that "Additional spectrum beyond the 4.4 MHz may also be considered for allocation after ensuring optimal and efficient utilization of the already allocated spectrum taking into account of all types of traffic and guidelines / prescribed from time to time. However 6.2 + 6.2 MHz in respect of TDMA (GSM) based system shall be allocated to any new Unified Access Services Licensee".

3.1.2 It implies that an operator is eligible for consideration of additional 1.8 MHz spectrum (making total of 6.2 MHz) after ensuring optimal and efficient utilization of the already allocated spectrum taking into account all types of traffic and guidelines / criteria prescribed from time to time.

3.1.3 The matter was internally discussed with Solicitor General, who opined that he is defending the Government cases in various courts, where one of the main contentions is that auction would lead to reduction of competition and will not help in reducing the tariff and hence it would be against increase of teledensity and affordability. These being public interest concerns, it would be difficult to change the track at this juncture.

3.1.4 It is, however, proposed to price the spectrum of 1.8 MHz beyond 4.4 MHz upto 6.2 MHz. The TRAI in its report of August 2007 has recommended that any licensee who seeks to get additional spectrum beyond 10 MHz in the existing 2G bands, i.e. 800, 900 and 1800 MHz after reaching the specified subscriber numbers shall have to pay a onetime spectrum charge at the below mentioned rates on pro-rata basis for allotment of each MHz or part thereof of spectrum beyond 10 MHz……."

Para 4 of the Approach Paper deals with the price of spectrum beyond 6.2 MHz. Relevant portion of para 4 reads as under:

"4. Price of spectrum beyond 6.2 MHz

The UASL does not explicitly provide any provision or spectrum beyond 6.2 MHz and upto 10 MHz, however the UASL clause 43.5(iv) provides that "the Licensor has right to modify and / or amend the procedure of allocation of spectrum including quantum of spectrum at any point of time without assigning any reason". Hence the spectrum beyond 6.2 MHz should be properly priced keeping in mind the market value of spectrum.

4.1 Auction Path:

Since we are not auctioning startup spectrum of 4.4 MHz and only pricing additional allocation of 1.8 MHz as explained earlier, therefore, we can take 6.2 MHz as threshold for consideration for auction as this also falls beyond the provisions of the license agreement. The following points are brought out:

- 2G GSM Spectrum bands are 890-915 MHz paired with 935-960 MHz, 1710-1755 MHz paired with 1805-1890 MHz i.e., 2.5 MHz is available in 900 & 75 MHz band is available in 1900 MHz band making a total of 100 MHz. Out of this more than 37 MHz stand allocated to the GSM service providers in different service areas. Remaining 63 MHz, major portion of the spectrum in 1800 MHz band is being used by Defence.
- 120 LOIs have been issued and startup spectrum is to be allotted to them as well as for the growth; existing operators should be given 6.2 MHz, subject to availability.

- After this allotment, hardly any identifiable free spectrum will be available, which is a pre-requisite for auction.
- At any given time one or two operators will be eligible for beyond 6.2 MHz based on the subscribers linked criteria. Hence if an auction is to be held, competition would be limited.
- Hence auctioning may not be successful in providing optimum value due to (a) limited availability of spectrum & (b) limited competition.

TRAI has also not recommended for auctioning of 2G spectrum in view of the following:

- Service providers were allocated spectrum at different times of their licenses and the amount of spectrum with them. Therefore, to decide the cut off after which spectrum is auctioned will be difficult and might raise issue of level playing field.
- Penetration of mobile service is to happen in semi urban and rural areas, where affordability of the services to the common man is the key for further expansion:

In view of all these factors, auction 2G spectrum at this juncture does not appears to be viable solution."

4.2 Fix Price for spectrum beyond 6.2 MHz

The following two options were considered:

Option 1

For this purpose it may be desirable to index, the entry fee of Rs.1650 crores in the year 2003-04 (for initial 4.4 MHz) i.e. Rs.375 crore per MHz, for inflation, potential for growth of tele-density and revenue etc. appropriately. If we take

an inflation of about 5% per year for 4 years upto 2007-08, which would mean about 20% compounded inflation till 2007. Therefore, additional charges can be levied at 20% of Rs.375 crores for one MHz of spectrum i.e. Rs.425 Crores.

This option is not favoured in view of the low value of spectrum.

Option 2

The service area wise AGR figures per MHz for the years 2003-04, and anticipated figure were calculated and is given at Annexure 1. It may be seen that there is an increase of about 3-5 times, if the figures of 2007-08 with 2003-04 is compared.

It is for consideration to charge 'x' times of base price of Rs.375 crore/MHz, where 'x' is to be decided. This will be charged to existing as well as new entrants. Those who decide not to pay may be asked to surrender the excess spectrum beyond 6.2 MHz."

Para 6 deals with the Merger and Acquisition (M&A) is also relevant and the same reads as under:

6. Mergers and Acquisition (M&A)

In the context of intra-circle merger and acquisition, TRAI in their report of August 2007 have considered various factors, namely Definition of Market Assessment of Market Power criteria and Methodology, Determination of minimum number of access service providers in a post merger scenario and spectrum cap of the merged entity. The TRAI Recommendations had been considered by Telecom Commission. Some of the issues have been referred back to TRAI for consultation. In view of very large number of new players, it is expected that consolidation is likely to take place in the industry in future.

6.1 In view of this, we need to have clear guidelines relating to M&A. We also need to consider fees on account of transfer of spectrum to the merged entity. In the event of M&A the transfer charge to the Government has not been considered by TRAI in their recommendation of August 2007. This is a complex issue requiring detailed deliberation and consultation. Therefore, the issue of quantum of fees which the Government would get on account of transfer of spectrum during M&A needs to be referred to TRAI. Based on the Recommendations of TRAI on the above issue, DoT will take appropriate decision with a specified time period and issue clear and transparent guidelines for M&A including transfer charges for spectrum."

44. The Secretary, DoT then vide letter dated 8.2.2008, forwarded the Approach Paper with regard to the meeting held. Minister of Finance vide note dated 11.2.2008, acknowledged the note dated 8.2.2008 which was the summary of the four rounds of discussion they had and a Sequal note setting out the then existing position regarding telecom fees and charges and pricing of spectrum and the issues for decision were high-lighted.

Paras 16 to 18 of the Sequal note read as under:

"**Auction of Spectrum**

16. Auctioning spectrum suggests itself is as a clear first choice. It has several merits.

(i) Best method of discovering price

(ii) Is more transparent and provides a level playing field

(iii) Promotes competition

17. However, it will be problematic for us to adopt the

auction route at this late stage mainly for 'historical legacy' reasons. A number of operators have already been given spectrum free of charge. The spectrum available for auction, therefore, will be quite limited (DoT has not been able to indicate the precise quantum of spectrum that will be available for allotment). Efficient price discovery becomes possible only if the supply is large and there are a number of potential buyers: a thin market has clear limitation in signalling a price. It may turn out that the 'discovered price' is either too low or too high. In its August 2007 report (para 2.79), TRAI too advised against auctioning of spectrum on the ground that it will trigger issues of level playing field.

18. Auction will be viable if we can increase the quantum of spectrum available. This can be done by withdrawing the spectrum already allotted to existing operators and putting all of it on auction. Both existing and new license will then bid on a clean slate. This is evidently an extreme measure, and has significant practical and legal implications."

On the subject of market based price determination, the MoF in paras 19 & 20 stated as follows:

"Market Based Price Determination

19. If auction is ruled out, what are the alternatives for determining an appropriate market based price for spectrum?

20. The value of spectrum embedded in the entry fee provides a possible reference frame for pricing spectrum. Currently, 4.4MHz of spectrum is allotted at the entry level on payment of an entry fee of Rs. 1650 crores for pan-India operation. This translates to an embedded price of Rs.375 crores/MHz. This price was discovered in 2001 and fixed in 2003/04. Using this reference frame price, there are two

options for determining the current price of spectrum.

On the question of pricing of spectrum beyond 4.4 MHz, the views expressed by the Ministry of Finance in the above letter read as follows:

28. DoT is of the view that it is not advisable / possible to price the start-up allocation of a 4.4 MHz on the following argument. Allocation of 4.4 MHz spectrum is part of the licence Agreement. This start-up spectrum was given free of cost in the past. The new entrants who were given licenses in January 2008 paid the entry fee on the understanding that they would get this start-up spectrum would be a breach of this understanding. It will also disturb the level playing field between the existing operators and the new licencees. This may also trigger litigation.

29. DoT is agreeable to pricing of spectrum beyond 4.4MHz. However, they have suggested a differentiated pricing regime. According to them, there should one price of spectrum between 4.4 MHz and 6.2 MHz (1.8 MHz), and another price for spectrum beyond 6.2 MHz. In August 2007, TRAI recommended a price for licensees who seek spectrum beyond 10 MHz. DoT wants to apply this price for spectrum between 4.4 MHz and 6.2 MHz for spectrum beyond 6.2 MHz, DoT is agreeable to using the price determined as at paragraph 22 above.

30. Ministry of Finance differs from the above position of DoT. There is no contractual obligation to allot a start-up spectrum of 4.4 MHz to every licensee free of cost. The entire range of the spectrum allotted should be priced. The issue of level playing field can be addressed by charging this price even on existing operators.

31. Moreover, the differentiated pricing suggested by DoT, viz. One price for spectrum between 4.4 and 6.2 MHz and a different price for spectrum beyond 6.2 MHz will be

clumsy, non-transparent and legally questionable. It will be neat and transparent to fix a single circle-specific price for spectrum across the entire bandwidth.

On Merger and Acquisition (M&A), the views expressed by the Finance Minister read as follows:

"32. It is likely that the market will see considerable M&A activity over the next few years. It should be Government's endeavour to ensure that this consolidation happens in an efficient and healthy manner. One question that arises is whether the Government should get a premium out of an M&A transaction. Since spectrum has not been auctioned but priced juristically, it is likely that the rent, if any, involved in the price of spectrum will form part of the M&A transaction which would typically involve a host of other assets and liabilities, is a complex task. TRAI is best positioned to think through and advise on this issue. The ToRs to TRAI in the regard should be: (i) What should be guidelines for M&As between UASL operators? (ii) Should Government get a premium out of M&A activity? And (iii) if yes, how can this premium be determined?

45. Ministry of Finance (Department of Economic Affairs) also prepared a note on 7.4.2008 after discussing the matter with the Minister of Finance, which shows that the Minister of Finance had also agreed that spectrum usage charges should be increased reflecting the scarcity value of spectrum as indicated in Ministry's note dated 11.2.2008. On pricing of spectrum, the Ministry of Finance was of the view that they might insist in principle on pricing spectrum (beyond 4.4. MHz) although details could be worked out after the auction of 3G's spectrum.

46. Mr. Govind Mohan, Director, Ministry of Finance had prepared a detailed office memorandum on 8.4.2008, wherein after referring to the DoT letter dated 29.1.2008, the following amendments were suggested:

"4.0 Union Cabinet, in its meeting on October 31, 2003 had, inter alia, decided that spectrum pricing would need to be decided mutually between DoT and MoF so as to provide incentive for efficient use of spectrum as well as disincentive for sub-optimal usage. In the context of this decision, the following amendments are being suggested in Pricing of Spectrum, its allotment among Access providers and Spectrum Usage Charges:

1. Any Allotments of Spectrum to access subscriber licensees under UASL regime may henceforth be specifically priced and charged for. The charge may be determined, circle wise, by adopting the Entry Fee, fixed for that circle in 2003-04, and thereafter inflating it by the multiplier, which represents the growth in aggregate AGR per MHz between 2003-04 and 2007-08; hence, for a Pan India operator, the Circle fee fixed in 2003-04 (Rs.375 crore per MHz) would be inflated by a multiple of 3.5 (which represents the growth in AGR/MHz between 2003-04 and 2007-08) to yield the new spectrum price of Rs.1,312 Crore per MHz (approximately);

2. The price determined as above may be made applicable to both the new and existing operators; moreover, the entire range of spectrum allotted may be charged, for both new and existing operators; such operators who do not intend to pay the new charges may be given the option of surrendering the Spectrum allotted to them;....."

47. Letter, it is seen, was issued with the approval of the Minister of Finance.

48. Noticing some mistakes in that office memorandum,

an amended office memorandum was issued by Mr. Govind Mohan, on the same date. The reason is obvious, because the Finance Secretary D. Subbaroa, had made a note on 7.4.2008 stating that the FM's view was that the Ministry must insist in principle on pricing of Spectrum (beyond 4.4.MHz), although details could be worked out after the auction of 3G Spectrum. Evidentially it was a bona fide mistake committed by Dr. Govind Mohan, because the original Memo dated 8.4.2008 was contrary to the note prepared by the Finance Secretary, and hence he had to issue a corrected OM the operative portion of the same reads as follows:

'4. Union Cabinet in its meeting on October 31, 2003, inter alia, decided that spectrum pricing would need to be decided mutually between DoT and MoF so as to provide incentive for efficient use of spectrum as well as disincentive for sub-optimal usage. In the context of this decision, the issues that need to be decided in respect of 2G spectrum were discussed by Finance Secretary in three rounds of meetings with Secretary (Telecom) in February, 2008. Accordingly, the following amendments are being suggested in Pricing of Spectrum, its allotment among Access providers and Spectrum Usage Charges:

1. Any allotments of spectrum to access subscriber licensees under UASL regime – beyond the initial "start-up" allocation of 4.4 MHz – may henceforth be specifically priced and charged for. Details in this regard can be worked out;

2. The price determined as above may be made applicable to both the new and existing operators; such operators who do not intend to pay the new charges may be given the option of surrendering the spectrum allotted to them;

3. Spectrum Usage Charge, instead of being charged as a fixed percentage of Adjusted Gross Revenue

(AGR) for different spectrum bands, may henceforth be charged as a percentage of AGR based on volume of business categorization, so as to better reflect and capture the circle specific scarcity value of spectrum. The revised charges proposed for various Circles are as per the table annexed to this OM and as agreed in the discussions between Finance Secretary and Secretary, Department of Telecom;

4. The recommendations of TRAI for revising the subscriber base criteria for allotment of spectrum may be considered for implementation in the interest of enhancing efficiency of spectrum usage and encouraging technological innovations.

49. Shri P. Chidambaram, wrote a letter dated 21.4.2008 to Shri A. Raja, forwarding a non-paper containing Finance Minister's views on issues relating to 2G Spectrum and issues relating to 3G (Wi Max Spectrum). After discussions, it was pointed out that the conclusion be presented to the Prime Minister.

50. The Finance Secretary, as instructed by the Finance Minister, met the Secretary DoT on 24th April, 2008 and a hand written note was prepared by the Finance Secretary on 29.4.2008 on all outstanding issues. The recommendations of the MoF were as follows:

"**Pricing of Spectrum**

3. We may recommend the following principles for pricing of spectrum:

(i) The start-up spectrum of 4.4 MHz for GSM (2.5 MHz for CDMA may be exempted from upfront pricing both for new and existing operators.

(ii) Under the UASL Licensing regime, there appears to be an implicit, indirect contractual obligation to allow further allotment of spectrum, beyond 4.4 MHz for GSM (2.5 MHz for CDMA), and upto 6.2 MHz for GSM (5MHz for CDMA) after payment of 1% additional spectrum usage charges and ensuring that already allocated spectrum has been optimally and efficiently utilized. This may effectively protect operators who have existing allocations upto 6.2 MHz for GSM (5MHz for CDMA) from payment of any other charges, including the "up front" spectrum price. Since it may not be possible to charge operators already having allocations upto this range, the principle of equity and "level playing field" would require that the operators, who get fresh allotment of spectrum upto 6.2 MHz for GSM (5MHz for CDMA) too should not be charged for spectrum upto 6.2 MHz for GSM (5 MHz for CDMA).

(iii) Spectrum beyond 6.2 MHz in case of GSM (5MHz in case of CDMA) should be priced. This is defensible on the following grounds. First, as per the terms of the UAS license, there is no contractual obligation on the part of the Government to necessarily allot spectrum beyond 6.2 MHz (beyond 5MHz in case of CDMA); and, secondly, Government retains the sovereign right to modify the terms of license as also the procedure for allocation of spectrum, including quantum of spectrum, at any point of the time without assigning any reason."

(emphasis supplied)

Issues relating to merger and acquisition have been dealt with in Paras 16 to 18 and the same read as follows:

"**Issues relating to Mergers and Acquisitions**

16. DoT have issued a notification on April 22, 2007 on "Guidelines for intra service merger of Cellular Mobile Telephone Service (CMTS)/Unified Access Services (UAS) Licensees".

17. The guidelines derive substantially from the recommendations made by TRAI on this subject vide Report of August, 2007. The guidelines mandate a "spectrum transfer charges" to be payable as specified by Government.

18. DoT may be advised that fixation of "spectrum transfer charges" shall be in consultation with DEA."

51. Shri P. Chidambaram and Shri A. Raja met on 29.5.2008 and 12.6.2008 for resolving the then outstanding issues relating to the allocation and pricing 2G and 3G Spectrums. Meeting of two Ministers would not by itself be sufficient to infer the existence of a conspiracy. Even before those meetings, as instructed by the Finance Minister, the Finance Secretary and Telecom Secretary had already met on 24.4.2008, had agreed that it might not be possible to charge operators already having allocation upto 6.2 MHz and the principle of equity and level playing field would require that the operators who get fresh allotment of Spectrum upto 6.2MHz for GSM too should not be charged for Spectrum upto 6.2 MHz for GSM. Therefore, the allegation that Shri P. Chidambaram had over-ruled his officers' views and had conspired with Shri A. Raja is without any basis.

52. Criminal conspiracy cannot be inferred on the mere fact that there were official discussions between the officers of the MoF and that of DoT and between two Ministers, which are all recorded. Suspicion, however, strong, cannot take the place of legal proof and the meeting between Shri P. Chidambaram and Shri A. Raja would not by itself be sufficient to infer the

existence of a criminal conspiracy so as to indict Shri P. Chidambaram. Petitioners submit that had the Minister of Finance and the Prime Minister intervened, this situation could have been avoided, might be or might not be. A wrong judgment or an inaccurate or incorrect approach or poor management by itself, even after due deliberations between Ministers or even with Prime Minister, by itself cannot be said to be a product of criminal conspiracy.

53. We are of the considered view that materials on record do not show that Shri P. Chidambaram had abused his position as a Minister of Finance or conspired or colluded with A. Raja so as to fix low entry fee by non-visiting spectrum charges fixed in the year 2001. No materials are also made available even for a *prima* facie conclusion that Shri P. Chidambaram had deliberately allowed dilution of equity of the two companies, i.e. Swan and Unitech. No materials is also available even *prima facie* to conclude that Shri P. Chidambaram had abused his official position, or used any corrupt or illegal means for obtaining any pecuniary advantage for himself or any other persons, including Shri A. Raja.

54. We are, therefore, of the considered opinion that no case is made out to interfere with the order dated 4.2.2012 in C.C. No. 01 (A) / 11 passed by Special Judge CBI (04) (2G Spectrum Cases), New Delhi or to grant reliefs prayed for in I.A. No. 34 of 2012. Special Leave Petition (Crl.) No. 1688 of 2012 is, therefore, not entertained, so also I.A. No. 34 of 2012 in Civil Appeal No.10660 of 2010 and they are accordingly stand rejected.

K.K.T. SLP & I.A. Rejected.

THE STATE OF MAHARASHTRA & ORS. ETC.ETC.
v.
SAEED SOHAIL SHEIKH ETC. ETC.
(Criminal Appeal Nos.1735-1739 of 2012)

NOVEMBER 2, 2012

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

Prisoners Act, 1900 – s.29 – Transfer of prisoners – When envisaged – Held: Transfer in terms of sub-section (1) of s.29 is permissible only in distinct situations covered by clauses (a) to (d) – The provision does not deal with undertrial prisoners who do not answer the description given therein – Transfer under sub-section (2) of s.29 is also permissible only if it relates to prisoners confined in circumstances indicated in sub-section (1) of s.29.

Code of Criminal Procedure, 1973 – ss.167 and 309 – Transfer of prisoner with permission of the court under whose warrant the undertrial had been remanded to custody – Power exercisable by the court while permitting or refusing transfer – Nature of the power – Held: Is 'judicial' and not 'ministerial' – It is obligatory for the Court to apply its mind fairly and objectively to the circumstances in which the transfer is being prayed for and take a considered view having regard to the objections which the prisoner may have to offer – There is in that process of determination and decision-making an implicit duty to act fairly, objectively or in other words to act judicially – Thus any order of transfer passed in any such proceedings can be nothing but a judicial order or at least a quasi-judicial one – In the instant case, inasmuch as the trial court appears to have treated the matter to be administrative and accordingly permitted the transfer without issuing notice to the under-trials or passing an appropriate order in the matter, it

committed a mistake – Communication received from the prison authorities was dealt with and disposed of at an administrative level by sending a communication in reply without due and proper consideration and without passing a considered judicial order which alone could justify a transfer in the case – Such being the position the High Court was right in declaring the transfer of respondent- undertrials to be void and directing their re-transfer back to Bombay jail.

Custodial torture – Report submitted by Sessions Judge – Consequent direction issued by High Court to the Government to hold inquiry against those responsible for using excessive force against the undertrial prisoners and for dereliction of duty by jail doctors – Challenge to – Held: Said direction of the High Court was issued entirely on the basis of the report submitted by the Sessions Judge – However, that report besides being preliminary was flawed in many respects including the fact that the same did not comply with the basic requirement of a fair opportunity of hearing being given to those likely to be affected – It was at any rate not for the High Court to record a final and authoritative finding that the force used by the jail authorities was excessive or that it was used for any extraneous purpose – It was a matter that could be determined only after a proper inquiry was conducted and an opportunity afforded to those who were accused of using such excessive force or abusing the power vested in them – Consequential directions issued by the High Court in directing the State Government to initiate disciplinary inquiry against all the officers involved in the incident were, therefore, premature – Government directed to treat the report submitted by the Sessions Judge as a preliminary inquiry and take a considered decision whether or not any further inquiry, investigation or proceedings needs to be conducted against those allegedly responsible for using excessive force against the under-trials.

The instant appeals were filed by the State of Maharashtra and senior officers in the Department of Prisons, Government of Maharashtra against a common judgment passed by the High Court whereby a batch of criminal writ petitions filed by the respondents were allowed, transfer of the respondents-prisoners from Arthur Road Jail in Bombay to three other jails in the State of Maharashtra held to be illegal and the appellants directed to transfer the prisoners back to the jail at Bombay.

Earlier, in the writ petitions filed by the respondents before the High Court, allegations regarding use of excessive force and inhuman treatment were made against the jail officials including the Superintendent of the Central Jail. The respondents alleged that the use of force was without any provocation and justification apart from being inspired by reasons extraneous to the need for maintaining peace and order within the jail. The nature of the allegations made in the writ petitions was found by the High Court to be sufficient to call for an inquiry into the violent incident. This inquiry was assigned to a Sessions Judge who came to the conclusion on the basis of the medical records of the injured that the use of force by the jail authorities was excessive and further that the injured were not given medical aid and they were not properly examined by the doctors from the Bombay Central Police.

On a consideration of the report received from the Sessions Judge, the High Court found it necessary to direct the Government to hold a departmental inquiry against the officials who had used excessive force in bringing the situation in the jail under control. The High Court found that the order transferring the respondents-undertrial prisoners from Bombay Central Jail to other jails in the State was illegal and unacceptable inasmuch as the request for transfer had been dealt with at an

administrative level without affording an opportunity to the undertrials to oppose the same. The High Court rejected the contention urged on behalf of the appellants that Section 29 of the Prisoners Act, 1900 empowers the State Government or the Inspector General of Prisons to transfer the undertrials. The power to transfer the undertrials was, according to the High Court, exercisable only by the Court under whose orders the prisoners were remanded to judicial custody in a given jail and that inasmuch as the court concerned had faltered in taking appropriate action on the request for transfer by treating the request to be only an administrative matter, the sanction for transfer of the undertrials to other jails was vitiated.

Partly allowing the appeals, the Court

HELD:1.1. Removal of any prisoner under Section 29 of the Prisoners Act, 1900 is envisaged only at the instance of the State Government in cases where the prisoner is under a sentence of death or under or in lieu of a sentence of imprisonment or transportation or is undergoing in default of payment of fine or imprisonment in default of security for keeping the peace or for maintaining good behaviour. Transfer in terms of sub-section (1) of Section 29 is thus permissible only in distinct situations covered by clauses (a) to (d). The provision does not, it is manifest, deal with undertrial prisoners who do not answer the description given therein. [Para 20] [935-A-C]

1.2. Though sub-section (2) of section 29 no doubt empowers the Inspector General of Prisons to direct a transfer but what is important is that any such transfer is of a prisoner who is confined in circumstances mentioned in sub-section (1) of Section 29. That is evident from the use of words "any prisoner confined as aforesaid in a prison". The expression leaves no manner

of doubt that a transfer under sub-section (2) is also permissible only if it relates to prisoners who were confined in circumstances indicated in sub-section (1) of Section 29. The respondents in the present case were undertrials who could not have been transferred in terms of the orders of the Inspector General of Prisons under Section 29. [Para 21] [935-D-F]

<u>Whether undertrials can be transferred to any prison with the permission of the court under whose orders he has been committed to the prison</u>

2.1. Section 167(2) CrPC empowers the Magistrate to whom an accused is forwarded whether or not he has jurisdiction to try the case to authorize his detention in such custody as the Magistrate deems fit for a term not exceeding 15 days in the whole. Section 309 CrPC, *inter alia*, empowers the court after taking cognizance of an offence or commencement of the trial to remand the accused in custody in cases where the court finds it necessary to postpone the commencement of trial or inquiry.The rationale underlying both these provisions is that the continued detention of the prisoner in jail during the trial or inquiry is legal and valid only under the authority of the Court/Magistrate before whom the accused is produced or before whom he is being tried. An undertrial remains in custody by reasons of such order of remand passed by the concerned court and such remand is by a warrant addressed to the authority who is to hold him in custody. The remand orders are invariably addressed to the Superintendents of jails where the undertrials are detained till their production before the court on the date fixed for that purpose. The prison where the undertrial is detained is thus a prison identified by the competent court either in terms of Section 167 or Section 309 CrPC. It is axiomatic that transfer of the prisoner from any such place of detention

would be permissible only with the permission of the court under whose warrant the undertrial has been remanded to custody. [Paras 24, 25] [936-G-H; 937-A; 938-C-G]

2.2. The power exercisable by the court while permitting or refusing transfer is 'judicial' and not 'ministerial'. Exercise of ministerial power is out of place in situations where quality of life or the liberty of a citizen is affected, no matter he/she is under a sentence of imprisonment or is facing a criminal charge in an on-going trial. Transfer of an undertrial to a distant prison may adversely affect his right to defend himself but also isolate him from the society of his friends and relations. [Para 27] [939-B-D]

2.3. Any order that the Court may make on a request for transfer of a prisoner is bound to affect him prejudicially. It is thus obligatory for the Court to apply its mind fairly and objectively to the circumstances in which the transfer is being prayed for and take a considered view having regard to the objections which the prisoner may have to offer. There is in that process of determination and decision-making an implicit duty to act fairly, objectively or in other words to act judicially. It follows that any order of transfer passed in any such proceedings can be nothing but a judicial order or at least a quasi-judicial one. In the instant case, inasmuch as the trial court appears to have treated the matter to be administrative and accordingly permitted the transfer without issuing notice to the under-trials or passing an appropriate order in the matter, it committed a mistake. A communication received from the prison authorities was dealt with and disposed of at an administrative level by sending a communication in reply without due and proper consideration and without passing a considered judicial order which alone could justify a transfer in the

case. Such being the position the High Court was right in declaring the transfer to be void and directing the re-transfer of the undertrials to Bombay jail. [Para 39] [947-C-G]

Sunil Batra v. Delhi Administration **AIR 1980 SC 1579: 1980 (2) SCR 557 – relied on.**

Province of Bombay v. Khusaldas Advani **AIR 1950 SC 222: 1950 SCR 621; ;** *State of Orissa v. Dr. Binapani Dei* **AIR 1967 SC 1269: 1967 SCR 625;** *A.K. Kraipak v. Union of India* **(1969) 2 SCC 262: 1970 (1) SCR 457;** *Mohinder Singh Gill. v. Chief Election Commission* **(1978) 1 SCC 405: 1978 (2) SCR 272;** *Jamal Uddin Ahmad v. Abu Saleh Najmuddin* **(2003) 4 SCC 257: 2003 (2) SCR 473 – referred to.**

The King v. The Electricity Commissioner **[1924] 1 K.B. 171 and** *The King v. London County Council* **[1931] 2 K.B. 215 – referred to.**

Judicial Review (Thomson Sweet & Maxwell, 6th Edition, 2007) by *Prof. De Smith* **and Black's Law Dictionary – referred to.**

Whether the High Court was justified in directing the Government to hold an inquiry against those responsible for using excessive force (against the undertrial prisoners) and for dereliction of duty by the medical officer (jail doctors)

3.1. The said direction of the High Court was issued entirely on the basis of the report submitted by the Sessions Judge. That report besides being preliminary is flawed in many respects including the fact that the same does not comply with the basic requirement of a fair opportunity of hearing being given to those likely to be affected. It is true that the statements of some of the jail officials have also been recorded in the course of the

inquiry but that is not enough. Those indicted in the report were entitled to an opportunity to cross-examine those who alleged misconduct against them. Not only that the Sessions Judge has not named the officers responsible for the alleged use of excessive force which was essential for any follow up or further action in the matter. So, also the report clearly states the officials concerned have not been allowed to examine any witness although a request was made by them to do so. Such being the position, some of the observations made by the High Court that give an impression as though the misdemeanour of the jail officers had been proved, do not appear to be justified. [Para 40, 41] [948-B-E-G-H]

3.2. It was at any rate not for the High Court to record a final and authoritative finding that the force used by the jail authorities was excessive or that it was used for any extraneous purpose. It was a matter that could be determined only after a proper inquiry was conducted and an opportunity afforded to those who were accused of using such excessive force or abusing the power vested in them. Consequential directions issued by the High Court in directing the State Government to initiate disciplinary inquiry against all the officers involved in the incident were, therefore, premature. This is because the question whether any disciplinary inquiry needs to be instituted against the jail officials would depend upon the outcome of a proper investigation into the incident and not a preliminary enquiry in which the Investigating Officer, apart from statements of the respondents, makes use of information discreetly collected from the jail inmates. The report of the Sessions Judge could in the circumstances provide no more than a *prima facie* basis for the Government to consider whether any further investigation into the incident was required to be conducted either for disciplinary action or for launching prosecution of those found guilty. Beyond that the

preliminary report could not serve any other purpose. [Para 41] [948-G-H; 949-A-D]

3.3. In a country governed by the rule of law police excesses whether inside or outside the jail cannot be countenanced in the name of maintaining discipline or dealing with anti-national elements. Accountability is one of the facets of the rule of law. If anyone is found to have acted in breach of law or abused his position while exercising powers that must be exercised only within the parameters of law, the breach and the abuse can be punished. That is especially so when the abuse is alleged to have been committed under the cover of authority exercised by people in uniform. Any such action is also open to critical scrutiny and examination by the Courts. Having said that one cannot ignore the fact that the country today faces challenges and threats from extremist elements operating from within and outside India. Those dealing with such elements have at times to pay a heavy price by sacrificing their lives in the discharge of their duties. The glory of the constitutional democracy that this country has adopted, however, is that whatever be the challenges posed by such dark forces, the country's commitment to the Rule of Law remains steadfast. Courts in this country have protected and would continue to protect the ideals of the rights of the citizen being inviolable except in accordance with the procedure established by law. [Para 42] [949-E-H; 950-A-B]

3.4. The Government shall treat the report submitted by the Sessions Judge as a preliminary inquiry and take a considered decision whether or not any further inquiry, investigation or proceedings against those allegedly responsible for using excessive force while restoring discipline in the Central Jail at Bombay on 26th June, 2008 needs to be conducted. [Para 43] [950-C-D]

Case Law Reference

1980 (2) SCR 557	**relied on**	**Para 27**
1950 SCR 621	**referred to**	**Paras 30, 31, 33**
1924 1 K.B. 171	**referred to**	**Para 31**
1931 2 K.B. 215	**referred to**	**Para 32**
1967 SCR 625	**referred to**	**Para 35**
1970 (1) SCR 457	**referred to**	**Para 36**
1978 (2) SCR 272	**referred to**	**Para 37**
2003 (2) SCR 473	**referred to**	**Para 38**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 1735-1739 of 2012.

From the Judgment & Order dated 21.7.2009 of the High Court of Judicature at Bombay in Criminal Writ Petition No. 1377 of 2008, Criminal Application No. 50 of 2009 in Criminal Writ Petition No. 1377 of 2008, Criminal Writ Petition No. 1496 of 2008, Criminal Writ Petition No. 1773 of 2008 and Criminal Writ Petition No. 2746 of 2008.

Shekhar Naphade, Amrender Saran, Arun R Pednekar, Sanjay Kharde, Asha Gopalan Nair, Abhay Kumar, Upendra Pratap Singh, Rutwik Panda, Nilofar Qureshi for the Appearing Parties.

The Judgment of the Court was delivered by

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

2. These appeals have been filed by the State of Maharashtra and senior officers in the Department of Prisons, Government of Maharashtra against a common judgment and order dated 21st July, 2009 passed by a Division Bench of the

High Court of Judicature at Bombay whereby a batch of criminal writ petitions filed by the respondents have been allowed, transfer of the respondents-prisoners from Arthur Road Jail in Bombay to three other jails in the State of Maharashtra held to be illegal and the appellants directed to transfer the prisoners back to the jail at Bombay. The High Court has expressed the view that jail authorities having used force against undertrial prisoners for no fault of theirs and since such force was used for extraneous reasons and was excessive, the Chief Secretary of the State of Maharashtra shall initiate a disciplinary inquiry against all those involved in the incident. The High Court has further held that if need be in addition to departmental inquiry, criminal action be also taken against the concerned officers including an inquiry into the conduct of the jail doctors for dereliction of their duty and alleged fudging of the records.

3. The factual matrix relating to the transfer of the prisoners from Bombay Central Prison to other prisons in the State and use of force causing injuries to some of them has been set out in the order passed by the High Court at some length. We need not, therefore, recount the same over again except to the extent it is necessary to do so for the disposal of these appeals.

4. Superintendent of the Bombay Central Prison appears to have addressed a letter to the Special Judge under The Maharashtra Control of Organised Crime Act, 1999 (hereinafter referred to as the MCOC Act) requesting for permission to transfer accused persons in three different Bombay blast cases being MCOC cases No.16/2006, 21/2006 and 23/2006. The request for transfer was proceeded on two distinct grounds namely (i) that against a capacity of 840 prisoners, the Bombay jail had as many as 2500 prisoners housed in it resulting in over-crowding and consequent problems of management in the jail and (ii) that proceedings in the on-going cases in question had been stayed with the result that the presence of the accused persons involved in the said cases was no longer required in the near future.

5. In response to the request aforementioned the Special Judge passed an order dated 26th March, 2004, inter alia, stating that:

"xxxxxxxx

It is true that Honourable Supreme Court has granted stay to entire further proceedings of above referred cases and therefore, presence of accused is no more required in near future. It is total domain of Jail Authorities to transfer accused to other jails due to scarcity of premises or for security purpose. As the presence of accused is not required immediately, you are at liberty to take action of transfer of above referred accused to other jails as per rules and regulations."

6. Administrative approval for the transfer of 37 undertrial prisoners involved in the above three cases was also obtained from the Inspector General of Prisons who directed the Superintendent, Bombay Central Prison, to keep in mind the criminal background of the prisoners while allocating them to different jails in the State.

7. On 22nd June, 2008 the jail authorities appear to have sent a requisition for an escort to the police headquarters which police escort was provided and reached the jail premises on 28th June, 2008 at 9.00 a.m. An announcement was then made requesting thirty-two undertrial prisoners to gather near Lal Gate in the prison premises out of whom seven prisoners were transferred to Ratnagiri Special Jail around 11.40 a.m. The other nineteen undertrials were said to be sitting outside while two other undertrial prisoners named Kamal Ahmad Vakil Ansari and Dr. Tanveer Mohd. Ibrahim Ansari refused to leave their cell to join the escort party despite persuasions by the jail authorities. The case of the appellants is that these undertrial prisoners refused to listen to the jail authorities and started abusing and misbehaving with the jail officials including Mrs. Swati Madhav Sathe, the Jail Superintendent. Not only that, the

undertrial prisoners started shouting anti-national and provocative slogans. After hearing these slogans from the high security cell, 21 undertrial prisoners who had gathered near the Lal Gate also started giving similar slogans and charged towards the jail officials, Wardens and watchmen and started assaulting them with bricks and stones. The version of the appellants is that these 21 undertrial prisoners also tried to approach the High Security Cell and tried to open its gate while they continued shouting slogans. Apprehending that the situation may go out of hand, the alarm bell was sounded in the jail and force reasonable enough to bring the situation under control used for that purpose. The appellants contend that because of the assault by the undertrial prisoners, the jail guards and prison officers sustained injuries.

8. A report regarding the incident in question was submitted on 30th June, 2008 to the Deputy Inspector General of Prison with a copy to the Principal Judge, City Sessions Court, Greater Bombay, Registrar Special-Judge, under MCOC Act apart from other officers in the prison hierarchy. Such of the prisoners as had received injuries were forwarded to the jail medical officers who examined them and issued medical certificates, regarding injuries sustained by them. The appellants allege that there was no violation of any statutory provision of law nor any other act of impropriety or illegality committed by them.

9. In the writ petitions filed by the respondents before the High Court, allegations regarding use of excessive force and inhuman treatment were made against the jail officials including the Superintendent of the Central Jail. The respondents alleged that the use of force was without any provocation and justification apart from being inspired by reasons extraneous to the need for maintaining peace and order within the jail. The nature of the allegations made in the writ petitions was found by the High Court to be sufficient to call for an inquiry into the violent incident. This inquiry was assigned to the Sessions

Judge, Greater Bombay who was asked to report whether use of force by the jail authorities on 28th June, 2008 was excessive and whether, force was used for any extraneous reasons other than for maintaining discipline in terms of the Discipline Rules, 1963 of the Jail Manual. The Sessions Judge was also asked to enquire into the circumstances in which the prisoners had access to bricks and stones as claimed by jail authorities in the counter-affidavit filed before the High Court.

10. An inquiry pursuant to the directions of the High Court was accordingly conducted by the learned Sessions Judge, Greater Bombay in which the Sessions Judge recorded the statements of the injured as also the jail officials besides some other inmates of the jail. The report submitted by the Sessions Judge concluded that the cause underlying the incident of 28th June, 2008 was the resistance offered by Kamal Ahmad Vakil Ansari and Dr. Tanveer Mohd. Ibrahim Ansari to their transfer from the prison. The Inquiry Officer observed:

> "….The inquiry revealed that Tanvir and Kamal had resisted the jail staff on that day and they were not ready to go out of the High Security Zone. Inquiry further revealed that the jail staff was required to use force against them for taking them out of the room, then from barrack and then from the circle itself….
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> xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
>
> Statements of prisoners sent to Kolhapur and Nagpur jails and the statement of the jail staff if considered together, are sufficient to infer that Tanvir and Kamal offered maximum resistance to jail staff and they had refused to come out of High Security Zone but they were not taken out of their respective rooms and so there is no convincing statement given by anybody in respect of other two prisoners. It can be said that they were removed after the main incident was over. If the exaggeration made by other prisoners who were brought from Kolhapur jail is

> ignored, and the facts which can be called as common from the statements given by the jail staff and the prisoners are considered, it can be said that shouts of Tanvir who was assaulted inside of High Security Zone were heard by the prisoners who had gathered outside, in the open space. Material is also sufficient to infer that Kamal came out though without stick and he instigated the 20 prisoners who were sitting outside in the open space."

11. The Inquiry Officer further found that the resistance offered by Kamal Ahmad Vakil Ansari and Dr. Tanveer Mohd. Ibrahim Ansari required use of force against them but since both of them started shouting slogans other prisoners who were gathered outside in the open portion of the jail gate got agitated and rushed towards the High Security Cell to see as to what was happening. The Inquiry Officer held that hearing the anti-national slogans, the jail officers lost their calm and ordered use of force leading to breach of disturbances within the jail. The Inquiry Officer has specifically noted that the disturbances had started on account of instigation given by Kamal Ansari and slogans shouted by him and that there were reasons for the jail authorities to bring the situation under control. The following passage in the inquiry report is, in this regard, relevant:

> "xxxxxxxxxxxxxx
>
> There is possibility that after hearing the shouting of Tanvir and after hearing from Kamal that Tanvir was being beaten in High Security Zone and after hearing slogans given by Tanvir, prisoners who had gathered outside became disturbed. It can be said that they must have rushed towards the High Security Zone to see as to what was happening. There is a clear possibility that after hearing of the slogans which were given against India, officers outside became angry and then order was made to use force. Aforesaid circumstances have created probability that there was breach of discipline in view of the Rules framed under the Maharashtra Prison (Discipline) Rules

of 1963 and there was disturbance to some extent. I have no hesitation to come to the conclusion that due to the instigation given by Kamal and slogans given by him, disturbance was caused and there was reason for the jail authority to order use of force. Force was used to bring the situation under control. But it needs to be ascertained as to whether there was excessive use of force or there was some extraneous reason also for excess use of force against these prisoners."

12. Having identified the cause of disturbances the Inquiry Officer next examined the question whether the force used by the jail authorities was excessive and came to the conclusion on the basis of the medical records of the injured namely, Tanveer, Kamal, Ehatesham, Sayed Asif, Abdul Wahid, Mohd. Zuber, Mushtaq Ahmed, Mohd. Zahid, Zameer Ahmad, Riyaz Ahmed and Mohd. Mujaffar that the use of force by the jail authorities was excessive. The Inquiry Officer further held that the injured were not given medical aid. They were not properly examined by the doctors from the Bombay Central Police. Speaking about the conduct of the doctors in Bombay Central Prison the Inquiry Officer observed:

"This conduct of the doctors of Mumbai Central Prison speaks volume about the general approach of the jail authority and the doctors working in the jail. It can be said that the doctors helped the jail authority in falsifying everything and screening illegal actions of the officers. It is surprising for the jail authority also that when under Chapter 11 of the Prison Act, action could have been taken against the prisoners if they had committed prison offence by assaulting officers, no record in that regard was created and no such action was proposed. Instead of that, jail authority hurriedly transferred the prisoners to other jails."

13. On a consideration of the report received from the Sessions Judge, the High Court found it necessary to direct the

Government to hold a departmental inquiry against the officials who had used excessive force in bringing the situation in the jail under control. The High Court found that the order transferring the respondents-undertrial prisoners from Bombay Central Jail to other jails in the State was illegal and unacceptable inasmuch as the request for transfer had been dealt with at an administrative level without affording an opportunity to the undertrials to oppose the same. The High Court rejected the contention urged on behalf of the appellants that Section 29 of the Prisoners Act, 1900 empowers the State Government or the Inspector General of Prisons to transfer the undertrials. The power to transfer the undertrials was, according to the High Court, exercisable only by the Court under whose orders the prisoners were remanded to judicial custody in a given jail. Inasmuch as the court concerned had faltered in taking appropriate action on the request for transfer by treating the request to be only an administrative matter, the sanction for transfer of the undertrials to other jails was vitiated.

14. Appearing for the appellants Mr. Shekhar Naphade, learned senior counsel, made a three-fold submission before us. Firstly, it was contended that the undertrial prisoners had no enforceable right to demand that they should be detained in a prison of their choice or to resist their transfer from one jail to the other if the court under whose orders they were remanded to such custody permitted such transfer. He argued that although Section 29(2) of the Prisoners Act, 1900 permitted the Inspector General of Prisons to remove any prisoner from one prison to another in the State even if that power was not available qua undertrial prisoners, there was no impediment in such removal after the court under whose orders the prisoners were committed to jail had permitted such a transfer.

15. Secondly, it was argued by Mr. Naphade, that the power exercisable by the court in the matter of permitting or refusing the transfer of a prisoner was ministerial in character and that the prisoner had no right to demand a notice of any

such request nor an opportunity to oppose the same. It is a matter entirely between the jail authorities on the one hand and the court concerned on the other in which the prisoner had no locus standi to intervene.

16. Thirdly, it was argued by Mr. Naphade that the High Court had fallen in a palpable error in holding that the use of force by the jail authorities was excessive, which called for any administrative or disciplinary action against those responsible for using such excessive force. He contended that what would constitute reasonable force to restore discipline and peace within the jail depends largely upon the nature of the incident, the extent of disturbances and the gravity of the consequences that would flow if force was not used to restore order. It was not, according to Mr. Naphade possible to sit in judgment over the decision of the jail authorities who were charged with maintenance of discipline and peace within the jail and determine whether force was rightly used and, if so, whether or not the use of force was excessive.

17. Mr. Naphade also urged that the underlying cause of the incident in the instant case was resistance put up by the undertrials involved in heinous offences against the society threatening the very sovereignty and integrity of the country. It was not open to the concerned prisoners, argued Mr. Naphade to resist their transfer from one jail to the other and to create a situation in which the jail authorities found it difficult to effectuate their transfer. It was also contended by Mr. Naphade that the reports submitted by the Sessions Judge was at best a preliminary fact finding report which has neither afforded an opportunity to all concerned to defend themselves against the insinuations or to examine witnesses in their defence. No such report could, therefore, be made a basis by the High Court to issue a mandamus to the State to institute disciplinary action against the officials concerned as though the finding that the use of force was excessive was unimpeachable and could constitute a basis for any such direction.

18. On behalf of the respondents Mr. Amrender Saran, learned senior counsel, argued that the transfer of a prisoner especially an undertrial from one prison to the other was not inconsequential for the prisoner and could not, therefore, be dealt with at a ministerial level. A prisoner was entitled to oppose the transfer especially if the same adversely affected his defence. It was also contended that Section 29 did not empower the Government or the Inspector General of Prisons to direct transfer of undertrials. It was argued that while the inquiry conducted by the Sessions Judge was not a substitute for a regular inquiry that may be conducted by the State, yet the exercise undertaken by a senior officer like the Sessions Judge under the orders of the High Court could furnish a prima facie basis for the High Court to direct an appropriate investigation into the case, and to initiate proceedings against those who may be found guilty of any misconduct on the basis of any such investigation.

19. Section 29 of the Prisoners Act, 1900 reads as under:

"29. Removal of prisoners-(1) The [State Government] may, by general or special order, provide for the removal of any prisoner confined in a prison-

(a) under sentence of death, or

(b) under, or in lieu of, a sentence of imprisonment or transportation, or

(c) in default of payment of a fine, or

(d) in default of giving security for keeping the peace or for maintaining good behaviour,

to any other prison in [the State]

(2) [Subject to the orders, and under the control of the State Government, the Inspector-General of prisons may, in like manner, provide for the removal of any prisoner

confined as aforesaid in a prison in the State to any other prison in the State]"

20. It is evident from a bare glance at the above provision that removal of any prisoner under the same is envisaged only at the instance of the State Government in cases where the prisoner is under a sentence of death or under or in lieu of a sentence of imprisonment or transportation or is undergoing in default of payment of fine or imprisonment in default of security for keeping the peace or for maintaining good behaviour. Transfer in terms of sub-section (1) of Section 29 (supra) is thus permissible only in distinct situations covered by clauses (a) to (d) above. The provision does not, it is manifest, deal with undertrial prisoners who do not answer the description given therein.

21. Reliance upon sub-section (2) of Section 29, in support of the contention that the transfer of an undertrial is permissible, is also of no assistance to the appellants in our opinion. Sub-section (2) no doubt empowers the Inspector General of Prisons to direct a transfer but what is important is that any such transfer is of a prisoner who is confined in circumstances mentioned in sub-section (1) of Section 29. That is evident from the use of words "any prisoner confined as aforesaid in a prison". The expression leaves no manner of doubt that a transfer under sub-section (2) is also permissible only if it relates to prisoners who were confined in circumstances indicated in sub-section (1) of Section 29. The respondents in the present case were undertrials who could not have been transferred in terms of the orders of the Inspector General of Prisons under Section 29 extracted above.

22. We may at this stage refer to Prison Act, 1894 to which our attention was drawn by learned counsel for the appellants in an attempt to show that the Government could direct transfer of the undertrials from one prison to another. Reliance, in particular, was placed upon the provisions of Section 26 of the Act which reads as under:

"26. Removal and discharge of prisoners. – (1) All prisoners, previously being removed to any other prison, shall be examined by the Medical Officer.

(2) No prisoner shall be removed from one prison to another unless the Medical Officer certifies that the prisoner is free from any illness rendering him unfit for removal.

(3) No prisoner shall be discharged against his will from prison, if labouring under any acute or dangerous distemper, nor until, in the opinion of the Medical Officer, such discharge is safe."

23. The above, does not, in our opinion, support the contention that the Inspector General of Prisons could direct removal of undertrial from one prison to other. All that Section 26 provides is that before being removed to any other prison the prisoner shall be examined by the medical officer and unless the medical officer certifies that the prisoner is free from any illness rendering him unfit for removal, no such removal shall take place. Section 26 may, therefore, oblige the prison authorities to have the prisoner, whether a convict or an undertrial, medically examined and to remove him only if he is found fit but any such requirement without any specific power vested in any authority to direct removal, cannot by itself, be interpreted to mean that such removal can be ordered under the order either by the Inspector General of Prisons or any other officer for that matter.

24. That leaves us with the question as to whether undertrials can be transferred to any prison with the permission of the court under whose orders he has been committed to the prison. Reference in this connection may be made to Sections 167 and 309 of the Code of Criminal Procedure, 1973. Section 167(2) empowers the Magistrate to whom an accused is forwarded whether or not he has jurisdiction to try the case to authorize his detention in such custody as the Magistrate

deems fit for a term not exceeding 15 days in the whole. It reads:

"167. Procedure when investigation cannot be completed in twenty-four hours

(1) xxxxxxxxxxxxxx

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further

detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that—

(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding—

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be to so released under the

provisions of Chapter XXXIII for the purposes of that Chapter;

(b) no Magistrate shall authorise detention in any custody under this section unless the accused is produced before him;

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police."

25. Reference may also be, at this stage made, to Section 309 of the Code which, inter alia, empowers the court after taking cognizance of an offence or commencement of the trial to remand the accused in custody in cases where the court finds it necessary to postpone the commencement of trial or inquiry. The rationale underlying both these provisions is that the continued detention of the prisoner in jail during the trial or inquiry is legal and valid only under the authority of the Court/ Magistrate before whom the accused is produced or before whom he is being tried. An undertrial remains in custody by reasons of such order of remand passed by the concerned court and such remand is by a warrant addressed to the authority who is to hold him in custody. The remand orders are invariably addressed to the Superintendents of jails where the undertrials are detained till their production before the court on the date fixed for that purpose. The prison where the undertrial is detained is thus a prison identified by the competent court either in terms of Section 167 or Section 309 of the Code. It is axiomatic that transfer of the prisoner from any such place of detention would be permissible only with the permission of the court under whose warrant the undertrial has been remanded to custody.

26. Both Mr. Naphade and Mr. Saran had no serious quarrel on the above proposition. It was all the same argued that if the provisions of the Prisoners Act, 1900 and the Prisons Act, 1894 did not empower the Inspector General of Prisons

to transfer the undertrial, the only other mode of such transfer was with the permission of the court and pursuant to whose warrant of remand the undertrial is held in a particular jail.

27. The forensic debate at the Bar was all about the nature of the power exercisable by the court while permitting or refusing transfer. We have, however, no hesitation in holding that the power exercisable by the court while permitting or refusing transfer is 'judicial' and not 'ministerial' as contended by Mr. Naphade. Exercise of ministerial power is out of place in situations where quality of life or the liberty of a citizen is affected, no matter he/she is under a sentence of imprisonment or is facing a criminal charge in an on-going trial. That transfer of an undertrial to a distant prison may adversely affect his right to defend himself but also isolate him from the society of his friends and relations is settled by the decision of this Court in *Sunil Batra v. Delhi Administration* AIR 1980 SC 1579, where this Court observed:

> *"48. Inflictions may take many protean forms, apart from physical assaults. Pushing the prisoner into a solitary cell, denial of a necessary amenity, and, more dreadful sometimes, transfer to a distant prison where visits or society of friends or relations may be snapped, allotment of degrading labour, assigning him to a desperate or tough gang and the like, may be punitive in effect. Every such affliction or abridgment is an infraction of liberty or life in its wider sense and cannot be sustained unless Article 21 is satisfied. There must be a corrective legal procedure, fair and reasonable and effective. Such infraction will be arbitrary, under Article 14 if it is dependent on unguided discretion, unreasonable, under Article 19 if it is irremediable and unappealable, and unfair, under Article 21 if it violates natural justice. The string of guidelines in Batra set out in the first judgment, which we adopt, provides for a hearing at some stages, a review by a superior, and early judicial consideration*

> *so that the proceedings may not hop from Caesar to Caesar. We direct strict compliance with those norms and institutional provisions for that purpose."*

28. The expressions 'ministerial', 'ministerial office', 'ministerial act', and 'ministerial duty' have been defined by Black's Law Dictionary as under:

> ***"Ministerial, Adj.*** *(16c) of our relating to an act that involves obedience to instructions or laws instead of discretion, judgment, or skill the court clerk's ministerial duties include recording judgments on the docket.*
>
> ***Ministerial office.*** *An office that does not include authority to exercise judgment, only to carry out orders given by a superior office, or to perform duties or acts required by rules, statutes, or regulations.*
>
> ***Ministerial act.*** *An act performed without the independent exercise of discretion or judgment. If the act is mandatory, it is also termed a ministerial duty.*
>
> ***Ministerial duty.*** *A duty that requires neither the exercise of official discretion nor judgment."*

29. Prof. De Smith in his book on 'Judicial Review' (Thomson Sweet & Maxwell, 6th Edn. 2007) refers to the meaning given by Courts to the terms 'judicial', 'quasi-judicial', 'administrative', 'legislative' and 'ministerial' for administrative law purposes and found them to be inconsistent. According to the author 'ministerial' as a technical legal term has no single fixed meaning. It may describe any duty the discharge whereof requires no element of discretion or independent judgment. It may often be used more narrowly to describe the issue of a formal instruction, in consequence of a prior determination which may or may not be of a judicial character. Execution of any such instructions by an inferior officer sometimes called ministerial officer may also be treated as a ministerial function.

It is sometimes loosely used to describe an act that is neither judicial nor legislative. In that sense the term is used interchangeably with 'executive' or 'administrative'. The tests which, according to Prof. De Smith delineate 'judicial functions', could be varied some of which may lead to the conclusion that certain functions discharged by the Courts are not judicial such as award of costs, award of sentence to prisoners, removal of trustees and arbitrators, grant of divorce to petitioners who are themselves guilty of adultery etc. We need not delve deep into all these aspects in the present case. We say so because pronouncements of this Court have over the past decades made a distinction between quasi-judicial function on the one hand and administrative or ministerial duties on the other which distinctions give a clear enough indication and insight into what constitutes ministerial function in contra-distinction to what would amount to judicial or quasi-judicial function.

30. In *Province of Bombay v. Khusaldas Advani* (AIR 1950 SC 222) this Court had an occasion to examine the difference between a quasi-judicial order and an administrative or ministerial order. Chief Justice Kania, in his opinion, quoted with approval an old Irish case on the issue in the following passage:

> *".....the point for determination is whether the order in question is a quasi-judicial order or an administrative or ministerial order. In Regina (John M'Evoy) v. Dublin Corporation [1978] 2 L.R. Irish 371, 376, May C.J. in dealing with this point observed as follows: "It is established that the writ of certiorari does not lie to remove an order merely ministerial, such as a warrant, but it lies to remove and adjudicate upon the validity of acts judicial. In this connection, the term 'judicial' does not necessarily mean acts of a judge or legal tribunal sitting for the determination of matters of law, but for the*

> *purpose of this question a judicial act seems to be an act done by competent authority, upon consideration of facts and circumstances, and imposing liability or affecting the rights of others."*
>
> *This definition was approved by Lord Atkinson in Frome United Breweries Co. v. Bath Justices [1926] A.C. 586, 602, as the best definition of a judicial act as distinguished from an administrative act."*

31. In *Khushaldas Advani's* case (supra) the Court was examining whether the act in question was a ministerial/ administrative act or a judicial/quasi-judicial one in the context of whether a writ of certiorari could be issued against an order under Section 3 of the Bombay Land Requisition Ordinance, 1947. The Court cited with approval the observation of L.J. *Atkin in The King v. The Electricity Commissioner* [1924] 1 K.B. 171 that laid down the following test:

> *"Whenever anybody of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."*

32. The Court quoted with approval the decision in *The King v. London County Council* [1931] 2 K.B. 215 according to which a rule of certiorari may issue; wherever a body of persons

(1) having legal authority

(2) to determine questions affecting rights of subjects and

(3) having the duty to act judicially

(4) act in excess of their legal authority-a writ of certiorari may issue.

33. Justice Fazl Ali, in his concurring opinion in *Khushaldas' case* (supra) made the following observations as regards judicial and quasi-judicial orders:

"16. Without going into the numerous cases cited before us, it may be safely laid down that an order will be a judicial or quasi-judicial order if it is made by a court or a judge, or by some person or authority who is legally bound or authorised to act as if he was a court or a judge. To act as a Court or a judge necessarily involves giving an opportunity to the party who is to be affected by an order to make a representation, making some kind of enquiry, hearing and weighing evidence, if any, and considering all the facts and circumstances bearing on the merits of the controversy before any decision affecting the rights of one or more parties is arrived at. The procedure to be followed may not be as elaborate as in a court of law and it may be very summary, but it must contain the essential elements of judicial procedure as indicated by me.

xxx xxx xxx

xxx xxx xxx

… The mere fact that an executive authority has to decide something does not make the decision judicial. It is the manner in which the decision has to be arrived at which makes the difference and the real test is: Is there any duty to decide judicially?"

34. The detailed concurrent opinion of Justice Das, in the same case, also agreed with the above test for determining whether a particular act is a judicial or an administrative one. Das J., observed:

"The real test which distinguishes a quasi-judicial act from an administrative act is the third item in Atkin L.J.'s definition, namely the duty to act judicially."

35. In *State of Orissa v. Dr. Binapani Dei* (AIR 1967 SC 1269) Justice Shah, speaking for the Court observed that the duty to act judicially arose from the very nature of the function intended to be performed. It need not be shown to be superadded. The Court held:

"If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power."

36. In *A.K. Kraipak v. Union of India* (1969) 2 SCC 262, Hegde, J., as His Lordship then was, recognised that the dividing line between an administrative power and a quasi-judicial power was fast vanishing. What was important, declared the Court, was the duty to act judicially which implies nothing but a duty to act justly and fairly and not arbitrarily or capriciously. The Court observed:

***"13.** The dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated. For determining whether a power is an administrative power or a quasi-judicial power one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that p wer is expected to be exercised. Under our Constitution t e rule of law pervades over the entire fiel*

of administration. Every organ of the State under our Consti ution is regulated and controlled by the rule of law. In a welfare State like ours it is inevitable that the jurisdiction of the administrative bodies is increasing at a rapid rate. The concept of rule of law would lose its vitality if the

instrumentalities of the State are not charged with the duty of discharging their functions in a fair and just manner. The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously. The procedures which are considered inherent in the exercise of a judicial power are merely those which facilitate if not ensure a just and fair decision. In recent years the concept of quasi-judicial power has been undergoing a radical change. What was considered as an administrative power some years back is now being considered as a quasi-judicial power."

37. To the same effect is the decision of this Court in *Mohinder Singh Gill. v. Chief Election Commission* (1978) 1 SCC 405 where Krishna Iyer, J. speaking for the Court observed:

***"48.** Once we understand the soul of the rule as fairplay in action — and it is so — we must hold that it extends to both the fields. After all, administrative power in a democratic set-up is not allergic to fairness in action and discretionary executive justice cannot degenerate into unilateral injustice. Nor is there ground to be frightened of delay, inconvenience and expense, if natural justice gains access. For fairness itself is a flexible, pragmatic and relative concept, not a rigid, ritualistic or sophisticated abstraction. It is not a bull in a china shop, nor a bee in one's bonnet. Its essence is good conscience in a given situation: nothing more — but nothing less. The "exceptions" to the rules of natural justice are a misnomer or rather are but a shorthand form of expressing the idea that in those exclusionary cases nothing unfair can be inferred by not affording an opportunity to present or meet a case. Text-book excerpts and ratios from rulings can be heaped, but they all converge to the same point that audi alteram partem is the justice of the law, without, of course, making law*

lifeless, absurd, stultifying, self-defeating or plainly contrary to the common sense of the situation."

38. Recently this Court in *Jamal Uddin Ahmad v. Abu Saleh Najmuddin* (2003) 4 SCC 257 dealt with the nature of distinction between judicial or ministerial functions in the following words:

***"14.** The judicial function entrusted to a Judge is inalienable and differs from an administrative or ministerial function which can be delegated or performance whereof may be secured through authorization."The judicial function consists in the interpretation of the law and its application by rule or discretion to the facts of particular cases. This involves the ascertainment of facts in dispute according to the law of evidence. The organs which the State sets up to exercise the judicial function are called courts of law or courts of justice. Administration consists of the operations, whatever their intrinsic nature may be, which are performed by administrators; and administrators are all State officials who are neither legislators nor judges." (See Constitutional and Administrative Law, Phillips and Jackson, 6th Edn., p. 13.) P. Ramanatha Aiyar's Law Lexicon defines judicial function as the doing of something in the nature of or in the course of an action in court. (p. 1015) The distinction between "judicial" and "ministerial acts" is: If a Judge dealing with a particular matter has to exercise his discretion in arriving at a decision, he is acting judicially; if on the other hand, he is merely required to do a particular act and is precluded from entering into the merits of the matter, he is said to be acting ministerially. (pp. 1013-14). Judicial function is exercised under legal authority to decide on the disputes, after hearing the parties, maybe after making an enquiry, and the decision affects the rights and obligations of the parties. There is a duty to act judicially. The Judge may*

construe the law and apply it to a particular state of facts presented for the determination of the controversy. A ministerial act, on the other hand, may be defined to be one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of a legal authority, without regard to, or the exercise of, his own judgment upon the propriety of the act done. (Law Lexicon, ibid., p. 1234). In ministerial duty nothing is left to discretion; it is a simple, definite duty."

39. Applying the above principles to the case at hand and keeping in view the fact that any order that the Court may make on a request for transfer of a prisoner is bound to affect him prejudicially, we cannot but hold that it is obligatory for the Court to apply its mind fairly and objectively to the circumstances in which the transfer is being prayed for and take a considered view having regard to the objections which the prisoner may have to offer. There is in that process of determination and decision-making an implicit duty to act fairly, objectively or in other words to act judicially. It follows that any order of transfer passed in any such proceedings can be nothing but a judicial order or at least a quasi-judicial one. Inasmuch as the trial court appears to have treated the matter to be administrative and accordingly permitted the transfer without issuing notice to the under-trials or passing an appropriate order in the matter, it committed a mistake. A communication received from the prison authorities was dealt with and disposed of at an administrative level by sending a communication in reply without due and proper consideration and without passing a considered judicial order which alone could justify a transfer in the case. Such being the position the High Court was right in declaring the transfer to be void and directing the re-transfer of the undertrials to Bombay jail. It is common ground that the stay of the proceedings in three trials pending against the respondents has been vacated by this Court. Appearance of the undertrials would, therefore, be required in connection with the proceedings pending against them for which purpose they

have already been transferred back to the Arthur Road Jail in Bombay. Nothing further, in that view, needs to be done by this Court in that regard at this stage.

40. That leaves us with the only other aspect namely whether the High Court was justified in directing the Government to hold an inquiry against those responsible for using excessive force and for dereliction of duty by the medical officer. As noticed earlier by us the said direction has been issued entirely on the basis of the report submitted by the Sessions Judge. That report besides being preliminary is flawed in many respects including the fact that the same does not comply with the basic requirement of a fair opportunity of hearing being given to those likely to be affected. It is true that the statements of some of the jail officials have also been recorded in the course of the inquiry but that is not enough. Those indicted in the report were entitled to an opportunity to cross-examine those who alleged misconduct against them. Not only that the Sessions Judge has not named the officers responsible for the alleged use of excessive force which was essential for any follow up or further action in the matter. The Sessions Judge has observed:

"I am avoiding naming the officers of the jail against whom allegations of use of force are made as I am expected to give findings only on the aforesaid five points and as officers who took part in the action, officers who gave orders of or the officers who did not oppose the action cannot be segregated."

41. So, also the report clearly states the officials concerned have not been allowed to examine any witness although a request was made by them to do so. Such being the position, some of the observations made by the High Court that give an impression as though the misdemeanour of the jail officers had been proved, do not appear to be justified. It was at any rate not for the High Court to record a final and authoritative finding that the force used by the jail authorities was excessive or that

it was used for any extraneous purpose. It was a matter that could be determined only after a proper inquiry was conducted and an opportunity afforded to those who were accused of using such excessive force or abusing the power vested in them. Consequential directions issued by the High Court in directing the State Government to initiate disciplinary inquiry against all the officers involved in the incident were, therefore, premature. We say so because the question whether any disciplinary inquiry needs to be instituted against the jail officials would depend upon the outcome of a proper investigation into the incident and not a preliminary enquiry in which the Investigating Officer, apart from statements of the respondents, makes use of information discreetly collected from the jail inmates. The report of the Sessions Judge could in the circumstances provide no more than a prima facie basis for the Government to consider whether any further investigation into the incident was required to be conducted either for disciplinary action or for launching prosecution of those found guilty. Beyond that the preliminary report could not in view of what we have said above serve any other purpose.

42. In a country governed by the rule of law police excesses whether inside or outside the jail cannot be countenanced in the name of maintaining discipline or dealing with anti-national elements. Accountability is one of the facets of the rule of law. If anyone is found to have acted in breach of law or abused his position while exercising powers that must be exercised only within the parameters of law, the breach and the abuse can be punished. That is especially so when the abuse is alleged to have been committed under the cover of authority exercised by people in uniform. Any such action is also open to critical scrutiny and examination by the Courts. Having said that we cannot ignore the fact that the country today faces challenges and threats from extremist elements operating from within and outside India. Those dealing with such elements have at times to pay a heavy price by sacrificing their lives in the discharge of their duties. The glory of the constitutional democracy that

we have adopted, however, is that whatever be the challenges posed by such dark forces, the country's commitment to the Rule of Law remains steadfast. Courts in this country have protected and would continue to protect the ideals of the rights of the citizen being inviolable except in accordance with the procedure established by law.

43. In the result we allow these appeals but only in part and to the extent that the Government shall treat the report submitted by the Sessions Judge as a preliminary inquiry and take a considered decision whether or not any further inquiry, investigation or proceedings against those allegedly responsible for using excessive force while restoring discipline in the Central Jail at Bombay on 26th June, 2008 needs to be conducted. We make it clear that if the Government decides to hold any further inquiry or investigation into the matter on the basis of the preliminary findings in the report submitted by the Sessions Judge or institute any departmental proceedings against any one of those found guilty in any such further inquiry or investigation, the observations made by the High Court in regard to the use of force or the extent thereof shall not prejudice the parties concerned or the outcome of any such inquiry nor shall any such observation be treated to be a final expression of opinion regarding the guilt or innocence of the concerned. The parties are left to bear their own costs.

B.B.B. Appeals Partly allowed.

MADALA VENKATA NARSIMHA RAO
v.
STATE OF A.P.
(Criminal Appeal No. 393 of 2009)

NOVEMBER 27, 2012

[SWATANTER KUMAR AND MADAN B. LOKUR, JJ.]

Penal Code, 1860 – ss. 302 and 376 – Rape and Murder – Circumstantial evidence – Three witnesses saw the accused coming out of the house of the victim – Blood-stains on the clothes of the accused – Victim telling the witnesses that the accused had assaulted her – In post-mortem, the doctor opined that rape was committed on the accused – Trial court acquitted the accused of both the charges – High Court convicted the accused – On appeal, held: There was sufficient evidence to hold the appellant guilty of committing the murder – But no cogent or admissible evidence regarding rape of the victim – The only evidence as regards rape is the opinion of the doctor who conducted post-mortem, which was not safe to rely upon as the doctor was not examined as a witness.

Appellant-accused was prosecuted for having raped and murdered a girl. The prosecution case was that when the victim/deceased was alone at home, her brother had sent the appellant-accused to the house for some work. PWs 3, 4 and 5 were standing near the house of the victim. When they heard the cry from the house of the victim, and when they went to the house, they saw the accused running out of the house in blood-stained clothes and he ran away from there pushing them away. The accused was also seen on the streets with blood-stained clothes by PW-7. The victim told PWs 3, 4 and 5 that the appellant hit her with chutney grinder, as she had slapped him on his holding her hand. PW-8 (doctor) administered her first-

aid. She died on her way to the hospital. In post-mortem report (Exbt. P-9), the doctor opined that the deceased was also raped.

Trial Court acquitted the accused of all the charges. High Court reversing the acquittal, convicted the accused u/ss. 302 and 376 IPC. Hence the present appeal.

Partly allowing the appeal, the Court

HELD: 1.1 To secure a conviction on circumstantial evidence, the prosecution must prove its case by cogent, reliable and admissible evidence. Each relevant circumstance must be proved like any other fact and upon a composite reading thereof, it must lead to a high degree of probability that it is only the accused and none other who has committed the alleged offence. [Para 21] [960-C-D]

Munna Kumar Upadhyay v. State of A.P. **(2012) 6 SCC 174 – relied on.**

1.2. In the present case, the presence of the appellant at the scene of the crime, moments after it was discovered, is not in dispute. In fact, he was running away from inside the house where the crime was committed. While doing so, he pushed the persons who were entering the house on hearing the cries of the deceased. This is proved by the consistent testimony of each one of them. There is nothing in the cross-examination of these witnesses to suggest that they had cooked up a story to implicate the appellant. There is no explanation for this strange conduct whatsoever. The appellant had also blood-stains on his clothes at that time and he was also seen running on the street in that condition independently by PW7 who reached the scene of crime soon thereafter when the deceased was being taken away for administration of first-aid. The eye-witness

account, moments after the discovery of the crime is so overwhelming, coupled with the conduct of the appellant, that only one conclusion is possible which is that the murder of the deceased was committed by the appellant. [Paras 22, 23, 24 and 25] [960-E-H; 961-A-C]

1.3. Even the deceased gave virtually a dying declaration in which she narrated the sequence of events including the fact that the appellant had hit her with a chutney grinder on her head and other parts of her body. There is no reason at all why the deceased should falsely implicate the appellant of such a heinous crime. Her statement on this aspect may be contrasted with her statement on the issue of rape, in which she did not say a word to implicate the appellant. There is, therefore, more than a ring of truth in the statement made by her, moments before her death to PWs 3, 4 and 5. In this view of the matter, on an overall consideration of all the facts of the case, there is no doubt that the appellant alone caused the murder. [Paras 26 and 27] [961-C-F]

1.4. It cannot be accepted that since there were a large number of discrepancies in the testimonies of various witnesses, as pointed out by the Trial Judge, the benefit thereof must go to the appellant. The discrepancies noted by the Trial Judge, such as the time of recording of the first information report, the time of commencement of investigations by the police, the absence of any clear evidence to suggest who informed PW1 and PW2, does not take away the substratum of the case of the prosecution. If, an overall picture of the events is taken into consideration, it will be clear that the discrepancies pointed out pale into insignificance and do not affect the substratum of the case for the prosecution. [Paras 33, 34 and 35] [962-F-H; 963-C]

Syed Ahmed v. State of Karnataka **(2012) 8 SCC 527 – relied on.**

1.5. The primary duty of the Trial Judge is to determine the facts and then test the theory put forward by the prosecution. In this regard, the Trial Judge has failed in this duty. The Trial Court has not considered the events in totality but has disjointedly read the statements of the witnesses and has picked up minor discrepancies and highlighted them. The result of this approach is that the Trial Court has cast doubt on almost every aspect of the case. [Para 14] [958-A-C]

2.1. On the issue of the appellant having raped the deceased, there is virtually no evidence except the final opinion of the doctor who had conducted the post-mortem Exhibit P-9. The deceased did not inform PWs 3, 4 and 5 that she was raped or attempted to be raped by the appellant. All that she said was that the appellant caught hold of her hand. Thereupon, she slapped the appellant which led him to pick up the chutney grinder and hit her on the head and other parts of her body. There does not seem to be anything in the testimony of PWs 3, 4 and 5 to suggest that the deceased was raped or an attempt was made to rape her. The evidence of the doctor who administered first-aid to the deceased also does not give any indication of her having been violated. Even the complaint made by PW3 to the police does not mention anything about the deceased having been raped. The only evidence in this regard is the final opinion of the doctor. However, in the absence of the doctor having entered the witness box, it would not be safe to rely on the medical opinion that the deceased was raped. [Paras 28, 29 and 30] [961-G-H; 962-A-D]

2.2. Merely because some semen was collected from the person of the deceased or the trousers of the appellant, does not *ipso facto* lead to the conclusion that he had raped her. On the basis of the facts on record,

there is no evidence to suggest that the appellant had raped the deceased. [Paras 31 and 32] [962-E-F]

Case Law Reference

(2012) 6 SCC 174	**Relied on**	**Para 21**
(2012) 8 SCC 527	**Relied on**	**Para 34**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 393 of 2009.

From the Judgment & Order dated 14.2.2008 of the High Court of Judicature Andhra Pradesh at Hyderabad in Criminal Appeal No. 42 of 2006.

Vikas Upadhyay (for B.S. Banthia) for the Appellant.

Shishir Pinaki, Suchitra Hranghwal (for D. Mahesh Babu) for the Respondent.

The Judgment of the Court was delivered by

MADAN B. LOKUR, J. 1. The question for consideration is whether the High Court was right in setting aside the acquittal of the appellant for the murder of Lalitha and whether she was raped before her murder. In our opinion, there is sufficient evidence to hold the appellant guilty of committing the murder of Lalitha, but no cogent or admissible evidence of her having been raped.

The facts:

2. On 4th December, 1998 PW-1 Srimannarayana and his wife had gone to village Jangareddygudem at about 6.00 a.m. for the purpose of fixing a matrimonial alliance for their daughter, Lalitha. Later that day, at about 7/7.30 a.m. PW-2 Subrahmanyam son of Srimannarayana and brother of Lalitha opened their kirana shop. He then instructed the appellant who had been working with the family for the last about 10 years to get some tiffin from a hotel, deliver it to him and then deliver to

his sister, Lalitha, who was at their residence.

3. According to Subrahmanyam, the appellant did not turn up for some time and at about 8.15 a.m. his uncle, PW-3 Lakshmi Narayana came to the kirana shop and informed him that his sister, Lalitha, was lying badly injured at their residence. Both of them then rushed to the residence where they picked up Lalitha and took her to a local doctor PW-8 Kasi Viswanadham who administered first-aid. However, considering Lalitha's serious condition, she was advised to be shifted to Rajamundry. Transport was arranged to take her to Rajamundry but she died en route. Her body was then brought back and kept in the front courtyard of the house.

4. In the meanwhile, Srimannarayan was informed about the incident by another daughter and he rushed back to his residence at about 9.30 a.m. by which time Lalitha had died.

5. After conducting necessary investigations, on the basis of a first information report lodged by Lakshmi Narayana, a challan was filed by the police in which it was alleged that the appellant had raped Lalitha and had murdered her.

6. According to the prosecution, Lakshmi Narayana, the uncle of Subrahmanyam and elder brother of Srimannarayana was asked by Srimannarayana to look after his residence in his absence. In this connection, Lakshmi Narayana went to their residential house at about 8 a.m. or so. There he found some neighbors PW-4 Purnachandra Rao and PW-5 Venkateswara Rao chitchatting and he joined them in the conversation. Suddenly, they heard some cries emanating from inside the house of Srimannarayana and while they were entering the house in response to the cries, the appellant came running out of the house with blood-stained clothes, pushed them and ran away.

7. When Lakshmi Narayana, Purnachandra Rao and Venkateswara Rao entered the house they found Lalitha lying

in a pool of blood and she informed them that the appellant had got hold of her hand whereupon she slapped him. He then picked up a chutney grinder and hit her on the head and other parts of the body and stabbed her with a knife. She asked these persons for medical assistance and was then taken to the local doctor.

8. After her death, a post-mortem examination was conducted on Lalitha by Dr. K. Shymala Devi who gave the final opinion Exhibit P-9 that Lalitha was raped. However, this doctor did not enter the witness box.

9. It may be mentioned that after the appellant ran out of the house, he was seen running on the street with blood-stained clothes by PW-7 N. Visweswara Rao who was returning from a temple. While N. Visweswara Rao was passing the house of Srimannarayana, he found some people gathered over there and saw Lalitha in a pool of blood and Lakshmi Narayana, Purnachandra Rao and Venkateswara Rao preparing to remove her.

10. The defence put up by the appellant was that in fact he had not committed the crime but had discovered it.

11. On these broad facts, the Trial Court by its order dated 18th June 2004 passed in Sessions Case No.163/99 found the evidence insufficient to convict the appellant of the charge of rape or murder. This view was reversed in appeal by the High Court by its judgment and order dated 14th February 2008 passed in Criminal Appeal No.42 of 2006. The High Court convicted the appellant of the crime of rape and murder and sentenced him to imprisonment for life.

12. It is under these circumstances that the matter is now before us.

Decision of the Trial Court:

13. The analysis of the evidence and the decision of the

Trial Court leave much to be desired. The Trial Judge has not determined any facts, but has only found loop-holes in the oral evidence. The primary duty of the Trial Judge is to determine the facts and then test the theory put forward by the prosecution. In this regard, the Trial Judge has unfortunately failed in this duty.

14. The Trial Court has not considered the events in totality but has disjointedly read the statements of the witnesses and has picked up minor discrepancies and highlighted them. The result of this approach is that the Trial Court has cast doubt on almost every aspect of the case. It has cast doubt on the lodging of the first information report; it has doubted the arrest of the appellant; the presence of Lakshmi Narayana, Purnachandra Rao and Venkateswara Rao at the scene of the crime; the testimony of Srimannarayana and Subrahmanyam as well as N. Venkateswara Rao. In other words, the Trial Court did not believe any of the material witnesses and concluded that the entire story was cooked up to implicate the appellant. On this basis, the appellant was acquitted.

15. However, the Trial Court did not err in its conclusion on the allegation of the prosecution that Lalitha was raped. In this regard, the Trial Court noted that Lalitha did not say that she was raped and only stated that the appellant caught hold of her hand. But, the Trial Court erroneously proceeded on the basis that rape can be committed only behind closed doors and since there was no evidence that the doors of the house were closed, Lalitha could not have been raped. The Trial Court noted that the complaint lodged by Lakshmi Narayana did not mention that Lalitha was raped. It also noted that even the local doctor Kasi Viswanadham who administered first aid did not notice any evidence of rape. The Trial Court failed to note that the final medical opinion given by Dr. K. Shymala Devi could not be accepted since the doctor did not enter the witness box to support the post-mortem report. Be that as it may, the Trial Court concluded that Lalitha was not raped.

Decision of the High Court:

16. The High Court disagreed with the Trial Court on every aspect of the case. It was found that the evidence of Lakshmi Narayana, Purnachandra Rao and Venkateswara Rao was consistent on material issues. They had seen the appellant in blood-stained clothes pushing them and running away from the scene of the crime. In fact, the appellant was also seen running with blood stained clothes on the street by N. Venkateswara Rao.

17. The High Court noted that appellant admitted his presence at the scene of the crime since he claimed to have reached there soon after the crime was committed. The High Court found that under these circumstances there was no explanation for his conduct of running away from the scene of the crime if in fact he had not committed any offence.

18. The High Court also took into consideration the fact that Lalitha, while gasping for life, clearly stated that the appellant had hit her with a chutney grinder and all these facts put together clearly indicated that the appellant had murdered Lalitha.

19. On the issue whether Lalitha had been raped, the High Court found that the post mortem report Exhibit P-9 established that Lalitha was raped and on this basis, the conclusion arrived at by the Trial Judge was reversed and the appellant convicted for having raped Lalitha.

Submissions:

20. The principal contention of learned counsel for the appellant was that the case is one of circumstantial evidence and however strong the suspicion may be, it cannot take place of proof. There were no eye witnesses to the crime and, therefore, it cannot be conclusively said that the appellant had murdered Lalitha. It was also contended that there was no

evidence that Lalitha had been raped and even in this regard the conclusion of the High Court was faulty. It was finally submitted by learned counsel for the appellant that there were far too many discrepancies in the evidence of the witnesses, as brought out by the Trial Judge, and they could not be ignored. The cumulative effect of all these discrepancies casts a doubt on the case of the prosecution and the benefit of this must go to the appellant.

Discussion:

21. The law on appreciation of circumstantial evidence is now too well settled to bear any repetition. Suffice it to say that to secure a conviction on circumstantial evidence, the prosecution must prove its case by cogent, reliable and admissible evidence. Each relevant circumstance must be proved like any other fact and upon a composite reading thereof it must lead to a high degree of probability that it is only the accused and none other who has committed the alleged offence. In this regard, reference may be made to *Munna Kumar Upadhyay v. State of A.P.,* (2012) 6 SCC 174 (authored by one of us, Swatanter Kumar, J).

22. In our case, the presence of the appellant at the scene of the crime moments after it was discovered is not in dispute. In fact, he was running away from inside the house where the crime was committed. While doing so, he pushed Lakshmi Narayana, Purnachandra Rao and Venkateswara Rao who were entering the house on hearing the cries of Lalitha. This is proved by the consistent testimony of each one of them. There is nothing in the cross-examination of these witnesses to suggest that they had cooked up a story to implicate the appellant.

23. The presence of the appellant having been conclusively established, there should be some reason why he ran away from the scene of the crime if in fact he was the one who had discovered it and not the one who had committed it. There is

no explanation for this strange conduct whatsoever. To say that the appellant is a rustic villager is neither here nor there.

24. In this context, it is not possible to overlook the fact that the appellant had blood-stains on his clothes at that time and he was also seen running on the street in that condition independently by N. Venkateswara Rao, who reached the scene of crime soon thereafter when Lalitha was being taken away for administration of first-aid.

25. The eye witness account, moments after the discovery of the crime is so overwhelming, coupled with the conduct of the appellant, that only one conclusion is possible which is that the murder of Lalitha was committed by the appellant.

26. In addition, it must be appreciated that even Lalitha gave virtually a dying declaration in which she narrated the sequence of events including the fact that the appellant had hit her with a chutney grinder on her head and other parts of her body. There is no reason at all why Lalitha should falsely implicate the appellant of such a heinous crime. Lalitha's statement on this aspect may be contrasted with her statement on the issue of rape, in which she did not say a word to implicate the appellant. There is, therefore, more than a ring of truth in the statement made by Lalitha moments before her death to Lakshmi Narayana, Purnachandra Rao and Venkateswara Rao.

27. In this view of the matter, on an overall consideration of all the facts of the case, we have no doubt that the appellant alone caused the murder of Lalitha.

28. On the issue of the appellant having raped Lalitha, we find that there is virtually no evidence to this effect except the final opinion Exhibit P-9. As noted above, Lalitha did not inform Lakshmi Narayana, Purnachandra Rao or Venkateswara Rao that she was raped or attempted to be raped by the appellant. All that she said was that the appellant caught hold of her hand.

Thereupon, Lalitha slapped the appellant which led him to pick up the chutney grinder and hit her on the head and other parts of her body. There does not seem to be anything in the testimony of Lakshmi Narayana, Purnachandra Rao and Venkateswara Rao to suggest that Lalitha was raped or an attempt was made to rape her.

29. The evidence of the doctor Kasi Viswanadham who administered first-aid to Lalitha also does not give any indication of Lalitha having been violated. Even the complaint made by Lakshmi Narayana to the police does not mention anything about Lalitha having been raped.

30. As mentioned above, the only evidence in this regard is the final opinion of Dr. K. Shymala Devi which is Exhibit P-9. However, in the absence of the doctor having entered the witness box, it would not be safe to rely on the medical opinion that Lalitha was raped.

31. We are also of the opinion that merely because some semen was collected from the person of Lalitha or the trousers of the appellant does not ipso facto lead to the conclusion that he had raped her.

32. On the basis of the facts on record, we hold that there is no evidence to suggest that the appellant had raped Lalitha.

33. We are not inclined to accept the contention of learned counsel for the appellant that since there were a large number of discrepancies in the testimonies of various witnesses, as pointed out by the Trial Judge, the benefit thereof must go to the appellant.

34. The discrepancies noted by the Trial Judge, such as the time of recording of the first information report, the time of commencement of investigations by the police, the absence of any clear evidence to suggest who informed Srimannarayana or Subrahmanyam does not take away the substratum of the case of the prosecution. What are minor discrepancies and

their impact has been dealt with in *Syed Ahmed v. State of Karnataka,* (2012) 8 SCC 527 (authored by one of us Lokur, J) and we need not repeat the view taken.

35. The substantive case of the prosecution is that Lalitha was murdered in her house. There is no doubt about this, nor is there any doubt that almost immediately thereafter (on hearing her cries) Lakshmi Narayana, Purnachandra Rao and Venkateswara Rao saw the appellant running away from the house in blood-stained clothes. There is also no doubt that these persons were informed by Lalitha that the appellant hit her with a chutney grinder. If, on these basic facts, an overall picture of the events is taken into consideration, it will be clear that the discrepancies pointed out pale into insignificance and do not affect the substratum of the case for the prosecution.

36. As we have noted above, the Trial Judge has not thought it fit to determine facts but only thought it appropriate to find out the smallest inconsistency or disagreement in the testimony of the witnesses so as to discredit them. This is not the correct approach for the Trial Court to adopt and, in fact, the High Court has characterized this as perverse. We say nothing on this and leave it at that.

Conclusion:

37. Under these circumstances, we have no hesitation in upholding the view of the High Court that the appellant is guilty of committing the murder of Lalitha. However, we are of the opinion that there is no evidence that the appellant had raped Lalitha.

38. The appeal is accordingly allowed in part and the conviction and sentence awarded to the appellant for an offence punishable under Section 302 of the IPC is confirmed.

K.K.T. Appeal partly allowed.

SUKHDEV SINGH
v.
STATE OF HARYANA
(Criminal Appeal No. 2118 of 2008)

DECEMBER 13, 2012

[SWATANTER KUMAR AND MADAN B. LOKUR, JJ.]

Narcotic Drugs and Psychotropic Substances Act, 1985 – s.42(2) [as pre-amended] and s.15 – Reporting of information reduced to writing to higher officer – Non-compliance – Effect – Held: On facts, the information was received by PW1 Investigating Officer on 4th February, 1994, thus, s.42(2) as amended w.e.f. 2nd October,2001 vide Amending Act No.9 of 2001 would not apply, and instead the pre-amended s.42(2) would govern the case – PW1, while on patrol duty, had received secret information against the accused – However, as per the statement of PW1, no effort was made by him to reduce the information into writing and inform his higher authorities instantaneously or even after a reasonable delay – PW1 had more than sufficient time at his disposal to comply with the provisions of s.42 – He had received the secret information at 11.30 a.m., but he reached the house of the accused at 2 p.m. even when the distance was only 6 kilometers away and he was in a jeep – Not an iota of evidence, either in the statement of PW1 or in any other documentary form, to show what PW1 was doing for these two hours and what prevented him from complying with the provisions of s.42 – There was patent illegality in the prosecution case, which was incurable – Relief granted to the accused – Conviction u/s.15 as recorded by Courts below set aside – Accused acquitted.

Narcotic Drugs and Psychotropic Substances Act, 1985 – s.42(2) – Reporting of information reduced to writing to

higher officer – Amendment of sub-section (2) of s.42 w.e.f. 2nd October, 2001 vide Amending Act 9 of 2001 – Effect – Held: After amendment of this sub-section, the words 'forthwith' stood amended by the words 'within 72 hours' – Resultantly, absolute certainty brought in by binding the officer concerned to send the intimation to the superior officer within 72 hours from the time of receipt of information – The amendment is suggestive of the legislative intent that information must reach the superior officer not only expeditiously or forthwith but definitely within the time contemplated under the amended sub-section (2) of s.42 – This provides greater certainty to the time in which the action should be taken as well as renders the safeguards provided to an accused more meaningful.

Narcotic Drugs and Psychotropic Substances Act, 1985 – s.42(2) – Amendment of, vide Amending Act No.9 of 2001 – Applicability of the Amending Act – Held: Cannot be with retrospective effect – The law as it existed at the time of commission of the offence would be the law which will govern the rights and obligations of the parties under the NDPS Act – Settled principle of interpretation of criminal jurisprudence that the provisions have to be strictly construed and cannot be given a retrospective effect unless legislative intent and expression is clear beyond ambiguity.

Narcotic Drugs and Psychotropic Substances Act, 1985 – s.42 – Compliance with – Is mandatory and not optional – Incumbent duty of every investigating officer to comply with the provisions of s.42 in true substance and spirit in consonance with the law stated by this Court in the case of ***Karnail Singh****.*

PW1(ASI), while on patrol duty, received secret information against the accused that he was in the habit of selling *chura post* (poppy husk) in his house and if a raid is conducted upon the house of the accused, he can be caught red-handed with the contraband. Search was

conducted and five bags were found lying concealed under a heap of chaff in the courtyard of the house of the accused. Notice was served upon the accused under Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act') giving him an offer to be searched before a Gazetted Officer or a Magistrate. The accused expressed his desire to be searched before a Gazetted Officer of the police. PW1 thereupon sent an application to the Deputy Superintendent of Police (DSP) who reached the spot and upon his instruction the search of the bags was conducted. From each gunny bag, 100 grams of *chura post* was separated as sample. The samples and the gunny bags were sealed and taken into possession. Thereafter a ruqa was sent to the police station where FIR was registered under the NDPS Act. The trial court held the accused guilty under Section 15 of the NDPS Act and sentenced him to 10 years' rigorous imprisonment. The High Court declined to interfere with the judgment of the trial Court and therefore the instant appeal.

The only contention raised before this Court on behalf of the appellant was that the prosecution case ought to fail for total non-compliance of the mandatory statutory provisions of Section 42(2) of the NDPS Act; and thus the accused was entitled to acquittal.

Allowing the appeal, the Court

HELD:1.1. Section 42 of the NDPS Act can be divided into two different parts. First is the power of entry, search seizure and arrest without warrant or authorisation as contemplated under sub-section (1) of the said section. Second is reporting of the information reduced to writing to a higher officer in consonance with sub-section (2) of that section. Sub-section (2) of Section 42 had been a matter of judicial interpretation as well as of legislative concern in the past. Sub-section (2) was amended by the

Parliament vide Act 9 of 2001 with effect from 2nd October, 2001. After amendment of this sub-section, the words 'forthwith' stood amended by the words 'within 72 hours'. In other words, whatever ambiguity or leverage was provided for under the unamended provision, was clarified and resultantly, absolute certainty was brought in by binding the officer concerned to send the intimation to the superior officers within 72 hours from the time of receipt of information. The amendment is suggestive of the legislative intent that information must reach the superior officer not only expeditiously or forthwith but definitely within the time contemplated under the amended sub-section (2) of Section 42. This provides a greater certainty to the time in which the action should be taken as well as renders the safeguards provided to an accused more meaningful. In the present case, the information was received by the empowered officer on 4th February, 1994 when the unamended provision was in force. The law as it existed at the time of commission of the offence would be the law which will govern the rights and obligations of the parties under the NDPS Act. [Para 14] [978-D-H; 979-A-B]

1.2. No law can be interpreted so as to frustrate the very basic rule of law. It is a settled principle of interpretation of criminal jurisprudence that the provisions have to be strictly construed and cannot be given a retrospective effect unless legislative intent and expression is clear beyond ambiguity. The amendments to criminal law would not intend that there should be undue delay in disposal of criminal trials or there should be retrial just because the law has changed. Such an approach would be contrary to the doctrine of finality as well as avoidance of delay in conclusion of criminal trial. [Para 15] [980-C-D]

1.3.In the present case, the occurrence was of 4th February, 1994. The trial of the accused concluded by

judgment of conviction dated 4th July, 1998. Thus, it will be the unamended Section 42(2) of the NDPS Act that would govern the present case. The provisions of Section 42 are intended to provide protection as well as lay down a procedure which is mandatory and should be followed positively by the Investigating Officer. He is obliged to furnish the information to his superior officer forthwith. That obviously means without any delay. But there could be cases where the Investigating Officer instantaneously, for special reasons to be explained in writing, is not able to reduce the information into writing and send the said information to his superior officers but could do it later and preferably prior to recovery. Compliance of Section 42 is mandatory and there cannot be an escape from its strict compliance. [Para 18] [981-A-D]

1.4. As per the statement of PW1, no effort was made by him to reduce the information into writing and inform his higher authorities instantaneously or even after a reasonable delay which has to be explained with reasons in writing. On the contrary, in the present case, the Investigating Officer PW1 had more than sufficient time at his disposal to comply with the provisions of Section 42. Admittedly, he had received the secret information at 11.30 a.m., but he reached the house of the accused at 2 p.m. even when the distance was only 6 kilometers away and he was in a jeep. There is not an iota of evidence, either in the statement of PW 1 or in any other documentary form, to show what the Investigating Officer was doing for these two hours and what prevented him from complying with the provisions of Section 42 of NDPS Act. [Para 21] [983-D-F]

1.5. There is patent illegality in the case of the prosecution and such illegality is incurable. This is a case of total non-compliance, thus the question of substantial

compliance would not even arise for consideration of the Court in the present case. The twin purpose of the provisions of Section 42 which can broadly be stated are that : (a) it is a mandatory provision which ought to be construed and complied strictly; and (b) compliance of furnishing information to the superior officer should be forthwith or within a very short time thereafter and preferably post-recovery. [Para 22] [983-G-H; 984-A]

1.6. Once the contraband is recovered, then there are other provisions like Section 57 which the empowered officer is mandatorily required to comply with. That itself to some extent would minimize the purpose and effectiveness of Section 42 of the NDPS Act. It is to provide fairness in the process of recovery and investigation which is one of the basic features of our criminal jurisprudence. It is a kind of prevention of false implication of innocent persons. The legislature in its wisdom had made the provisions of Section 42 of NDPS Act mandatory and not optional as stated by this Court in the case of *Karnail Singh.* [Para 23] [984-B-C]

1.7. The accused is therefore entitled to grant of relief. The judgment of the High Court as well as the Trial Court are accordingly set aside and the accused is acquitted of the offence under Section 15 of NDPS Act. [Para 24] [984-D]

1.8. The Director General of Police concerned of all the States are directed to issue appropriate instructions directing the investigating officers to duly comply with the provisions of Section 42 of NDPS Act at the appropriate stage to avoid such acquittals. Compliance to the provisions of Section 42 being mandatory, it is the incumbent duty of every investigating officer to comply with the same in true substance and spirit in consonance with the law stated by this Court in the case of *Karnail Singh*. [Paras 25, 26] [984-E-F]

Karnail Singh v. State of Haryana **(2009) 8 SCC 539: 2009 (11) SCR 470 – followed.**

Basheer @ N.P. Basheer v. *State of Kerala* **(2004) 3 SCC 609: 2004 (2) SCR 224;** *Jawahar Singh @ Bhagat Ji. v. State of GNCT of Delhi* **(2009) 6 SCC 490: 2009 (7) SCR 495;** *Ravinder Singh v. State of Himachal Pradesh* **(2009) 14 SCC 201 and** *Hari Ram v. State of Rajasthan & Ors.* **(2009) 13 SCC 211: 2009 (7) SCR 623 – relied on.**

Sajan Abraham v. State of Kerala **(2001) 6 SCC 692: 2001 (1) Suppl. SCR 335 and** *Abdul Rashid Ibrahim Mansuri v. State of Gujarat* **(2000) 2 SCC 513: 2000 (1) SCR 542 – referred to.**

Case Law Reference:

2001 (1) Suppl. SCR 335	**referred to**	**Para 11**
2004 (2) SCR 224	**relied on**	**Para 14**
2009 (7) SCR 495	**relied on**	**Para 14**
(2009) 14 SCC 201	**relied on**	**Para 16**
2009 (7) SCR 623	**relied on**	**Para 17**
2009 (11) SCR 470	**followed**	**Para 19**
2000 (1) SCR 542	**referred to**	**Para 19**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2118 of 2008.

From the Judgment & Order dated 27.3.2008 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 802-SB of 1998.

Shiv Kumar Suri, Suchismita Bardhan for the Appellant.

Kamal Mohan Gupta, Mohd. Zahid Hussain for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. The present appeal is directed against the judgment dated 27th March, 2008 pronounced by the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 802-SB of 1998. We may notice the case of the prosecution and the facts which have given rise to the filing of the present criminal appeal.

2. On 4th February, 1994, ASI Nand Lal along with HC Hoshiar Singh, HC Suraj Bhan and other police officials were present in village Jogewala, in connection with patrolling duty. ASI Nand Lal, who was examined as PW 1, received secret information against the accused that the accused was in the habit of selling *chura* post (poppy husk) in his house and if a raid is conducted upon the house of the accused, the accused can be caught red-handed with the contraband. One Nacchatter Singh is stated to have been associated with the raiding party which raided the house of the accused. However, this witness was declared hostile before the Court during his examination. On conducting a search, five bags were found lying concealed under a heap of chaff in the courtyard of the house of the accused. On suspicion of having some intoxicant in his possession, the Investigating Officer served notice upon the accused under Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act') giving him an offer to be searched before a Gazetted Officer or a Magistrate. Accused is stated to have responded to such notice vide Ext. PC/1 where he expressed his desire to be searched before a Gazetted Officer of the police. Upon having known the desired choice of the accused, it is stated that PW1 had sent an application, Ext. PD, to the Deputy Superintendent of Police, Dabwali, through Constable Amir Singh requesting him to reach the spot. Mr. Jagdish Nagar, DSP, reached the spot after about half an hour and upon his instruction the search of the bags was conducted. From each gunny bag, 100 grams of *chura* post was separated as sample. The samples as well

as the remaining gunny bags weighed 39 kgs. and 900 grams each and were sealed with the seal bearing impressions JN and NL, and thereafter were taken into possession vide recovery memo Ext. PE. The seal NL was handed over to HC Hoshiar Singh while seal JN was retained by the DSP himself. After completing this process, a ruqa Ex. PF was sent to the police station where the FIR being Ext. PF/1 was registered under Sections 15/16/61/85 of NDPS Act. The Investigating Officer prepared a site plan Ext. PG. On return to the police station, the case property was handed over to the MHC with its seals intact. After receiving the test report Ext. PH from the Forensic Science Laboratory, Haryana, Madhuban (Karnal) and after completing all other formalities, the challan was filed. The challan in terms of Section 173 of the Code of Criminal Procedure, 1973 (for short "Cr.PC") was presented before the court of competent jurisdiction. The prosecution examined a number of witnesses including PW1 Nand Lal, PW2 Jagdish Nagar, DSP and PW Nachhattar Singh. Affidavits of Nihan Singh, Head Constable and Tejas Singh, Constable (Ext. PA and PB respectively) were taken into evidence. The accused took the plea that he had been falsely implicated in the case at the instance of Harnand Singh, Ex-Member of the Block Samiti of the area and examined four witnesses in support of his case. The Trial Court vide its judgment of conviction dated 4th July, 1998 held the accused guilty of an offence punishable under Section 15 of NDPS Act and after hearing the party on the quantum of sentence vide its order dated 6th July, 1998 awarded 10 years' rigorous imprisonment to the accused with fine Rs. 1 lakh and in the event of default to undergo simple imprisonment for another two years. The legality and correctness of the judgment and order of sentence was challenged by the accused before the High Court.

3. The High Court vide its detailed judgment dated 27th March, 2008 declined to interfere with the judgment of the Trial Court and while upholding the same, maintained the order of sentence, giving rise to the filing of the present appeal.

4. The only contention raised before us on behalf of the appellant is that the case of the prosecution must fail for total non-compliance of the statutory provisions of Section 42 of NDPS Act. These provisions are mandatory and in the present case, there is admittedly no compliance of the said provisions, thus the accused is entitled to acquittal as the whole case of the prosecution is vitiated in law.

5. To the contra, the contention on behalf of the State is that there is substantial compliance of the provisions of Section 42 of NDPS Act and therefore, the concurrent judgments of conviction and order of sentence do not call for any interference.

6. In order to examine the merit or otherwise of the above contention, it is necessary for us to discuss the entire gamut of the prosecution evidence.

7. At this stage, it will be useful to refer to the relevant statement of ASI Nand Lal, PW1 who is stated to have received a secret information, proceeded to raid the house of the accused and recovered the *chura* post as noticed above:

> "On 04.02.1994, I was posted as Incharge of CIA Staff, Dabwali. On that day, I alongwith Hoshiar Singh H.C. Suraj Bhan H.C. and other police officials was present at village Jogewala in connection with patrolling and detection of crimes. Then, I received a secret information that the accused present in the court is in the habit of selling churapost and if a raid is conducted at the once, churapost could be recovered from him. On receipt of this information, I formed a raiding party and when I reached near the school of village Panniwala Morika, Nicchattar Singh son of Sunder Singh met me and he was joined in the raiding party and then the raiding party reached the house of the accused. The accused was found present in the court-yard of his house and at that time, he was sitting on a cot. Then, I conducted the house search of the accused and on search five bags lying under the heap of Turi were

> recovered which were lying in the court-yard of the house of the accused. Then, I served a notice Ex. PC on the accused on the suspicion of his having possessed some narcotic substance in these five gunny bags, offering him the search of the bags before any Gazetted Officer of Police or a Magistrate. The accused as per his reply Ex.PC/1 desired the search of the gunny bags before any Gazetted Officer of Police. Ex. PC and Ex. PC/1 were signed by the accused and attested by PWs H.C. Suraj Bhan and Hoshiar Singh and Nachittar Singh independent witness. Then I sent a written application Ex.PD through constable Amir Singh to DSP Dabwali requesting him to reach on the spot. Thereafter, the DSP Dabwali reached at the spot after half an hour and then on his instructions, I conducted the search of the five gunny bags in the presence of PWs. Poppy straw was found in it. 100 grams churapost was separated as samples from each gunny bags. The remaining on weighment was found to be 39 kgs. 900 grams in each gunny bag. The samples and the gunny bags remaining churapost were sealed with the seals NL and JN and were taken into possession vide recovery memo Ex. PE attested by DSP Jegdish Nagar, Nichhatar Singh, Suraj Bhan H.C. Seal NL after use was handed over to Hoshiar Singh H.C., while the seal JN was retained by the DSP himself I sent ruqa Ex. PF to the Police-Station for registration of a case on which for-mail FIR Ex.PF/1 was recorded by Shri Davinder Kumar ASI whose signatures Iidentify."

8. It is clear from the statement of PW1 that he, upon receiving the secret information, neither reduced the same in writing nor communicated to his senior officer about receiving the secret information as required under Section 42 of NDPS Act.

9. In his cross-examination, he admitted that he had received the secret information at about 11.30 a.m. at Village

Jogewala. He did not know from where the secret information was received. He was in a jeep. The distance between the house of the accused and the spot where he was at the time of receiving the secret information was merely 6 kilometers, but he reached the house of the accused only at 2 p.m. He also admitted that the house of the accused was situated in the middle of the village in a busy locality, and yet he did not call anybody from the neighbourhood at the time of effecting recovery.

10. According to the learned counsel appearing for the State, there was substantial compliance inasmuch as after effecting the recovery he had sent a ruqa Ext. PF to his senior officer, on the basis of which the FIR Ext. PF/1 was registered and thus, there was substantial compliance of the provisions of Section 42 of NDPS Act. This aspect has also been considered by the High Court and while accepting the contention of the State as to substantial compliance of the provisions of Section 42 of NDPS Act, the High Court in the judgment impugned herein noticed as under:-

> "9-A. In the instant case too, a secret information, was received by Nand Lal, ASI on 4.2.1994, when he alongwith Hoshiar Singh, HC, Suraj Bhan and other police officials, was present in village Jogewala, in connection with patrol duty, and detection of crime. It means that Nand Lal, ASI, was in motion, at the time, when he received the secret information, against the accused. Since, the secret informer had informed Nand Lal, ASI that if a raid was conducted immediately, then a big haul of contraband, could be recovered from the house of the accused, where he was present. It was his bounden duty, to immediately rush to the disclosed place, to detect the accused with contraband. It was, in this view of the matter, that he had no time to record the information, and send the same to the Officer Superior, as had he done so, there would have been every possibility of the accuse absconding, and the

> purpose of the very raid would have been defeated. However, he substantially complied the provisions of Section 42 of the Act, by recording the ruqa, embodying the secret information therein, as also by sending the message to the DSP, to come to the spot, as a result whereof, he came to the spot. Since, there was substantial compliance, with the provisions of Section 42 of the Act, it could not be said that there was intentional and deliberate non-compliance thereof strictly. On account of this reason, the case of the prosecution cannot be thrown out. The principle of law, laid down in *Sajan Abraha's case (supra),* a case decided by three Judge Bench of the Apex Court, is, thus, fully applicable to the facts of the present case. In this view of the matter, fully applicable to the facts of the present case. In this view of the matter, the submission of the Counsel for the appellant, in this regard, does not appear to be correct, and stands rejected."

11. We may notice that the High Court, while arriving at the above conclusion, appears to have relied upon the judgment of this Court in the case of *Sajan Abraham v. State of Kerala* [(2001) 6 SCC 692].

12. The High Court has proceeded apparently on the basis of substantial compliance of the provisions. The concept of substantial compliance appears to have been construed on the basis that PW1 had sent a ruqa and had informed about the recovery effected on the basis of which the FIR was registered. All these are post-recovery steps taken by PW1.

13. Now, the question that arises for consideration is as to at what stage and by what time the authorized officer should comply with the requirements of Section 42 of the Act and report the matter to his superior officer. For this purpose, we must refer to Section 42 of the NDPS Act at his stage :

> "Section 42—Power of entry, search, seizure and arrest without warrant or authorisation—(1) Any such officer

(being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,—

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior."

14. Section 42 can be divided into two different parts. First is the power of entry, search seizure and arrest without warrant or authorisation as contemplated under sub-section (1) of the said section. Second is reporting of the information reduced to writing to a higher officer in consonance with sub-section (2) of that section. Sub-section (2) of Section 42 had been a matter of judicial interpretation as well as of legislative concern in the past. Sub-section (2) was amended by the Parliament vide Act 9 of 2001 with effect from 2nd October, 2001. After amendment of this sub-section, the words 'forthwith' stood amended by the words 'within 72 hours'. In other words, whatever ambiguity or leverage was provided for under the unamended provision, was clarified and resultantly, absolute certainty was brought in by binding the officer concerned to send the intimation to the superior officers within 72 hours from the time of receipt of information. The amendment is suggestive of the legislative intent that information must reach the superior officer not only expeditiously or forthwith but definitely within the time contemplated under the amended sub-section (2) of Section

42. This, in our opinion, provides a greater certainty to the time in which the action should be taken as well as renders the safeguards provided to an accused more meaningful. In the present case, the information was received by the empowered officer on 4th February, 1994 when the unamended provision was in force. The law as it existed at the time of commission of the offence would be the law which will govern the rights and obligations of the parties under the NDPS Act. In the case of *Basheer @ N.P. Basheer* v. *State of Kerala* [(2004) 3 SCC 609] wherein this Court was concerned with the Amending Act 9 of 2001 of the NDPS Act, the Court took the view that application of the Amending Act, where the trial had been concluded and appeal was pending on the date of its commencement and where the accused had been tried and convicted, would not apply. The contention that trials were not held in accordance with law was not sustainable for the reason that there could be direct and deleterious consequences of applying the amending provisions of the Act to trials which had concluded in which appeals were filed prior to the date of Amending Act coming into force. This would certainly defeat the first object of avoiding delay in such trials. Another Bench of this Court in the case of *Jawahar Singh @ Bhagat Ji. v. State of GNCT of Delhi* [(2009) 6 SCC 490], while dealing with the amendments of Section 21 of the NDPS Act, the Court took the view that amendments made by Act 9 of 2001 could not be given retrospective effect as if it was so given, it would warrant a retrial which is not the object of the Act. The Court held as under :

> "9. It is now beyond any doubt or dispute that the quantum of punishment to be inflicted on an accused upon recording a judgment of conviction would be as per the law which was prevailing at the relevant time. As on the date of commission of the offence and/or the date of conviction, there was no distinction between a small quantity and a commercial quantity, question of infliction of a lesser sentence by reason of the provisions of the amending Act,

> in our considered opinion, would not arise.
>
> 10. It is also a well-settled principle of law that a substantive provision unless specifically provided for or otherwise intended by Parliament should be held to have a prospective operation. One of the facets of the rule of law is also that all statutes should be presumed to have a prospective operation only."

15. No law can be interpreted so as to frustrate the very basic rule of law. It is a settled principle of interpretation of criminal jurisprudence that the provisions have to be strictly construed and cannot be given a retrospective effect unless legislative intent and expression is clear beyond ambiguity. The amendments to criminal law would not intend that there should be undue delay in disposal of criminal trials or there should be retrial just because the law has changed. Such an approach would be contrary to the doctrine of finality as well as avoidance of delay in conclusion of criminal trial.

16. Still, reference can be made to the judgment of this Court in the case of *Ravinder Singh v. State of Himachal Pradesh* [(2009) 14 SCC 201], wherein this Court was dealing with the question as to what would be the law applicable for imposition of a sentence irrespective of when the trial was concluded with reference to Article 21 of the Act and provision of the Punjab Excise Act, 1914 as applicable and amended by H.P. Act 8 of 1995 where punishment was enhanced and minimum sentenced was provided. The Court held that it is trite law that the sentence imposable on the date of commission of the offence has to determine the sentence imposable on completion of trial'.

17. Even in the case of *Hari Ram v. State of Rajasthan & Ors.* [(2009) 13 SCC 211], this Court stated with reference to the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 (as amended by Act of 2006) that the relevant date for applicability of the Act so as the age of the

accused, who claims to be a child, is concerned, is the date of occurrence and not the date of trial.

18. In the present case, the occurrence was of 4th February, 1994. The Trial of the accused concluded by judgment of conviction dated 4th July, 1998. Thus, it will be the unamended Section 42(2) of the NDPS Act that would govern the present case. The provisions of Section 42 are intended to provide protection as well as lay down a procedure which is mandatory and should be followed positively by the Investigating Officer. He is obliged to furnish the information to his superior officer forthwith. That obviously means without any delay. But there could be cases where the Investigating Officer instantaneously, for special reasons to be explained in writing, is not able to reduce the information into writing and send the said information to his superior officers but could do it later and preferably prior to recovery. Compliance of Section 42 is mandatory and there cannot be an escape from its strict compliance.

19. This question is no more *res integra* and stands fully answered by the Constitution Bench judgment of this Court in *Karnail Singh v. State of Haryana* [(2009) 8 SCC 539]. The Constitution Bench had the occasion to consider the conflict between the two judgments i.e. in the case of *Abdul Rashid Ibrahim Mansuri v. State of Gujarat* [(2000) 2 SCC 513] and *Sajan Abraham (supra)* and held as under:-

> "**35.** In conclusion, what is to be noticed is that *Abdul Rashid* did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did *Sajan Abraham hold* that the requirements of Sections 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:
>
> (*a*) The officer on receiving the information [of the nature referred to in sub-section (1) of Section 42] from any person had to record it in writing in the register concerned and forthwith send a copy to his immediate official superior,

> before proceeding to take action in terms of clauses (*a*) to (*d*) of Section 42(1).
>
> (*b*) But if the information was received when the officer was not in the police station, but while he was on the move either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (*a*) to (*d*) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.
>
> (*c*) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally *precede* the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.
>
> (*d*) While total non-compliance with requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police

officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001."

20. Having referred to the above settled principle of law, we are unable to accept the contention raised on behalf of the State and have to grant our approval to the submission made on behalf of the appellant.

21. As per the statement of PW1, no effort was made by him to reduce the information into writing and inform his higher authorities instantaneously or even after a reasonable delay which has to be explained with reasons in writing. On the contrary, in the present case, the Investigating Officer PW 1 had more than sufficient time at his disposal to comply with the provisions of Section 42. Admittedly, he had received the secret information at 11.30 a.m., but he reached the house of the accused at 2 p.m. even when the distance was only 6 kilometers away and he was in a jeep. There is not an iota of evidence, either in the statement of PW 1 or in any other documentary form, to show what the Investigating Officer was doing for these two hours and what prevented him from complying with the provisions of Section 42 of NDPS Act.

22. There is patent illegality in the case of the prosecution and such illegality is incurable. This is a case of total non-compliance, thus the question of substantial compliance would not even arise for consideration of the Court in the present case. The twin purpose of the provisions of Section 42 which can broadly be stated are that : (a) it is a mandatory provision which ought to be construed and complied strictly; and (b) compliance

of furnishing information to the superior officer should be forthwith or within a very short time thereafter and preferably post-recovery.

23. Once the contraband is recovered, then there are other provisions like Section 57 which the empowered officer is mandatorily required to comply with. That itself to some extent would minimize the purpose and effectiveness of Section 42 of the NDPS Act. It is to provide fairness in the process of recovery and investigation which is one of the basic features of our criminal jurisprudence. It is a kind of prevention of false implication of innocent persons. The legislature in its wisdom had made the provisions of Section 42 of NDPS Act mandatory and not optional as stated by this Court in the case of *Karnail Singh* (*supra*).

24. Thus, the present appeal merits grant of relief to the accused. We accordingly set aside the judgment of the High Court as well as the Trial Court and acquit the accused of an offence under Section 15 of NDPS Act. We direct the accused to be set at liberty forthwith, if not required in any other case.

25. Before we part with this file, we consider it the duty of the Court to direct the Director General of Police concerned of all the States to issue appropriate instructions directing the investigating officers to duly comply with the provisions of Section 42 of NDPS Act at the appropriate stage to avoid such acquittals. Compliance to the provisions of Section 42 being mandatory, it is the incumbent duty of every investigating officer to comply with the same in true substance and spirit in consonance with the law stated by this Court in the case of *Karnail Singh* (*supra*).

26. The Registry shall send a copy of this judgment to all the Director Generals of Police of the States for immediate compliance.

27. The appeal is accordingly allowed.

B.B.B. Appeal allowed.

JEEWAN & ORS.
v.
STATE OF UTTARAKHAND
(Criminal Appeal No. 1275 of 2009)

DECEMBER 13, 2012

[SWATANTER KUMAR AND MADAN B. LOKUR, JJ.]

Appeal:

Criminal appeal filed by accused before High Court – Proper and fair hearing to appellants – Held: The appeal was filed by accused through advocates, who appeared and took several adjournments – Subsequently, another counsel appeared for the appellants and stated that he had no instructions in the matter – High Court then heard the appeal with the assistance of amicus curiae and the State counsel – Thus, High Court took every precaution and ensured proper hearing to the appellants – Penal Code, 1860 – s.302/34.

Penal Code, 1860:

s. 302 r/w s.34 – Murder – Three accused – Two accused caught hold of the victim and the third stabbed him several times causing his death – Conviction of all the three and sentence of imprisonment for life, upheld by High Court – Held: The accused had participated with the common intention in committing the murder of the deceased – The cumulative effect of the oral and documentary evidence was that all the three accused had been found guilty of offence punishable u/s. 302 read with s. 34 – In the facts and circumstances of the case, there is no reason to interfere with the concurrent finding of conviction and order of sentence passed by courts below – There is some delay in lodging of the FIR, but the same stands fully explained – Motive – Evidence – Constitution of India, 1950 – Art. 136 – Delay in lodging FIR.

Evidence:

Discrepancies in inquest report – Held: Discrepancy has to be material and seriously affecting the prosecution case – Every minor and immaterial discrepancy would not prove fatal to the prosecution case – Inquest Report or the post mortem report cannot be termed to be basic evidence or substantive evidence and discrepancies occurring therein cannot be termed to be fatal nor even a suspicious circumstance which would warrant benefit to the accused and result in dismissal of the case of prosecution – Court has to examine entire case and discuss prosecution evidence in its entirety to examine the real impact of a material contradiction upon the prosecution case – There is sufficient evidence in the instant case to show involvement of accused persons in commission of the crime.

The appellants were prosecuted for committing murder of the brother of PW-1. The prosecution case was that on 12-3-1991 at about 10 p.m., the complainant (PW-1) and the deceased were returning home after attending a marriage. When they had gone, about 100 steps away from the venue of the marriage, they met the accused persons, namely, A-1, A-2 and A-3. A-1 was carrying a knife while A-2 and A-3 were armed with sticks (*dandas*). A-2 and A-3 caught hold of the deceased while A-1 struck several blows with knife on his chest and abdomen. PW2 and PW3, who after attending the marriage were taking rest in the nearby house, upon hearing the cries, reached the place of occurrence, whereupon the accused ran away. The victim was taken to the hospital where he succumbed to his injuries. The trial court convicted all the three accused u/s 302 read with s. 34 IPC and sentenced them to imprisonment for life. The High Court upheld the conviction and the sentence.

In the instant appeal, apart from raising a plea that the accused persons had not been given proper hearing

before the High Court and their right to a fair defence stood denied, it was contended that the presence of PW2 and PW3 at the place of occurrence was very doubtful; that there was inordinate delay in lodging the FIR; and that the Inquest Report was in contradiction with the medical evidence and the ocular evidence of the prosecution and there being material contradictions, the appellants were entitled to acquittal.

Dismissing the appeal, the Court

HELD: 1. It cannot be said that the appellants were denied proper and fair hearing before the High Court. The accused had filed appeal before the High Court through advocates, who appeared and took several adjournments. Thereafter they did not appear. Then another advocate appearing for appellants stated that he had no instructions in the matter. The High Court then heard the appeal with the assistance of amicus curiae appointed by it and the State counsel. Thus, the High Court took every precaution and ensured proper hearing to the appellants before it passed the impugned judgment. [para 8] [996-E-H; 997-D]

Dharam Pal v. State of U.P. **2008 (1) SCR 65 = AIR 2008 SC 920 – referred to.**

2.1. As regards merits of the case, according to the prosecution, the deceased was murdered by three accused to which his brother (PW1), PW2 and PW3 were eye-witnesses. PW1 has fully supported the case of the prosecution and has stated that A-1 was carrying a knife and A-2 and A-3 were carrying *Dandas*. There was a heated exchange of words between them and thereafter A-2 caught hold of the deceased while A-1 stabbed three to four times in his stomach. On the alarm raised by PW1, PW 2 and PW 3 reached to the place of occurrence whereupon the accused persons ran away. [para 10] [997-F-H; 998-A]

2.2. According to PW2, PW-3 and he were sitting in the house of their acquaintance when they heard the noise. They thereafter reached the place of occurrence. In the torch light, they claimed to have seen the accused persons committing the crime including the fact that A-1 was carrying knife and he stabbed the deceased. According to him, when they challenged the accused persons, they ran away. On similar lines is the statement of PW3. [para 12] [998-C-D]

2.3. It is an undisputed case that there was a marriage and all the three witnesses had gone to attend the marriage. The presence of PW2 and PW3 at the place in the nearby house can hardly be doubtful. PW1 would be accompanying the deceased, as he was his brother. Thus it cannot be said that the presence of these witnesses at the place of occurrence was doubtful. There is no discrepancy of any material consequence in the statements of PWs 1, PWs 2 and 3. [para 13 and 15] [998-E-G; 999-F]

2.4. As regards the discrepancy that in the inquest report, Ext. A6, the name of A-2 has been recorded, stating that he committed the murder of the deceased by stabbing him, while according to the witnesses giving the ocular version, it was A-1 who had given stab injuries to the deceased, it is significant to note that the expression used in the inquest report is *Malum*. This could be a plausible error that crept in Ext. A6. It records the name of the witnesses, name of the Panchas and it appears that the names of the other accused have not been stated. The object of the inquest report was more towards recording the status of the body and articles thereon and the situation existing at the spot. This error cannot frustrate the case of the prosecution which stands fully established by the statements of PW1, PW2 and PW3. Further, PW1 is even a Panch witness to Ext.A6 which clearly establishes his presence at the place of

occurrence. The medical report and the injuries recorded and the statement of the doctor (PW7) fully support the case of the prosecution that the deceased was stabbed three to four times by the accused persons. [para 18-20] [1000-D-H; 1001-A, C]

2.5. Discrepancy has to be material and seriously affecting the case of the prosecution. Every minor and immaterial discrepancy would not prove fatal to the case of the prosecution. The court has to keep in mind that the evidence is recorded after years together and to expect the witnesses to give a minute to minute account of the occurrence with perfection and exactitude would not be a just and fair rule of evidence. Even an omission or discrepancy in the inquest report may not be fatal to the case of the prosecution. Besides, the Inquest Report or the post mortem report cannot be termed to be basic evidence or substantive evidence and discrepancies occurring therein cannot be termed to be fatal nor even a suspicious circumstance which would warrant a benefit to the accused and result in dismissal of the case of the prosecution. The court has to examine the entire case and discuss the prosecution evidence in its entirety to examine the real impact of a material contradiction upon the case of the prosecution. Trustworthy evidence cannot be rejected on fanciful ground or treated to be in the nature of conjectures. In the instant case, the discrepancies pointed out by the appellants are neither material nor do they affect the case of the prosecution adversely. There is sufficient evidence in the instant case to show the involvement of the accused persons in the commission of the crime. [para 21, 25-26] [1001-E-G; 1005-F-G; 1006-A-B]

Brahm Swaroop and Anr. v. State of Uttar Pradesh **2010 (15) SCR 1 = (2011) 6 SCC 288;** *Shyamal Ghosh v. State of West Bengal* **(2012) 7 SCC 646;** *Munshi Prasad & Ors. v. State of Bihar* **2001 (4) Suppl. SCR 25 = (2002) 1 SCC 351 – referred to.**

2.6. As regards, the delay in institution of the FIR, admittedly, the occurrence took place at about 10 p.m. on 12-3-1991 and the FIR was lodged on 13-3-1991 at about 8.45 a.m. There is some delay in lodging of the FIR, but the same stands fully explained by the statement of the witnesses and the conduct of such witnesses. This has been well discussed by the trial court in its judgment. Wherever the delay is properly explained by the prosecution or the witnesses, the court would be reluctant to grant benefit of acquittal to the accused only on that ground. [para 27-28] [1006-B-C-E; 1007-D]

Nagesh v. State of Karnataka **(2012) 6 SCC 477;** *Bhajan Singh @ Harbhajan Singh & Ors. v. State of Haryana* **2011 (7) SCR 1 = (2011) 7 SCC 421; and** *Jitender Kumar v. State of Haryana* **(2012) 6 SCC 204 – referred to.**

2.7. Motive is not an absolute essential feature of commission of a crime. According to PW1, there had been scuffle between the parties few days prior to the date of occurrence, when the accused persons were playing cards along with the deceased and gambling which could be settled only by the intervention of the village-headman and that they had threatened the deceased and stated that they would see him later. This may or may not be a motive enough to kill somebody, but the fact remains that prior to the date of occurrence, there was a scuffle between the parties where the accused persons had threatened the deceased. [para 30] [1009-C-E]

2.8. The accused had participated with the common intention in committing the murder of the deceased. While A-2 caught hold of the deceased A-1 had stabbed him and A-3 also participated in the commission of the crime. The cumulative effect of the oral and documentary evidence was that all the three accused had been found guilty of offence punishable u/s. 302 read with s. 34 IPC. [para 20] [1001-C-D]

2.9. Unless finding recorded by the High Court is so outweighed so outrageously defies logic as to suffer from the vice of irrationality, this Court would not interfere with the judgment. In the facts and circumstances of the case, there is no reason to interfere with the concurrent finding of conviction and order of sentence passed by the courts below. [para 24 and 31] [1005-B; 1009-E]

State of U.P. v. Naresh and Ors. **2011 (4) SCR 1176 = (2011) 4 SCC 324; and** *Bhola @ Paras Ram v. State of H.P.* **2009 (2) SCR 750 = (2009) 11 SCC 460 – referred to.**

Case Law Reference:

2008 (1) SCR 65	**referred to**	**para 8**
2010 (15) SCR 1	**referred to**	**para 21**
(2012) 7 SCC 646	**referred to**	**para 22**
2011 (4) SCR 1176	**referred to**	**para 24**
2009 (2) SCR 750	**referred to**	**para 24**
2001 (4) Suppl. SCR 25	**referred to**	**para 25**
(2012) 6 SCC 477	**referred to**	**para 28**
2011 (7) SCR 1	**referred to**	**para 29**
(2012) 6 SCC 204	**referred to**	**para 29**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1275 of 2009.

From the Judgment & Order dated 14.10.2008 of the High Court of Uttarakhand at Naintial in Criminal Appeal No. 1392 of 2001 (Old No. 300 of 1994)

Binu Tamta for the Appellants.

Rahul Verma, Jatinder Kumar Bhatia for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. The present appeal is directed against the judgment of the High Court of Uttarakhand at Nainital dated 14th October, 2008 vide which the High Court confirmed the judgment of the trial court and dismissed the appeal preferred by the accused against their conviction and order of sentence.

2. The conviction of the accused is based upon the version of the prosecution that on 12th March, 1991 at about 10 p.m., complainant Bhupal Chandra, who later came to be examined as PW1, along with his brother Devendra Lal after attending the marriage ceremony of one Pooran Chandra in Village Dhapla within the limits of Police Station Kaladhungi, District Nainital, were returning home. On their way, they found the accused Jeewan Ram, Dalip and Kamal, all residents of their village, standing there. Jeewan was carrying a knife while Kamal and Dalip were armed with sticks (*danda*). Accused Kamal and Dalip caught hold of Devendra while Jeewan struck several blows with knife on his chest and abdomen. PW1 was carrying torch and saw the occurrence in that light. Two more persons, Rajendra Singh, PW2 and Prem Ram, PW3, who after attending the marriage were taking rest in the nearby house of Shyam Lal, upon hearing the alarm raised by Devendra Lal, reached the place of occurrence. In the light of the torches they were carrying, they witnessed the accused com itting the crime. Upon hearing the alarm raised by Devendra, th se witnesses saw the accused persons running away, however, they did not chase them out of fear.

3. Devendra Lal, was immediately taken to a hospital in Haldwani where he succumbed to his injuries. At about 8.45 a.m., on 13th March, 1991 Bhupal Chandra, PW1, lodged the First Information Report (for short, the 'FIR') against the three accused persons at Police Station Kaladhungi and a crime case No. 68 of 1991 was accordingly registered under Section

302 of the Indian Penal Code (for short, the 'IPC') against all the three accused persons. In the First Information Report, Ext. A1, the complainant stated that the motive for commission of crime by the accused was previous enmity between the parties. According to him, during Deepawali festival, the accused persons along with Devendra Lal were playing cards and gambling, when they picked up a quarrel and there was a scuffle between the parties. The scuffle did not aggravate into any serious situation because of intervention by Sabhapati, the head-man of the village. Though, he got the matter compromised, the three accused continued to harbour enmity and even threatened Devendra Lal to see him later.

4. After Devendra Lal succumbed to his injuries in the hospital, a report was sent to the police. Sub Inspector Daya Ram Singh, PW8 came to the civil hospital, Haldwani, took up the charge of the dead body and prepared the inquest report, Ext. A6, whereafter the body was handed over to Dr. T.C. Pant, PW7 with a request to perform post-mortem upon the body of the deceased. The doctor performed the post-mortem and prepared a report, Ext. A7, in which he noticed the injuries upon the body of the deceased as well as the cause of death, which reads as under:-

"(i) P.W. 1.2 cm X ½ cm on front of sterum, 7 cm medial left nipple. On opening the wound it is cavity deep piercing the sterum.

(ii) P.W. 8 cm X 3 cm X cavity deep, on right side of chest, 3 cms towards right nipple. On opening the wond right lobe of liver is cut.

(iii) P.W. 15 cm X 5 cm X cavity deep. Medial end of wound touching 6th thoracic spine extending to right side of back of chest. Right lung beneath the injury is cut.

(iv) Punctured wound 4 cm x 2 cm x cavity deep, 3 cm above from the left ant sup iliac spine on left lat side of

abdomen. Loops of intestine coming out.

(v) P.W. 3 cm X 1 ½ cm X cavity deep about 3 cm from left nipple underneath the injury. Left lung is cut.

(vi) I.W. 4 cm X 2 cm X muscle deep on medial side of right knee about 2 ½ cm from upper border of patella.

(vii) I.W. 3 cm X 1½ cm X muscle deep, about 2 cm lateral to left ant sup iliac spine."

5. PW9, Sub Inspector Ram Baran Ram, interrogated the witnesses, inspected the torches of the complainant and witnesses, prepared memorandums, Ext. A2 to A4, the site plan of the place of occurrence, Ext. A10, arrested the accused persons on 15th March, 1991 and recovered the knife used in the crime upon the statement of Jeewan vide memorandum Ext. A-12. The Report was filed in the court of competent jurisdiction. The accused persons were committed to the court of III Additional Sessions Judge, Nainital and were tried under Section 302 IPC read with Section 34 IPC, the offence with which they were charged. The learned trial court vide its judgment dated 25th February, 1994 formed the view that the prosecution had been able to prove its case beyond reasonable doubt and therefore convicted the accused persons of committing an offence under Section 302 read with Section 34 IPC and awarded them the following sentence :-

"On the basis of the above evidence and circumstances, I arrive at the conclusion that the prosecution has succeeded in proving the charges levelled by them. Thus, I find the accused persons Jeevan, Kamal and Dalip guilty for the offence of murder of Devender on dated 12.03.1991 at 10.00 p.m. in village Dhapla, Police Station Kaladungi.

Sd/-
(Bijender Singh)
Third Addl. Sessions Judge,
Nainital, Camp at Haldwani

Dated: 25.02.1994

O R D E R

The accused persons Jeevan, Kamal and Dalip are found guilty for the offence under section 302 read with section 34 I.P.C. They are on bail. Their Personal Bonds and Bail Bonds are cancelled and the sureties are discharged.

They be taken in custody for undergoing sentence to awarded after hearing them on the quantum of sentence.

Sd/-
(Bijender Singh)
Third Addl. Sessions Judge,
Nainital, Camp at Haldwani

Dated: 25.02.1994

I have heard the accused persons Jeevan, Kamal and Dalip and their learned counsel Shri Shyam Singh Mehra, Advocate on the quantum of sentence, who has stated that the accused persons are innocent, but I have convicted them after analyzing the evidence."

6. Aggrieved from the judgment of conviction and order of sentence, the accused persons preferred a common appeal before the High Court which came to be dismissed vide judgment of the High Court dated 14th October, 2008 giving rise to the present appeal.

7. It is contended on behalf of the appellants/accused that :

(a) the presence of PW2 and PW3 at the place of occurrence is very doubtful on the one hand, while on the other, as per the case of prosecution, the incident occurred near the place of marriage

where, obviously, a large number of persons must be present and non-production of any such person from the marriage party raises doubt towards the case of prosecution.

(b) there is inordinate delay in lodging the FIR. The occurrence took place at about 10.00 p.m. on 12th March, 1991 while the First Information Report Ext.A1 was lodged at about 8.45 a.m. on 13th March, 1991. Thus, the accused are entitled to the benefit of doubt.

(c) The Inquest Report is in contradiction with the medical evidence and the ocular evidence of the prosecution and there being material contradictions, the appellant is entitled to the benefit of acquittal.

(d) The accused persons had not been given proper hearing before the High Court and their right to a fair defence stood denied.

8. Amongst the above contentions, we may deal with the last argument raised on behalf of the appellant at the threshold. There is no merit in this submission that the appellant was denied proper and fair hearing before the High Court. The accused had filed an appeal before the High Court through private counsel Mr. V.S. Pal and Mr. M.S. Pal, advocates. These advocates appeared and took several adjournments before the High Court. Thereafter they did not appear in that court. Then, Advocate Shri D.N. Sharma appearing for appellants stated that he had no instructions in the matter. The High Court having been left with no alternative but to proceed with the matter and keeping in view the judgment of this Court in the case of *Dharam Pal v. State of U.P.* [AIR 2008 SC 920], heard the appeal with the assistance of *amicus curiae* appointed by the court. Having heard both the amicus and the State counsel, the Court then decided the appeal. The appeal

was decided by the court in accordance with law. These facts have also been recorded by the High Court in its judgment under appeal. In the grounds of appeal raised by the appellant, there is no challenge to these facts. Thus, in view of the undisputed facts, there is no occasion for this Court to return a finding that the appellant had no proper opportunity of hearing before the High Court. The contention that the *amicus curiae* did not raise all the relevant contentions before the High Court is without any substance. It is not for the Court to require a counsel, including *Amicus Curiae*, to raise a submission, the submission may vary from counsel to counsel. The duty of the court was only to ensure that the accused was not held guilty without affording him an opportunity of hearing in accordance with law. If the counsel appearing for the appellants pleaded no instructions, no fault of procedural or substantial violation could be attributed to the court. The blame for such attitude would lie on none else but the appellants or the persons pursuing appeal on their behalf. The High Court took every precaution and ensured proper hearing to the appellants before it passed the impugned judgment. Thus, we have no hesitation in rejecting this contention.

9. The remaining three contentions raised on behalf of the appellant can be discussed together in order to avoid repetitive discussion, as they are inter-linked with appreciation of evidence.

10. According to the prosecution, the deceased Devendra was murdered by three accused to which his brother Bhupal Chandra, PW1, Rajendra Singh, PW2 and Prem Ram, PW3 were eye-witnesses. They were coming from the marriage and in torch light they saw the accused persons committing the crime. PW1 has fully supported the case of the prosecution and has stated that Jeewan was carrying a knife and Kamal and Dalip were carrying *Dandas*. There was a heated exchange of words between them and thereafter Kamal caught hold of Devendra while Jeewan stabbed three to four times in the

stomach of Devendra. On seeing this, PW1 raised an alarm and then witnesses Rajendra Singh and Prem Ram came to the place of occurrence. Upon their coming, the accused persons ran away.

11. The deceased was taken to the hospital where he collapsed. In his cross-examination, PW1 also stated that crime scene was about 100 steps away from the venue of the marriage of Pooran Chandra and there was no light in the passage.

12. According to PW2, Rajendra Singh, they were sitting in the house of Shyam Lal and talking when they heard the noise coming from the hut of Nathu Ram. PW2 and PW3 thereafter reached the place of occurrence. In the torch light, they claimed to have seen the accused persons committing the crime including the fact that Jeewan was carrying knife and that Jeewan stabbed the deceased. According to him, when they challenged the accused persons, the accused persons ran away. On similar lines is the statement of PW3.

13. The first question that arises for consideration is whether the presence of these three witnesses in and around the place of occurrence is so very doubtful that their statement should be disbelieved. The answer to this question has to be in the negative. It is an undisputed case before us that there was a marriage in the house of Pooran Chandra and all the three witnesses had gone to attend the marriage. PW1 was accompanying the deceased. When they were returning from the marriage, the incident occurred near the place of Nathu Ram. It is not unbelievable that village persons would attend a marriage and sit down at somebody's place to chat. Thus, the presence of PW2 and PW3 at the place of Shyam Lal can hardly be doubtful. PW1 would be accompanying the deceased, as he was his brother. We are unable to see any merit in the contention and the reasons for which the court can come to the conclusion that the presence of these witnesses at the place of occurrence was doubtful.

14. Heavy reliance was placed upon a discrepancy appearing in the statement of PW1 and PW2. PW1 had stated as follows:-

> "....Devendra was caught by Kamal and Devendra and Jeevan stabbed three to four times in the stomach of Devendra. I raised alarm and then witnesses Prem Ram and Rajendra Singh came there. Accused persons ran away when they were challenged."

While PW2 stated as follows:-

> "...Right then we heard the noise coming from the hut of Nathu Ram and then I and Prem Singh reached at the crime scene. We were carrying torch and we saw in its light that Jeevan was carrying knife and Kamal and Dalip were carrying Danda and they were attacking with them on Devendra. Jeevan stabbed him and Kamal and Dilip caught his hold. When we challenged them, accused persons ran away. Devendra fell down on the surface."

15. The contention is that PW2 and PW3 never saw the occurrence as according to PW1, it was after Jeewan had stabbed the deceased three-four times in the stomach that he raised alarm. While according to PW2, in the torch light they had seen Jeewan stabbing the deceased. This cannot be called a discrepancy of any material consequence. Firstly, PW1 had categorically stated that he had raised the alarm upon which Prem Ram and Rajendra Singh reached at the spot. Secondly, PW2 and PW3 were in the house of Shyam Lal which was very close by. Listening to the hue and cry, they had come to the house of Nathu Ram and in the torch light had seen Jeewan stabbing and Kamal and Dalip holding the deceased.

16. The court cannot lose sight of the fact that the statement of these witnesses had been recorded more than two years subsequent to the date of occurrence. To expect the witnesses to depose with arithmetical exactitude would not be proper

application of rule of evidence, keeping in view the facts and circumstances of the case.

17. It is but natural that it would take a little time for the offender to stab a person three to four times. Natural conduct of PW1 would be to raise alarm, which he did. Immediately then, PW2 and PW3 came and saw the deceased being stabbed. They might not have seen all the stabbings, but even last stabbing by Jeewan could be viewed by them as they were carrying torches and had seen the accused persons. They not only saw the occurrence, but PW2 and PW3 also challenged the accused persons upon which they ran away. Thus, PW2 and PW3 had sufficient time to see, if not the entire occurrence, at least a part thereof as well as the participation of the accused persons in committing the murder of the deceased.

18. Another discrepancy that is sought to be highlighted on behalf of the appellant is that in the inquest report, Ext. A6, the name of Kamal has been recorded, stating that he committed the murder of the deceased by stabbing him. While according to the witnesses giving the ocular version, it was Jeewan who had given stab injuries to the deceased. It is to be noticed that Ext. A6 is an inquest report prepared by S.I. Daya Ram Singh in which various factors were recorded and then it was an impression that was formed by the person preparing it. The expression used in Ext. A6 is *Malum.* This could be a plausible error that crept in Ext. A6. It records the name of the witnesses, name of the Panchas and it appears that names of the other accused have not been stated. The object of the inquest report was more towards recording the status of the body, the articles on the body of the deceased and the situation existing at the spot. This error cannot frustrate the case of the prosecution which stands fully established by the statements of PW1, PW2 and PW3.

19. At this stage, it can be very usefully noticed that PW1 is even a Panch witness to Ext.A6 which clearly establishes his presence at the place of occurrence. The medical report and

the injuries afore-recorded and the statement of PW7, Dr. T.C. Pant fully support the case of the prosecution. In the post-mortem report, he noticed as many as five punctured wounds i.e. on the left nipple, towards right nipple on the right side of the chest cutting right lobe of the liver, punctured wound touching 6th thoracic spine extending to right side of back of chest, punctured wound cavity deep anterior superior illiac spine on the left lateral side of abdomen and punctured wound cavity deep underneath the first injury. Besides this, two more incised wounds were noticed at the right knee and the spine region.

20. This medical evidence clearly supports the case of the prosecution that the deceased was stabbed three to four times by the accused persons. They had participated with the common intention in committing the murder of the deceased. While Kamal caught hold of the deceased Jeewan had stabbed him and Dalip also participated in the commission of the crime. The cumulative effect of the oral and documentary evidence was that all the three accused had been found guilty of offence under Section 302 read with Section 34 IPC and punished with imprisonment for life.

21. Now, let us examine the law in relation to discrepancies. Discrepancy has to be material and seriously affecting the case of the prosecution. Every minor and immaterial discrepancy would not prove fatal to the case of the prosecution. The Court has to keep in mind that evidence is recorded after years together and to expect the witnesses to give a minute to minute account of the occurrence with perfection and exactitude would not be a just and fair rule of evidence. The law in this regard is well settled. Even an omission or discrepancy in the inquest report may not be fatal to the case of the prosecution. The Court would have to examine the entire case and discuss the prosecution evidence in its entirety to examine the real impact of a material contradiction upon the case of the prosecution. Trustworthy evidence cannot be rejected on fanciful ground or treated to be

in the nature of conjectures. In this regard, reference can be made to the case of *Brahm Swaroop and Anr. v. State of Uttar Pradesh* [(2011) 6 SCC 288], where the Court held as under:-

> "10. *Omissions in the inquest report are not sufficient to put the prosecution out of court*. The basic purpose of holding an inquest is to report regarding the apparent cause of death, namely, whether it is suicidal, homicidal, accidental or by some machinery, etc. It is, therefore, not necessary to enter all the details of the overt acts in the inquest report. Evidence of eyewitnesses cannot be discarded if their names do not figure in the inquest report prepared at the earliest point of time. The inquest report cannot be treated as substantive evidence but may be utilised for contradicting the witnesses of inquest. (See *Pedda Narayana v. State of A.P., Khujji v. State of M.P., George v. State of Kerala, Sk. Ayub v. State of Maharashtra*[4]*, Suresh Rai v. State of Bihar, Amar Singh v. Balwinder Singh*[6]*, Radha Mohan Singh v. State of U.P.*[7] *and Aqeel Ahmad v. State of U.P.*[8]*)*
>
> 11. In *Radha Mohan Singh*, a three-Judge Bench of this Court held: (SCC p. 460, para 11)
>
> "*11*. ... No argument on the basis of an alleged *discrepancy*, overwriting, *omission* or contradiction *in the inquest report* can be entertained unless the attention of the author thereof is drawn to the said fact and he is given an opportunity to explain when he is examined as a witness in court."
>
> (emphasis added)
>
> 12. Even where the attention of the author of the inquest is drawn to the alleged discrepancy, overwriting, omission or contradiction in the inquest report and the author in his deposition has also admitted that through a mistake he omitted to mention the crime number in the inquest report,

this Court has held that just because the author of the report had not been diligent did not mean that reliable and clinching evidence adduced by the eyewitnesses should be discarded by the Court. [Vide *Krishna Pal (Dr.)* v. *State of U.P.*]

13. In view of the law referred to hereinabove it cannot be held that any omission or discrepancy in the inquest is fatal to the prosecution's case and such omissions would necessarily lead to the inference that FIR is ante-timed. Shri N.K. Sharma, Sub-Inspector (PW 7), had denied the suggestion made by the defence that till the time of preparing the report the names of the accused persons were not available. He further stated that the column for filling up the nature of weapons used in the crime was left open as it could be ascertained only by the doctor what weapons had been used in the crime. Thus, the submissions made in this regard are preposterous."

22. Similarly, reference can also be made to the case of *Shyamal Ghosh v. State of West Bengal* [(2012) 7 SCC 646], where the Court dealing with discrepancies in the investigation and non-obtaining of FSL and their effect on the case of the prosecution held as under:-

"58. Of course, there are certain discrepancies in the investigation inasmuch as the investigating officer failed to send the bloodstained gunny bags and other recovered weapons to the FSL, to take photographs of the shops in question, prepare the site plan thereof, etc. Every discrepancy in investigation does not weigh with the court to an extent that it necessarily results in acquittal of the accused. These are the discrepancies/lapses of immaterial consequence. In fact, there is no serious dispute in the present case to the fact that the deceased had constructed shops on his own land. These shops were not the site of occurrence, but merely constituted a relatable fact. Non-preparation of the site plan or not

sending the gunny bags to the FSL cannot be said to be fatal to the case of the prosecution in the circumstances of the present case. Of course, it would certainly have been better for the prosecution case if such steps were taken by the investigating officer.

***** ***** ******

68. From the above discussion, it precipitates that the discrepancies or the omissions have to be material ones and then alone, they may amount to contradiction of some serious consequence. Every omission cannot take the place of a contradiction in law and therefore, be the foundation for doubting the case of the prosecution. Minor contradictions, inconsistencies or embellishments of trivial nature which do not affect the core of the prosecution case should not be taken to be a ground to reject the prosecution evidence in its entirety. It is only when such omissions amount to a contradiction creating a serious doubt about the truthfulness or creditworthiness of the witness and other witnesses also make material improvements or contradictions before the court in order to render the evidence unacceptable, that the courts may not be in a position to safely rely upon such evidence. Serious contradictions and omissions which materially affect the case of the prosecution have to be understood in clear contradistinction to mere marginal variations in the statement of the witnesses. The prior may have effect in law upon the evidentiary value of the prosecution case; however, the latter would not adversely affect the case of the prosecution."

23. This Court has also expressed the view that it is a fair and settled position of law that even if there are some omissions, contradictions or discrepancies, the entire evidence cannot be discarded. After exercising care and caution and sifting the evidence to separate the truth from untruth, exaggeration, embellishments and improvements, the Court can

come to the conclusion as to whether the residual evidence is sufficient to convict the accused.

24. Still, in some cases, the Court took the view that unless finding recorded by the High Court is so outweighed or such finding so outrageously defies logic so as to suffer from the vice of irrationality, this Court would not interfere with the judgment. A mere discrepancy simplicitor does not affect the case of the prosecution materially or make it improbable and the Court will not be inclined to interfere with the finding recorded by the high courts. (Ref. *State of U.P. v. Naresh and Ors.* [(2011) 4 SCC 324] and *Bhola @ Paras Ram v. State of H.P.* [(2009) 11 SCC 460].

25. In the case of *Munshi Prasad & Ors. v. State of Bihar* [(2002) 1 SCC 351], this Court has also taken the view, after discussing various judgments, that some documents are not substantive evidence by themselves and it is the statement of expert or the author of the document that has the credibility of a substantive evidence. In the similar vein, the inquest report also cannot be termed to be basic or substantive evidence being prepared by the police personnel being a non-medical man and at the earliest stage of the proceeding. In the wake of the aforesaid, a mere omission of a particular injury or indication therein of an additional one cannot, however, invalidate the prosecution case. The evidential value of inquest report cannot be placed at a level as has been so placed by the appellants. The Inquest Report or the post mortem report cannot be termed to be basic evidence or substantive evidence and discrepancies occurring therein cannot be termed to be fatal nor even a suspicious circumstance which would warrant a benefit to the accused and result in dismissal of the case of the prosecution.

26. In view of the above discussion on the evidence of the case and other attending circumstances seen in light of the above stated principles, we have no hesitation in coming to the conclusion that the discrepancies pointed out by the appellants

are neither material nor do they affect the case of the prosecution adversely. The Court has to examine the entire evidence as a whole and not in parts so as not to frustrate the entire eye witness version and the medical evidence. There is sufficient evidence in the present case to show the involvement of the accused persons in the commission of the crime.

27. Lastly, we should deal with the contention of the appellant dealing with the delay in institution of the FIR. Admittedly, the occurrence took place at about 10 p.m. on 12th March, 1991 and the FIR was lodged on 13th March, 1991 at about 8.45 a.m. There is some delay in lodging of the FIR, but this delay stands fully explained by the statement of the witnesses and the conduct of such witnesses. PW1 is the author of the FIR. According to his statement, he had first taken the deceased to the hospital and he remained in the hospital and went to the police station in the morning hours of 13th March, 1991. This conduct of PW1 is natural. He is the brother of the deceased and was grieving the death of his brother. His priority would be to ensure that his brother gets the best of the medical aid at the earliest and then to look after him. There is some distance between the hospital and the place of occurrence and he remained in the hospital to look after his brother. Unfortunately, his brother was declared dead. This entire controversy has been well discussed by the trial court in its judgment. The relevant part of the judgment reads as under:-

> "According to the prosecution, the incident occurred on 12.03.1991 at 10.00 p.m. whereas the first information report of the incident was lodged with Police Station Kaladungi on dated 13.02.1991 at 8.45 a.m. The place of incident is situated at a distance of 10 kms from the Police Station. The learned defence counsel has pleaded that no satisfactory explanation has been given for delay in lodging first information report, due to which the prosecution story appears to be doubtful. PW-1 Bhopal Chander has stated that after receiving injury Devender was taken to the

hospital in Haldwani in a tractor where he died and subsequently he went to Police Station Kaladungi in the morning to lodge the complaint leaving the dead body in the Hospital in Haldwani itself. It is the natural process that the every family member first of all tries to save the life of injured instead of lodging first information report and the same has happened in the present case as well that the complainant first of all brought his brother to the hospital in Haldwani in order to save his life where he died and subsequently he went to the Police Station and lodged the complaint. Keeping in view the circumstances of the case, satisfactory explanation is available on the file to the delay in lodging first information report."

28. We are in full agreement with the reasoning given by the trial court for accepting that delay in lodging of the FIR had been duly explained. It is not the law that mere delay in lodging the FIR would always or unexceptionally prove fatal to the case of the prosecution. Wherever the delay is properly explained by the prosecution or the witnesses, the court would be reluctant to grant benefit of acquittal to the accused only on that ground. In the case of *Nagesh v. State of Karnataka* [(2012) 6 SCC 477], the Court discussed various judgments of this Court and while noticing the principle that "letting the guilty escape is not doing justice according to law" held as under:-

"26. The Court has to examine the evidence in its entirety, particularly, in the case of circumstantial evidence, the Court cannot just take one aspect of the entire evidence led in the case like delay in lodging the FIR in isolation of the other evidence placed on record and give undue advantage to the theory of benefit of doubt in favour of the accused.

27. This Court in *Sucha Singh v. State of Punjab* has stated: (SCC pp. 653-54, para 20)

"*20*. Exaggerated devotion to the rule of benefit of doubt

must not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let a hundred guilty escape than punish an innocent. Letting the guilty escape is not doing justice according to law. (See *Gurbachan Singh v. Satpal Singh*) The prosecution is not required to meet any and every hypothesis put forward by the accused. (See *State of U.P. v. Ashok Kumar Srivastava*.) A reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. If a case is proved perfectly, it is argued that it is artificial; if a case has some inevitable flaws because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty persons must be allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish. [See *Inder Singh* v. *State (Delhi Admn.)*. Vague hunches cannot take place of judicial evaluation.

'A Judge does not preside over a criminal trial, merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties.' [Per Viscount Simon in *Stirland v. Director of Public Prosecutions* quoted in *State of U.P. v. Anil Singh* (SCC p. 692, para 17).]

Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth."

29. In other cases, the Court has taken the view that mere delay in lodging the FIR may not prove fatal in all cases, but in given circumstances of a case, delay in lodging the FIR can be one of the factors which corrode the credibility of the prosecution version. Delay in lodging of the FIR cannot be a ground for throwing the entire prosecution case. In cases, where

there is some delay in filing the FIR, the complainant must give explanation for the same. Undoubtedly, delay in lodging the FIR does not make the complainant's case improbable when such delay is properly explained. (Ref. *Bhajan Singh @ Harbhajan Singh & Ors. v. State of Haryana* [(2011) 7 SCC 421] and *Jitender Kumar v. State of Haryana* [(2012) 6 SCC 204].

30. The delay having been properly explained by the investigating agency, PW2 and PW1, we see no reason to take the view that delay in lodging of the FIR in the facts of the present case would prove fatal to the case of the prosecution. The motive is not an absolute essential feature of commission of a crime. According to PW1, there had been scuffle between the parties few days prior to the date of occurrence, when the accused persons were playing cards along with the deceased and gambling which could be settled only by the intervention of the Sabhapati and that they had threatened the deceased and stated that they would see him later. This may or may not be a motive enough to kill somebody, but the fact remains that prior to the date of occurrence, there was a scuffle between the parties where the accused persons had threatened the deceased.

31. In view of the above discussion, we see no reason to interfere with the concurrent finding of conviction and order of sentence passed by the courts. Consequently the appeal is dismissed.

R.P. Appeal dismissed.

KISHAN CHAND
v.
STATE OF HARYANA
(Criminal Appeal No. 1375 of 2008)

DECEMBER 13, 2012

[SWATANTER KUMAR AND MADAN B. LOKUR, JJ.]

Narcotics Drugs and Psychotropic Substances Act, 1985:

s.42 – Non-compliance of – Held: Provisions of s. 42 or s. 50 being mandatory require exact and definite compliance as opposed to the principle of substantial compliance – The trial court clearly recorded that the IO did not reduce the secret information in writing nor did he send the same to the higher officer or to the police station for registration of the case – The Investigating Officer, in the examination-in-chief, while referring to the story of the prosecution, does not state that he had made the report immediately upon receiving the secret information and had informed his senior officers – In view of the total non-compliance of s. 42, non-involvement of any independent witness at any stage of the investigation and the presence of the Tehsildar-cum-Executive Magistrate being doubtful, prosecution has failed to prove its case beyond reasonable doubt – Both the courts below have fallen in error of law as well as that of appreciation of evidence – Accused is acquitted – Constitution of India, 1950 – Art.136.

ss. 42, 50 and 57 – Compliance of – Held: These provisions provide separate rights and protections – They are neither inter-linked nor inter-dependent so as to dispense compliance of one with the compliance of another – In fact, they operate in different fields and at different stages – That distinction has to be kept in mind by the courts while deciding such cases – The sending of report as required u/s. 57 of the Act the following day will be no compliance, factually and/or

in the eyes of law to the provisions of s. 42 of the Act.

The appellant along with another accused was prosecuted for committing an offence u/s 18 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (the Act). The prosecution case was that on 19-7-2000, on receiving secret information, PW7, who at the relevant time was the Station House Officer of Police Station, apprehended the appellant, who was driving a scooter, with the other accused as the pillion rider. P.W. 7 called the Tehsildar (PW-5), who directed the former to conduct the search of the scooter. Thereupon 3.800 kg of opium was stated to have been recovered from the dicky of the scooter. The trial court acquitted the other accused, but convicted the appellant u/s 18 of the Act and sentenced him to undergo RI for 10 years and to pay a fine of Rs. 1 lakh. The High Court upheld the conviction and the sentence.

In the instant appeal filed by the convict, it was contended for the appellant that there was no compliance with the provisions of sub-ss (1) and (2) of s. 42 of the Act. The appellant also raised a serious doubt about the recovery and the very presence of PW5.

Allowing the appeal, the Court

HELD: 1.1. The language of s. 42 Narcotics Drugs and Psychotropic Substances Act, 1985 does not admit any ambiguity. The provisions like s. 42 or s. 50 of the Act are the provisions which require exact and definite compliance as opposed to the principle of substantial compliance. The Constitution Bench in the case of *Karnail Singh carved out an exception which is not founded on substantial compliance but is based upon delayed compliance duly explained by definite and reliable grounds. These are indefeasible, protective rights vested in a suspect and are incapable of being shadowed**

on the strength of substantial compliance. The purpose of these provisions is to provide due protection to a suspect against false implication and ensure that these provisions are strictly complied with to further the legislative mandate of fair investigation and trial. It will be opposed to the very essence of criminal jurisprudence, if upon apparent and admitted non-compliance of these provisions in their entirety, the Court has to examine the element of prejudice. The element of prejudice is of some significance where provisions are directory or are of the nature admitting substantial compliance. Where the duty is absolute, the element of prejudice would be of least relevancy. Absolute duty coupled with strict compliance would rule out the element of prejudice where there is total non-compliance of the provision. [Para16, 19, 21 and 22] [1023-E; 1026-D-E; 1027-G]

Karnail Singh v. State of Haryana* **2009 (11) SCR 470 = (2009) 8 SCC 539 - relied on.

Abdul Rashid Ibrahim Mansuri v. State of Gujarat **2000 (1) SCR 542 = (2000) 2 SCC 513;** *Sajan Abraham v. State of Kerala* **2001 (1) Suppl. SCR 335 = (2001) 6 SCC 692;** *Rajinder Singh v. State of Haryana* **2011 (9) SCR 879 = (2011) 8 SCC 130;** *Karnail Singh v. State of Haryana* **2009 (11) SCR 470 = (2009) 8 SCC 539;** *State of Delhi v. Ram Avtar alias Rama* **2011 (7) SCR 1129 = (2011) 12 SCC 207 – referred to**

Beckodan Abdul Rahiman v. State of Kerala **2002 (3) SCR 53 - cited.**

1.2. In the instant case, both the trial court and the High Court have proceeded on the basis of substantial compliance and there being no prejudice to the accused, though clearly recording that it was an admitted case of total non-compliance. The trial court clearly recorded that the IO did not reduce the secret information in writing nor did he send the same to the higher officer or to the police

station for registration of the case. PW-7, the Investigating Officer, in the examination-in-chief, while referring to the story of the prosecution, does not state that he had made the report immediately upon receiving the secret information and has informed his senior officers. The statement of PW7 puts the matter beyond ambiguity that there was 'total non-compliance of the statutory provisions of s. 42 of the Act'. Once, there is total non-compliance and these provisions being mandatory in nature, the prosecution case must fail. [Para 13, 15 and 23] [1022-G-H; 1023-C-E; 1028-C-E]

1.3. It is not a case where any reason has come in evidence as to why the secret information was not reduced to writing and sent to the higher officer, which is the requirement to be adhered to 'pre-search'. The sending of report as required u/s. 57 of the Act on 20.7.2000 will be no compliance, factually and/or in the eyes of law to the provisions of s. 42 of the Act. These are separate rights and protections available to an accused and their compliance has to be done in accordance with the provisions of ss. 42, 50 and 57 of the Act. They are neither inter-linked nor inter-dependent so as to dispense compliance of one with the compliance of another. In fact, they operate in different fields and at different stages. That distinction has to be kept in mind by the courts while deciding such cases. [Para 24] [1028-G-H; 1029-A-C]

2.1. There is a serious doubt in the recovery and the very presence of PW5, at the time of recovery. The prosecution has not been able to establish this aspect of the case beyond reasonable doubt. According to PW7 after stopping the scooter of the accused, he had sent for PW5 who had reached there and recovery was effected in his presence after giving option to the accused as required u/s. 50 of the Act. PW5, in his statement had categorically stated that he had come to

the site in his official jeep No. HR 09 7007 driven by DW1 and no other person was in the jeep. He claimed to have left the spot at about 11.15 a.m. on 19-7-2000. The driver of Jeep No. HR 09 7007 was examined as DW-1 along with log book. The suggestion in his cross-examination that every movement of the vehicles is not entered in the log book and that the vehicle was used by PW5 on the day of the incident was categorically denied by him and no other question was put to this witness. There is no reason to disbelieve the statement of DW1, particularly, when he produced the log book maintained in normal course of business. The log book showed a clear entry at serial no. 422 dated 19-7-2000 where the vehicle in question was stated to be used by the Naib Tehsildar, from 12.30 p.m. to 7.00 p.m. PW5, Tehsildar-cum-Executive Magistrate, in fact, did not use the official vehicle on that day as per the log book. The witness even gave the exact reading of the meter of the vehicle which showed that it was driven for 117 kilometers on that date by the Naib Tehsildar, not even anywhere near to the area where the accused is alleged to have been apprehended. It was also stated that except that journey, the vehicle had gone nowhere. He specifically stated that he had never taken PW5 to the place in question. Once, the statement of this witness is examined with the statement of PW7, that he did not associate any private person/independent witness in the recovery or in the entire process of investigation and that he did not even record such a fact in the proceedings casts a shadow of doubt over the case of the prosecution. [Para 25-27] [1029-C-H; 1030-A-G-H; 1031-A-D]

2.2. In view of the total non-compliance of s. 42, non-involvement of any independent witness at any stage of the investigation and the presence of PW5 at the spot being so very doubtful, this Court holds that the prosecution has failed to prove its case beyond

reasonable doubt. Both the High Court and the trial court have noticed the evidence as well as its legal position. Thus, both courts below have fallen in error of law as well as that of appreciation of evidence. The accused is acquitted. [Para 27-29] [1031-D-G]

Case Law Reference:

2002 (3) SCR 53	**cited**	**para 8**
2000 (1) SCR 542	**referred to**	**para 8**
2001 (1) Suppl. SCR 335	**referred to**	**para 9**
2011 (9) SCR 879	**referred to**	**para 11**
2009 (11) SCR 470	**relied on**	**para 11**
2011 (7) SCR 1129	**referred to**	**para 20**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1375 of 2008.

From the Judgment & Order dated 22.4.2008 of the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 1481-SB-2002.

Hari Kesh Singh and Sanjay Gir (for Satyendra Kumar) for the Appellant.

Ramesh Kumar (for Naresh Bakshi) for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. The Judge, Special Court, Kaithal, Haryana vide his judgment dated 31st July, 2002 rendered the judgment of conviction and passed an order of sentence under Section 18 of the Narcotics Drugs and Psychotropic Substances Act, 1985 (for short "the Act") and awarded the punishment to undergo Rigorous Imprisonment for 10 years and to pay a fine of Rs. 1 lakh, and in default thereto

and to further undergo rigorous imprisonment for a period of two years to accused Kishan Chand, while it acquitted the other accused Ramphal as the prosecution had failed to prove its charge against that accused.

2. Upon appeal, the judgment of the Trial Court was affirmed by the High Court as it was of the opinion that the judgment of the Trial Court did not warrant any interference. Thus, by its judgment dated 22nd April, 2008, the High Court sustained the conviction and sentence of the accused. Aggrieved from the judgment of the Division Bench of the High Court, the accused filed the present appeal.

3. Before we dwell upon the merit or otherwise of the contentions raised before us, it will be appropriate for the Court to fully narrate the facts resulting in the conviction of the appellant. On 19th July, 2000, a secret information was received by Sub-Inspector Kaptan Singh, PW7 who at the relevant time was the Station House Officer of Police Station, Cheeka and was present near the bus stand Bhagal in relation to investigation of a crime. Assistant Sub-Inspector Mohinder Singh was also present there. According to the information received the accused/appellant Kishan Chand and Ramphal, the other accused, used to smuggle opium on their Scooter No. HR 31 B 1975. On that day, they were coming on Kakrala-Kakrali Road and were on their way to Bhagal. It was further informed that upon *nakabandi*, they could be caught red handed and a large quantity of opium could be recovered from the scooter. Kaptan Singh, PW7, then reached T-Point, turning Theh Banehra and made the *nakabandi*. After 20-25 minutes, both the accused came on scooter from the side of Kakrala-Kakrali. Accused Kishan Chand was driving the scooter, whereas accused Ramphal was the pillion rider. Suspecting the presence of narcotic substance in the scooter of the accused, a notice under Section 50 of the Act, Ext. PC was given to both the accused and they were asked to get the scooter searched in the presence of a Gazetted Officer or a Magistrate. Ext. P

C, was signed by both the accused which was also signed by Assistant Sub-Inspectors Manohar Lal (PW6) and Mohinder Singh. The accused vide their reply Ext. PD opted to give the search in the presence of a Gazetted Officer. Ext. PD was also signed by the witnesses in addition to the accused.

4. Thereafter, the investigating officer called for Subhash Seoran PW5, Tehsildar-cum-Executive Magistrate, Guhla on the spot, who then directed PW7 to conduct the search of the scooter. The scooter was having a *Diggi* (Tool box) and upon checking the same, opium was recovered which was wrapped in a polythene. From the recovered opium, 50 grams opium was separated for the purposes of sample and a separate parcel was made of the same. On weighing, the residue opium was found to be 3 kg and 750 grams. It was sealed in a separate parcel with the seals SS of Tehsildar, Subhash Seoran, PW5 and KS of the investigating officer, Kaptan Singh, PW7.

5. Kaptan Singh handed over his seal KS to ASI Manohar Lal, PW6 whereas PW5 retained his seal with him. The case property, sample parcel, specimen seal impressions were taken into custody by recovery memo Ext. PG, along with the scooter. It was attested by the Tehsildar and other witnesses. A *rukka,* Ext. PA was sent to the police station, where on the basis of the same, a formal First Information Report Ext. PA/1 was recorded. Rough site plan, Ext. PF was also prepared by the Investigating Officer. Thereafter, the accused were arrested. The statements of the witnesses under Section 161 of the Code of Criminal Procedure, 1973 (for short "CrPC") were recorded. After completion of the investigation at the spot, the case property was deposited with the MHC along with the scooter and seal impressions on the same day. A report under Section 57 of the Act Ext. PG was also sent to the higher officer. After completing the investigation, a report under Section 173 CrPC was prepared by PW7 and submitted before the court of competent jurisdiction.

6. The prosecution examined eight witnesses including Shri S.K. Nagpal, Senior Scientific Officer, FSL, Madhuban. The accused in his statement under Section 313 CrPC refuted all allegations of the prosecution levelled against them and pleaded innocence. Accused Kishan Chand stated that ASI Balwan Singh was resident of his village and there was a dispute regarding land between the two families. The possession of the land had been taken by the family of the accused from ASI Balwan Singh. Thereafter, he had gone to see Sarpanch Bansa Singh of Village Bhoosla in connection with some personal work and at about 4 p.m., he was going towards Village Kalar Majra and on the way, Joginder, son of Dewa Singh met him at the Buss Adda Bhagal and when they were taking tea in a shop, then two police officials came in a civil dress and asked them to go to police post Bhagal as he was required by ASI Mohinder Singh Incharge Police Post Bhagal and, thus, a false case was planted against him.

7. As already noticed, the Trial Court acquitted accused Ramphal, but convicted Kishan Chand and the conviction was upheld by the High Court giving rise to the filing of the present appeal.

8. At this stage itself, we would like to notice certain findings of the Trial Court which were recorded, while acquitting the accused Ramphal and convicting accused Kishan Chand.

> "33. The learned defence counsel further argued that in the present case inspite of secret information the information was not sent to the higher officer as required under Section 42(2) of the NDPS Act nor the case was registered. As such, on this sole ground, accused are entitled to acquittal. The reliance has been placed on Beckodan Abdul Rahiman Versus State of Kerala, 2002 (2) RCR (Criminal)-385, where in that case, police recovered opium from accused on receipt of secret information on telephone. Information was not reduced in

writing as required under section 42 of the NDPS Act. The conviction was set aside. The reliance was also placed on *Lamin Bojang versus State of Maharashtra,* 1997 (2) RCR – 294.

34. Admittedly in the present case, the secret information was received against the accused. The investigation officer did not reduce the secret information in writing nor send the same to the higher officer or to the police station for registration of the case. Non-compliance of section 42(2) is not fatal to the prosecution case in the present case, because had the investigating officer tried to take down the secret information in writing and send the same to the police officer in that eventuality, there was possibility of the accused to escape as they were to come on a scooter. The statement of investigating officer proves that after picketing within 20 minutes, the accused appeared on the scooter. Since, there was possibility of the accused to escape, so in such a situation, if the investigating officer did not reduce into writing the secret information and send the same to the superior officer, then it cannot be said that any prejudice has been used to the accused, particularly, when the recovery has been effected in the presence of Subhash Seoran Teshildar who is an Executive Magistrate. The Hon'ble Supreme Court in a case *Sajjan Abraham versus State of Kerala* [2001 (2) RCR (Criminal)-808], wherein it was observed as under:-

> "In construing any facts to find, whether prosecution has complied with the mandate of any provision which is mandatory, one has to examine it with pragmatic approach. The law under the aforesaid act being stringent to the persons involved in the field of illicit drug abuse, the legislature time and again has made some of the provisions obligatory for the prosecution to comply, which the courts have interpreted it to be mandatory. This is in order to

> balance the stringency for an accused by casting an obligation on the prosecution for its strict compliance. The stringency is because of the type of crime involved under it, so that no such person escapes from the clutches of law. The court however, while construing such provisions strictly should not interpret it so, literally so as to render its compliance, impossible. However, before drawing such an inference, it should be examined with caution and circumspection. In other words, if in a case, the following of mandate strictly, results in delay in trapping an accused, which may lead the accused to escape, then prosecution case should not be thrown out."

9. The Division Bench of the High Court confirmed the finding recorded by the Trial Court. It also recorded that the accused was in motion at the time when the secret information was received. Since secret information was from a reliable source, PW7 acted swiftly and arrested the accused and under these circumstances, the secret information report was not recorded by the investigating officer immediately nor was it sent to the superior officer. Therefore, in these circumstances, it is to be seen whether any prejudice was caused to the accused or not.

10. Relying upon the following paragraph of the judgment of this Court regarding 'substantial compliance' in *Sajan Abraham v. State of Kerala* [(2001) 6 SCC 692], the High Court sustained the order of the Trial Court.

> "6..... In construing any facts to find, whether the prosecution has complied with the mandate of any provision which is mandatory, one has to examine it with a pragmatic approach. The law under the aforesaid Act being stringent to the persons involved in the field of illicit drug traffic and drug abuse, the legislature time and again has made some of its provisions obligatory for the

prosecution to comply with, which the courts have interpreted it to be mandatory. This is in order to balance the stringency for an accused by casting an obligation on the prosecution for its strict compliance. The stringency is because of the type of crime involved under it, so that no such person escapes from the clutches of the law. The court however while construing such provisions strictly should not interpret them so literally so as to render their compliance, impossible. However, before drawing such an inference, it should be examined with caution and circumspection. In other words, if in a case, the following of a mandate strictly, results in delay in trapping an accused, which may lead the accused to escape, then the prosecution case should not be thrown out."

11. While challenging the above concurrent findings of the courts, the learned counsel appearing for the appellant has raised the following contentions for consideration by the court.

1. Apparently and, in fact, admittedly there is no compliance with the provisions of sub-sections (1) and (2) of Section 42 of the Act and they are mandatory and not directory. Once, there is non-compliance of these mandatory provisions, the appellant is entitled to acquittal. In this regard, the counsel for the appellant has relied upon the judgment of this court in the case of *Rajinder Singh v. State of Haryana* [(2011) 8 SCC 130] and the Constitution Bench judgment in the case of *Karnail Singh v. State of Haryana* [(2009) 8 SCC 539].

2. Once, on similar facts and evidence, and particularly for non-production of key of the *diggy* of the scooter, the accused Ramphal was acquitted, the appellant could not have been convicted by the courts, thus, there is inbuilt contradiction in the judgments and they suffer from error in appreciation of evidence as well as in application of law.

3. The entire recovery is vitiated as PW5, Subhash Seoran, Tehsildar-cum-Executive Magistrate, was never present at the site and there was no compliance to the provisions of Section 50 of the Act as stated. No independent witness had been associated which itself will show that the prosecution had not been able to establish its case beyond reasonable doubt and that the appellant had been falsely implicated in the case.

12. To the contra, the submission on behalf of the State of Haryana is that the prosecution has been able to establish its case beyond reasonable doubt. There had been substantial compliance to the provisions of Section 42 of the Act. The compliance with the provisions of Section 57 and the Report which was sent vide Ext. PG on 20th July, 2002, fully establishes the substantial compliance to the provisions of Section 42 of the Act. The provisions of Section 50 had also been complied with and, therefore, the contentions raised on behalf of the appellant have no merit. On the other hand the question of falsely implicating the appellant does not arise as the secret information was reliable and has so been established by the prosecution evidence. The judgment under appeal, according to the counsel for the State, does not call for any interference.

13. First and the foremost, we will deal with the question of non-compliance with Section 42(1) and (2) of the Act. It is necessary for us to examine whether factually there was a compliance or non-compliance of the said provisions and, if so, to what effect. In this regard, there can be no better evidence than the statement of Investigating Officer PW7 himself. PW7, Kaptan Singh in his statement while referring to the story of the prosecution as noticed above, does not state in examination-in-chief that he had made the report immediately upon receiving the secret information and had informed his senior officers.

14. In his examination-in-chief, such statement is conspicuous by its very absence. On the contra, in his cross-examination by the defence, he clearly admits as under:-

> "....the distance between the place of secret information and the place of recovery is about 1½ kilometre. Secret information was not reduced into the writing so no copy of the same was sent to the higher officer. I did not ask any witness of the public in writing to join the raiding party"

15. The learned Trial Court in para 34 of its judgment clearly recorded that admittedly in the present case, the secret information was received against the accused. The Investigation Officer did not reduce the secret information in writing nor did he send the same to the higher officer or to the police station for registration of the case. However, stating that if this was done, there was possibility that the accused escaped, the trial court observed that if the Investigating Officer did not reduce into writing the secret information and sent the same to the superior officer, then in light of the given circumstances, it could not be said that any prejudice was caused to the accused.

16. We are unable to contribute to this interpretation and approach of the Trial Court and the High Court in relation to the provisions of sub-Section (1) and (2) of Section 42 of the Act. The language of Section 42 does not admit any ambiguity. These are penal provisions and prescribe very harsh punishments for the offender. The question of substantial compliance of these provisions would amount to misconstruction of these relevant provisions. It is a settled canon of interpretation that the penal provisions, particularly with harsher punishments and with clear intendment of the legislature for definite compliance, ought to be construed strictly. The doctrine of substantial compliance cannot be called in aid to answer such interpretations. The principle of substantial compliance would be applicable in the cases where the

language of the provision strictly or by necessary implication admits of such compliance.

17. In our considered view, this controversy is no more *res integra* and stands answered by a Constitution Bench judgment of this Court in the case of *Karnail Singh* (supra). In that judgment, the Court in the very opening paragraph noticed that in the case of *Abdul Rashid Ibrahim Mansuri v. State of Gujarat* [(2000) 2 SCC 513], a three Judge Bench of the Court had held that compliance of Section 42 of the Act is mandatory and failure to take down the information in writing and sending the report forthwith to the immediate officer superior may cause prejudice to the accused. However, in the case of *Sajan Abraham* (supra), again a Bench of three Judges, held that this provision is not mandatory and substantial compliance was sufficient. The Court noticed, if there is total non-compliance of the provisions of Section 42 of the Act, it would adversely affect the prosecution case and to that extent, it is mandatory. But, if there is delay, whether it was undue or whether the same was explained or not, will be a question of fact in each case. The Court in paragraph 35 of the judgment held as under:-

> 35. In conclusion, what is to be noticed is that *Abdul Rashid* did not require literal compliance with the requirements of Sections 42(1) and 42(2) nor did *Sajan Abraham hold* that the requirements of Sections 42(1) and 42(2) need not be fulfilled at all. The effect of the two decisions was as follows:
>
> (*a*) The officer on receiving the information [of the nature referred to in sub-section (1) of Section 42] from any person had to record it in writing in the register concerned and forthwith send a copy to his immediate official superior, before proceeding to take action in terms of clauses (*a*) to (*d*) of Section 42(1).
>
> (*b*) But if the information was received when the officer was not in the police station, but while he was on the move

either on patrol duty or otherwise, either by mobile phone, or other means, and the information calls for immediate action and any delay would have resulted in the goods or evidence being removed or destroyed, it would not be feasible or practical to take down in writing the information given to him, in such a situation, he could take action as per clauses (*a*) to (*d*) of Section 42(1) and thereafter, as soon as it is practical, record the information in writing and forthwith inform the same to the official superior.

(*c*) In other words, the compliance with the requirements of Sections 42(1) and 42(2) in regard to writing down the information received and sending a copy thereof to the superior officer, should normally *precede* the entry, search and seizure by the officer. But in special circumstances involving emergent situations, the recording of the information in writing and sending a copy thereof to the official superior may get postponed by a reasonable period, that is, after the search, entry and seizure. The question is one of urgency and expediency.

(*d*) While total non-compliance with requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior forthwith, may not be treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer

does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001.

18. Following the above judgment, a Bench of this Court in the case of *Rajinder Singh* (supra) took the view that total non-compliance of the provisions of sub-Sections (1) and (2) of Section 42 of the Act is impermissible but delayed compliance with a satisfactory explanation for delay can, however, be countenanced.

19. The provisions like Section 42 or 50 of the Act are the provisions which require exact and definite compliance as opposed to the principle of substantial compliance. The Constitution Bench in the case of *Karnail Singh* (supra) carved out an exception which is not founded on substantial compliance but is based upon delayed compliance duly explained by definite and reliable grounds.

20. While dealing with the requirement of complying with the provisions of Section 50 of the Act and keeping in mind its mandatory nature, a Bench of this Court held that there is need for exact compliance without any attribute to the element of prejudice, where there is an admitted or apparent non-compliance. The Court in the case of *State of Delhi v. Ram Avtar alias Rama* [(2011) 12 SCC 207], held as under:-

26. The High Court while relying upon the judgment of this Court in *Baldev Singh* and rejecting the theory of substantial compliance, which had been suggested in *Joseph Fernandez*, found that the intimation did not satisfy the provisions of Section 50 of the Act. The Court reasoned that the expression "duly" used in Section 50 of the Act connotes not "substantial" but "exact and definite compliance". Vide Ext. PW 6/A, the

appellant was informed that a gazetted officer or a Magistrate could be arranged for taking his search, if he so required. This intimation could not be treated as communicating to the appellant that he had a right under law, to be searched before the said authorities. As the recovery itself was illegal, the conviction and sentence has to be set aside.

27. It is a settled canon of criminal jurisprudence that when a safeguard or a right is provided, favouring the accused, compliance therewith should be strictly construed. As already held by the Constitution Bench in *Vijaysinh Chandubha Jadeja*, the theory of "substantial compliance" would not be applicable to such situations, particularly where the punishment provided is very harsh and is likely to cause serious prejudice against the suspect. The safeguard cannot be treated as a formality, but it must be construed in its proper perspective, compliance therewith must be ensured. The law has provided a right to the accused, and makes it obligatory upon the officer concerned to make the suspect aware of such right. The officer had prior information of the raid; thus, he was expected to be prepared for carrying out his duties of investigation in accordance with the provisions of Section 50 of the Act. While discharging the onus of Section 50 of the Act, the prosecution has to establish that information regarding the existence of such a right had been given to the suspect. If such information is incomplete and ambiguous, then it cannot be construed to satisfy the requirements of Section 50 of the Act. Non-compliance with the provisions of Section 50 of the Act would cause prejudice to the accused, and, therefore, amount to the denial of a fair trial.

21. When there is total and definite non-compliance of such statutory provisions, the question of prejudice loses its significance. It will *per se* amount to prejudice. These are indefeasible, protective rights vested in a suspect and are incapable of being shadowed on the strength of substantial compliance.

22. The purpose of these provisions is to provide due protection to a suspect against false implication and ensure that these provisions are strictly complied with to further the legislative mandate of fair investigation and trial. It will be opposed to the very essence of criminal jurisprudence, if upon apparent and admitted non-compliance of these provisions in their entirety, the Court has to examine the element of prejudice. The element of prejudice is of some significance where provisions are directory or are of the nature admitting substantial compliance. Where the duty is absolute, the element of prejudice would be of least relevancy. Absolute duty coupled with strict compliance would rule out the element of prejudice where there is total non-compliance of the provision.

23. Reverting to the facts of the present case, we have already noticed that both the Trial Court and the High Court have proceeded on the basis of substantial compliance and there being no prejudice to the accused, though clearly recording that it was an admitted case of total non-compliance. The statement of PW7 puts the matter beyond ambiguity that there was 'total non-compliance of the statutory provisions of Section 42 of the Act'. Once, there is total non-compliance and these provisions being mandatory in nature, the prosecution case must fail.

24. Reliance placed by the learned counsel appearing for the State on the case of *Sajan Abraham* (supra) is entirely misplaced, firstly in view of the Constitution Bench judgment of this Court in the case of *Karnail Singh* (supra). Secondly, in that case the Court was also dealing with the application of the provisions of Section 57 of the Act which are worded differently and have different requirements, as opposed to Sections 42 and 50 of the Act. It is not a case where any reason has come in evidence as to why the secret information was not reduced to writing and sent to the higher officer, which is the requirement to be adhered to 'pre-search'. The question of sending it immediately thereafter does not arise in the present case, as

it is an admitted position that there is total non-compliance of Section 42 of the Act. The sending of report as required under Section 57 of the Act on 20th July, 2000 will be no compliance, factually and/or in the eyes of law to the provisions of Section 42 of the Act. These are separate rights and protections available to an accused and their compliance has to be done in accordance with the provisions of Sections 42, 50 and 57 of the Act. They are neither inter-linked nor inter-dependent so as to dispense compliance of one with the compliance of another. In fact, they operate in different fields and at different stages. That distinction has to be kept in mind by the courts while deciding such cases.

25. Now, we will deal with a serious doubt that has been pointed out on behalf of the appellant in the recovery and the very presence of PW5, Subhash Seoran, at the time of recovery. The prosecution has not been able to establish this aspect of the case beyond reasonable doubt. According to PW7 after stopping the scooter of the accused at T-Point, Theh Banehra, he had sent for PW5 who had reached there and recovery was effected in his presence after giving option to the accused as required under Section 50 of the Act. We do not consider it necessary to deal with the other contentions including the plea taken with regard to compliance of Section 50 of the Act. We would only confine ourselves in regard to the doubt that has been created in recovery of the contraband from the custody of the accused.

26. PW5 in his statement had categorically stated that he had come to the site in his official jeep No. HR 09 7007 driven by DW1, Desraj and no other person was in the jeep. He claimed to have left the spot at about 11.15 a.m. on 19th July, 2000. The accused had contended that he was falsely implicated, no independent witness was associated in the recovery or in the entire investigation and lastly that no recovery was effected and even PW5 has falsely deposed before the court. To support this contention, the accused had examined DW-1 Desraj, the driver of the car along with log book of Jeep

No. HR 09 7007. It will be interesting to note the examination in chief of this witness.

> "I have brought the Log Book of Jeep no. HR09-7007. I am working as driver in Tehsil Office, at Guhla. In this Log Book at sr. no. 422 dated 19.7.2K, the vehicle was used by Naib Tehsildar from 12.30 P.M. to 7 P.M. and it was used in the area of Kamehri, Baupur, Gagarpur, Harnoli, Landaheri and the beginning of journey, the reading of speedometer was 85056 and closing of the journey was 85173. Total numbers covered 117 kilometers. The Naib Tehsildar was Sh. Batti Sahib, of Guhla. Except this journey, the said vehicle has not gone anywhere. I had not gone with Sh. Subhash Seoran, the then Tehsildar at the area of village Theh Banehra at its T-point or in that area. Copy of entry in the Log book is Ex. D1, nor I went in this vehicle with Tehsildar Sh. Subhash Seoran in the area of village Bhagal or at the turn of vill. Theh Banehra. The entry of the movement of the vehicle is definitely recorded in the Log book. It is correct that I had not gone anywhere with Tehsildar Guhla Sh. Subhash Seoran on 19.7.2000.
>
> It is incorrect to suggest that the entries in the Log Book has not been made correctly and that every movements of the vehicles are not mentioned in this log book, rather it has been made later on as per convenience of the driver. It is incorrect to suggest that on the alleged day, i.e. 19.7.2000, the vehicle was used by the Tehsildar Sh. Subhash Seoran and I was also with him. It is further incorrect that on 19.7.2000, I had visited the area of village Bhagal at the turning of vill. Theh Banehra along with Tehsildar Subhash Seoran in the aforesaid jeep."

27. In his cross-examination, except the suggestion that every movement of the vehicles is not entered in the log book and that the vehicle was used by PW7 on that day, which suggestion he categorically denied, no other question was put to this witness. One has no reason to disbelieve the statement of DW1 particularly when he produced the log book maintained

in normal course of business. The log book showed a clear entry at serial no. 422 dated 19th July, 2000 where the vehicle in question was stated to be used by Mr. Bhatti, Naib Tehsildar, from 12.30 p.m. to 7.00 p.m. and was driven for 117 kms. PW5, Tehsildar-cum-Executive Magistrate, in fact, did not use the official vehicle on that day as per the log book. The witness even gave the exact reading of the meter of the vehicle which showed that it was driven for 117 kilometers on that date by the Naib Tehsildar, not even anywhere near to the area where the accused is alleged to have been apprehended It was also stated that except that journey, the vehicle had gone nowhere. He specifically stated that he had never taken PW5 to the place in question. Once, the statement of this witness is examined with the statement of PW7, that he did not associate any private person, independent witness in the recovery or in the entire process of investigation and that he did not even record such a fact in this proceedings casts a shadow of doubt over the case of the prosecution. Total non-compliance of Section 42, non-involvement of any independent witness at any stage of the investigation and the presence of PW5 at the spot being so very doubtful, thus, compel this Court to hold that the prosecution has failed to prove its case beyond reasonable doubt.

28. As already noticed, we do not propose to discuss other arguments raised on behalf of the appellant. We may also notice here that both the High Court and the Trial Court have noticed the above evidence as well as its legal position. Thus, the Trial Court as well as the High Court has fallen in error of law as well as that of appreciation of evidence.

29. Resultantly, the present appeal is accepted. The accused is acquitted of the offence under Section 18 of the Act and is directed to be set at liberty forthwith. The case property be disposed of in accordance with the provisions of the Act.

R.P. Appeal allowed.

BIHAR PUBLIC SERVICE COMMISSION
v.
SAIYED HUSSAIN ABBAS RIZWI & ANR.
(Civil Appeal No. 9052 of 2012)

DECEMBER 13, 2012

[SWATANTER KUMAR AND SUDHANSU JYOTI MUKHOPADHAYA, JJ.]

RIGHT TO INFORMATON ACT, 2005

s. 2(h) – 'Public authority' – Held: Public Service Commission shall be a public authority within the scope of s.2(h).

ss. 8(1)(g), and 11 – Disclosure of names and addresses of members of interview board constituted by State Public Service Commission – Held: If in the opinion of the authority concerned there is danger to life or possibility of danger to physical safety of members, the State Information Commission would be entitled to bring such case within the exemption of s. 8(1)(g) – Direction to furnish the names and addresses of the members of Interview Board would certainly be opposed to the very spirit of s. 8(1)(g) and would ex facie endanger their lives or physical safety – Further, such disclosure would serve no fruitful much less any public purpose – Marks are required to be disclosed but disclosure of individual names would hardly hold relevancy either to the concept of transparency or for proper exercise of the right to information within the limitation of the Act – Therefore the Commission is not bound to disclose such information – Constitution of India, 1950 – Article 21.

ss.2(f) and 2(j)) – Expressions 'information', and 'right to information' – Explained.

Respondent No. 1, claiming himself to be a public

spirited person, filed an application seeking certain information under the Right to Information Act, 2005 in connection with the selection of 'State Examiner of Questioned Documents' conducted by the State Public Service Commission. The Commission furnished information nearly to all the queries except the names, designations and addresses of the members of the Interview Board. The writ petition filed by respondent No. 1 was dismissed by the Single Judge of the High Court. But the Division Bench directed the Commission to provide the names of the members of the Interview Board while denying the disclosure of their addresses.

Allowing the appeal, the Court

HELD: 1. Public Service Commission is established under Art.315 of the Constitution of India and, as such, there cannot be any escape from the conclusion that the Commission shall be a public authority within the scope of s.2(h) of the Right to Information Act, 2005. [Para 14] [1043-B-C]

2.1. Right to information is a basic and celebrated fundamental/basic right but is not uncontrolled. It has its limitations. The right is subject to a dual check. Firstly, this right is subject to the restrictions inbuilt within the Act and secondly the constitutional limitations emerging from Art.21 of the Constitution. The right to information has to be balanced with the right to privacy within the framework of law. Section 8 of the Right to Information Act gives the category of cases where the public authority is exempted from providing the information. To such exemptions, there are inbuilt exceptions under some of the provisions, where despite exemption, the Information Commission may call upon the authority to furnish the information in the larger public interest. This shows the wide scope of these provisions as intended by the framers of law. In such cases, the Information

Commission has to apply its mind whether it is a case of exemption within the provisions of the said section. The expression 'public interest' has to be understood in its true connotation so as to give complete meaning to the relevant provisions of the Act. The expression 'public interest' must be viewed in its strict sense with all its exceptions so as to justify denial of a statutory exemption in terms of the Act. [Para 11 – 13 and 23] [1042-A-C-F; 1046-G-H; 1047-A]

Namit Sharma v. Union of India **2012 (8) SCALE 593 – referred to**

Black's Law Dictionary ***(Eighth Edition)*** **– referred to**

2.2. The expression 'information' as defined in s. 2(f) is exhaustive in nature. The Legislature has given meaning to the expression 'information' and has stated that it shall mean any material in any form including papers, samples, data material held in electronic form, etc. Right to information u/s. 2(j) means the 'right to information' accessible under the Act which is held by or under the control of any public authority and includes the right to inspection of work, documents, records, taking notes, extracts, taking certified sample of materials, obtaining information in the form of diskettes, floppies and video cassettes, etc. The right sought to be exercised and information asked for should fall within the scope of 'information' and 'right to information' as defined under the Act. [Para 15] [1043-D-F]

2.3. If the information called for falls in any of the categories specified u/s. 8 or relates to the organizations to which the Act itself does not apply in terms of s.24 of the Act, the public authority can take such stand before the Commission and decline to furnish such information. Another aspect of exercise of this right is that where the information asked for relates to third party information, the Commission is required to follow the procedure

prescribed u/s. 11 of the Act. [Para 16] [1043-G-H; 1044-A]

2.4. Section 8(1)(e) carves out a protection in favour of a person who possesses information in his fiduciary relationship. In the instant case, the examining body (the Commission), is in no fiduciary relationship with the examiners (interviewers) or the candidate interviewed. Once the fiduciary relationship is not established, the obvious consequence is that the Commission cannot claim exemption as contemplated u/s. 8(1)(e) of the Act. The question of directing disclosure for a larger public interest, therefore, would not arise at all. [para 22 and 26] [1046-B; 1051-G-H]

Central Board of Secondary Education & Anr. v. Aditya Bandopadhyay & Ors. **(2011) 8 SCC 497 – relied on**

2.5. Section 8 opens with the *non obstante* language and is an exception to the furnishing of information as is required under the relevant provisions of the Act. In terms of s.8(1)(g), the public authority is not obliged to furnish any such information the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement and security purposes. [Paras 21- 22] [1045-C-E-F]

2.6. The interviewers hold the position of an 'agent' vis-a-vis the examining body which is the 'principal'. This relationship *per se* is not relatable to any of the exemption clauses but there are some clauses of exemption, the foundation of which is not a particular relationship like fiduciary relationship. Section 8(1)(g) can come into play with any kind of relationship. It concerns with the cases where no obligation is cast upon the public authority to furnish information, the disclosure of which would endanger (a) the life (b) physical safety of any person. The legislature, in its wisdom, has used two

distinct expressions. They cannot be read or construed as being synonymous. 'Physical safety' is a restricted term while 'life' is a term of wide connotation. The expression 'life' also appears in Art. 21 of the Constitution and has been provided a wide meaning. The expression life u/s. 8(1(g) the Act, thus, has to be understood in somewhat similar dimensions. If in the opinion of the authority concerned there is danger to life or possibility of danger to physical safety, the State Information Commission would be entitled to bring such case within the exemption of s. 8(1)(g) of the Act. The disclosure of information which would endanger the life or physical safety of any person is one category and identification of the source of information or assistance given in confidence for law enforcement or security purposes is another category. The expression 'for law enforcement or security purposes' is to be read *ejusdem generis* only to the expression 'assistance given in confidence' and not to any other clause of the section. On the plain reading of s.8(1)(g), it becomes clear that the said clause is complete in itself. It cannot be said to have any reference to the expression 'assistance given in confidence for law enforcement or security purposes'. Neither the language nor the object of the Section requires such an interpretation. The High Court though has referred to s. 8(1)(j) but it has, in fact, dealt with the language of s. 8(1)(g). The reasoning of the High Court, therefore, is neither clear in reference to provision of the Section nor in terms of the language thereof. [Para 27-28] [1052-A-C, F-H; 1053-A-C-G]

2.7. The consequences that the interviewers or the members of the interview board would be exposed to in the event their names and addresses or individual marks given by them are disclosed, would be: Firstly, the members of the Board are likely to be exposed to danger to their lives or physical safety. Secondly, it will hamper

effective performance and discharge of their duties as examiners. This is the information available with the examining body in confidence with the interviewers. Declaration of collective marks to the candidates has been permitted by the authorities as well as the High Court. There is no error of jurisdiction or reasoning in this regard. But direction to furnish the names and addresses of the interviewers would *ex facie* endanger their lives or physical safety and would certainly be opposed to the very spirit of s. 8(1)(g) of the Act. The Commission is not bound to disclose the information asked for by the applicant under Query No.1 of the application. The judgment of the High Court is set aside. [Para 29-31] [1053-H; 1054-A-C; 1056-C-D]

Case Law Reference:

2012 (8) SCALE 593	**referred to**	**Para 10**
(2011) 8 SCC 497]	**referred to**	**para 25**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9052 of 2012.

From the Judgment & Order dated 20.01.2011 of the High Court of Patna in LPA No. 102 of 2010.

Navin Prakash for the Appellant.

Mamta Tiwari, Pranav Vyas (for Fox Mandal & Co.) Anjan Chakraborty, Shekhar Kumar for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. Leave granted.

2. The Bihar Public Service Commission (for short, 'the Commission) published advertisement No.6 of 2000 dated 10th May, 2000 in the local papers of the State of Bihar declaring its intention to fill up the posts of 'State Examiner of Questioned Documents', in Police Laboratory in Crime Investigation

Department, Government of Bihar, Patna. The advertisement, *inter alia*, stated that written examination would be held if adequate number of applications were received. As very limited number of applications were received, the Commission, in terms of the advertisement, decided against the holding of written examination. It exercised the option to select the candidates for appointment to the said post on the basis of *viva voce* test alone. The Commission completed the process of selection and recommended the panel of selected candidates to the State of Bihar.

3. One Saiyed Hussain Abbas Rizwi, respondent No.1 herein, claiming to be a public spirited citizen, filed an application before the Commission (appellant herein) under the Right to Information Act, 2005 (for short "the Act") on 16th December, 2008 seeking information in relation to eight queries. These queries concerned the interview which was held on 30th September, 2002 and 1st October, 2002 by the Commission with regard to the above advertisement. These queries, *inter alia*, related to providing the names, designation and addresses of the subject experts present in the Interview Board, names and addresses of the candidates who appeared, the interview statement with certified photocopies of the marks of all the candidates, criteria for selection of the candidates, tabulated statement containing average marks allotted to the candidates from matriculation to M.Sc. during the selection process with the signatures of the members/officers and certified copy of the merit list. This application remained pending with the Public Information Officer of the Commission for a considerable time that led to filing of an appeal by respondent No.1 before the State Information Commission. When the appeal came up for hearing, the State Information Commission vide its order dated 30th April, 2009 had directed the Public Information Officer-cum-Officer on Special Duty of the Commission that the information sought for be made available and the case was fixed for 27th August, 2009 when the following order was passed :

"The applicant is present. A letter dated 12.08.2009 of the Public Information Officer, Bihar Public Service Commission, Patna has been received whereby the required paragraph-wise information which could be supplied, has been given to the applicant. Since the information which could be supplied has been given to the applicant, the proceedings of the case are closed."

4. At this stage, we may also notice that the Commission, vide its letter dated 12th August, 2009, had furnished the information nearly to all the queries of respondent No.1. It also stated that no written test had been conducted and that the name, designation and addresses of the members of the Interview Board could not be furnished as they were not required to be supplied in accordance with the provisions of Section 8(1)(g) of the Act.

5. Aggrieved from the said order of the Information Commission dated 27th August, 2009, respondent No.1 challenged the same by filing a writ before the High Court of Judicature at Patna. The matter came up for hearing before a learned Judge of that Court, who, vide judgment dated 27th November, 2009 made the following observations and dismissed the writ petition :

"If information with regard to them is disclosed, the secrecy and the authenticity of the process itself may be jeopardized apart from that information would be an unwarranted invasion into privacy of the individual. Restricting giving this information has a larger public purpose behind it. It is to maintain purity of the process of selection. Thus, in view of specific provision in Section 8(1)(j), in my view, the information could not be demanded as matter of right. The designated authority in that organization also did not consider it right to divulge the information in larger public interest, as provided in the said provision."

6. Feeling aggrieved, respondent No.1 challenged the judgment of the learned Single Judge before the Division Bench of that Court by filing a letters patent appeal being LPA No.102 of 2010. The Division Bench, amongst others, noticed the following contentions :

(i) that third party interest was involved in providing the information asked for and, therefore, could properly be denied in terms of Section 2(n) read with Sections 8(1)(j) and 11 of the Act.

(ii) that respondent No.1 (the applicant) was a mere busybody and not a candidate himself and was attempting to meddle with the affairs of the Commission needlessly.

7. The Division Bench took the view that the provisions of Section 8(1)(j) were not attracted in the facts of the case in hand inasmuch as this provision had application in respect of law enforcement agency and for security purposes. Since no such consideration arose with respect to the affairs of the Commission and its function was in public domain, reliance on the said provision for denying the information sought for was not tenable in law. Thus, the Court in its order dated 20th January, 2011 accepted the appeal, set aside the order of the learned Single Judge and directed the Commission to communicate the information sought for to respondent No.1. The Court directed the Commission to provide the names of the members of the Interview Board, while denying the disclosure of and providing photocopies of the papers containing the signatures and addresses of the members of the Interview Board.

8. The Commission challenging the legality and correctness of the said judgment has filed the present appeal by way of special leave.

9. The question that arises for consideration in the present case is as to whether the Commission was duty bound to

disclose the names of the members of the Interview Board to any person including the examinee. Further, when the Commission could take up the plea of exemption from disclosure of information as contemplated under Section 8 of the Act in this regard.

10. Firstly, we must examine the purpose and scheme of this Act. For this purpose, suffice would it be to refer to the judgment of this Court in the case of *Namit Sharma v. Union of India* [2012 (8) SCALE 593], wherein this Court has held as under :

> "27. In terms of the Statement of Objects and Reasons of the Act of 2002, it was stated that this law was enacted in order to make the government more transparent and accountable to the public. It was felt that in the present democratic framework, free flow of information for citizens and non-Government institutions suffers from several bottlenecks including the existing legal framework, lack of infrastructure at the grass root level and an attitude of secrecy within the Civil Services as a result of the old framework of rules. The Act was to deal with all such aspects. The purpose and object was to make the government more transparent and accountable to the public and to provide freedom to every citizen to secure access to information under the control of public authorities, consistent with public interest, in order to promote openness, transparency and accountability in administration and in relation to matters connected therewith or incidental thereto."

11. The scheme of the Act contemplates for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities, in order to promote transparency and accountability in the working of every public authority. It was aimed at providing free access to information with the object of making governance more transparent and accountable. Another right of a citizen

protected under the Constitution is the right to privacy. This right is enshrined within the spirit of Article 21 of the Constitution. Thus, the right to information has to be balanced with the right to privacy within the framework of law.

12. Where Section 3 of the Act grants right to citizens to have access to information, there Section 4 places an obligation upon the public authorities to maintain records and provide the prescribed information. Once an application seeking information is made, the same has to be dealt with as per Sections 6 and 7 of the Act. The request for information is to be disposed of within the time postulated under the provisions of Section 7 of the Act. Section 8 is one of the most important provisions of the Act as it is an exception to the general rule of obligation to furnish information. It gives the category of cases where the public authority is exempted from providing the information. To such exemptions, there are inbuilt exceptions under some of the provisions, where despite exemption, the Commission may call upon the authority to furnish the information in the larger public interest. This shows the wide scope of these provisions as intended by the framers of law. In such cases, the Information Commission has to apply its mind whether it is a case of exemption within the provisions of the said section.

13. Right to information is a basic and celebrated fundamental/basic right but is not uncontrolled. It has its limitations. The right is subject to a dual check. Firstly, this right is subject to the restrictions inbuilt within the Act and secondly the constitutional limitations emerging from Article 21 of the Constitution. Thus, wherever in response to an application for disclosure of information, the public authority takes shelter under the provisions relating to exemption, non-applicability or infringement of Article 21 of the Constitution, the State Information Commission has to apply its mind and form an opinion objectively if the exemption claimed for was sustainable on facts of the case.

14. Now, we have to examine whether the Commission is a public authority within the meaning of the Act. The expression 'public authority' has been given an exhaustive definition under section 2(h) of the Act as the Legislature has used the word 'means' which is an expression of wide connotation. Thus, 'public authority' is defined as any authority or body or institution of the Government, established or constituted by the Government which falls in any of the stated categories under Section 2(h) of the Act. In terms of Section 2(h)(a), a body or an institution which is established or constituted by or under the Constitution would be a public authority. Public Service Commission is established under Article 315 of the Constitution of India and as such there cannot be any escape from the conclusion that the Commission shall be a public authority within the scope of this section.

15. Section 2(f) again is exhaustive in nature. The Legislature has given meaning to the expression 'information' and has stated that it shall mean any material in any form including papers, samples, data material held in electronic form, etc. Right to information under Section 2(j) means the 'right to information' accessible under this Act which is held by or under the control of any public authority and includes the right to inspection of work, documents, records, taking notes, extracts, taking certified sample of materials, obtaining information in the form of diskettes, floppies and video cassettes, etc. The right sought to be exercised and information asked for should fall within the scope of 'information' and 'right to information' as defined under the Act.

16. Thus, what has to be seen is whether the information sought for in exercise of right to information is one that is permissible within the framework of law as prescribed under the Act. If the information called for falls in any of the categories specified under Section 8 or relates to the organizations to which the Act itself does not apply in terms of section 24 of the Act, the public authority can take such stand before the

commission and decline to furnish such information. Another aspect of exercise of this right is that where the information asked for relates to third party information, the Commission is required to follow the procedure prescribed under Section 11 of the Act.

17. Before the High Court, reliance had been placed upon Section 8(1)(j) and Section 11 of the Act. On facts, the controversy in the present case falls within a very narrow compass. Most of the details asked for by the applicant have already been furnished. The dispute between the parties related only to the first query of the applicant, that is, with regard to disclosure of the names and addresses of the members of the Interview Board.

18. On behalf of the Commission, reliance was placed upon Section 8(1)(j) and Section 11 of the Act to contend that disclosure of the names would endanger the life of the members of the interview board and such disclosure would also cause unwarranted invasion of the privacy of the interviewers. Further, it was contended that this information related to third party interest. The expression 'third party' has been defined in Section 2(n) of the Act to mean a person other than the citizen making a request for information and includes a public authority. For these reasons, they were entitled to the exemption contemplated under Section 8(1)(j) and were not liable to disclose the required information. It is also contended on behalf of the Commission that the Commission was entitled to exemption under Sections 8(1)(e) and 8(1)(g) read together.

19. On the contrary, the submission on behalf of the applicant was that it is an information which the applicant is entitled to receive. The Commission was not entitled to any exemption under any of the provisions of Section 8, and therefore, was obliged to disclose the said information to the applicant.

20. In the present case, we are not concerned with the

correctness or otherwise of the method adopted for selection of the candidates. Thus, the fact that no written examination was held and the selections were made purely on the basis of *viva voce*, one of the options given in the advertisement itself, does not arise for our consideration. We have to deal only with the plea as to whether the information asked for by the applicant should be directed to be disclosed by the Commission or whether the Commission is entitled to the exemption under the stated provisions of Section 8 of the Act.

21. Section 8 opens with the *non obstante* language and is an exception to the furnishing of information as is required under the relevant provisions of the Act. During the course of the hearing, it was not pressed before us that the Commission is entitled to the exemption in terms of Section 8(1)(j) of the Act. In view of this, we do not propose to discuss this issue any further nor would we deal with the correctness or otherwise of the impugned judgment of the High Court in that behalf.

22. Section 8(1)(e) provides an exemption from furnishing of information, if the information available to a person is in his fiduciary relationship unless the competent authority is satisfied that larger public interest warrants the disclosure of such information. In terms of Section 8(1)(g), the public authority is not obliged to furnish any such information the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement and security purposes. If the concerned public authority holds the information in fiduciary relationship, then the obligation to furnish information is obliterated. But if the competent authority is still satisfied that in the larger public interest, despite such objection, the information should be furnished, it may so direct the public authority. The term 'fiduciary' refers to a person having a duty to act for the benefit of another, showing good faith and condour, where such other person reposes trust and special confidence in the person owing or discharging the duty. The

term 'fiduciary relationship' is used to describe a situation or transaction where one person places complete confidence in another person in regard to his affairs, business or transactions. This aspect has been discussed in some detail in the judgment of this Court in the case of *Central Board of Secondary Education (supra)*. Section 8(1)(e), therefore, carves out a protection in favour of a person who possesses information in his fiduciary relationship. This protection can be negated by the competent authority where larger public interest warrants the disclosure of such information, in which case, the authority is expected to record reasons for its satisfaction. Another very significant provision of the Act is 8(1)(j). In terms of this provision, information which relates to personal information, the disclosure of which has no relationship to any public activity or interest or which would cause unwarranted invasion of the privacy of the individual would fall within the exempted category, unless the authority concerned is satisfied that larger public interest justifies the disclosure of such information. It is, therefore, to be understood clearly that it is a statutory exemption which must operate as a rule and only in exceptional cases would disclosure be permitted, that too, for reasons to be recorded demonstrating satisfaction to the test of larger public interest. It will not be in consonance with the spirit of these provisions, if in a mechanical manner, directions are passed by the appropriate authority to disclose information which may be protected in terms of the above provisions. All information which has come to the notice of or on record of a person holding fiduciary relationship with another and but for such capacity, such information would not have been provided to that authority, would normally need to be protected and would not be open to disclosure keeping the higher standards of integrity and confidentiality of such relationship. Such exemption would be available to such authority or department.

23. The expression 'public interest' has to be understood in its true connotation so as to give complete meaning to the relevant provisions of the Act. The expression 'public interest'

must be viewed in its strict sense with all its exceptions so as to justify denial of a statutory exemption in terms of the Act. In its common parlance, the expression 'public interest', like 'public purpose', is not capable of any precise definition . It does not have a rigid meaning, is elastic and takes its colour from the statute in which it occurs, the concept varying with time and state of society and its needs. [*State of Bihar v. Kameshwar Singh* (AIR 1952 SC 252)]. It also means the general welfare of the public that warrants recommendation and protection; something in which the public as a whole has a stake [Black's Law Dictionary (Eighth Edition)].

24. The satisfaction has to be arrived at by the authorities objectively and the consequences of such disclosure have to be weighed with regard to circumstances of a given case. The decision has to be based on objective satisfaction recorded for ensuring that larger public interest outweighs unwarranted invasion of privacy or other factors stated in the provision. Certain matters, particularly in relation to appointment, are required to be dealt with great confidentiality. The information may come to knowledge of the authority as a result of disclosure by others who give that information in confidence and with complete faith, integrity and fidelity. Secrecy of such information shall be maintained, thus, bringing it within the ambit of fiduciary capacity. Similarly, there may be cases where the disclosure has no relationship to any public activity or interest or it may even cause unwarranted invasion of privacy of the individual. All these protections have to be given their due implementation as they spring from statutory exemptions. It is not a decision simpliciter between private interest and public interest. It is a matter where a constitutional protection is available to a person with regard to the right to privacy. Thus, the public interest has to be construed while keeping in mind the balance factor between right to privacy and right to information with the purpose sought to be achieved and the purpose that would be served in the larger public interest, particularly when both these

rights emerge from the constitutional values under the Constitution of India.

25. First of all, the Court has to decide whether in the facts of the present case, the Commission holds any fiduciary relationship with the examinee or the interviewers. Discussion on this question need not detain us any further as it stands fully answered by a judgment of this Court in the case of *Central Board of Secondary Education & Anr. v. Aditya Bandopadhyay & Ors.* [(2011) 8 SCC 497] wherein the Court held as under :

> "**40.** There are also certain relationships where both the parties have to act in a fiduciary capacity treating the other as the beneficiary. Examples of these are: a partner vis-à-vis another partner and an employer vis-à-vis employee. An employee who comes into possession of business or trade secrets or confidential information relating to the employer in the course of his employment, is expected to act as a fiduciary and cannot disclose it to others. Similarly, if on the request of the employer or official superior or the head of a department, an employee furnishes his personal details and information, to be retained in confidence, the employer, the official superior or departmental head is expected to hold such personal information in confidence as a fiduciary, to be made use of or disclosed only if the employee's conduct or acts are found to be prejudicial to the employer.
>
> **41.** In a philosophical and very wide sense, examining bodies can be said to act in a fiduciary capacity, with reference to the students who participate in an examination, as a Government does while governing its citizens or as the present generation does with reference to the future generation while preserving the environment. But the words "information available to a person in his

fiduciary relationship" are used in Section 8(1)(*e*) of the RTI Act in its normal and well-recognised sense, that is, to refer to persons who act in a fiduciary capacity, with reference to a specific beneficiary or beneficiaries who are to be expected to be protected or benefited by the actions of the fiduciary—a trustee with reference to the beneficiary of the trust, a guardian with reference to a minor/physically infirm/ mentally challenged, a parent with reference to a child, a lawyer or a chartered accountant with reference to a client, a doctor or nurse with reference to a patient, an agent with reference to a principal, a partner with reference to another partner, a Director of a company with reference to a shareholder, an executor with reference to a legatee, a Receiver with reference to the parties to a lis, an employer with reference to the confidential information relating to the employee, and an employee with reference to business dealings/transaction of the employer. We do not find that kind of fiduciary relationship between the examining body and the examinee, with reference to the evaluated answer books, that come into the custody of the examining body.

42. The duty of examining bodies is to subject the candidates who have completed a course of study or a period of training in accordance with its curricula, to a process of verification/examination/testing of their knowledge, ability or skill, or to ascertain whether they can be said to have successfully completed or passed the course of study or training. Other specialised examining bodies may simply subject the candidates to a process of verification by an examination, to find out whether such person is suitable for a particular post, job or assignment. An examining body, if it is a public authority entrusted with public functions, is required to act fairly, reasonably, uniformly and consistently for public good and in public interest.

43. This Court has explained the role of an examining body

in regard to the process of holding examination in the context of examining whether it amounts to "service" to a consumer, in *Bihar School Examination Board* v. *Suresh Prasad Sinha* in the following manner: (SCC p. 487, paras 11-13)

> "*11*. … The process of holding examinations, evaluating answer scripts, declaring results and issuing certificates are different stages of a single statutory non-commercial function. It is not possible to divide this function as partly statutory and partly administrative.
>
> *12*. When the Examination Board conducts an examination in discharge of its statutory function, it does not offer its 'services' to any candidate. Nor does a student who participates in the examination conducted by the Board, hire or avail of any service from the Board for a consideration. On the other hand, a candidate who participates in the examination conducted by the Board, is a person who has undergone a course of study and who requests the Board to test him as to whether he has imbibed sufficient knowledge to be fit to be declared as having successfully completed the said course of education; and if so, determine his position or rank or competence vis-à-vis other examinees. The process is not, therefore, availment of a service by a student, but participation in a general examination conducted by the Board to ascertain whether he is eligible and fit to be considered as having successfully completed the secondary education course. The examination fee paid by the student is not the consideration for availment of any service, but the charge paid for the privilege of participation in the examination.
>
> *13*. … The fact that in the course of conduct of the

> examination, or evaluation of answer scripts, or furnishing of marksheets or certificates, there may be some negligence, omission or deficiency, does not convert the Board into a service provider for a consideration, nor convert the examinee into a consumer…."

It cannot therefore be said that the examining body is in a fiduciary relationship either with reference to the examinee who participates in the examination and whose answer books are evaluated by the examining body.

XXX XXX XXX

49. The examining body entrusts the answer books to an examiner for evaluation and pays the examiner for his expert service. The work of evaluation and marking the answer book is an assignment given by the examining body to the examiner which he discharges for a consideration. Sometimes, an examiner may assess answer books, in the course of his employment, as a part of his duties without any specific or special remuneration. In other words, the examining body is the "principal" and the examiner is the "agent" entrusted with the work, that is, the evaluation of answer books. Therefore, the examining body is not in the position of a fiduciary with reference to the examiner."

(emphasis supplied)

26. We, with respect, would follow the above reasoning of the Bench and, thus, would have no hesitation in holding that in the present case, the examining body (the Commission), is in no fiduciary relationship with the examinee (interviewers) or the candidate interviewed. Once the fiduciary relationship is not established, the obvious consequence is that the Commission cannot claim exemption as contemplated under Section 8(1)(e) of the Act. The question of directing disclosure for a larger public interest, therefore, would not arise at all.

27. In *CBSE case* (supra), this Court had clearly stated the view that an examiner who examines the answer sheets holds the relationship of principal and agent with the examining body. Applying the same principle, it has to be held that the interviewers hold the position of an 'agent' vis-a-vis the examining body which is the 'principal'. This relationship *per se* is not relatable to any of the exemption clauses but there are some clauses of exemption, the foundation of which is not a particular relationship like fiduciary relationship. Clause 8(1)(g) can come into play with any kind of relationship. It requires that where the disclosure of information would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes, the information need not be provided. The High Court has rejected the application of Section 8(1)(g) on the ground that it applies only with regard to law enforcement or security purposes and does not have general application. This reasoning of the High Court is contrary to the very language of Section 8(1)(g). Section 8(1)(g) has various clauses in itself.

28. Now, let us examine the provisions of Section 8(1)(g) with greater emphasis on the expressions that are relevant to the present case. This section concerns with the cases where no obligation is cast upon the public authority to furnish information, the disclosure of which would endanger (a) the life (b) physical safety of any person. The legislature, in its wisdom, has used two distinct expressions. They cannot be read or construed as being synonymous. Every expression used by the Legislature must be given its intended meaning and, in fact, a purposeful interpretation. The expression 'life' has to be construed liberally. 'Physical safety' is a restricted term while life is a term of wide connotation. 'Life' includes reputation of an individual as well as the right to live with freedom. The expression ' life' also appears in Article 21 of the Constitution and has been provided a wide meaning so as to *inter alia* include within its ambit the right to live with dignity, right to

shelter, right to basic needs and even the right to reputation. The expression life under section 8(1(g) the Act, thus, has to be understood in somewhat similar dimensions. The term 'endanger' or 'endangerment' means the act or an instance of putting someone or something in danger; exposure to peril or such situation which would hurt the concept of life as understood in its wider sense [refer Black's Law Dictionary (Eighth Edition)]. Of course, physical safety would mean the likelihood of assault to physical existence of a person. If in the opinion of the concerned authority there is danger to life or possibility of danger to physical safety, the State Information Commission would be entitled to bring such case within the exemption of Section 8(1)(g) of the Act. The disclosure of information which would endanger the life or physical safety of any person is one category and identification of the source of information or assistance given in confidence for law enforcement or security purposes is another category. The expression 'for law enforcement or security purposes' is to be read *ejusdem generis* only to the expression 'assistance given in confidence' and not to any other clause of the section. On the plain reading of Section 8(1)(g), it becomes clear that the said clause is complete in itself. It cannot be said to have any reference to the expression 'assistance given in confidence for law enforcement or security purposes'. Neither the language of the Section nor the object of the Section requires such interpretation. It would not further the cause of this section. Section 8 attempts to provide exemptions and once the language of the Section is unambiguous and squarely deals with every situation, there is no occasion for the Court to frustrate the very object of the Section. It will amount to misconstruing the provisions of the Act. The High Court though has referred to Section 8(1)(j) but has, in fact, dealt with the language of Section 8(1)(g). The reasoning of the High Court, therefore, is neither clear in reference to provision of the Section nor in terms of the language thereof.

29. Now, the ancillary question that arises is as to the

consequences that the interviewers or the members of the interview board would be exposed to in the event their names and addresses or individual marks given by them are directed to be disclosed. Firstly, the members of the Board are likely to be exposed to danger to their lives or physical safety. Secondly, it will hamper effective performance and discharge of their duties as examiners. This is the information available with the examining body in confidence with the interviewers. Declaration of collective marks to the candidate is one thing and that, in fact, has been permitted by the authorities as well as the High Court. We see no error of jurisdiction or reasoning in this regard. But direction to furnish the names and addresses of the interviewers would certainly be opposed to the very spirit of Section 8(1)(g) of the Act. *CBSE case* (supra) has given sufficient reasoning in this regard and at this stage, we may refer to paragraphs 52 and 53 of the said judgment which read as under :

"**52.** When an examining body engages the services of an examiner to evaluate the answer books, the examining body expects the examiner not to disclose the information regarding evaluation to anyone other than the examining body. Similarly the examiner also expects that his name and particulars would not be disclosed to the candidates whose answer books are evaluated by him. In the event of such information being made known, a disgruntled examinee who is not satisfied with the evaluation of the answer books, may act to the prejudice of the examiner by attempting to endanger his physical safety. Further, any apprehension on the part of the examiner that there may be danger to his physical safety, if his identity becomes known to the examinees, may come in the way of effective discharge of his duties. The above applies not only to the examiner, but also to the scrutiniser, co-ordinator and head examiner who deal with the answer book.

53. The answer book usually contains not only the signature

and code number of the examiner, but also the signatures and code number of the scrutiniser/co-ordinator/head examiner. The information as to the names or particulars of the examiners/co-ordinators/scrutinisers/head examiners are therefore exempted from disclosure under Section 8(1)(*g*) of the RTI Act, on the ground that if such information is disclosed, it may endanger their physical safety. Therefore, if the examinees are to be given access to evaluated answer books either by permitting inspection or by granting certified copies, such access will have to be given only to that part of the answer book which does not contain any information or signature of the examiners/ co-ordinators/scrutinisers/head examiners, exempted from disclosure under Section 8(1)(*g*) of the RTI Act. Those portions of the answer books which contain information regarding the examiners/co-ordinators/scrutinisers/head examiners or which may disclose their identity with reference to signature or initials, shall have to be removed, covered, or otherwise severed from the non-exempted part of the answer books, under Section 10 of the RTI Act."

30. The above reasoning of the Bench squarely applies to the present case as well**.** The disclosure of names and addresses of the members of the Interview Board would *ex facie* endanger their lives or physical safety. The possibility of a failed candidate attempting to take revenge from such persons cannot be ruled out. On the one hand, it is likely to expose the members of the Interview Board to harm and, on the other, such disclosure would serve no fruitful much less any public purpose. Furthermore, the view of the High Court in the judgment under appeal that element of bias can be traced and would be crystallized only if the names and addresses of the examiners/interviewers are furnished is without any substance. The element of bias can hardly be co-related with the disclosure of the names and addresses of the interviewers. Bias is not a ground which can be considered for or against a party making an application to which exemption under Section 8 is pleaded

as a defence. We are unable to accept this reasoning of the High Court. Suffice it to note that the reasoning of the High Court is not in conformity with the principles stated by this Court in the *CBSE case* (supra). The transparency that is expected to be maintained in such process would not take within its ambit the disclosure of the information called for under query No.1 of the application. Transparency in such cases is relatable to the process where selection is based on collective wisdom and collective marking. Marks are required to be disclosed but disclosure of individual names would hardly hold relevancy either to the concept of transparency or for proper exercise of the right to information within the limitation of the Act.

31. For the reasons afore-stated, we accept the present appeal, set aside the judgment of the High Court and hold that the Commission is not bound to disclose the information asked for by the applicant under Query No.1 of the application.

R.P. Appeal allowed.

PARSHAVANATH CHARITABLE TRUST & ORS.
v.
ALL INDIA COUNCIL FOR TECH. EDU & ORS.
(Civil Appeal No. 9048 of 2012 etc.)

DECEMBER 13, 2012

[A.K. PATNAIK AND SWATANTER KUMAR, JJ.]

All India Council for Technical Education Act, 1987:

s.10(1)(k) of the Act and clause 9.22 of the Handbook of Approval Process – Shifting of Engineering College – Requirements to be complied with – Held: Clause 9.22 of the Handbook of Approval Process issued by AICTE provides a complete procedure for change of location and the same is permissible subject to compliance with the procedure – In the instant case, appellant-college had shifted to the new premises without approval of AICTE and without 'No Objection Certificate' from the State Government and Directorate of Technical Education – Undisputedly, the appellant-college had no title to the property and, in fact, it did not even have a registered lease deed in its favour to create some recognizable interest in the property in question – High Court in its judgment had specifically noticed the defects pointed out by the Expert Committee – View of High Court that the College had failed to comply with requirements for grant of approval and had shifted to the new site without approval of the AICTE and other authorities concerned cannot be faulted with and does not call for any interference – In the circumstances, withdrawal of approval by AICTE can also not be interfered with.

ss. 10 and 23 of the Act and Regulation 8(15) of 1994 Regulations – Application for grant of approval to shifting of Engineering College – AICTE granting approval for academic

years 2008-2009 and 2009-2010, albeit to operate the College only from the approved location – Subsequently, approval withdrawn on 7.1.2011 – Held: It is the requirement of law that there should be strict adherence to the time schedule for grant of approval as well as for admissions without exception – The Schedule to the Regulations has statutory backing – Its adherence is mandatory and not directory – In the instant case, there has been apparent error in exercise of power and discretion by the AICTE – Admittedly, the appellant-college had been carrying on its education courses since the year 1994 – It had submitted its application for transfer to the new site on 24.5.2008 – There is nothing on record to show that this application was dealt with either by the Regional Office or by the main office of the AICTE – Granting of approval for the academic years 2008-09 and 2009-10 particularly when the Expert Committee is stated to have visited the premises on 26.6.2008 and found inadequacies in the report, is certainly a lapse on the part of the AICTE which cannot be ignored by the Court as it had far-reaching consequences including placing the career of the students admitted during these two years in jeopardy – Thus, cost of Rs.50,000/- is imposed upon the AICTE for such irresponsible working – The costs would be recovered from the salary of the erring officials/officers involved in the erroneous approach – Admission schedule and Schedule for granting/refusal of approval modified and directions issued accordingly – All India Council for Technical Education (Grant of Approvals for Staffing New Technical Institution, Introduction of Course and Programmes and Approval of Intake Capacity) Regulations, 1994.

The appellant Trust started an Engineering College at the premises bearing Survey No. 27, from the academic year 1994-95 after obtaining approval from the authorities concerned. On 24.5.2008, the Trust moved an application to the Regional Office of the All India Council for Technical Education (AICTE) seeking its permission to

shift the College to new premises; it also applied for issuance of a "No Objection Certificate". However, in May 2008, the Trust shifted the College to the new site. On 30.6.2008, the AICTE granted extension of approval to the College for academic years 2008-2011 with an intake capacity of 280 students and with a specific assertion that the institution would operate only from the approved location. By letter dated 20.8.2009 AICTE granted approval to the College with increased intake from 280 to 360 students for the academic year 2009. On 18.5.2010 the AICTE issued a notice to the College that it had shifted to another location without obtaining prior approval. The College was also not included in the Centralised Admission Process by the State Government. The appellant filed a writ petition before the High Court, which directed that the College be allowed to participate in CAP in the second round. On 7.1.2011, the AICTE passed an order withdrawing the approval granted to the College for the academic year 2008-2009. The writ petition filed by the appellant having been dismissed by the High Court, it filed the appeals. Two students also filed another appeal by seeking leave of the Court.

Dismissing the appeals, the Court

HELD: 1.1. The AICTE is a specialized body constituted for the purpose of bringing uniformity in technical education all over the country and to ensure that the institutions which are recognised by it are possessed of complete infrastructure, staff and other facilities and are capable of maintaining education standards for imparting technical education. [para 25] [1080-B-C]

Jaya Gokul Educational Trust v. Commissioner & Secretary to Government Higher Education Department, Thiruvanathapuram, Kerala State and Anr. **2000 (2) SCR 1234 = (2000) 5 SCC 231 - referred to.**

1.2. Section 10(1)(k) of the All India Council for Technical Education Act, 1987 (AICTE Act) empowers the AICTE to "grant approval for starting new technical institutions and for introduction of new courses or programmes in consultation with the agencies concerned". It is important to see that the AICTE is empowered to inspect or cause to inspect any technical institution under clause (p) of sub-s. (1) of s. 10 without any reservation whatsoever. However, when it comes to the question of universities, it is confined and limited to ascertaining the financial needs or its standards of teaching, examination and research. The inspection may be made or caused to be made of any department or departments only and that too, in such manner as may be prescribed, as envisaged in s. 11 of the AICTE Act. [para 23] [1079-B-E]

Adarsh Shiksha Mahavidyalaya v. Subhash Rahangdale **(2012) 2 SCC 425;** *State of Tamil Nadu v. Adhiyaman Educational & Research Institute* **1995 (2) SCR 1075 = (1995) 4 SCC 104; and** *Bharathidasan University v. All India Council for Technical Education* **(2001) 8 SCC 676 – referred to.**

1.3. The consistent view of this Court has been that where both Parliament and State Legislature have the power to legislate, the Central Act shall take precedence in the matters which are covered by such legislations and the State enactments shall pave way for such legislations to the extent they are in conflict or repugnant. As per the established canons of law, primacy of the Central Act is undisputable which necessarily implies primacy of AICTE in the field of technical education. The AICTE is the authority constituted under the Central Act with the responsibility of maintaining operational standards and judging the infrastructure and facilities available for imparting professional education. It shall take

precedence over the opinion of the State as well as that of the University. It needs to be clarified that grant of approval by the State and affiliation by the University for increased intake of seats or commencement of new college should not be repugnant to the conditions of approval/recommendation granted by the AICTE. [para 27] [1083-E-H; 1084-A-B-C]

1.4. It is also a settled principle that the regulations framed by the central authorities such as the AICTE have the force of law and are binding on all concerned. Once approval is granted or declined by such expert body, the courts would normally not substitute their view in this regard. Such expert views would normally be accepted by the court unless the powers vested in such expert body are exercised arbitrarily, capriciously or in a manner impermissible under the Regulations and the AICTE Act. [para 28] [1084-D-F]

AICTE v. Surinder Kumar Dhawan **2009 (3) SCR 859 = (2009) 11 SCC 726;** *Unni Krishnan, J.P. and Others etc. etc. vs. State of Andhra Pradesh and Others etc. etc.* **(1993) 1 SCC 645 - referred to.**

2.1. Right to establish an educational institution does not carry with it the right to recognition or the right to affiliation. Grant of recognition or affiliation is neither a matter of course nor is it a formality. Admission to the privileges of a University is a power to be exercised with great care keeping in view the interest of the public at large and the nation. Recognition has to be as per statutorily prescribed conditions and their strict adherence by all concerned. These conditions of recognition and the duly notified directions controlling the admission process are to be construed and applied *stricto sensu*. They cannot be varied from case to case. [para 29] [1086-C-E]

Ranjan Purohit and Ors. v. Rajasthan University of Health Science and Ors. **(2012) 8 SCALE 71;** *Medical Council of India v. Madhu Singh* **2002 (2) Suppl. SCR 228 = (2002) 7 SCC 258 - referred to.**

2.2. Compliance with the conditions for approval as well as regulations and provisions of the AICTE Act is an unexceptionable condition. Clause 9.22 of the Handbook of Approval Process issued by the AICTE provides a complete procedure for change of location, station and the same is permissible subject to compliance with the procedure. It contemplates obtaining of 'No Objection Certificate' from the concerned State Government or UT Administration and affiliating body. The same clause also requires submission of the land documents in original and clearly provides that the same may be a registered sale deed, irrevocable government lease for a minimum period of 30 years, etc. by the concerned authority of the Government. [para 31] [1087-D-F]

2.3. There is no dispute as to the fact that the appellant-college had shifted to the new premises without approval of the AICTE and without 'No Objection Certificate' from the State Government and Directorate of Technical Education. Undisputedly, the appellant-college had no title to the property and, in fact, it did not even have a registered lease deed in its favour to create some recognizable interest in the property in question. The High Court in its judgment had specifically noticed the defects pointed out by the Expert Committee. [para 30] [1086-F-G; 1087-A-B]

2.4. Even the approvals granted for the academic years 2008-09 and 2009-10 had clearly stated that the institution shall operate only from the approved location and it shall not open any campus/executive centres directly or in collaboration with any other institution/ university for the purpose of imparting technical

education without obtaining prior approval from the AICTE. The approval for these academic years was granted to the College being run at Survey Nos.27 and not at any other place. There is no occasion to take it as a deemed and/or implied approval for the new site of the appellant-college. Approval can hardly be inferred. It is a matter of fact and the authorities are expected to pass appropriate orders in accordance with law and upon due diligence and in compliance with the procedure prescribed under law. [para 32-33] [1088-B-D]

2.5. Thus, the view of the High Court that the College had failed to comply with the requirements for grant of approval and had shifted to the new site without approval of the AICTE and other authorities concerned cannot be faulted with and does not call for any interference. There being no compliance to the legal requirements and binding conditions of recognition, the withdrawal of approval by the AICTE can also be not interfered with. [para 34] [1088-E-F]

2.6. In the circumstances, the appellant college could not have been included in the counselling for the current year. Even otherwise, the last date for admission was 30.8.2012, which is since over and there is no reason whatsoever to extend this date. Further, the Court is required to strictly construe and comply with the schedule for admission. [para 35] [1088-G-H; 1089-A]

3.1. It is the requirement of law that there should be strict adherence to the time schedule for grant of approval as well as for admissions without exception. In exercise of the powers vested in the AICTE, under sub-s. (1) of s.23 of the AICTE Act, it had made regulations namely the All India Council for Technical Education (Grant of Approvals for Staffing New Technical Institution, Introduction of Course and Programmes and Approval of

Intake Capacity) Regulations, 1994. Schedule to these regulations has statutory backing. Thus, its adherence is mandatory and not directory. The authorities concerned, particularly the AICTE, should ensure proper and timely action upon the applications submitted to it. For better administration, the AICTE should also state the time within which the deficiencies/ defects should be removed by the applicant. [para 38-40] [1089-F-G; 1091-C-D, F]

3.2. Admission schedule should be declared once and for all rather than making it a yearly declaration. Consistency and smoothness in admission process would demand and require that there is a fixed and unaltered time schedule provided for admission to the colleges so that the students know with certainty and well in advance the admission schedule that is to be followed and on the basis of which they are to have their choice of college or course exercised. It cannot be appreciated that once the academic session begins on 1st August, then as to why should admission be granted upto 30th August of the year, particularly when, as per the terms of the Schedule, beyond or after 30th April, AICTE will not issue any approval for commencement of new course for additional intakes. The Schedule, thus, introduces an element of arbitrariness and may cause prejudice to the students who might miss their classes for a period of one month without any justification. Thus, it is required that the Schedule be modified to bring it in line with the Schedule for approval as well as to prevent inequalities, arbitrariness and prejudice from affecting the students in relation to their academic courses. The order granting or refusing approval, thus, should positively be passed by 10th April of the relevant year. The appeal should be filed within one week and the Appellate Committee should hear the appeal and decide the same by 30th April of the relevant year. The University should grant/decline

approval/affiliation by 15th May of the relevant year. Advertisement should be issued and entrance examination conducted positively by the end of the month of May. The appropriate Schedule has been given in the judgment. The admission to academic courses should start, as proposed, by 1st August of the relevant year. The seats remaining vacant should again be duly notified and advertised. All seats should be filled positively by 15th August after which there shall be no admission, whatever be the reason or ground. [para 42-44] [1092-F-H; 1093-A; 1094-D-H; 1096-D]

3.3. The admission Schedule as proposed is in conformity with the affiliation/ recognition schedule. They both can co-exist. Thus, these admission dates are approved and it is declared to be the law which shall be strictly adhered to by all concerned and none of the authorities shall have the power or jurisdiction to vary these dates of admission. Certainty in this field is bound to serve the ends of fair, transparent and judicious method of grant of admission and commencement of the technical courses. Any variation is bound to adversely affect the maintenance of higher standards of education and systemic and proper completion of courses. [para 45] [1096-E-G]

3.4. There has been apparent error in exercise of power and discretion by the AICTE. Admittedly, the appellant-college had been carrying on its education courses since the year 1994. It had submitted its application for transfer to the new site on 24.5.2008. There is nothing on record to show that this application was dealt with either by the Regional Office or by the main office of the AICTE. Having known the fact that the college had shifted to a new site, the AICTE accorded approval for the academic years 2008-09 and 2009-10 for which again there is no justification placed on record. It

is the case of the appellant that on 26.6.2008, the Expert Committee visited the new site of the appellant-college where the college was being run. Thereafter approval for the two academic years was granted. Strangely, on the basis of the same report, on 18.5.2010 the show cause notice was issued and again the Expert Committee is stated to have visited the college premises on 16.7.2010 leading to the issuance firstly of the rejection of the seats and, secondly, of withdrawal/cancellation of approval on 7.1.2011. [para 46] [1096-G-H; 1097-A-D]

3.5. Granting of approval for the academic years 2008-09 and 2009-10 particularly when the Expert Committee is stated to have visited the premises on 26.6.2008 and found inadequacies in the report, is certainly a lapse on the part of the AICTE which cannot be ignored by the Court as it had far-reaching consequences including placing the career of the students admitted during these two years in jeopardy. Shifting of students is a consequential order and is in the interest of the students. Even though the High Court has directed allocation of these students in other colleges, their academic course certainly stands adversely affected and disturbed, for which the AICTE is responsible. In this regard, the Court cannot overlook such apparent erroneous approach and default which can be for anything but bona fide reasons. Thus, cost of Rs.50,000/- is imposed upon the AICTE for such irresponsible working. The costs would be payable to the Supreme Court Legal Services Committee and would be recovered from the salary of the erring officials/ officers involved in this erroneous approach. [para 34 and 47] [1088-F-G; 1097-D-G]

4.2. It is directed that:

(i) Both grant/refusal of approval and admission schedule shall be strictly adhered to by all the

authorities concerned including the AICTE, University, State Government and any other authority directly or indirectly connected with the grant of approval and admission;

(ii) No person or authority shall have the power or jurisdiction to vary the Schedule;

(iii) While dealing with the application for grant of approval to new colleges or additional seats, the AICTE shall inform the applicant within three weeks from the date of receipt of its application or date of inspection, as the case may be, the shortcomings/ defects, who, in turn, shall remove such shortcomings/defects within 15 days from the date of such communication or within such period as the AICTE may grant and re-submit its papers without default. The process of grant of approval has to be transparent and fair. The AICTE or the University concerned or State Government shall take disciplinary action against the person who commits default in adherence to the Schedule and performance of his duties in accordance therewith;

(iv) The reports submitted by the Expert Committee visiting the college should be unambiguous and clear, and should bear the date and time of inspection and should be sufficiently comprehensive and inspection be conducted in the presence of a representative of the institute;

(v) The students of the appellant-college shall be re-allocated to the recognized and affiliated colleges in terms of the judgment of the High Court; and the AICTE and the University concerned shall ensure that the academic courses of these students are completed within the balance period of the academic

year in all respects. For this purpose, if extra classes are required to be held, the concerned institute, the University and the AICTE are directed to ensure holding of such extra classes; and

(vi) If the appellate authority decides the matter prior to 30th April of the concerned year and grants approval to a college, then alone such institution will be permitted to be included in the list of colleges to which admissions are to be made and not otherwise. Thus, even if the appellate authority grants approval after 30th April, it will not be operative for the current academic year. All colleges which have been granted approval/affiliation by 10th or 30th April, as the case may be, shall alone be included in the brochure/ advertisement/website for the purpose of admission and none thereafter. [para 48] [1098-A-H; 1099-A-E]

Case Law Reference:

(2012) 2 SCC 425	**referred to**	**Para 24**
1995 (2) SCR 1075	**referred to**	**Para 24**
2001 (3) Suppl. SCR 253	**referred to**	**Para 24**
2000 (2) SCR 1234	**referred to**	**Para 26**
2009 (3) SCR 859	**referred to**	**Para 28**
(1993) 1 SCC 645	**referred to**	**para 29**
(2012) 8 SCALE 71	**referred to**	**para 29**
2002 (2) Suppl. SCR 228	**referred to**	**para 29**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9048 of 2012.

From the Judgment & Order dated 22.8.2012 of the High Court of Judicature at Bombay in Writ Petition No. 460 of 2011.

WITH

C.A. No. 9047 of 2012.

C.A. Sundaram, Sunil Gupta, Hemant Mehta, Jatin Zaveri, Shiv Sagar Tiwari, Neel Kamal Mishra for the Appellants.

Rakesh Dwivedi, Amitesh Kumar, Ravi Kant, Gopal Singh, Navin Prakash, Satyajit A. Desai, Anagha S. Desai, Asha Gopalan Nair for the Respondents.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. IA Nos.1-2 of 2012 are applications filed by the two students of Parshavanath College of Engineering run by Parshavanath Charitable Trust for permission to file special leave petition SLP (C) No. 27021 of 2012 (CC No.15485 of 2012) against the judgment dated 22nd August, 2012 passed by the High Court of Judicature at Bombay in Writ Petition No.460 of 2011. The applications are allowed subject to just exceptions.

2. SLP (C) No.26086 of 2012 has been preferred by the appellant-Trust against the same judgment.

3 Leave granted in both the SLPs.

4. As the challenge in both these appeals is to one and the same judgment of the Bombay High Court, it will, thus, be appropriate for us to dispose of both these appeals by this common judgment.

FACTS :

5. The appellant, Parshvanath Charitable Trust, was formed as a minority community trust in the year 1993. One of its objects was to establish educational institutions. Consequently, it established the Parshavanath College, after obtaining approval of all the concerned authorities on 11th June,

1994 with the intake capacity of 140 students for academic year 1994-95. This college was running at the premises being Survey No.27 (part) at Kasarvadavali, Ghodbunder Road in the district of Thane. The annual approvals by the All India Council for Technical Education (for short, the 'AICTE') continued till the year 2008. On 29th April, 2008, the appellant sought a 'No Objection Certificate' from the University of Mumbai. It also applied for an 'occupation certificate' from the Municipal Corporation of Bombay for shifting the college to new premises located at a distance of barely 300 meters from the old site being Survey No. 12/1, 2, 4, 13/8, 9, 10A and 13/10B. In furtherance to this, the appellant had made an application dated 24th May, 2008 to the Regional Office of the AICTE seeking its permission to shift the college to the new premises and also submitted all the requisite documents. The appellant had also written to the Directorate of Technical Education for issuance of a No Objection Certificate for the said purpose.

6. It is not in dispute that in May, 2008, the college shifted its location to the new site. This exercise was undertaken by the college and the Trust without taking prior approval of the AICTE and without receiving "No Objection Certificate" from the University of Mumbai as well as the State Government. It is also evident from the record that no Occupation Certificate was received from the Municipal Corporation of Thane before shifting.

7. On or about 24th June, 2008, the AICTE appointed an Expert Committee to verify the infrastructure available at the new site and the Expert Committee visited the college on 28th June, 2008. It noted that No Objection Certificate of the affiliating University for change in the location had not been produced though they were informed that the same was in process. It also made certain observations with regard to the title of the land and the same, according to them, stood in the name of some other Trust which in turn had leased out the land to the appellant

Trust. The Committee also noticed that all the laboratories and other infrastructure had been shifted to the new site. On 30th June, 2008, the AICTE granted an extension of approval to the Engineering College for the academic years 2008-2011 with an intake capacity of 280 students. Clause 3 of this approval letter reads as under :-

> "3. That the institution shall operate only from the approved location, and that the institution shall not open any off campus study centres/extensive centres directly or in collaboration with any other institution/university organization for the purpose of imparting technical education without obtaining prior approval from the AICTE."

8. As is obvious from a bare reading of the letter, the appellant-college was to run its courses from the campus which was approved. Thereafter vide letter dated 20th August, 2009, AICTE granted approval to the appellant-college with increased intake from 280 to 360 students for the academic year 2009.

9. The appellant college was running its courses when the show cause notice dated 18th May, 2010 was issued by the AICTE to the Trust on the ground that the college had shifted to another location without obtaining prior approval of the AICTE. It was stated therein that an institution has to run courses only from an approved site and if it desires to shift to another site, it has to follow the complete procedure as per the norms of AICTE. The show cause notice reads as under:-

> "Your institutions i.e. PARSHWANATH COLLEGE OF ENGINEERING and VEER MATA HIRABEN P. SHAH COLLEGE OF PHARMACY are approved by AICTE for running engineering and pharmacy course at GODBHUNDER ROAD, KASAR VADAVALI 400601 DIST. THANE as per our records as a permanent site.
>
> As per AICTE norms, the institute has to run the courses

> in the approved site only. In any case, if the institute wants to shift the institute to another location, due process has to be followed as per AICTE norms to get AICTE approval for shifting.
>
> However, it was found that you have shifted your Engineering And Pharmacy institutions to another location without obtaining approval from AICTE, which is gross violation of AICTE norms.
>
> In the above circumstances, you are requested to show-cause as to why disciplinary action should not be initiated including withdrawal of approval or reducing your intake/ stop admission. Your reply should reach AICTE headquarters and Regional Office within three working days."

10. To this, the appellant Trust submitted its reply dated 21st May, 2010 relevant extract of which reads as under:-

> "We have reason to state that after filing proposal for shifting the aforesaid colleges to the new premises, we have applied for permission for shifting the aforesaid colleges in the new premises in the year 2008 only and accordingly we are conducting engineering and pharmacy colleges in the new premises."

11. The matter remained in controversy, but as a result of issuance of show cause notice, the college of the appellant Trust was not included in the Centralised Admission Process (CAP) by the State Government. The appellant, thus, challenged the non- inclusion of the college in the CAP and action of the State Government by filing a Writ Petition before the Bombay High Court being Writ Petition (Civil) No. 1776 of 2010. This Writ Petition was allowed by a Division Bench of the High Court vide its order dated 11th August, 2010 wherein it directed as under:-

"17. We, therefore, allow this petition and quash and set aside the impugned communication of the Director of Technical Education and direct the respondents to permit the appellant-college to participate in the Central Admission Process when the second round has commenced.

18. In view of the submission already made by the petitioners in their reply dated 21st May, 2010 i.e. the Joint Charity Commissioner has passed the restraint against their Managing Trustee restraining him from interfering in the administration of the college and the educational institution run by the trust, we also direct that the respondent-Municipal Corporation of Thane should consider the petitioner's application for grant of occupation certificate for the building in which the engineering college and the pharmacy college are being run without being influenced by any objection taken by Mr. Tekchand Shah against whom the order is passed by the Charity Commissioner.

19. It is clarified that it is open to the AICTE to proceed with the show-cause notice but if any order adverse to the petitioner-college is passed, the same shall not be implemented for a period of two weeks from today.

20. This order is passed in presence of the learned Assistant Government Pleader appearing for the Director of Technical Education and Mr. S.V. Kolla, officer, Admission Section from the office of Director of Technical Education who shall immediately instruct the concerned persons to place the name of the petitioner-engineering college on the website of the centralised online admission process today itself."

12. It needs to be noticed at this stage that during the proceedings before the Division Bench, the Municipal Corporation of Thane had stated that Occupancy Certificate

had not been granted to the appellant-college; however, reason thereof could not be brought to the notice of the Court at that stage because of shortage of time. In the meanwhile, certain disputes also arose among the management of the appellant-Trust.

13. Subsequent to the above order of the High Court, on 7th January, 2011, the AICTE passed an order withdrawing the approval granted to the appellant-college in terms of Clause 2.11 of the Approval Process Handbook and the Guidelines for the academic year 2008-2009 and the terms and conditions mentioned in the Letter of Approval. The basis for withdrawing the approval was shifting of the college to the new location without Occupancy Certificate, without informing the State Government and without obtaining the requisite permission from the AICTE as per regulations. The Expert Committee had also noticed in its inspection dated 28th June, 2008 that the construction was not suitable.

14. This cancellation of approval was challenged by the appellant-Trust before the Bombay High Court in Writ Petition No.460 of 2011. *Inter alia*, the principal contention before the High Court was that an application dated 24th May, 2008 was made to the AICTE for change in location. Contemporaneously, applications were also made to the University of Mumbai and the Directorate of Technical Education for the issuance of No Objection Certificate and extension of approval by the AICTE itself showed that the site in question met the requisite standards and there was no justification for reducing the intake capacity and withdrawing the approval. The High Court noticed that there was no challenge to the Regulations or any other clause of the Handbook. Clause 9.22 of the Hand Book for Approval Process 2008 required a registered sale or gift deed in favour of the institution and only a Government lease of 30 years was acceptable as per that clause. The relevant para of Clause 9.22 reads as follows:-

"9.22. Procedure for Change of Site and Norms Concerning Land and Building on New Site.

Changing of location/Station may be permitted after getting "No Objection Certificate" (NOC) from the concerned State Govt./UT Administration and Affiliating Body, by the Competent Authority in AICTE as per laid down procedure subject to the fulfilment of Norms and Standards of AICTE. No request/representation/Proposal for change of site will be considered after submission of application/proposal for establishment of a new Technical Institution, till the completion of at least two years after a new institution is started with the approval of AICTE. No partial shifting of institution to a different site shall be permitted.

The following procedure shall be followed:

The applicant shall have to submit a Proposal along with the following documents in original in one lot to the concerned Regional Office of AICTE.

. Registration document of the Trust/Society indicating members of Society/Trust and its Objectives.

. **Land document(s) in original for the new site showing ownership in the name of Trust/ Society in the form of Registration Sale Deed/ Irrevocable Gift Deed (Registered)/Irrevocable Government Lease (for a minimum of 30 years) by concerned authority of Government. In case, the land documents are in vernacular language, Notarized English translation of the document must to be produced.**

. Land use Certificate/Land Conversion Certificate for the new site allowing the land to be used for educational purpose, from the Competent Authority

along with Topo-sketch/Village Map indicating land Survey Nos. and a copy of city map showing location of proposal site of the institution.

. **Site Plan, Building Plan for the new site prepared by a registered Architect and duly approved by the Competent Plan Sanctioning Authority designated by the concerned State.**

. Proof of completion of the building structure at the new site as per approved Engineering & Architectural Building Plan, in the form of Color photographs giving External and Internal views.

. An undertaking by the Institution stating that the changes shall not affect the admission procedure and the fee that a student has to pay."

(emphasis supplied)

15. While noticing the above Clauses, the High Court proceeded on the admitted position that the appellant-college had shifted to the new site without the necessary permission and further it had no ownership to the land in question at the relevant time. The Court also noticed that an inspection was carried out by the Municipal Corporation on 9th August, 2012 and they had still not issued the Occupancy Certificate to the appellant-college.

16. In view of the above factual matrix of the case, the Division Bench of the High Court dismissed the writ petition vide order dated 22nd August, 2012 and also passed a direction with regard to adjustment of students in other colleges keeping their welfare in mind. The operative part of the order reads as under:-

"20. In the exercise of the jurisdiction under Article 226 of the Constitution of India it would not be permissible for this

Court to direct AICTE to grant its approval for conducting the engineering college at the new location particularly in view of the fact that no Occupation Certificate has been granted; the Petitioners have not established a clear title to or ownership of land and they have not obtained the NOCs of the State government or of the University of Mumbai.

21. Learned Counsel appearing on behalf of AICTE has stated before the Court that AICTE will take all necessary steps to ensure that the welfare of the students who have been allotted to the Petitioners would be duly taken care of by making alternative allotments to other institutions in consultation with the Directorate of Technical Education of the State government.

22. For these reasons, it would not be appropriate to interfere with the decision which has been taken by the AICTE. The Petition shall stand dismissed. There shall be no order as to costs.

23. In view of the dismissal of the Petition, the Notices of Motion do not survive which shall accordingly stand disposed of."

17. Aggrieved from the dismissal of the writ petition by the High Court, the appellants have filed the present appeals.

18. As already noted, two students of Parshvanath College of Engineering have filed a separate application for leave to prefer Special Leave Petition against the same judgment of the High Court dated 22nd August, 2012. According to the appellant-students in Civil Appeal arising out of SLP (C) No. 27021 of 2012 (CC No.15485/2012), the judgment of the High Court has adversely affected their interests. It is their contention that revocation of approval has resulted in closure of the Engineering College and it has jeopardised the future and career of the students studying in the college including those

studying in pursuance of the interim orders passed by the same High Court.

19. We allow this application and, in fact, the affected appellant-students have been heard along with parties in the main appeal. Thus, as already noticed, we would dispose of both these appeals by this common judgment.

20. Before we dwell upon the merit or otherwise of the contentions raised, it is necessary for us to notice certain settled legal principles which would help in judicious disposal of these appeals.

21. The provisions of the All India Council for Technical Education Act, 1987 (for short 'the AICTE Act') are intended to improve the technical education system throughout the country. The various authorities under the AICTE Act have been given exclusive responsibility to coordinate and determine the standards of higher education. It is a general power given to evaluate, harmonise and secure proper relationship to any project of national importance. Such coordinated action in higher education with proper standard is of paramount importance to national progress.

22. The provisions of the AICTE Act, including its preamble, make it abundantly clear that the AICTE has been established under the Act for coordinated and integrated development of the technical education system at all levels throughout the country and is enjoined to promote qualitative improvement of such education **in relation to** planned quantitative growth. The AICTE is required to regulate and ensure proper maintenance of norms and standards in technical education system. The AICTE is to further evolve suitable performance appraisal system for technical institutions and universities incorporating norms and mechanisms in enforcing their accountability**.** It is required to provide guidelines for admission of students and has the power to withhold or discontinue grants to such technical institutions where norms

and standards laid down by it and directions given by it from time to time are not followed. The duty and responsibility cast on the AICTE implies that the norms and standards to be set should be such as would prevent isolated development of education in the country.

23. Section 10 of the AICTE Act enumerates various powers and functions of AICTE as also its duties and obligations to take steps towards fulfilment of the same. One such power as envisaged in Section 10(1)(k) is to "grant approval for starting new technical institutions and for introduction of new courses or programmes in consultation with the agencies concerned". It is important to see that the AICTE is empowered to inspect or cause to inspect any technical institution in clause (p) of sub-section (1) of Section 10 without any reservation whatsoever. However, when it comes to the question of universities, it is confined and limited to ascertaining the financial needs or its standards of teaching, examination and research. The inspection may be made or caused to be made of any department or departments only and that too, in such manner as may be prescribed, as envisaged in Section 11 of the AICTE Act.

24. All these vitally important aspects go to show that the Council (AICTE) created under the AICTE Act is not intended to be an authority either superior to or to supervise and control the universities and thereby superimpose itself upon such universities merely for the reason that they are imparting teaching in technical education or programmes in any of their departments or units. A careful scanning of the provisions of the AICTE Act and the provisions of the University Grants Commission Act, 1956 in juxtaposition, will show that the role of AICTE vis-à-vis the universities is only advisory, recommendatory and one of providing guidance, thereby subserving the cause of maintaining appropriate standards and qualitative norms and not as an authority empowered to issue and enforce any sanctions by itself. Reference can be made

to the judgments of this Court in the case of *Adarsh Shiksha Mahavidyalaya v. Subhash Rahangdale* [(2012) 2 SCC 425], *State of Tamil Nadu v. Adhiyaman Educational & Research Institute* [(1995) 4 SCC 104] and *Bharathidasan University v. All India Council for Technical Education* [(2001) 8 SCC 676].

25. From the above principles, it is clear that the AICTE has varied functions and powers under the AICTE Act. It is a specialized body constituted for the purpose of bringing uniformity in technical education all over the country and to ensure that the institutions which are recognised by the AICTE are possessed of complete infrastructure, staff and other facilities and are capable of maintaining education standards for imparting technical education.

26. It is not necessary for us to refer to various provisions of the AICTE Act in any greater detail as no controversy in relation to application or interpretation of any of its provisions is raised for consideration in the present case. The facts are primarily admitted and it is only the exercise of discretion vested in the AICTE which is the subject matter of challenge in the present appeals. In the case of *Jaya Gokul Educational Trust v. Commissioner & Secretary to Government Higher Education Department, Thiruvanathapuram, Kerala State and Anr.* [(2000) 5 SCC 231], this Court after discussing all the relevant provisions of the AICTE Act and provisions of the Madras University Act, 1923 (for short "the Madras Act") which required the Institute to obtain approval of the State Government before it started the academic courses, found that the provisions of the latter Act overlapped and were in conflict with the provisions of the AICTE Act in various areas and granting of approval for starting new technical institutions, inspection of technical institutions, etc. The Court held as under:-

> "17. ... Thus, in the two passages set out above, this Court clearly held that because of Section 19(K) of the Central Act which vested the powers of granting approval in the Council, the T.N. Act of 1976 and the University Act, 1923

could not deal with any questions of 'approval' for establishment of technical institutions. All that was necessary was that under the Regulations, the AICTE Council had to consult them.

XXX XXX XXX

22. As held in *T.N. case* the Central Act of 1987 and in particular, Section 10(k) occupied the field relating to "grant of approvals" for establishing technical institutions and the provisions of the Central Act alone were to be complied with. So far as the provisions of the Mahatma Gandhi University Act or its statutes were concerned and in particular Statute 9(7), they merely required the University to obtain the "*views*" of the State Government. That could not be characterised as requiring the "*approval*" of the State Government. If, indeed, the University statute could be so interpreted, such a provision requiring approval of the State Government would be repugnant to the provisions of Section 10(k) of the AICTE Act, 1987 and would again be void. As pointed out in *T.N. case* there were enough provisions in the Central Act for consultation by the Council of AICTE with various agencies, including the State Governments and the universities concerned. The State-Level Committee and the Central Regional Committees contained various experts and State representatives. In case of difference of opinion as between the various consultees, AICTE would have to go by the views of the Central Task Force. These were sufficient safeguards for ascertaining the views of the State Governments and the universities. No doubt the question of affiliation was a different matter and was not covered by the Central Act but in T.N. case it was held that the University could not impose any conditions inconsistent with the AICTE Act or its Regulation or the conditions imposed by AICTE. Therefore, the procedure for obtaining the affiliation and any conditions which could be imposed

by the University, could not be inconsistent with the provisions of the Central Act. The University could not, therefore, in any event have sought for "approval" of the State Government.

23. Thus we hold, in the present case that there was no statutory requirement for obtaining the approval of the State Government and even if there was one, it would have been repugnant to the AICTE Act. The University Statute 9(7) merely required that the "views" of the State Government be obtained before granting affiliation and this did not amount to obtaining "approval". If the University statute required "approval", it would have been repugnant to the AICTE Act. Point 1 is decided accordingly.

XXX XXX XXX

27. The so-called "policy" of the State as mentioned in the counter-affidavit filed in the High Court was not a ground for refusing approval. In *Thirumuruga Kirupananda & Variyar Thavathiru Sundara Swamigal Medical Educational & Charitable Trust v. State of T.N.* which was a case relating to medical education and which also related to the effect of a Central law upon a law made by the State under Entry 25 List III, it was held (at SCC p. 35, para 34) that the

> "essentiality certificate cannot be withheld by the State Government on any policy consideration because the policy in the matter of establishment of a new medical college now rests with the Central Government alone".
>
> (emphasis supplied)

Therefore, the State could not have any "policy" outside the AICTE Act and indeed if it had a policy, it should have placed the same before AICTE and that too before the latter granted permission. Once that procedure laid down

in the AICTE Act and Regulations had been followed under Regulation 8(4), and the Central Task Force had also given its favourable recommendations, there was no scope for any further objection or approval by the State. We may however add that if thereafter, any fresh facts came to light after an approval was granted by AICTE or if the State felt that some conditions attached to the permission and required by AICTE to be complied with, were not complied with, then the State Government could always write to AICTE, to enable the latter to take appropriate action.

Decision of University in not granting further or final affiliation wrong on merits.

XXX XXX XXX

30. Thus, the University ought to have considered the grant of final or further affiliation without waiting for any approval from the State Government and should have acted on the basis of the permission granted by AICTE and other relevant factors in the University Act or statutes, which are not inconsistent with the AICTE Act or its Regulations."

27. The consistent view of this Court has been that where both Parliament and State Legislature have the power to legislate, the Central Act shall take precedence in the matters which are covered by such legislation and the State enactments shall pave way for such legislations to the extent they are in conflict or repugnant. As per the established canons of law, primacy of the Central Act is undisputable which necessarily implies primacy of AICTE in the field of technical education. Statutes like the present one as well as the National Council for Teachers Education Act, 1993, the Medical Council of India Act, 1956, etc. fall within the ambit of this canon of law. The AICTE is the authority constituted under the Central Act with the responsibility of maintaining operational standards and judging the infrastructure and facilities available for imparting

professional education. It shall take precedence over the opinion of the State as well as that of the University. The concerned department of the State and the affiliating university have a role to play, but it is limited in its application. They cannot lay down any guidelines or policies in conflict with the Central statute or the standards laid down by the Central body. The State can frame its policies, but such policy again has to be in conformity with the direction issued by the Central body. Though there is no such apparent conflict in the present case, yet it needs to be clarified that grant of approval by the State and affiliation by the University for increased intake of seats or commencement of new college should not be repugnant to the conditions of approval/recommendation granted by the AICTE. These authorities have to work *in tandem* as all of them have the common object to ensure maintenance of proper standards of education, examination and proper infrastructure for betterment of technical educational system.

28. It is also a settled principle that the regulations framed by the central authorities such as the AICTE have the force of law and are binding on all concerned. Once approval is granted or declined by such expert body, the courts would normally not substitute their view in this regard. Such expert views would normally be accepted by the court unless the powers vested in such expert body are exercised arbitrarily, capriciously or in a manner impermissible under the Regulations and the AICTE Act. In the case of *AICTE v. Surinder Kumar Dhawan* [(2009) 11 SCC 726], this Court, while stating the principles that the courts may not substitute their opinion in place of opinion of the Council, held as under:-

"The role of statutory expert bodies on education and role of courts are well defined by a simple rule. If it is a question of educational policy or an issue involving academic matter, the courts keep their hands off. If any provision of law or principle of law has to be interpreted, applied or enforced, with reference to or connected with education, courts will step in. In *Dr. J.P. Kulshreshtha v. Chancellor,*

Allahabad University: (1980) IILJ 175 SC this Court observed:

Judges must not rush in where even educationists fear to tread... While there is no absolute bar, it is a rule of prudence that courts should hesitate to dislodge decisions of academic bodies.

In *Maharashtra State Board of Secondary and Higher Secondary Education v. Paritosh Bhupesh Kumar Sheth :* [1985] 1 SCR 29, this Court reiterated:

..the Court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formulated by professional men possessing technical expertise and rich experience of actual day-to-day working of educational institutions and the departments controlling them."

18. This is a classic case where an educational course has been created and continued merely by the fiat of the court, without any prior statutory or academic evaluation or assessment or acceptance. Granting approval for a new course or programme requires examination of various academic/technical facets which can only be done by an expert body like AICTE. This function cannot obviously be taken over or discharged by courts. In this case, for example, by a mandamus of the court, a bridge course was permitted for four year Advance Diploma holders who had passed the entry level examination of 10+2 with PCM subjects. Thereafter, by another mandamus in another case, what was a one time measure was extended for several years and was also extended to Post Diploma holders. Again by another mandamus, it was extended to those who had passed only 10+1 examination. Each direction was obviously intended to give relief to students who wanted to better their career prospects, purely as an

ad hoc measure. But together they lead to an unintended dilution of educational standards, adversely affecting the standards and quality of engineering degree courses. Courts should guard against such forays in the field of education."

29. Right from the case of *Unni Krishnan, J.P. and others etc. etc. V. State of Andhra Pradesh and Others etc. etc.* [(1993) 1 SCC 645], this Court has unequivocally held that the right to establish an educational institution does not carry within it the right to recognition or the right to affiliation. Grant of recognition or affiliation is neither a matter of course nor is it a formality. Admission to the privileges of a University is a power to be exercised with great care keeping in view the interest of the public at large and the nation. Recognition has to be as per statutorily prescribed conditions and their strict adherence by all concerned. These conditions of recognition and the duly notified directions controlling the admission process are to be construed and applied *stricto sensu*. They cannot be varied from case to case. Time schedule is one such condition specifically prescribed for admission to the colleges. Adherence to admission schedule is again a subject which requires strict conformity by all concerned, without exception. Reference in this regard can be made to *Ranjan Purohit and Ors. v. Rajasthan University of Health Science and Ors.* [(2012) 8 SCALE 71] at this stage, in addition to the case of *Medical Council of India v. Madhu Singh* [(2002) 7 SCC 258].

30. In light of the above principles, let us now revert to the facts of the case in hand. There is no dispute as to the fact that the appellant-college had shifted to the new premises without approval of the AICTE and without 'No Objection Certificate' from the State Government and Directorate of Technical Education. Undisputedly, the college had no title to the property in question inasmuch as the property had been sold in a Court auction by the bank on 8th August, 2011 and had been purchased by a firm in which the members of the Trust were

partners. This partnership firm had executed a Memorandum of Understanding with the appellant Trust and given property on lease to the Trust. These undisputed facts clearly show that the appellant-college had no title to the property and, in fact, it did not even have a registered lease deed in its favour to create some recognizable interest in the property in question. The High Court in its judgment had specifically noticed the defects pointed out by the Expert Committee. They, *inter alia*, related to some disputes within the management of the Trust, failure to obtain NOC from the State Government, Occupancy Certificate from the Municipal Corporation, Thane and NOC from the University of Mumbai, omission to seek/obtain the approval of AICTE and finally shifting to the new premises despite such non-compliance.

31. We have already noticed that the compliance with the conditions for approval as well as regulations and provisions of the AICTE Act is an unexceptionable condition. Clause 9.22 of the Handbook of Approval Process issued by the AICTE provides a complete procedure for change of location, station and the same is permissible subject to compliance with the procedure. It contemplates obtaining of 'No Objection Certificate' from the concerned State Government or UT Administration and affiliating body. The same clause also requires submission of the land documents in original and clearly provides that the same may be a registered sale deed, irrevocable government lease for a minimum period of 30 years, etc. by the concerned authority of the Government. Further, it provides that site plan, building plan for new site should be prepared by a registered architect and should be approved by the Competent Plan Sanctioning Authority designated by the State.

32. One of the contentions raised before us is that the AICTE itself had granted approval for the academic years 2008-09 and 2009-10 both vide letters dated 30th June, 2008 and 20th August, 2009, respectively. This itself should be taken

to be a deemed compliance of all the requirements. We shall separately deal with the issue with regard to the effect of these letters and whether withdrawal of approval was a step appropriately taken by the AICTE or not as well as the effect of the prescribed time schedule. As of now, suffice it to note that even these approvals for the relevant academic years had clearly stated that the institution shall operate only from the approved location and it shall not open any campus/executive centres directly or in collaboration with any other institution/ university for the purpose of imparting technical education without obtaining prior approval from the AICTE. The approval for these academic years was granted to the college being run at Survey Nos.27 (part) at Lasandvali, Godbhunder Road, Kasar Vadavali, Thane, and not at any other place.

33. Thus, there is no occasion to take it as a deemed and/ or implied approval for the new site of the appellant-college. Approval can hardly be inferred. It is a matter of fact and the authorities are expected to pass appropriate orders in accordance with law and upon due diligence and in compliance with the procedure prescribed under law. For these reasons, we find that the view taken by the High Court does not call for any interference.

34. Thus, the view of the High Court that the college had failed to comply with the requirements for grant of approval and had shifted to the new site without approval of the AICTE and other concerned authorities cannot be faulted with. There being no compliance to the legal requirements and binding conditions of recognition, the withdrawal of approval by the AICTE can also be not interfered with. Shifting of students is a consequential order and is in the interest of the students.

35. The sequel to the above finding is that the appellant college could not have been included in the counselling for the current year. Even otherwise, the last date for admission was 30th August, 2012, which is since over and we see no reason

whatsoever to extend this date. We have already noticed various judgments of this Court stating that the Court is required to strictly construe and comply with the schedule for admission. Even on that count, the appellant would not be entitled to any other relief.

36. Another argument raised before us is that the appellant-college had applied for shifting of the college to the new premises on 24th May, 2008, but even after a lapse of two years, the AICTE had not finally disposed of said request.

37. The college had shifted to the new premises without requisite permission/approval and still permission was granted for the two years, i.e., 2008-09 and 2009-10 and the show cause notice was issued only on 18th May, 2010. We have no hesitation in observing that the AICTE is evidentiary at fault and it ought not to have granted any approval for the academic years 2008-09 and 2009-10. There has been definite slackness and irresponsibility in functioning on the part of the AICTE. The approval itself was issued by the Regional Committee when the application for transfer was pending with the AICTE itself. It is a matter of regret that as a result of such approval granted by the AICTE, the career of these students has been jeopardised to some extent. Now, they are required to shift colleges mid-term, even in excess of specified seats of those colleges and hinder their academic courses. All this is bound to prove disadvantageous to their academic career.

38. It is the requirement of law that there should be strict adherence to the time schedule for grant of approval as well as for admissions without exception. In exercise of the powers vested in the AICTE, under sub-section (1) of Section 23 of the AICTE Act, it had made regulations namely the All India Council for Technical Education (Grant of Approvals for Staffing New Technical Institution, Introduction of Course and Programmes and Approval of Intake Capacity) Regulations, 1994. Schedule to these regulations reads as under:-

Sl. No	Stage of processing application	Last date by which the processing should be completed
(1)	(2)	(3)
1.	For receiving proposals by Bureau RC.	31st December
2.	For the Bureau RC to screen the application and (a) to return the incomplete applications to applicants, and (b) to forward the applications to (i) State Government concerned (ii) University or State Board concerned, for their comments (iii) Regional Officer to arrange visits by Export Committees, and (iv) Bureaus MPCD, BOS and RA for their comments.	
3.	For receiving the comments is from (i) the State Government (ii) the University or State Board and (iii) the Regional Committee based on the Expert Committee's report and (iv) from the Bureaus MPCD, BOS and RA	15th March
4.	For consideration of the comments from the State Governments, Universities or State Boards, Regional Committees, and Bureaus of the Council by the State level Committee	31st March

5.	For recommendations to be made by the Central Task Force	15th April
6.	For communicating the final decision to the State Government or the University Grants Commission, under intimation to the Regional office, Director of Technical Education, applicant, University or State Board	30th April

39. This Schedule has statutory backing. Thus, its adherence is mandatory and not directory.

40. Non-adherence of this Schedule can result in serious consequences and can jeopardize not only the interest of the college students but also the maintenance of proper standards of technical education. The authorities concerned, particularly the AICTE, should ensure proper and timely action upon the applications submitted to it. It must respond to the applicant within a reasonable time period and should not let the matter drag till the final date giving rise to avoidable speculations by all stakeholders. Thus, it would be appropriate for these authorities to bring to the knowledge of the parties concerned, the deficiencies, if any, and the defects pointed out by the Expert Committee during the inspection within three weeks from the date of such inspection or pointing out of defects, as the case may be. For better administration, the AICTE should also state the time within which such deficiencies/defects should be removed by the applicant. This will help in building of a coherent and disciplined method of working to ensure the proper implementation of the entire formulated scheme of technical education. The AICTE will not have any jurisdiction or authority to issue approval for commencement of a new course or for additional intake of students beyond 30th April of the year immediately preceding the commencement of an academic year.

41. Apparently, there seems to be some variations in the Schedule issued under Regulation 8(15), as aforenoticed, and the dates reflected in the Handbook. Another Schedule has been printed as per the website of the AICTE according to which the letter of approval for starting new technical institutions could be issued by 10th October, if application was submitted between January to June of the relevant year and 10th April, if the application was submitted between July to December of that year. Rejection of approval is an order which is appealable to the Appellate Committee of the AICTE. If the applicant wishes to file an appeal against the order, he is expected to file the appeal and, in any case, after directions of the Appellate Committee are complied with, the order of approval after the reconsideration/appeal has to be issued by 15th November in the first case and 15th May in the other. If one reads these two schedules collectively, it is clear that the letter of approval should be issued by 15th April or by 30th April at the maximum. It is only the Appellate Committee's order which can be issued by 15th May. If such order grants recognition, then it must specify the academic year for which it is being granted. If it falls foul of the admission schedule, then it ought not to be granted for the current academic year. It has been brought to our notice that the last date for admission to the courses and the date on which the courses should begin is 30th August of the academic year. In that event, admissions to such courses, if permitted by the appellate authority, could be made strictly in accordance with the academic Schedule and without violating the same in any manner whatsoever. This brings us to the admission schedule which again should be strictly obeyed by all concerned.

42. We must notice that admission schedule should be declared once and for all rather than making it a yearly declaration. Consistency and smoothness in admission process would demand and require that there is a fixed and unaltered time schedule provided for admission to the colleges so that the students know with certainty and well in advance the admission schedule that is to be followed and on the basis of

which they are to have their choice of college or course exercised. The Schedule for admission for the coming academic year, i.e., 2013-2014 has been submitted to the Court after the matter was reserved for judgment. The said Schedule reads as under :

Event	**Schedule**
Conduct of Entrance Examination (AIEEE/State CET/ Mgt. quota exams etc.)	In the month of May
Declaration of Result of Qualifying Examination (12th Exam or similar) and Entrance Examination	On or before 5th June
1st round of counselling/ admission for allotment of seats	To be completed on or before 30th June
2nd round counselling for allotment of seats	To be completed on or before 10th July
Last round of counselling for allotment of seats	To be completed on or before 20th July
Last date for admitting candidates in seats other than allotted above	30th July. However, any number of rounds for counselling could be conducted depending on local requirements, but all the rounds shall be completed before 30th July
Commencement of academic session	1st August

Last date upto which students can be admitted against vacancies arising due to any reason (no student should be admitted in any institution after the last date under any quota)	30th August
Last date of granting or refusing approval by AICTE	30th April
Last date of granting or refusing approval by University / State Govt.	31st May

43. The above Schedule though was finalized by the Committee on 29th January, 2012 but the same appears to have been notified only on 30th September, 2012. The reasons for the same are again unknown. We are unable to appreciate that once the academic session begins on 1st August, then as to why should admission be granted upto 30th August of the year, particularly when, as per the terms of the Schedule, beyond or after 30th April, AICTE will not issue any approval for commencement of new course for additional intakes. The Schedule, thus, introduces an element of arbitrariness and may cause prejudice to the students who might miss their classes for a period of one month without any justification. Thus, it is required that the above-stated Schedule be modified to bring it in line with the Schedule for approval as well as to prevent inequalities, arbitrariness and prejudice from affecting the students in relation to their academic courses. The order granting or refusing approval, thus, should positively be passed by 10th April of the relevant year. The appeal should be filed within one week and the Appellate Committee should hear the appeal and decide the same by 30th April of the relevant year. The University should grant/decline approval/affiliation by 15th May of the relevant year. Advertisement should be issued and entrance examination conducted positively by the end of the month of May. The appropriate Schedule, thus, would be as follows :

Event	Schedule
Conduct of Entrance Examination (AIEEE/State CET/Mgt. quota exams etc.)	In the month of May
Declaration of Result of Qualifying Examination (12th Exam or similar) and Entrance Examination	On or before 5th June
1st round of counselling/ admission for allotment of seats	To be completed on or before 30th June
2nd round counselling for allotment of seats	To be completed on or before 10th July
Last round of counselling for allotment of seats.	To be completed on or before 20th July
Last date for admitting candidates in seats other than allotted above	30th July. However, any number of rounds for counselling could be conducted depending on local requirements, but all the rounds shall be completed before 30th July
Commencement of academic session	1st August

Last date upto which students can be admitted against vacancies arising due to any reason (no student should be admitted in any institution after the last date under any quota)	15th August
Last date of granting or refusing approval by AICTE	10th April
Last date of granting or refusing approval by University / State Govt.	15th May

44. The admission to academic courses should start, as proposed, by 1st August of the relevant year. The seats remaining vacant should again be duly notified and advertised. All seats should be filled positively by 15th August after which there shall be no admission, whatever be the reason or ground.

45. We find that the above Schedule is in conformity with the affiliation/recognition schedule afore-noticed. They both can co-exist. Thus, we approve these admission dates and declare it to be the law which shall be strictly adhered to by all concerned and none of the authorities shall have the power or jurisdiction to vary these dates of admission. Certainty in this field is bound to serve the ends of fair, transparent and judicious method of grant of admission and commencement of the technical courses. Any variation is bound to adversely affect the maintenance of higher standards of education and systemic and proper completion of courses.

46. Having declared the confirmed Schedule for grant of approval and completion of admission process, now it is necessary for us to revert to the apparent error in exercise of power and discretion by the AICTE. Admittedly, the appellant-

college had been carrying on its education courses since the year 1994. It had submitted its application for transfer to the new site on 24th May, 2008. There is no document placed before us by any party including the AICTE to show that this application was dealt with either by the Regional Office or by the main office of the AICTE. Having known the fact that the college had shifted to a new site, the AICTE accorded approval for the academic years 2008-09 and 2009-10 for which again there is no justification placed on record. It is the case of the appellant that the Expert Committee visited the new site of the appellant-college where the college was being run on 26th June, 2008. Thereafter approval for the two academic years was granted. Strangely, on the basis of the same report, on 18th May, 2010 the show cause notice was issued and again the Expert Committee is stated to have visited the college premises on 16th July, 2010 leading to the issuance firstly of the rejection of the seats and, secondly, of withdrawal/ cancellation of approval on 7th January, 2011.

47. We fail to understand why the college was granted approval for the academic years 2008-09 and 2009-10 particularly when the Expert Committee is stated to have visited the premises on 26th June, 2008 and found inadequacies in the report. It is certainly a lapse on the part of the AICTE which cannot be ignored by the Court as it had far-reaching consequences including placing the career of the students admitted during these two years in jeopardy. Even though the High Court has directed allocation of these students in other colleges, their academic course certainly stands adversely affected and disturbed, for which the AICTE is responsible. In this regard, the Court cannot overlook such apparent erroneous approach and default which can be for anything but bona fide reasons. Thus, we impose costs of Rs.50,000/- upon the AICTE for such irresponsible working. The costs would be payable to the Supreme Court Legal Services Committee and would be recovered from the salary of the erring officials/officers involved in this erroneous approach. The recovery shall be effected in

accordance with law.

48. For the reasons afore-recorded, we find no merit in both the appeals afore-referred. While dismissing these appeals, we issue the following directions :

(i) Both grant/refusal of approval and admission schedule, as aforestated, shall be strictly adhered to by all the authorities concerned including the AICTE, University, State Government and any other authority directly or indirectly connected with the grant of approval and admission.

(ii) No person or authority shall have the power or jurisdiction to vary the Schedule prescribed hereinabove.

(iii) While dealing with the application for grant of approval to new colleges or additional seats, the AICTE shall inform the applicant within three weeks from the date of receipt of its application or date of inspection, as the case may be, the shortcomings/defects, who, in turn, shall remove such shortcomings/defects within 15 days from the date of such communication or within such period as the AICTE may grant and re-submit its papers without default. The process of grant of approval has to be transparent and fair. The AICTE or the concerned University or State Government shall take disciplinary action against the person who commits default in adherence to the Schedule and performance of his duties in accordance therewith.

(iv) The reports submitted by the Expert Committee visiting the college should be unambiguous and clear, and should bear the date and time of inspection and should be sufficiently comprehensive and inspection be conducted in the

presence of a representative of the institute.

(v) The students of the appellant-college shall be re-allocated to the recognized and affiliated colleges in terms of the judgment of the High Court; and the AICTE and the concerned University shall ensure that the academic courses of these students are completed within the balance period of the academic year in all respects. For this purpose, if extra classes are required to be held, the concerned institute, the University and the AICTE are directed to ensure holding of such extra classes.

(vi) If the appellate authority decides the matter prior to 30th April of the concerned year and grants approval to a college, then alone such institution will be permitted to be included in the list of colleges to which admissions are to be made and not otherwise. In other words, even if the appellate authority grants approval after 30th April, it will not be operative for the current academic year. All colleges which have been granted approval/ affiliation by 10th or 30th April, as the case may be, shall alone be included in the brochure/ advertisement/website for the purpose of admission and none thereafter.

R.P. Appeals dismissed.

STATE OF PUNJAB

v.

GIAN CHAND & ORS.

(Civil Appeal No. 9007 of 2012 etc.)

DECEMBER 13, 2012

[SWATANTER KUMAR AND MADAN B. LOKUR, JJ.]

Service Law – Pension – Commutation – Table for calculation of commutation substituted by a Circular – Affecting the employees of Punjab State Electricity Board retiring between 31-7-2003 and 31-10-2006 – Writ petition by the employees retiring between the above period contending that the Circular was to their disadvantage – High Court allowing the petitions – On appeal, new plea raised by State that Circular was issued due to financial crunch and that under the Rules, the respondents-employees had option to withdraw the request of commutation – Held: New pleas are not permissible to be raised for the first time before Supreme Court – But the new questions raised are substantial legal questions and are having far reaching consequences and hence require discussion and determination by the Court – The impugned judgment also lacks proper reasoning – Therefore, matter remitted to High Court for fresh decision in accordance with law – Cost of Rs. 50,000/- to be paid to respondent Nos. 1 to 26 in equal proportion – Punjab Civil Services Rules Vol. II – r. 11.5(1), Note 2 – Practice and Procedure – New Plea – Permissibility.

Practice and Procedure – New Plea – Raised before Supreme Court – Permissibility – Held: Not permissible – Determination of new plea may deprive either of the parties of a right to appeal to Supreme Court – Such deprivation can be construed as prejudicial to the rights and interest of the parties.

Punjab State Electricity Board had adopted the Rules pertaining to pension contained in the Punjab Civil Services Rules, Vol. II for its employees. Table of commutation of pension was provided in terms of Rule 11.5(2) of the Civil Services Rules. Appellant-State issued a Circular dated 29.7.2003, whereby the existing table was replaced with a new table for calculation of commutation of pension and was applicable to all the cases of retirement arising on or after 31.7.2003. However, by a further Circular dated 31.10.2006, the previous circular was superseded, revising the existing table of commutation of pensions.

The employees-respondents who retired between 31.7.2003 and 30.10.2006 filed writ petition, challenging the Circular dated 29.7.2003 contending that the table of calculation of commutation of pensions, provided by that Circular was to their disadvantage. They pleaded that it was in violation of Article 14 of the Constitution. High Court allowed the petition.

In appeal to this court, appellant-State inter-alia contended that the State issued the Circular dated 29.7.2003, as the State was suffering from serious financial crunch and that the respondents had choice to withdraw the request of commutation under Note 2 to Rule 11.5 (1).

The respondents contended that all the pleas raised before this court by the appellant was raised for the fist time and taking new grounds for the first time before Supreme Court could not be permitted.

Partly allowing C.A. Nos. 9007, 9010, 9011, 1912, 9013, 9014, 9015, 9016 and 9019 of 2012 and remitting them to High Court and directing to detach the C.A.Nos. 9008-9009/2012, 9017/2012 and 9018/2012 from the other appeals, the Court

HELD: 1.1. From the record, it is clear that the substantial pleas are being sought to be raised before this Court for the first time. From the orders passed by this Court, it is clear that while granting liberty to the State to file additional affidavit, no objection was raised by the respondents. Now, once the additional facts and grounds had been brought on record to which the said respondents have already filed a rejoinder, they cannot be permitted to raise the objection in regard to the new grounds being examined by the Court. There are certainly lapses on the part of the State, but the questions raised before this Court are not only substantial legal questions but are also likely to have far reaching consequences. It is argued that the Circular dated 29th July, 2003 has been issued by the State of Punjab and the same having been quashed, there is every likelihood that all the employees of the State of Punjab, including various corporations, would raise similar claims. The grounds with regard to Note 2 of Rule 11.5, financial crunch of the State and there being proper rationale for fixation of the cut-off period (31st July, 2003 to 30th October, 2010) are matters which require discussion and determination by the Court in accordance with law. Equally, the pleas raised by the respondents require proper examination. There is no doubt that the Circular dated 29th July, 2003 does not contain any reason, whatsoever, for passing a directive, which enmass adversely affects the people who have retired in the period between 31st July, 2003 to 31st October, 2006. Additional affidavit filed before this Court, with the leave of the Court, does provide reasons and some justifiable grounds in support of the Circular. [Paras 11 and 12] [1112-A-E]

1.2. The judgment impugned does not discuss the plea of arbitrariness and discrimination in its proper perspective. The Court also has not deliberated upon as

to whether the law stated by this Court in the case of **V. Kasturi* **is applicable to the facts of the case in hand or not, particularly with reference to the contentions raised. Another aspect which could be considered by this Court on the basis of the material produced before it, was whether the format to a statutory rule can be amended, altered or substituted by an executive order. For lack of proper reasoning in the judgment of the High Court, in view of the additional pleas raised before this Court which have significant ramifications in law and with regard to the liability of the State, the judgment of the High Court is set aside and the matter is remitted to the High Court for fresh decision in accordance with law. [Paras 12 and 13] [1112-F-H; 1113-A-B]**

1.3. The determination of the contentions raised before this Court for the first time may deprive either of the parties of a right to appeal to this Court. Deprivation of right to appeal can be construed as prejudicial to the rights and interests of the parties to the *lis.* [Para 13] [1113-C-D]

1.4. The Civil Appeal Nos. 9007 of 2012, 9010-9016 of 2012 and 9019 of 2012 are partly allowed and the matter is remitted to the High Court, however, with cost of Rs.50,000/- to be paid to the respondent Nos.1 to 26 in equal proportion cost being conditional to the hearing of the writ petition, in default thereto, the appeal preferred by the State shall stand dismissed. [Para 14] [1113-D-E]

V. Kasturi v. Managing Director, State Bank of India* **1998 (5) SLR 629; *State of Bihar v. Bihar Pensioner's Samaj* **(2006) 5 SCC 65;** *State of Punjab v. Amar Nath Goyal* **(2005) 6 SCC 754: 2005 (2) Suppl. SCR 549;** *Union of India v. P.N. Menon and Ors.* **(1994) 4 SCC 69;** *Chairman, All India Railway Recruitment Board and Anr. v. M. Shyam Kumar and Ors.* **(2010) 6 SCC 614: 2010 (6) SCR 291;** *D.S. Nakara v. Union of India* **(1983) 1 SCC 305:1983 (2) SCR 165;** *Dr.*

Rajinder Singh v. State of Punjab **(2001) 5 SCC 482: 2001(2) SCR 1108 – referred to.**

2. As the questions arising Civil Appeal Nos. 9008-9009/2012 and 9017-9018/2012 are different and the High Court has dealt with these questions on merits, the arguments raised in Civil Appeals Nos. 9007/2012, 9010-9016/2012 and 9019/2012 are not available to the State of Punjab in these cases. Thus, these cases are ordered to be detached from this batch and be listed for hearing independently. [Para 15] [1113-F-G]

Case Law Reference:

1998 (5) SLR 629	**Referred to.**	**Para 8**
(2006) 5 SCC 65	**Referred to.**	**Para 8**
2005 (2) Suppl. SCR 549	**Referred to.**	**Para 8**
(1994) 4 SCC 69	**Referred to.**	**Para 8**
2010 (6) SCR 291	**Referred to.**	**Para 8**
1983 (2) SCR 165	**Referred to.**	**Para 9**
2001(2) SCR 1108	**Referred to.**	**Para 9**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9007 of 2012.

From the Judgment & Order dated 21.7.2008 of the High Court of Punjab & Haryana at Chandigarh in CWP No. 15554 of 2007.

WITH

C.A. Nos.9008-9009, 9010, 9011, 9012, 9013, 9014, 9015, 9016, 9017, 9018, 9019 of 2012.

K.V. Viswanathan, Balram Gupta, Nidhesh Gupta, Jayant K. Sud, Rakesh Khanna, Manjit Singh, AAG, Shefali Malhotra,

Adeeta Mujahid, Balaji Srinivasan, Udit Kumar Chaturvedi, Arzu Chimni (for Kuldip Singh), K.K. Mohan, Tarjit Singh (for Kamal Mohan Gupta), Ajay Pal, Suryanarayana Singh, Pragati Neekhra,Tarun Gupta, M.K. Ghai, S. Janani, K. Sarada Devi, Nikhil Nayyar, Ansar Ahmad Chaudhary for the appearing parties and M.L. Ahuja (Respodent-in-person).

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. Leave granted in all the Special Leave Petitions.

CAs @ SLP (C) Nos. 25856/08, 18878/10, 22841/09, 23121/10, 23607/10, 25387/12, 27327/08, 3110/12 and 9569/10

2. Petitioners before the High Court and Respondent Nos.1 to 26 before this Court, were in service of the Punjab State Electricity Board (for short, the 'PSEB') on different posts. All these respondents superannuated on different dates between 31st July, 2003 and 30th October, 2006 after they had satisfactorily rendered the required years of service in PSEB. Though these respondents had retired on different dates, their grievance was common and hence all of them filed a common writ petition challenging the circular dated 29th July, 2003 issued by the Government. The circular dated 29th July, 2003 reads as under :

> "I am directed to invite a reference to the subject cited above and to say that the Governor of Punjab is pleased to prescribe a new table (copy enclosed) for present values for the calculation of commutation of pension to replace the present table incorporated as Annexure to Chapter XI of Punjab Civil Service Rules Volume II. This table supersedes the existing table with immediate effect and shall apply to all the cases of retirement arising on or after 31.07.2003.
>
> 2. Annexure to Chapter XI of Punjab Civil Services Rules shall be deemed to have been substituted accordingly. Correction slip shall be issued in due course.
>
> It may please be ensured that this is brought to the notice of all the employees who are retiring on or after 31.07.2003 inviting their attention to provisions of Note 2 below Rule 11.5(1) of Punjab Civil Services Rules, Volume-II."

3. The grievance of the respondents was in relation to the table of calculation of commutation of pension, which had been replaced to the disadvantage of the persons who had retired within the above-referred period. They pleaded violation of Article 14 of the Constitution of India.

4. The PSEB had framed regulations called the Punjab State Electricity Board Main Service Regulations, Vol.I, Part I, 1972 in exercise of the powers conferred by Section 79(c) of the Electricity Supply Act, 1948. Regulation 1.7 of these Regulations provided that unless it was otherwise specifically provided in any regulation, the PSEB employees' claim to pay and allowances shall be regulated by the Regulations in force at the time in respect of which the pay and allowances are earned. It also provided that claims with regard to pension shall be by the regulations in force applicable to him at the time when the employee retires or is discharged from service. As the PSEB had not framed any Regulations of its own with regard to the Pension Rules pertaining to pension contained in the Punjab Civil Services Rules, Vol.II were to be applicable to the employees of the PSEB. The PSEB had, vide its circular dated 4th September, 1999, (Circular No. 36 of 1998) adopted the applicability of the Punjab Government Rules. Rule 11.5 of the Punjab Civil Service Rules, Vol.II dealing with the subject reads as under :

> "11.5 (1) The lump sum payable on commutation shall be calculated in accordance with a table or tables of present

values which shall be prescribed by the competent authority.

Note 1. - The lump payable on commutation to Government employees who have served under more than one Government when the commutation tables applied by the different Governments are not identical, shall be calculated according to the commutation table of the Government under whose rule making control they are, at the time of retirement. In the case of Government employees who are temporarily lent by one Government to another, the commutation shall be according to the table of the lending Government and in the case of those who are permanently transferred from one Government to another it shall be according to the table of the Government to which their services have been permanently transferred.

Note 2. - In the event of the table of present values applicable to an applicant having been modified between the date of administrative sanction to commutation and the date on which commutation is due to become absolute, payment shall be made in accordance with the modified table, but it shall be open to the applicant if the modified table is less favourable to him than that previously in force, to withdraw his application, by notice in writing despatched within 14 days of the date on which he receives notice of modification. (2) The table of present value is given in Annexure to this Chapter and will be applicable to all Government employees.

For the purpose of this rule, the age, in case of impaired lives, shall be assumed to be such age, not being less than the actual age as the certifying medical authority may direct."

5. The table of commutation of pension was prescribed by the State Government on the recommendation made by the 4th Pay Commission which was accepted by the State Government

and was implemented with effect from 1st January, 1996. The State of Punjab, appellant herein, issued a circular dated 29th July, 2003 replacing the existing table with a new table for calculation of commutation of pension superseding the existing table. As already noticed, this circular contains the table of commutation of pension. As is clear from the above referred circular dated 29th July, 2003, it had directed deemed substitution of Annexure to Chapter XI of the Punjab Civil Services Rules, Volume II and stated that commutation table was based on rate of interest of 8 per cent per annum (commutation value for pension to Re1/- per annum). However, vide circular dated 31st October, 2006, this circular was superseded. The circular dated 31st October, 2006 revised the existing table of commutation of pension and the Governor of Punjab reduced the discount rate from existing 8 per cent to 4.75 per cent and consequently revised the existing table in terms of Rule 11.5(2). As a result, employees who retired between 31st July, 2003 and 30th October, 2006 are at a disadvantageous position. The respondents cited illustrations to show that they were placed at a disadvantageous position. The circular dated 29th July, 2003 is arbitrary and has no reasonable nexus for making a classification between the employees who retired during the above period and the employees who retired prior to and /or after the cut off period. Before the High Court, the appellant as well as the PSEB filed a reply in which facts were hardly disputed. In that reply, it was stated that the law relied upon by the respondents before the High Court was not applicable and the claim of the said respondents was generally denied. They prayed for dismissal of the writ petition.

6. The High Court, vide its judgment dated 21st July, 2008 accepted the writ filed by the respondents and while allowing the writ petition, the High Court noticed that no justification or clarification had been provided by the State, while making a feeble attempt to defend its stand and there was no rational basis for providing the cut off dates between the period from

31st July, 2003 to 30th October, 2006. The following operative part of the judgment can usefully be reproduced at this stage :

> "After hearing the counsel for the parties, we are of the considered opinion that this petition deserves to be allowed and our opinion is further strengthened by the ratio of law, laid down in *V. Kasturi's* case (supra) which has been followed by *Hoshiar Singh's* case (supra). The State cannot be permitted to create two categories of retirees by providing a cut off date as there is no rationale.
>
> In view of the above, we allow the writ petition and quash the impugned circular dated 29.07.2003 and restore the pension of the petitioner, in accordance with the revised table, issued as per the Circular dated 31.10.2006 (Annexure P-6)."

7. Aggrieved from the above judgment of the High Court, the State of Punjab has filed the present appeal by way of special leave challenging the legality and correctness of the above judgment.

8. On behalf of the appellant, it is contended that :

(a) the High Court has not correctly applied the principle of law contained in the judgment of this Court in the case of *V. Kasturi v. Managing Director, State Bank of India* [1998 (5) SLR 629]. That case related to computation of pension and not commuting of pension.

(b) The circular was neither arbitrary nor violative of Article 14 of the Constitution of India as there was rationale behind the decision of the State Government which had been implemented by the PSEB.

(c) The State was suffering from serious financial crunch and the State with the intention to balance its financial liability, for good and valid economic reasons had issued the circular dated 29th July, 2003. Reliance in this regard is placed upon the judgment of this Court in the case of *State of Bihar v. Bihar Pensioner's Samaj* [(2006) 5 SCC 65] and *State of Punjab v. Amar Nath Goyal* [(2005) 6 SCC 754].

(d) Date of retirement by itself is a reasonable classification and does not offend the doctrine of equality. Reliance in this regard is placed upon *Union of India v. P.N. Menon & Ors.* [(1994) 4 SCC 69]. Vide circular dated 29th July, 2003, an attempt had been made on behalf of the Government to stabilize its financial position. It was a decision taken in the larger public interest and can even be supported by subsequent reasons. Reliance for this proposition is placed upon the case of *Chairman, All India Railway Recruitment Board & Anr. v. M. Shyam Kumar & Ors.* [(2010) 6 SCC 614].

(e) Under Note 2 to Rule 11.5(1), the respondents had a choice to withdraw the request for commutation, if they were adversely affected within 14 days from the issuance of the circular dated 29th July, 2003 in terms of the Punjab Civil Service Rules.

9. On behalf of the respondents, it is contended that none of these arguments were raised either in the affidavits filed before the High Court or even during the course of hearing. No records were produced to substantiate any such plea. On the contrary, it was a case of 'no stand' on behalf of the official respondents as even noticed by the High Court. It is vehemently argued that the date of retirement by itself is capable of providing a rational basis for issuance of such orders and the same would affect the rights of the parties adversely. In this regard reliance is placed on the cases of *V. Kasturi* (supra) and *D.S. Nakara v. Union of India* [(1983) 1 SCC 305]. According

to the respondents, the High Court has rightly applied the law as stated by this Court. Further, to substantiate their plea, it has been argued with some vehemence that no reasons are disclosed in the circular and there is no rationale for such categorization. It is also the contention that an executive circular cannot amend, alter or substitute an appendix or annexure which is the result of an exercise of statutory power. In this regard, reference is made to the judgment of this Court in the case of *Dr. Rajinder Singh v*. *State of Punjab* [(2001) 5 SCC 482]. The appellant cannot be permitted to take new grounds before this Court for the first time and the appeals deserve to be dismissed.

10. From the record, it is clear that none of these arguments were taken in the counter affidavit or even appear to have been addressed before the High Court during the course of arguments. The substantial pleas are being sought to be raised before this Court for the first time. It requires to be noticed at this stage that vide order dated 16th December, 2010 passed by a Bench of this Court after hearing, liberty was granted to the State to file additional affidavit. The affidavit dated 7th January, 2011 was filed on behalf of the State taking the ground that the State of Punjab had faced an acute financial crisis in the year 2003 and, in fact, was in a virtual debt trap. Since the commutation of pension is essentially loan/advance against the future payments of the monthly pension, the State Government could ill-afford to raise further debt at higher rate of interest to make such payments to employees at concessional effective rate of interest which was as low as 4.75 per cent per annum. The chart showing figures of fiscal indicators of Punjab from 2002-03 to 2006-07 was also annexed to this affidavit. Still another affidavit was filed with the leave of the Court dated 21st April, 2011 by the Deputy Secretary, Department of Finance, Punjab, Chandigarh bringing on record the policy of the Government, formula adopted for commutation factor and giving facts and figures as to how the circular dated 29th July, 2003 came to be issued.

11. From the orders passed by this Court, it is clear that while granting liberty to the State to file additional affidavit, no objection was raised by the respondents herein. Now, once the additional facts and grounds had been brought on record to which the said respondents have already filed a rejoinder, they cannot be permitted to raise the objection in regard to the new grounds being examined by the Court. There are certainly lapses on the part of the State, but the questions raised before us are not only substantial legal questions but are also likely to have far reaching consequences. It is argued that the circular dated 29th July, 2003 has been issued by the State of Punjab and the same having been quashed, there is every likelihood that all the employees of the State of Punjab, including various corporations, would raise similar claims. The grounds with regard to Note 2 of Rule 11.5, financial crunch of the State and there being proper rationale for fixation of the cut off period (31st July, 2003 to 30th October, 2010) are matters which require discussion and determination by the Court in accordance with law. Equally, the pleas raised by the respondents require proper examination. There is no doubt that the circular dated 29th July, 2003 does not contain any reason, whatsoever, for passing a directive, which enmass adversely affects the people who have retired in the period between 31st July, 2003 to 31st October, 2006. Additional affidavit now filed before this Court, with the leave of the Court, does provide reasons and some justifiable grounds in support of the circular. All that we propose to say is that the contentions raised by the respective parties are worthy of consideration in accordance with law.

12. The judgment impugned in the present petition, in fact, does not even discuss the plea of arbitrariness and discrimination in its proper perspective. The Court also has not deliberated upon as to whether the law stated by this Court in the case of *V. Kasturi* (supra) to the facts of the case in hand or not, particularly with reference to the contentions raised. Another aspect which could be considered by this Court on the basis of the material produced before it, was whether the format

to a statutory rule can be amended, altered or substituted by an executive order.

13. For lack of proper reasoning in the judgment of the High Court, in view of the additional pleas raised before this Court which have significant ramifications in law and with regard to the liability of the State, we are left with no option but to set aside the judgment of the High Court under appeal and remit the matter to the High Court for fresh decision in accordance with law. We would request the High Court to consider all the arguments that have been noticed by us above. All the affidavits placed on record of this Court shall also be placed before the High Court for its consideration. Another reason which can be stated in support of the view that we are taking is that the determination of the contentions raised before this Court for the first time may deprive either of the parties of a right to appeal to this Court. Deprivation of right to appeal can be construed as prejudicial to the rights and interests of the parties to the *lis.*

14. Accordingly, the appeal is partly allowed and the matter is remitted to the High Court, however, with cost of Rs.50,000/- to be paid to the respondent Nos.1 to 26 in equal proportion cost being conditional to the hearing of the writ petition, in default thereto, the appeal preferred by the State shall stand dismissed.

CAs @ SLP (C) Nos.18734-18735/07, 4036/07 and 7474/07

15. As the questions arising in these cases are different and the High Court has dealt with these questions on merits, the arguments raised in SLP Nos. Civil Appeals @ SLP (C) Nos. 25856/08, 18878/10, 22841/09, 23121/10, 23607/10, 25387/12, 27327/08, 3110/12 and 9569/10 are not available to the State of Punjab in these cases. Thus, these cases are ordered to be detached from this batch and be listed for hearing independently.

K.K.T. Appeals partly allowed.

RADHAKRISHNA NAGESH
v.
STATE OF ANDHRA PRADESH
(Criminal Appeal No.1707 of 2009)

DECEMBER 13, 2012

[SWATANTER KUMAR AND GYAN SUDHA MISRA, JJ.]

Penal Code, 1860 – ss.376(2)(f) and 363 – Rape – Of minor girl – Conviction of accused-appellant – Challenge to – Plea of accused that serious contradictions between ocular and medical evidence materially affected the case of the prosecution – Held: Not tenable – In order to establish conflict between the ocular evidence and the medical evidence, there has to be specific and material contradictions – Absence of injuries on the body of the victim girl (PW2) not of any advantage to the accused – Absence of injuries on her back and neck can be safely explained by the fact that she was lured into the offence rather than being taken by using physical force on her – Preparation, attempt and actual act on the part of the accused clear from the fact that he had purchased bangles which he had promised to her and thereafter had taken her into the tennis court store room, the key of which was with him – This is also corroborated from the recovery evidence – Merely because, some fact was not recorded or stated by the doctor at a given point of time and subsequently such fact was established by the expert report, the FSL Report, would not by itself substantiate the plea of contradiction or variation – No reason to disbelieve the statement of PW2 that she knew the accused and that he incited her and lured her to buying bangles and then took her to the storeroom where he committed rape on her – PW3 had seen the accused taking PW2 inside the tennis court store room and bolted the door from outside, and then went to report the matter – On way, he met PW1 (a police official), who

accompanied him to the store room, brought both the accused and PW2 to the police station, and got an FIR registered on his own statement, the investigation of which was conducted by PW11 – No reason to disbelieve the statements of PW1, PW2, PW3, PW5(mother of PW2) and PW11, particularly when they stood lengthy cross-examination without any material damage to the case of the prosecution.

Penal Code, 1860 – ss.376(2)(f) and 363 – Rape – Of minor girl – Conviction of accused-appellant – Challenge to – Plea of accused that there was no direct evidence connecting him to the commission of the crime – Held: Not tenable – On facts, presence of the element of mens rea on part of the accused cannot be denied – He had fully prepared himself – He first lured the victim girl (PW2) not only by inciting her, but even by actually purchasing bangles for her – Thereafter, he took the girl to a room where he threatened her of physical assault as a consequence of which the girl did not raise protest – This is why no marks of physical injury could be noticed on her body – Absence of injuries in the context of the present case would not justify drawing of any adverse inference against the prosecution, but on the contrary would support the case of the prosecution – Direct link of the accused with the commission of the crime well established by the statement of the witnesses, the recoveries made, the Medical Report and the FSL Report –Statement of PW2 credible, truthful and, thus, can safely be relied upon – Such statement fully corroborated by the statements of PW1 and PW3, who were independent witnesses and had no personal interest or motive of falsely implicating the accused or supporting the case of the prosecution.

Penal Code, 1860 – s.376 and Explanation to s.375 – Rape – Penetration – Intact hymen – Inference – Held: The mere fact that the hymen was intact and there was no actual wound on her private parts not conclusive of the fact that she was not subjected to rape – Penetration itself proves the

offence of rape, but the contrary is not true i.e. even if there is no penetration, it does not necessarily mean that there is no rape – Penetration may not always result in tearing of the hymen and the same will always depend upon the facts and circumstances of a given case – In the case at hand, it was clear that there was limited penetration due to which probably the hymen of the victim girl (PW2) was not ruptured.

Appeal – Appeal against acquittal – Interference with – Principles – Held: The appellate Court has to be more cautious while dealing with the judgment of acquittal – However, it does not mean that the appellate Court cannot disturb the finding of acquittal – All that is required is that there should be a compelling rationale and also clear and cogent evidence, which was ignored by the Trial Court to upset the finding of acquittal – On facts, the course of appreciation of evidence and application of law adopted by the Trial Court was not proper – Trial Court failed to appreciate the evidence on record cumulatively and in its correct perspective by ignoring the material piece of evidence and by improper appreciation of evidence – It recorded findings which are on the face of it unsustainable – This error was rightly corrected by the High Court – No reason to interfere with the judgment of conviction recorded by the High Court.

The prosecution case was that the accused-appellant, a ball picker in the University tennis court, enticed PW2, a maid working in the staff quarters of the University, on the pretext of purchasing gold colour plastic bangles for her and when she agreed to accompany him, he bought her the bangles and then took her inside the store room near the tennis court and committed rape on her against her will. The appellant was charged with having committed offences under Sections 363 and 376 (2)(f) IPC. The trial court acquitted the appellant, but the High Court reversed the order of

acquittal and convicted him under Sections 363 and 376(2)(f) IPC, and therefore the instant appeal.

The appellant challenged his conviction *inter alia* on the following grounds: 1) that the High Court exceeded its jurisdiction by interfering with the judgment of acquittal of the Trial Court which was very well-reasoned, based upon proper appreciation of evidence and in consonance with the settled principles of law; 2) that there were serious contradictions between the ocular and the medical evidence which materially affected the case of the prosecution; 3) that there was no sexual intercourse between the appellant and the victim and the prosecution had not been able to establish any link between the commission of the alleged offence and the appellant and 4) that the case of the prosecution was based upon the sole testimony of the victim.

Dismissing the appeal, the Court

HELD: 1.1. There is no merit in the contention raised on behalf of the appellant with regard to discrepancy in the medical and the ocular evidence. [Para 20] [1138-D]

1.2. PW2 was 11 years old at the time of occurrence, while she was 12 years old, when her statement was recorded in the Court. After the Court was convinced of the fact that she is competent to make the statement, the same was recorded. In her statement, she stated that she was working as a maid in the staff quarters of the University, known as the red building. According to her, she knew the accused-appellant and he was in the habit of escorting children to the school. The accused had taken her to the tennis court, promised her that he would buy bangles for her and after purchasing the bangles the accused took her to a room in the tennis court. The accused closed the door of the room, lifted her *langa,* removed his own pant and underwear, put her on the

floor of the room and passed liquid like urine into her private parts. In the meanwhile, she stated that she felt the starch in her private parts. At that time, one rickshaw puller, PW3 came and knocked at the door. The accused abused him in a filthy language and later the police came to the room. She further narrated that it was PW1 (Sub-Inspector of Police, Traffic P.S.) who had taken her and the accused to the police station, where she was examined by the Police. The *langa* of PW2 was seized by the police and was sent to hospital for examination. She stated that her mother (PW5) was also working as a maid in the red building itself. Despite a lengthy cross-examination, she stood to her statement and did not cast any doubt on the statement made by her in her examination-in-chief. [Paras 10, 11] [1134-B-G]

1.3. When PW2 was taken to the hospital, she was examined by Dr. PW8, a Professor of Forensic Medicine in a Medical College and also by PW9, an Assistant Professor in a Maternity Hospital. According to PW9, the girl had washed herself after the incident. PW9 also stated that considering the age of the victim and on seeing that the parts were tender to touch, she could say that there was an attempt to rape the victim girl. Since, according to PW9, the girl had washed herself after the incident, the doctor had to reserve her final opinion till the Chemical Analyst's Report (FSL Report). The FSL Report was Ext. P.6, while the Wound Certificate of victim girl was Ext. P.5. According to the FSL Report, semen was detected on Items 1, 2, 4, 5 and 6 and the same was of human origin. Saliva of human origin was detected on Item No. 3. The Chemical Analyst also detected semen and spermatozoa on Item Nos. 1, 2, 4, 5 and 6 and on Item No. 3 saliva was found. Item No. 1 was torn brown colour polyester *langa* with dirty stains which the girl was wearing. Item No. 2 was a torn grey colour mill made cut drawer with dirty stains which the accused was wearing.

Item No. 3 and Item No. 4 were the turbid liquid which was present on the cloth and in a bottle respectively. Item No. 5 was a cotton swab and Item No. 6 were two glass slides which were sent for opinion and via FSL Report, Ext. P.6, the opinion was received. From the above evidence, it is not feasible to state with certainty that there is any conflict between the medical and the ocular evidence. No fault can be found in the statement of Dr. PW9, who waited to give her final opinion till she received the FSL Report. [Paras 11, 12, 13 and 14] [1134-G; 1135-A-H; 1136-A]

1.4. According to the medical evidence and statements of PW8 and PW9, the victim was 11 years old at the time of occurrence and her private parts were tender to touch. The doctor, PW9 had reserved her final opinion awaiting the FSL Report. According to the FSL Report, the *langa* of the girl as well as the drawer of the accused were containing semen of human origin. The slides which contained the swab taken from the vagina of the girl also showed presence of semen of human origin. Noticeably these reports, in relation to Items 1, 2, 4, 5 and 6 came despite the fact that the girl had washed herself after the occurrence. [Para 24] [1139-D-E]

1.5. It is a settled principle of law that a conflict or contradiction between the ocular and the medical evidence has to be direct and material and only then the same can be pleaded. Even where it is so, the Court has to examine as to which of the two is more reliable, corroborated by other prosecution evidence and gives the most balanced happening of events as per the case of the prosecution. [Para 15] [1136-B-C]

1.6. The absence of injuries on the back and neck of the victim girl can safely be explained by the fact that she was lured into the offence rather than being taken by using physical force on her. The preparation, attempt and

actual act on the part of the accused is further clear from the fact that he had purchased bangles which he had promised to her and thereafter had taken her into the tennis court store room, the key of which was with him. This is also corroborated from the fact that even vide Ext. P.3, the *langa* as well as the bangles, coated with golden colour were recovered by the Investigating Officer, PW11. [Para 16] [1136-D-F]

1.7. An eleven year old girl and that too from a small place and serving as a maid could hardly be aware of the technicalities of law in relation to an offence of sexual assault. She felt very shy while making her statement in the Court, which fact was duly noticed by the Court. [Para 17] [1136-F-G]

1.8. In order to establish a conflict between the ocular evidence and the medical evidence, there has to be specific and material contradictions. Merely because, some fact was not recorded or stated by the doctor at a given point of time and subsequently such fact was established by the expert report, the FSL Report, would not by itself substantiate the plea of contradiction or variation. Absence of injuries on the body of the prosecutrix would not be of any advantage to the accused. [Para 18] [1136-G-H; 1137-A-B]

1.9. The possibility of some variations in the exhibits, medical and ocular evidence cannot be ruled out. But it is not that every minor variation or inconsistency would tilt the balance of justice in favour the accused. Where the eye witness account is found credible and trustworthy, medical opinion pointing to alternative possibilities may not be accepted as conclusive. [Para 19] [1137-C-D; 1138-A]

1.10. There is no reason for the Court to disbelieve the statement of PW2 that she knew the accused and that the accused incited her and lured her to buying bangles

and then took her to the storeroom where he committed rape on her even threatened her of physical assault. PW3, the rickshaw puller who was standing at the gate of the University, had seen the accused taking the young girl towards the tennis court store room. Suspecting that he would do something wrong with the girl, he went to the room and knocked the door. The door was not opened by the accused, however, he persisted with the knocking. Thereafter the accused opened the door and abused him, but PW3 maintained his presence of mind and bolted the door from outside, leaving the accused and the prosecutrix inside the room and went to report the matter. On his way, he met PW1, who accompanied him to the store room, brought both the accused and the victim to the police station, got an FIR registered on his own statement, the investigation of which was conducted by PW11, the Inspector of Police. [Para 22] [1138-F-H; 1139-A-B]

1.11. There is no reason as to why this Court should disbelieve the statements of PW1, PW2, PW3, PW5 and PW11, particularly when they stood the lengthy cross-examination without any material damage to the case of the prosecution. [Para 23] [1139-B-C]

Dayal Singh and Others v State of Uttaranchal **[(2012) 7 SCALE 165] – relied on.**

2.1. The mere fact that the hymen was intact and there was no actual wound on her private parts is not conclusive of the fact that she was not subjected to rape. According to PW9, there was a definite indication of attempt to rape the girl. Also, later semen of human origin was traceable in the private parts of the girl, as indicated by the FSL Report. This would sufficiently indicate that she had been subjected to rape. Penetration itself proves the offence of rape, but the contrary is not true i.e. even if there is no penetration, it does not necessarily mean

that there is no rape. The Explanation to Section 375 IPC has been worded by the legislature so as to presume that if there was penetration, it would be sufficient to constitute sexual intercourse necessary for the offence of rape. Penetration may not always result in tearing of the hymen and the same will always depend upon the facts and circumstances of a given case. The Court must examine the evidence of the prosecution in its entirety and then see its cumulative effect to determine whether the offence of rape has been committed or it is a case of criminal sexual assault or criminal assault outraging the modesty of a girl. [Para 25] [1139-F-H; 1140-A-B]

2.2. It can safely be concluded in the case at hand that there was limited penetration due to which probably the hymen of the victim girl was not ruptured. [Para 28] [1143-F]

Guddu @ Santosh v. State of Madhya Pradesh **(2006) Supp. 1 SCR 414;** *Tarkeshwawr Sahu v. State of Bihar (now Jharkhand)* **(2006) 8 SCC 560: 2006 (7) Suppl. SCR 10 – relied on.**

3.1. The Court should adhere to a comprehensive approach, in order to examine the case of the prosecution. But as regards the facts and circumstances of the present case, the presence of the element of *mens rea* on part of the accused cannot be denied. He had fully prepared himself. He first lured the girl not only by inciting her, but even by actually purchasing bangles for her. Thereafter, he took the girl to a room where he threatened her of physical assault as a consequence of which the girl did not raise protest. This is why no marks of physical injury could be noticed on her body. Absence of injuries in the context of the present case would not justify drawing of any adverse inference against the prosecution, but on the contrary would support the case of the prosecution. [Para 28] [1143-F-H; 1144-A]

3.2. As per the facts and circumstances of the present case, there is a direct link of the accused with the commission of the crime. Such conclusion can well be established by the statement of the witnesses, the recoveries made, the Medical Report and the FSL Report. It does not leave any doubt that the accused has committed the offence with which he was charged. [Para 31] [1146-B-C]

3.3. There is nothing on record to show that the statement of PW2 is either unreliable or untrustworthy. On the contrary, in light of the given facts, the statement of PW2 is credible, truthful and, thus, can safely be relied upon. Statement of PW2 is fully corroborated by the statements of PW1 and PW3. They are independent witnesses and have no personal interest or motive of falsely implicating the accused or supporting the case of the prosecution. PW2 is a poor young girl who works as a maid servant. PW3 coming to her rescue and PW1 reaching the spot without any delay, saved the girl from further assault and serious consequences. The High Court has not based the conviction of the accused solely on the statement of PW2. Even if it were so, still the judgment of the High Court will not call for any interference because the statement of PW2 was reliable, trustworthy and by itself sufficient to convict the accused, by virtue of it being the statement of the victim herself. [Para 32, 33] [1146-D-G]

O.M. Baby (Dead) by L.Rs. v. State of Kerala **JT 2012 (6) SC 117 and** *State of Himachal Pradesh v Asha Ram* **AIR 2006 SC 381: 2005 (5) Suppl. SCR 280 – relied on.**

4.1. It is true that the appellate Court has to be more cautious while dealing with the judgment of acquittal. Under the Indian criminal jurisprudence, the accused has two fundamental protections available to him in a criminal trial or investigation. Firstly, he is presumed to be

innocent till proved guilty and secondly that he is entitled to a fair trial and investigation. Both these facets attain even greater significance where the accused has a judgment of acquittal in his favour. A judgment of acquittal enhances the presumption of innocence of the accused and in some cases, it may even indicate a false implication. But then, this has to be established on record of the Court. However when one mentions about the Court being cautious, it does not mean that the appellate Court cannot disturb the finding of acquittal. All that is required is that there should be a compelling rationale and also clear and cogent evidence, which has been ignored by the Trial Court to upset the finding of acquittal. [Paras 34, 35] [1147-A-D]

4.2. In the facts of the present case, the High Court has recorded reasons while interfering with the judgment of acquittal by the Trial Court. The Trial Court attempted to create a serious doubt in the case of the prosecution on the basis of the statement of PW3, that he does not know what PW2 narrated to PW1, when he made inquiries. This was not a proper way to appreciate the evidence on record. The statement of a witness must be read in its entirety. Reading a line out of context is not an accepted canon of appreciation of evidence. Another aspect of the statement of PW3 which the Trial Court had a doubt with, was, as to how PW3 had noticed the accused taking away the minor girl along with him to the tennis store room and how he suspected some foul play. PW3 admittedly was a rickshaw puller and was standing at the gate of the University. The tennis store room was quite near to the gate. PW3, quite obviously knew the accused as well as PW2. The conduct of PW3 in the given circumstances of the case was precisely as it would have been of a person of normal behaviour and was not at all extra-ordinary in nature, particularly in the late hours of evening. Still, another fact that was taken into

consideration by the Trial Court while acquitting the accused was that Ext. P.5 neither showed any injuries on the body nor reflected that rape was attempted on the victim. In the considered view of this Court, the course of appreciation of evidence and application of law adopted by the Trial Court was not proper. It was expected of the Trial Court to examine the cumulative effect of the complete evidence on record and case of the prosecution in its entirety. [Paras 36 to 40] [1152-F-H; 1153-A-E]

4.3. Equally without merit is the contention that Ext. P.5 which was authored by PW9 upon examination of the victim neither recorded any injuries on her person nor the fact that she was raped. It is for the reason that PW9 had not recorded any final opinion and kept the matter pending, awaiting the FSL Report. Furthermore, in Ext. P.5, she had noticed that her parts were tender to touch. The vaginal swabs and vaginal wash were taken and slides were preserved. She was also sent to the hospital for further examination. Thus, Ext. P.5 cannot be looked into in isolation and must be examined in light of other ocular and documentary evidence. In the peculiar facts and circumstances of the case, it was not even expected of PW1 or the Investigating officer PW11 to examine the victim particularly in relation to her private parts. Absence of such recording does not cause any infirmity to the case of the prosecution much less a reason for acquitting the accused. [Para 41] [1153-E-H; 1154-A]

4.4. The trial Court has failed to appreciate the evidence on record cumulatively and in its correct perspective by ignoring the material piece of evidence and improper appreciation of evidence. It has recorded findings which are on the face of it unsustainable. This error was rightly corrected by the High Court, and there is no reason to interfere with the judgment of conviction

recorded by the High Court. [Para 42] [1154-A-C]

Ravi Kapur v. State of Rajasthan **JT 2012(7) SC 480 – relied on.**

Case Law Reference:

(2012) 7 SCALE 165	**relied on**	**Para 18**
(2006) Supp. 1 SCR 414	**relied on**	**Para 26**
2006 (7) Suppl. SCR 10	**relied on**	**Para 27**
JT 2012 (6) SC 117	**relied on**	**Para 29**
2005 (5) Suppl. SCR 280	**relied on**	**Para 30**
JT 2012(7) SC 480	**relied on**	**Para 35**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1707 of 2009.

From the Judgment & Order dated 23.1.2009 of the High Court of Judicature of Andhra Pradesh at Hyderabad in Criminal Appeal No. 1007 of 1999.

Ch. Leela Sarveswar, V. Sridhar Reddy and V.N. Raghupathy for the Appellant.

D. Mahesh Babu, Suchitra, Amit, Balashivdu and D. Bharathi Reddy for the Respondent.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. The present appeal is directed against the judgment dated 23rd January, 2009 passed by the Division Bench of the High Court of Judicature at Hyderabad, Andhra Pradesh whereby the order of acquittal dated 11th February, 1999 passed by the Trial Court was reversed. The appellant, while impugning the judgment under appeal, raised the following contentions: -

1. The High Court could not have interfered with the judgment of acquittal of the Trial Court which was very well-reasoned, based upon proper appreciation of evidence and was in consonance with the settled principles of law. The High Court, thus, has exceeded its jurisdiction by interfering with the judgment of acquittal of the Court of Sessions.

2. There are serious contradictions between the ocular and the medical evidence which materially affect the case of the prosecution. Therefore, the accused is entitled to a reversal of the judgment of the High Court.

3. There was no sexual intercourse between the appellant and the victim. The prosecution has not been able to establish any link between the commission of the alleged offence and the appellant.

4. The case of the prosecution is based upon the sole testimony of the victim. All these circumstances, examined cumulatively, entitle the accused for an order of acquittal.

5. Lastly, the punishment awarded to the accused is too harsh.

2. These contentions have been raised with reference to the case brought on record by the prosecution. The factual matrix of the case as per the prosecution is:

3. The accused/appellant was working as a ball picker in S.V. University tennis court, Tirupati, and in that capacity he was having the custody of the key to the storeroom situated on the south-east of the tennis court. The tennis net and other articles were stored in this place. On 7th September, 1997 at about 7.00 p.m., the accused saw a girl named A. Haritha, who was

standing alone outside the red building. It may be noticed, that the mother of the victim girl, namely Sampuramma, PW5, was working as a maid-servant in the red building attached to the University.

4. A. Haritha, the victim belonged to the Scheduled Caste category and was about 11 years of age at the time of the incident. The accused asked her to come along with him. At first she refused but the accused enticed her on the pretext of purchasing gold colour plastic bangles. When she agreed to accompany him, he bought her the bangles and then took her to the store room near the tennis court, the key to which he was possessing. He opened the lock and took the victim inside the room and committed rape on her against her will. In fact, he even threatened to assault her. One Narayanaswamy, PW3, a rickshaw puller, who was waiting by the side of Gate No. 3 of the S.V. University noticed the accused taking the victim into the store room and thus, became suspicious. He went to the store room and tapped the door several times. However, the accused did not open the door at first, but upon further insistence of PW3, he did so. PW3 saw the victim girl weeping. The accused slammed the door. Suspecting that the accused might have done some wrong to the minor girl, Narayanswami, PW3 bolted the door from outside and ran to inform the authorities and/or the police. On his way he met Sub-Inspector of Police, Traffic P.S., Tirupati, Sh. S.M. Ramesh, PW1, who was standing near the NCC Office traffic point and informed him of the incident. Immediately, PW1 along with another Traffic R.S.I, R. Sivanandakishore, PW4, accompanied by PW3 went to the said storeroom, opened the door from outside and found the victim girl A. Haritha. She complained of pain in her vaginal region. PW1 took the victim girl as well as the accused to the SVU Campus Police Station and made a complaint, Ex. P.1, based upon which FIR, Ex. P.7 was registered under Sections 363 and 376 (2)(f) of the Indian Penal Code 1860 (for short 'IPC') and Section 3(2)(v) of the Schedule Castes and the Schedule Tribes (Prevention of Atrocities) Act, 1989.

5. Upon this report, Sub-Inspector of Police, B. Katamaraju, PW10 undertook the investigation. The accused was sent to the SV RR GG Hospital, Tirupati for medical examination. The victim girl was sent to the Government Maternity Hospital, Tirupati, for the same purpose and also for the assessment of her age. Certain articles, including the cut drawer of accused containing seminal stains, skirt of the victim girl etc. were seized and were sent to the laboratory. The Assistant Director, RFSL Anantpur, after analysing the material objects, detected semen on the clothes and on the vaginal swabs of the victim, collected and preserved by the Medical Officer, and also on the underwear of the accused. The Investigating Officer recorded the statement of various witnesses and completed the investigation. Upon completion of the investigation, the Inspector of Police, PW11 presented a report under Section 173(2) of the Code of Criminal Procedure 1973 (for short 'the CrPC) for offences under Sections 363 and 376 (2)(f) of IPC. As the alleged offences were triable exclusively by the Court of Sessions, the accused was committed to the Court of Sessions, where he faced the trial. The prosecution examined 12 witnesses being PW1 to PW12 and exhibited documents P1 to P9 and material objects (M.Os.) 1 to 3 in its effort to bring home the guilt of the accused. As already noticed the Trial Court vide its judgment dated 11th February, 1999 held the accused not guilty of any offence and acquitted him. While recording the finding of acquittal, the Trial Court found certain material improbabilities and contradictions in the statements of the witnesses. Since we have to deal with the judgment of reversal of an order of acquittal, it will be useful for us to notice some relevant extracts of the judgment which would indicate as to what really weighed with the Trial Court while granting acquittal to the accused.

> "(32) In the evidence of P.W.3, he says that he does not know what P.W.2 informed to P.W.1 when he made enquiries. The evidence of P.W.4 is of no use. As seen from his evidence, it is manifest that he is unable to identify

> the accused person who was present in the court on the date of his giving evidence. Even he has not divulged anything about P.W.2 informing the incident to P.W.1. As such, the evidence of PW.1 that the victim girl narrated the incident to him, is not corroborated by any one of the witnesses.
>
> (33) It is an admitted fact that at the scene of offence, P.W.1 did not prepare any statements, and he simply brought both the accused and P.W.2 to the Police Station. But, it is (sic) not unnatural on the part of P.W.1 and other police personnel who went to the scene of offence without any pen or papers on their hand, as it is evident from the evidence of P.W.3 that immediately after informing the incident to P.W.1 they went to the scene of offence. In such case we cannot expect P.W.1 to procure paper and pen to prepare any statement on the spot. Hence, in this context, the version of learned counsel for accused, that as P.W.1 failed to record any police proceedings or statement at the spot, cannot go against the prosecution case.
>
> (34) Nextly, it may be pointed out that though P.W.10 the S.I. of the Police registered the case, he did not try to record the statements of P.Ws 1 to 3 though they were available at that juncture. Till arrival of P.W.11, the Inspector of Police, the statements were not recorded. When P.W.10 himself registered the case, why he has not recorded the statements of the witnesses available at the spot, was not explained by him., it is only P.W.11 who received express F.I.R. from P.W.10 recorded statements of P.Ws. 1 and 2, and later sent the victim girl to the hospital for medical examination.
>
> (35) When coming to the evidence of P.W.2, though she narrated the incident and stated in her chief – examination that the accused removed his pant and underwear and laid

her on the floor and passed liquid like urine in her private part, her admission in the cross-examination that Narayanswamy P.W.3 tutored her to depose in this case and also at the request of P.W.1, she deposed about purchasing of bangles by the accused and taken her to the room, makes her entire evidence lack of credibility and inadmissible.

(36) In this context, the learned counsel for accused submitted that in view of the particular admission made by P.W.2 that she was tutored by P.W.3, the evidence of P.W.2 becomes worthless and inadmissible. In this regard, he placed reliance upon a decision reported in *"Ramvilas and others, Appellants. Vs. State of Madhya Pradesh,* Respondent" (1985 Crl.L.J. Page 1773), wherein Their Lordships held that, when the statement was narrated to the witness just before entering into the witness box, the evidence of such witness is inadmissible in view of section 162 Cr.P.C. because the fact remains that it was narrated to the witness for the purpose of giving evidence at the trial and that tantamounts to making use of the statement at the trial which is prohibited by section 162 Cr.P.C.

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(38) When coming to the evidence of P.W.3, it goes to show that he noticed the accused taking away a minor girl along with him to the tennis court. Though he suspected some foul play, he did not try to prevent the accused from taking the girl into the room of tennis court. This conduct of P.W.3 is not natural in those circumstances.

(39) The evidence of P.W.5, the mother of victim girl goes to show that she came to know the incident after the victim girl and the accused were brought to Police Station. Hence, she is also not a direct eye-witness.

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(43) Hence, it is manifest that for sustaining tenderness on the private parts of the victim girl, there could be some other reasons and those reasons are not ruled out by P.W.9. Admittedly, in the wound certificate furnished by her under Ex.P.5, she has not mentioned that there was an attempt on the person of P.W.2 victim girl. Further, there is no record to show that she obtained acknowledgment from the police for handing over the material objects collected by her at the time of examination. She collected vaginal swab and also vaginal washings. Further, on her examination, she found the hymen of the victim girl was intact and there was no laceration or congestion on fourchette.

(59) But, in this case on hand, the evidence of P.W.2 the prosecutrix is of no avail in view of her admission that she was tutored by P.W.3 before her giving evidence. Hence, the above said citation also cannot be made applicable to the present facts of the case.

(70) In this case, what is important is, that, though P.W.2 narrated the incident and stated that the accused took her to the tennis room and passed urine like substance on her private part, her own admission that she was tutored by P.W.3, demolishes the credibility of the victim girl. Hence, when the very direct evidence is doubtful in nature, the evidence of P.W.3 that he saw the accused taking away the girl along with him, and also P.W.1 and other noticing the victim girl along with the accused in the tennis court room, it also not much helpful.

(71) Further as seen from the record, though P.Ws. 1 to 5 were examined by P.W.11 on the date of incident itself, all the said statements were sent to the court only on 28.1.1998. The alleged occurrence is on 7.9.1997. Hence,

the sending statements to the court at a belated stage, has the effect of losing the spontaneity of the statements and further, admittedly the statement of P.W.2 recorded by P.W.1 was also not read over to her. Hence, in these circumstances, the benefit of doubt should be given to the accused. Hence, this point is answered against the prosecution."

6. Besides the above, the Trial Court had also expressed its doubt in relation to the authenticity of Ex.P.9, the wound certificate of accused, issued by the Chief Medical Officer, SV RR GG Hospital, Dr. V.V. Pandurana Vittal, PW12. There were certain corrections as referred to in paragraph 52 of the judgment in this regard. The High Court disturbed the above judgment of the Trial Court and found the accused guilty under Sections 363 and 376(2)(f) of IPC and convicted him to undergo rigorous imprisonment for three years and to pay a fine of Rs.1000/- and in default of payment, to undergo simple imprisonment for three months under Section 363 of IPC. Accused was sentenced to undergo rigorous imprisonment for 10 years and also to pay a fine of Rs.2000/-, and in default of payment, to undergo simple imprisonment for six months for the offence under Section 376 (2)(f) of IPC. The substantive sentences were directed to run concurrently.

7. Aggrieved from the judgment of conviction and order of sentence passed by the High Court, the accused has filed the present appeal.

8. We would prefer to discuss the first argument advanced on behalf of the appellant as the last because it would primarily depend upon the view we take upon appreciation of the evidence and the case of the prosecution in its entirety.

9. The second contention on behalf of the appellant is that there is a clear conflict between the medical evidence and the ocular evidence which creates a serious doubt in the case of the prosecution. To buttress this contention, reference has been

made to the statement of PW2, the prosecutrix, where she states that she was subjected to rape, but according to the doctor, PW9 and the Medical Report, Ext. P.5, neither was she subjected to sexual intercourse nor was there any penetration.

10. PW2 was 11 years old at the time of occurrence, while she was 12 years old, when her statement was recorded in the Court. After the Court was convinced of the fact that she is competent to make the statement, the same was recorded. In her statement, she stated that she was working as a maid in the staff quarters of S.V. University, known as the red building. According to her, she knew the accused and he was in the habit of escorting children to the school. The accused had taken her to the tennis court, promised her that he would buy bangles for her and after purchasing the bangles the accused took her to a room in the tennis court. The accused closed the door of the room, lifted her *langa,* removed his own pant and underwear, put her on the floor of the room and passed liquid like urine into her private parts. In the meanwhile, she stated that she felt the starch in her private parts. At that time, one rickshaw puller, PW3 came and knocked at the door. The accused abused him in a filthy language and later the police came to the room. She further narrated that it was PW1 who had taken her and the accused to the police station, where she was examined by the Police.

11.Her *langa* was seized by the police and was sent to hospital for examination. She stated that her mother was also working as a maid in the red building itself. We must notice that despite a lengthy cross-examination, she stood to her statement and did not cast any doubt on the statement made by her in her examination-in-chief. When she was taken to the hospital, she was examined by Dr. G. Veeranagi Reddy, PW8, who stated that he was working as a Professor of Forensic Medicine in the S.V. Medical College, Tirupati and that on 13th September, 1997, he had examined a girl A. Haritha for the purposes of finding out her age. He stated as follows:-

"2. On physical mental and radiological examination I am of the opinion of that the age of Haritha is between 10 and 11 years. Ex. P.4 is the certificate."

12. She was also examined by Smt. Dr. P. Vijayalakshmi, Assistant Professor in Maternity Hospital, Tirupati, PW9 on 7th September, 1997. According to PW9, the girl had washed herself after the incident. PW9 made the following remarks:- "There are no marks of violence nape of neck, front and back of the body. The abdomen was soft. Liver and spleen not palpable. The breasts are not developed. There was no axilliary pubic hair. The hymen was intact. No laceration or congestion in fourchette, the parts were tender to touch, which according to the doctor was an indication of attempt to rape with the girl." The doctor, PW9 also stated that considering the age of the victim and on seeing that the parts were tender to touch, she could say that there was an attempt to rape the victim girl A. Haritha. Since, according to PW9, the girl had washed herself after the incident, the doctor had to reserve her final opinion till the Chemical Analyst's Report (FSL Report). The vaginal swab and washing were preserved for chemical analysis. The FSL Report was Ext. P.6, while the Wound Certificate of victim girl was Ext. P.5. According to the FSL Report, semen was detected on Items 1, 2, 4, 5 and 6 and the same was of human origin. Saliva of human origin was detected on Item No. 3. The Chemical Analyst also detected semen and spermatozoa on Item Nos. 1, 2, 4, 5 and 6 and on Item No. 3 saliva was found.

13. Item No. 1 was torn brown colour polyester *langa* with dirty stains which the girl was wearing. Item No. 2 was a torn grey colour mill made cut drawer with dirty stains which the accused was wearing. Item No. 3 and Item No. 4 were the turbid liquid which was present on the cloth and in a bottle respectively. Item No. 5 was a cotton swab and Item No. 6 were two glass slides which were sent for opinion and via FSL Report, Ext. P.6, the opinion was received.

14. From the above evidence, it is not feasible to state with

certainty that there is any conflict between the medical and the ocular evidence. One cannot find any fault in the statement of Dr. P. Vijyalakshmi, PW9, who waited to give her final opinion till she received the FSL Report. According to her, an attempt to rape the young girl was made, while according to PW2, she was subjected to rape and the accused person had discharged some liquid like urine in her private parts.

15. It is a settled principle of law that a conflict or contradiction between the ocular and the medical evidence has to be direct and material and only then the same can be pleaded. Even where it is so, the Court has to examine as to which of the two is more reliable, corroborated by other prosecution evidence and gives the most balanced happening of events as per the case of the prosecution.

16. The absence of injuries on the back and neck of the victim girl can safely be explained by the fact that she was lured into the offence rather than being taken by using physical force on her. The preparation, attempt and actual act on the part of the accused is further clear from the fact that he had purchased bangles which he had promised to her and thereafter had taken her into the tennis court store room, the key of which was with him. This is also corroborated from the fact that even vide Ext. P.3, the *langa* as well as the bangles, coated with golden colour were recovered by the Investigating Officer, S.M. Khaleel, PW11.

17. An eleven year old girl and that too from a small place and serving as a maid could hardly be aware of such technicalities of law in relation to an offence of sexual assault. She felt very shy while making her statement in the Court, which fact was duly noticed by the Court in its Order dated 9th November, 1998.

18. In order to establish a conflict between the ocular evidence and the medical evidence, there has to be specific and material contradictions. Merely because, some fact was

not recorded or stated by the doctor at a given point of time and subsequently such fact was established by the expert report, the FSL Report, would not by itself substantiate the plea of contradiction or variation. Absence of injuries on the body of the prosecutrix, as already explained, would not be of any advantage to the accused.

19. In any case, to establish a conflict between the medical and the ocular evidence, the law is no more *res integra* and stands squarely answered by the recent judgment of this Court in the case of *Dayal Singh and Others v. State of Uttaranchal* [(2012) 7 SCALE 165]

> "29. This brings us to an ancillary issue as to how the Court would appreciate the evidence in such cases. The possibility of some variations in the exhibits, medical and ocular evidence cannot be ruled out. But it is not that every minor variation or inconsistency would tilt the balance of justice in favour the accused. Of course, where contradictions and variations are of a serious nature, which apparently or impliedly are destructive of the substantive case sought to be proved by the prosecution, they may provide an advantage to the accused. The Courts, normally, look at expert evidence with a greater sense of acceptability, but it is equally true that the courts are not absolutely guided by the report of the experts, especially if such reports are perfunctory, unsustainable and are the result of a deliberate attempt to misdirect the prosecution. In *Kamaljit Singh v. State of Punjab* [2004 Cri.LJ 28], the Court, while dealing with discrepancies between ocular and medical evidence, held, "It is trite law that minor variations between medical evidence and ocular evidence do not take away the primacy of the latter. Unless medical evidence in its term goes so far as to completely rule out all possibilities whatsoever of injuries taking place in the manner stated by the eyewitnesses, the testimony of the eyewitnesses cannot be thrown out."

> 30. Where the eye witness account is found credible and trustworthy, medical opinion pointing to alternative possibilities may not be accepted as conclusive. The expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the court on the technical aspect of the case by examining the terms of science, so that the court, although not an expert, may form its own judgment on those materials after giving due regard to the expert's opinion, because once the expert opinion is accepted, it is not the opinion of the medical officer but that of the Court. {Plz. See *Madan Gopal Kakad v. Naval Dubey & Anr.* [(1992) 2 SCR 921 : (1992) 3 SCC 204]}."

20. In light of the above settled canon of criminal jurisprudence, we have no hesitation in concluding that we find no merit in the contention raised on behalf of the appellant with regard to discrepancy in the medical and the ocular evidence.

21. Further, it is argued by the appellant that there is no direct evidence connecting the accused to the commission of the crime and that there was no penetration, therefore, the accused has not committed the offence punishable under Section 376 IPC. As already noticed, the prosecution had examined nearly 12 witnesses and produced documentary evidence on record including Medical and FSL Report in support of its case.

22. Firstly, there is no reason for the Court to disbelieve the statement of PW2 that she knew the accused and that the accused incited her and lured her to buying bangles and then took her to the storeroom where he committed rape on her even threatened her of physical assault. PW3, the rickshaw puller who was standing at the gate of the University, had seen the accused taking the young girl towards the tennis court store room. Suspecting that he would do something wrong with the girl, he went to the room and knocked the door. The door was not opened by the accused, however, he persisted with the

knocking. Thereafter the accused opened the door and abused him, but PW3 maintained his presence of mind and bolted the door from outside, leaving the accused and the prosecutrix inside the room and went to report the matter. On his way, he met PW1, S.M. Ramesh, Sub-Inspector of Police, Traffic P.S., Tirupati who accompanied him to the store room, brought both the accused and the victim to the police station, got an FIR registered on his own statement, the investigation of which was conducted by PW11, S.M. Khaleel, the Inspector of Police.

23. We see no reason as to why this Court should disbelieve the statements of PW1, PW2, PW3, PW5 and PW11, particularly when they stood the lengthy cross-examination without any material damage to the case of the prosecution.

24. According to the medical evidence and statements of PW8 and PW9, the victim was 11 years old at the time of occurrence and her private parts were tender to touch. The doctor, PW9 had reserved her final opinion awaiting the FSL Report. According to the FSL Report, the *langa* of the girl as well as the drawer of the accused were containing semen of human origin. The slides which contained the swab taken from the vagina of the girl also showed presence of semen of human origin. It may be noticed that these reports, in relation to Items 1, 2, 4, 5 and 6 came despite the fact that the girl had washed herself after the occurrence.

25. The mere fact that the hymen was intact and there was no actual wound on her private parts is not conclusive of the fact that she was not subjected to rape. According to PW9, there was a definite indication of attempt to rape the girl. Also, later semen of human origin was traceable in the private parts of the girl, as indicated by the FSL Report. This would sufficiently indicate that she had been subjected to rape. Penetration itself proves the offence of rape, but the contrary is not true i.e. even if there is no penetration, it does not necessarily mean that there is no rape. The Explanation to

Section 375 IPC has been worded by the legislature so as to presume that if there was penetration, it would be sufficient to constitute sexual intercourse necessary for the offence of rape. Penetration may not always result in tearing of the hymen and the same will always depend upon the facts and circumstances of a given case. The Court must examine the evidence of the prosecution in its entirety and then see its cumulative effect to determine whether the offence of rape has been committed or it is a case of criminal sexual assault or criminal assault outraging the modesty of a girl.

26. At this stage, we may make a reference to the judgments of this Court which would support the view that we have taken. Firstly, in the case of *Guddu @ Santosh v. State of Madhya Pradesh* [(2006) Supp. 1 SCR 414], where the Court was dealing with somewhat similar circumstances, this Court made a finding that the High Court had failed to notice that even slight penetration was sufficient to constitute the offence of rape and upheld the conviction of accused, though the sentence was reduced. It held as under:-

> "It is not a case where merely a preparation had been undergone by the appellant as contended by the learned Counsel. Evidently, the appellant made an attempt to criminally assault the prosecutrix. In fact, from the nature of the medical evidence an inference could 'also have been drawn by the High Court that there had been penetration. The High Court failed to notice that even slight penetration was sufficient to constitute an offence of rape. The redness of the hymen would not have been possible but for penetration to some extent. In *Kappula Venkat Rao* (supra), this Court categorically made a distinction between the preparation for commission of an offence and attempt to commit the same, in the following terms:
>
> Attempt to commit an offence can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the

offence and which is a step towards the commission of the offence. The moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence. The word 'attempt' is not itself defined, and must, therefore, be taken in its ordinary meaning. This is exactly what the provisions of Section 511 require. An attempt to commit a crime is to be distinguished from an intention to commit it, and from preparation made for its commission. Mere intention to commit an offence, not followed by any act, cannot constitute an offence. The will is not to be taken for the deed unless there be some external act which shows that progress has been made in the direction of it, or towards maturing and effecting it. Intention is the direction of conduct towards the object chosen upon considering the motives which suggest the choice. Preparation consists in devising or arranging the means or measure necessary for the commission of the offence. It differs widely from attempt which is the direct movement towards the commission after preparations are made. Preparation to commit an offence is punishable only when the preparation is to commit offence under Section 122 (waging war against the Government of India) and Section 399 (preparation to commit dacoity). The dividing line between a mere preparation and an attempt is sometimes thin and has to be decided on the facts of each case.

(Emphasis supplied)"

27. Secondly, in the case of *Tarkeshwawr Sahu v. State of Bihar (now Jharkhand)* [(2006) 8 SCC 560], the Court held as under:-

10. Under Section 375 IPC, six categories indicated above are the basic ingredients of the offence. In the facts and circumstances of this case, the prosecutrix was about 12 years of age, therefore, her consent was irrelevant. The appellant had forcibly taken her to his gumti with the

intention of committing sexual intercourse with her. The important ingredient of the offence under Section 375 punishable under Section 376 IPC is penetration which is altogether missing in the instant case. No offence under Section 376 IPC can be made out unless there was penetration to some extent. In the absence of penetration to any extent, it would not bring the offence of the appellant within the four corners of Section 375 of the Penal Code. Therefore, the basic ingredients for proving a charge of rape are the accomplishment of the act with force. The other important ingredient is penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of semen or even an attempt at penetration into the private part of the victim completely, partially or slightly would be enough for the purpose of Sections 375 and 376 IPC. This Court had an occasion to deal with the basic ingredients of this offence in *State of U.P.* v. *Babul Nath*. In this case, this Court dealt with the basic ingredients of the offence under Section 375 in the following words: (SCC p. 34, para 8)

"*8.* It may here be noticed that Section 375 IPC defines rape and the Explanation to Section 375 reads as follows:

'*Explanation.*—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.'

From the Explanation reproduced above it is distinctly clear that ingredients which are essential for proving a charge of rape are the accomplishment of the act with force and resistance. To constitute the offence of rape neither Section 375 IPC nor the Explanation attached thereto require that there should necessarily be complete penetration of the penis into the private part of the victim/ prosecutrix. In other words to constitute the offence of rape it is not at all necessary that there should be complete penetration of the male organ with emission of semen and rupture of hymen. Even partial or slightest penetration of

the male organ within the labia majora or the vulva or pudenda with or without any emission of semen or even an attempt at penetration into the private part of the victim would be quite enough for the purpose of Sections 375 and 376 IPC. That being so it is quite possible to commit legally the offence of rape even without causing any injury to the genitals or leaving any seminal stains. But in the present case before us as noticed above there is more than enough evidence positively showing that there was sexual activity on the victim and she was subjected to sexual assault without which she would not have sustained injuries of the nature found on her private part by the doctor who examined her."

xxxxx xxxxx xxxxx xxxxx

12. The word "penetrate", according to *Concise Oxford Dictionary* means "find access into or through, pass through".

13. In order to constitute rape, what Section 375 IPC requires is medical evidence of penetration, and this may occur and the hymen remain intact. In view of the Explanation to Section 375, mere penetration of penis in vagina is an offence of rape. Slightest penetration is sufficient for conviction under Section 376 IPC.

28. In light of the above judgments, it can safely be concluded that there was limited penetration due to which probably the hymen of the victim girl was not ruptured. The Court should adhere to a comprehensive approach, in order to examine the case of the prosecution. But as regards the facts and circumstances of the present case, the presence of the element of *mens rea* on part of the accused cannot be denied. He had fully prepared himself. He first lured the girl not only by inciting her, but even by actually purchasing bangles for her. Thereafter, he took the girl to a room where he threatened her of physical assault as a consequence of which the girl did not

raise protest. This is why no marks of physical injury could be noticed on her body. Absence of injuries in the context of the present case would not justify drawing of any adverse inference against the prosecution, but on the contrary would support the case of the prosecution.

29. It will be useful to refer to the judgment of this Court in the case of *O.M. Baby (Dead) by L.Rs. v. State of Kerala* [JT 2012 (6) SC 117], where the Court held as follows:-

"16. A prosecutrix of a sex offence cannot be put on a par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to

be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence.

14. We would further like to observe that while appreciating the evidence of the prosecutrix, the court must keep in mind that in the context of the values prevailing in the country, particularly in rural India, it would be unusual for a woman to come up with a false story of being a victim of sexual assault so as to implicate an innocent person. Such a view has been expressed by the judgment of this Court in the case of *State of Punjab v. Gurmit Singh* (1996) 2 SCC 384 and has found reiteration in a recent judgment in *Rajinder @ Raju v. State of H.P.* (2009) 16 SCC 69, para 19 whereof may be usefully extracted:

> 19. In the context of Indian culture, a woman - victim of sexual aggression - would rather suffer silently than to falsely implicate somebody. Any statement of rape is an extremely humiliating experience for a woman and until she is a victim of sex crime, she would not blame anyone but the real culprit. While appreciating the evidence of the prosecutrix, the courts must always keep in mind that no self-respecting woman would put her honour at stake by falsely alleging commission of rape on her and therefore, ordinarily a look for corroboration of her testimony is unnecessary and uncalled for. But for high improbability in the prosecution case, the conviction in the case of sex crime may be based on the sole testimony of the prosecutrix. It has been rightly said that corroborative evidence is not an imperative component of judicial credence in every case of rape nor the absence of injuries on the private parts of the victim can be construed as evidence of consent."

30. Reference can also be made to the judgment of this Court in the case of *State of Himachal Pradesh v. Asha Ram* [AIR 2006 SC 381].

31. Thus, as per the facts and circumstances of the present case, there is a direct link of the accused with the commission of the crime. Such conclusion can well be established by the statement of the witnesses, the recoveries made, the Medical Report and the FSL Report. It does not leave any doubt in our mind that the accused has committed the offence with which he was charged.

32. Still, another argument was advanced to contend that the conviction of the appellant cannot be based on the sole statement of prosecutrix PW2, because it is not reliable. We have already discussed above at some length that there is nothing on record to show that the statement of PW2 is either unreliable or untrustworthy. On the contrary, in light of the given facts, the statement of PW2 is credible, truthful and, thus, can safely be relied upon.

33. Statement of PW2 is fully corroborated by the statements of PW1 and PW3. They are independent witnesses and have no personal interest or motive of falsely implicating the accused or supporting the case of the prosecution. PW2 is a poor young girl who works as a maid servant. PW3 coming to her rescue and PW1 reaching the spot without any delay, saved the girl from further assault and serious consequences. Firstly, the High Court has not based the conviction of the accused solely on the statement of PW2. Even if it were so, still the judgment of the High Court will not call for any interference because the statement of PW2 was reliable, trustworthy and by itself sufficient to convict the accused, by virtue of it being the statement of the victim herself.

34. Lastly, coming back to the first contention raised on

behalf of the accused, it is true that the appellate Court has to be more cautious while dealing with the judgment of acquittal. Under the Indian criminal jurisprudence, the accused has two fundamental protections available to him in a criminal trial or investigation. Firstly, he is presumed to be innocent till proved guilty and secondly that he is entitled to a fair trial and investigation. Both these facets attain even greater significance where the accused has a judgment of acquittal in his favour. A judgment of acquittal enhances the presumption of innocence of the accused and in some cases, it may even indicate a false implication. But then, this has to be established on record of the Court.

35. When we mention about the Court being cautious, it does not mean that the appellate Court cannot disturb the finding of acquittal. All that is required is that there should be a compelling rationale and also clear and cogent evidence, which has been ignored by the Trial Court to upset the finding of acquittal. We need not deliberate on this issue in greater detail. Suffice it to notice the recent judgment of this Court in the case of *Ravi Kapur v. State of Rajasthan* [JT 2012(7) SC 480], where the Court, after discussing various other judgments of this Court held on the facts of that case that interference with the judgment of acquittal by the High Court was justified. The Court explained the law as under:-

> 37. Lastly, we may proceed to discuss the first contention raised on behalf of the accused. No doubt, the Court of appeal would normally be reluctant to interfere with the judgment of acquittal but this is not an absolute rule and has a number of well accepted exceptions. In the case of *State of UP* v. *Banne & Anr.* [(2009) 4 SCC 271], the Court held that even the Supreme Court would be justified in interfering with the judgment of acquittal of the High Court but only when there are very substantial and compelling reasons to discard the High Court's decision. In the case of *State of Haryana v. Shakuntala & Ors.*

[2012 (4) SCALE 526], this Court held as under :

> "36. The High Court has acquitted some accused while accepting the plea of *alibi* taken by them. Against the judgment of acquittal, onus is on the prosecution to show that the finding recorded by the High Court is perverse and requires correction by this Court, in exercise of its powers under Article 136 of the Constitution of India. This Court has repeatedly held that an appellate Court must bear in mind that in case of acquittal, there is a double presumption in favour of the accused. Firstly, the presumption of innocence is available to such accused under the fundamental principles of criminal jurisprudence, i.e., that every person shall be presumed to be innocent unless proved guilty before the court and secondly, that a lower court, upon due appreciation of all evidence has found in favour of his innocence. Merely because another view is possible, it would be no reason for this Court to interfere with the order of acquittal.

37. In *Girja Prasad (Dead) By Lrs. v. State of M.P.* [(2007) 7 SCC 625], this Court held as under:-

> "28. Regarding setting aside acquittal by the High Court, the learned Counsel for the appellant relied upon *Kunju Muhammed v. State of Kerala* (2004) 9 SCC 193, *Kashi Ram v. State of M.P.* AIR 2001 SC 2902 and *Meena v. State of Maharashtra* 2000 Cri LJ 2273. In our opinion, the law is well settled. An appeal against acquittal is also an appeal under the Code and an Appellate Court has every power to reappreciate, review and reconsider the evidence as a whole before it. It is, no doubt, true that there is presumption of innocence in favour of the accused and that presumption is reinforced by an order of acquittal recorded by the Trial Court.

But that is not the end of the matter. It is for the Appellate Court to keep in view the relevant principles of law, to reappreciate and reweigh the evidence as a whole and to come to its own conclusion on such evidence in consonance with the principles of criminal jurisprudence."

38. In *Chandrappa v. State of Karnataka* [(2007) 4 SCC 415], this Court held as under:-

"42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the

presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

39. In *C. Antony v. K.G. Raghavan Nair* [(2003) 1 SCC 1], this Court held :-

"6. This Court in a number of cases has held that though the appellate court has full power to review the evidence upon which the order of acquittal is founded, still while exercising such an appellate power in a case of acquittal, the appellate court, should not only consider every matter on record having a bearing on the question of fact and the reasons given by the courts below in support of its order of acquittal, it must express its reasons in the judgment which led it to hold that the acquittal is not justified. In those line of cases this Court has also held that the appellate court must also bear in mind the fact that the trial court had the benefit of seeing the witnesses in the witness box and the presumption of innocence is not weakened by the order of acquittal, and in such cases if two reasonable conclusions can be reached on the basis of the evidence on record, the appellate court should not disturb the finding of the trial court. (See *Bhim Singh Rup Singh v. State of Maharashtra*[1] *and Dharamdeo Singh v. State of Bihar.*)"

40. The State has not been able to make out a case of exception to the above settled principles. It was for the State to show that the High Court has completely fallen in error of law or that judgment in relation to these accused was palpably erroneous, perverse or untenable. None of these parameters are satisfied in the appeal preferred by the State against the acquittal of three accused."

38. In the present case, there are more than sufficient reasons for the High Court to interfere with the judgment of acquittal recorded by the Trial Court. Probably, this issue was not even raised before the High Court and that is why we find that there are hardly any reasons recorded in the judgment of the High Court impugned in the present appeal. Be that as it may, it was not a case of non-availability of evidence or presence of material and serious contradictions proving fatal to the case of the prosecution. There was no plausible reason before the Trial Court to disbelieve the eye account given by PW2 and PW4 and the Court could not have ignored the fact that the accused had been duly identified at the place of occurrence and even in the Court. The Trial Court has certainly fallen in error of law and appreciation of evidence. Once the Trial Court has ignored material piece of evidence and failed to appreciate the prosecution evidence in its correct perspective, particularly when the prosecution has proved its case beyond reasonable doubt, then it would amount to failure of justice. In some cases, such error in appreciation of evidence may even amount to recording of perverse finding. We may also notice at the cost of repetition that the Trial Court had first delivered its judgment on 24th June, 1999 convicting the accused of the offences. However, on appeal, the matter was remanded on two grounds, i.e., considering the effect of non-holding of test identification parade and not examining the doctor. Upon remand, the Trial Court had taken a different view

than what was taken by it earlier and vide judgment dated 11th May, 2006, it had acquitted the accused. This itself became a ground for interference by the High Court in the judgment of acquittal recorded by the Trial Court. From the judgment of the Trial Court, there does not appear to be any substantial discussion on the effect of non-holding of the test identification parade or the non-examination of the doctor. On the contrary, the Trial Court passed its judgment on certain assumptions. None of the witnesses, not even the accused, in his statement, had stated that the jeep was at a fast speed but still the Trial Court recorded a finding that the jeep was at a fast speed and was not being driven properly. The Trial Court also recorded that a suspicion arises as to whether Ravi Kapur was actually driving the bus at the time of the accident or not and identification was very important.

39. We are unable to understand as to how the Trial Court could ignore the statement of the eye-witnesses, particularly when they were reliable, trustworthy and gave the most appropriate eye account of the accident. The judgment of the Trial Court, therefore, suffered from errors of law and in appreciation of evidence both. The interference by the High Court with the judgment of acquittal passed by the Trial Court does not suffer from any jurisdictional error."

36. Reverting to the facts of the present case, the High Court has recorded reasons while interfering with the judgment of acquittal by the Trial Court. We may also notice that the Trial Court attempted to create a serious doubt in the case of the prosecution on the basis of the statement of PW3, that he does not know what PW2 narrated to PW1, when he made inquiries. We do not think that this was a proper way to appreciate the evidence on record.

37. The statement of a witness must be read in its entirety. Reading a line out of context is not an accepted canon of appreciation of evidence.

38. Another aspect of the statement of PW3 which the Trial Court had a doubt with, was, as to how PW3 had noticed the accused taking away the minor girl along with him to the tennis store room and how he suspected some foul play.

39. PW3 admittedly was a rickshaw puller and was standing at the gate of the University. The tennis store room was quite near to the gate. PW3, quite obviously knew the accused as well as PW2. The conduct of PW3 in the given circumstances of the case was precisely as it would have been of a person of normal behaviour and was not at all extra-ordinary in nature, particularly in the late hours of evening.

40. Still, another fact that was taken into consideration by the Trial Court while acquitting the accused was that Ext. P.5 neither showed any injuries on the body nor reflected that rape was attempted on the victim. In our considered view, the course of appreciation of evidence and application of law adopted by the Trial Court was not proper. It was expected of the Trial Court to examine the cumulative effect of the complete evidence on record and case of the prosecution in its entirety.

41. Equally without merit is the contention that Ext. P.5 which was authored by PW9 upon examination of the victim neither recorded any injuries on her person nor the fact that she was raped. It is for the reason that PW9 had not recorded any final opinion and kept the matter pending, awaiting the FSL Report. Furthermore, in Ext. P.5, she had noticed that her parts were tender to touch. The vaginal swabs and vaginal wash were taken and slides were preserved. She was also sent to the hospital for further examination. Thus, Ext. P.5 cannot be looked into in isolation and must be examined in light of other ocular and documentary evidence. In the peculiar facts and circumstances of the case, it was not even expected of PW1

or the Investigating officer PW11 to examine the victim particularly in relation to her private parts. Absence of such recording does not cause any infirmity to the case of the prosecution much less a reason for acquitting the accused.

42. In our considered opinion, the learned Trial Court has failed to appreciate the evidence on record cumulatively and in its correct perspective by ignoring the material piece of evidence and improper appreciation of evidence. It has recorded findings which are on the face of it unsustainable. This error was rightly corrected by the High Court, and we see no reason to interfere with the judgment of conviction recorded by the High Court.

43. We find no merit in the present appeal and the same is dismissed.

B.B.B. Appeal dismissed.

SOMAN

v

STATE OF KERALA

(Criminal Appeal Nos.1533-1534 of 2005)

DECEMBER 14, 2012.

[AFTAB ALAM AND RANJANA PRAKASH DESAI, JJ.]

[KERALA] ABKARI ACT:

ss.55(a) and (i), 57A(2)(ii) and 58 – Sale by accused, a retail vendor, of spurious liquor adulterated with methyl alcohol – Death of one person while others developed serious sickness – High Court taking into account the consequences of the culpable act, enhanced the sentence from two years RI, as awarded by trial court, to 5 years RI – Held: High Court was fully justified in taking into account the death of a person, as a result of consuming the illicit liquor, sold by the appellant as a ground for enhancing his sentence from two years to five years RI – There was absolutely no illegality or lack of jurisdiction in the order of High Court – However, in view of the fact that in the case of the supplier co-accused, sentence of life imprisonment has been reduced to 10 years RI, sentence of appellant also reduced to 3 years RI being minimum u/s.57A(2)(ii) – Sentence / Sentencing.

SENTENCE / SENTENCING:

Awarding of appropriate punishment – Taking into consideration the consequences of culpable act and its impact on other people – Principles from judicial pronouncements, culled out.

The appellant, a retail vendor, was one of the accused in the case of supply of spurious liquor, contaminated with methyl alcohol, consumption whereof

took the lives of 31 people and more than 500 developed serious sickness out of which six lost their vision completely. The medical evidence and the chemical analysis established that by consuming the liquor adulterated with methyl alcohol, sold by the appellant, one person died and several others became seriously sick. The trial court convicted the appellant u/ss 55(a) and (i), 57A and 58 of the [Kerala] Abkari Act and sentenced him to undergo rigorous imprisonment for two years on each count and a fine of Rs. 1 lakh on ach count except u/s 57A. He was also convicted u/s 201 IPC and sentenced to rigorous imprisonment for six months and fine of Rs.5,000/- . The accused as well as the State filed appeals. The High Court dismissed the appeals of the accused including the one filed by the appellant, and dealing with question of sentence on the basis of the State's appeal, enhanced appellant's sentence of imprisonment from 2 years to 5 years.

In the instant appeal filed by the accused, it was contended for the appellant that the death of a person as a result of sale of spurious liquor could not have been a ground for imposition of a heavier sentence; and that his conviction was not maintainable u/s.57(2)(ii).

The question before the Court was: whether or not the consequences of a culpable act and its impact on other people can be a relevant consideration for imposing a heavier punishment, of course, within the limits fixed by the law.

Dismissing the appeals, the Court

HELD: 1.1. Punishment should acknowledge the sanctity of human life. Giving punishment to the wrongdoer is at the heart of the criminal justice delivery, but in our country, it is the weakest part of the administration of criminal justice. There are no legislative

or judicially laid down guidelines to assist the trial court in meting out the just punishment to the accused facing trial before it after he is held guilty of the charges. Nonetheless, if one goes through the decisions of this Court carefully, it would appear that this Court takes into account a combination of different factors while exercising discretion in sentencing, that is proportionality, deterrence, rehabilitation etc. [para 12-13 and 21] [1169-C-D-H; 1170-A; 1174-C-D]

State of Punjab v. Prem Sagar **2008 (8) SCR 574 = 2008 (7) SCC 550;** *Ramashraya Chakravarti v. State of Madhya Pradesh* **1976 (2) SCR 703 = 1976 (1) SCC 281,** *Dhananjoy Chatterjee alias Dhana v. State of W.B.* **1994 (1) SCR 37 = 1994 (2) SCC 220;** *State of Madhya Pradesh v. Ghanshyam Singh* **2003 (3) Suppl. SCR 618 = 2003 (8) SCC 13,** *State of Karnataka v. Puttaraja* **2003 (6) Suppl. SCR 274 = 2004 (1) SCC 475,** *Union of India v. Kuldeep Singh* **2003 (6) Suppl. SCR 526 = 2004 (2) SCC 590,** *Shailesh Jasvantbhai and another v. State of Gujarat and others* **2006 (1) SCR 477 = 2006 (2) SCC 359;** *Siddarama and others v. State of Karnataka* **2006 (6) Suppl. SCR 276 = 2006 (10) SCC 673,** *State of Madhya Pradesh v. Babulal* **2007 (12) SCR 795 =2008 (1) SCC 234;** *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* **2009 (9) SCR 90 = 2009 (6) SCC 498 – referred to**

S Nyathi and The State **[2005] ZASCA 134 (23 May 2005) – referred to.**

1.2. In a proportionality analysis, it is necessary to assess the seriousness of an offence in order to determine the commensurate punishment for the offender. The seriousness of an offence depends, apart from other things, also upon its harmfulness. To understand the relevance of consequences of criminal conduct from a sentencing standpoint, one must examine: (1) whether such consequences enhanced the

harmfulness of the offence; and (2) whether they are an aggravating factor that need to be taken into account by the courts while deciding on the sentence. [para 14] [1170-C-F]

Sentencing and Criminal Justice by Andrew Ashworth**, 5th Edition, Cambridge University Press, 2010 – referred to**

1.3. From the judicial pronouncements, one may conclude that:

i. Courts ought to base sentencing decisions on various different rationales – most prominent amongst which would be proportionality and deterrence.

ii. The question of consequences of criminal action can be relevant from both: proportionality and deterrence standpoint.

iii. Insofar as proportionality is concerned, the sentence must be commensurate with the seriousness or gravity of the offence.

iv. One of the factors relevant for judging seriousness of the offence is the consequences resulting from it.

v. Unintended consequences/harm may still be properly attributed to the offender if they were reasonably foreseeable. In case of illicit and underground manufacture of liquor, the chances of toxicity are so high that not only its manufacturer but the distributor and the retail vendor would know its likely risks to the consumer. Hence, even though any harm to the consumer might not be directly intended, some aggravated culpability must attach if the

consumer suffers some grievous hurt or dies as result of consuming the spurious liquor. [para 22] [1174-D-H; 1175-A-B]

1.4. In the instant case, it may be seen that all the three provisions as contained u/s. 55, 57A and 58 of the [Kerala] Abkari Act, provide for long periods of imprisonment, leaving it to the discretion of the court to fix the exact sentence having regard to the facts and circumstances of a particular case. In regard to taking into consideration the consequences of an offence for determining the appropriate punishment, a complete answer is to be found in s. 57A itself. Under s.57A, adulteration of liquor or omission to take reasonable precaution to prevent mixing of any noxious substance with any liquor are made offences. And then different sentences are provided in clauses (i), (ii) and (iii), depending upon the different consequences resulting from the offence. In case of grievous hurt, the minimum sentence is two years' imprisonment, in case of death, three years and, in any other case, one year's imprisonment. There is no reason why the same basis may not be adopted for sentencing under the other provisions of the Act, e.g., ss. 8, 55 (a) and (i) and 58. [para 10-11] [1168-D; 1169-A-C]

1.5. Therefore, this Court is clearly of the view, that the High Court was fully justified in taking into account the death of a person, as a result of consuming the illicit liquor, sold by the appellant as a ground for enhancing his sentence from two years to five years rigorous imprisonment. There was absolutely no illegality or lack of jurisdiction in the order of the High Court. [para 23] [1175-B-D]

1.6. No good reason has been given to hold that the appellant's conviction u/s. 57 (2) (ii) is not sustainable. [Para 11] [1168-G-H]

1.7. In the case of a co-accused, namely, accused no. 25, who was the supplier of the illicit liquor to the appellant, this Court, while maintaining the conviction of accused no.25 under the various provisions as recorded by the trial court and affirmed by the High Court, deemed it fit to reduce his sentence of life term u/s 57A(2)(ii) of the Act to ten years rigorous imprisonment*. It will, therefore, not be fair not to give the same concession to the appellant, who was the last and weakest link in the chain. Accordingly, his sentence from five years rigorous imprisonment is reduced to three years rigorous imprisonment, being the minimum u/ss 57A (2) (ii) of the Act. The fines imposed by the courts below for the different offences remain unaltered. [para 23] [1175-B-E-G-H; 1176-A-C]

****Chandran v. State of Kerala* 2011 (8) SCR 273 = 2011 (5) SCC 161 - referred to**

Case Law Reference:

2011 (8) SCR 273	referred to	para 23
2008 (8) SCR 574	referred to	para 13
1976 (2) SCR 703	referred to	para 13
1994 (1) SCR 37	referred to	para 13
2003 (3) Suppl. SCR 618	referred to	para 13
2003 (6) Suppl. SCR 274	referred to	para 13
2003 (6) Suppl. SCR 526	referred to	para 13
2006 (1) SCR 477	referred to	para 13
2006 (6) Suppl. SCR 276	referred to	para 13
2007 (12) SCR 795	referred to	para 13
2009 (9) SCR 90	referred to	para 13

[2005] ZASCA 134 referred to para 20

2011 (8) SCR 273 referred to para 23

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 1533-1534 of 2005.

From the Judgment & Order dated 08.10.2004 of the High Court of Kerala at Ernakulam in Criminal Appeal No. 711 of 2002 (C) and Criminal Appeal No. 1285 of 2004.

T.V. George, Dushyant Kumar, Maurya Sarkar for the Appellant.

M.T. George for the Respondent.

The Judgment of the Court was delivered by

AFTAB ALAM, J. 1. The short question that arises for consideration in these appeals is whether or not the social consequences of a culpable act and its impact on other people can be a relevant consideration for giving a heavier punishment, of course, within the limits fixed by the law. The facts and circumstances in which the question arises may be briefly stated thus. In October 2000, 31 people died, and more than 500 developed serious sicknesses, of which six lost their vision completely as a result of consuming spurious liquor, contaminated with methyl alcohol at different places in Kollam district, Kerala. Cases were initially registered at different police stations, but, later on, all the cases were consolidated into a single case and on the basis of investigations made by the police, 48 accused in all were put on trial. The accused were broadly classified into three groups: one, the maker and manufacturers of the spurious liquor; two, the distributors and suppliers of the killer brew; and third the retail vendors who sold the stuff to the consumers. The appellant who was accused No.41 before the trial court fell in the third category. The prosecution case, insofar as the appellant is concerned, was that he was engaged in the sale of liquor and he received his supplies from accused Nos. 25 & 26.

2. Before the trial court the prosecution was able to successfully establish that on October 21, 2000, two days prior to the tragic occurrence, fresh supply was brought to the appellant on a motor cycle. The arrack received by him on that date was sold to various persons and on consuming it, they became very ill and one of them, namely, Yohannan died. The post-mortem report of Yohannan showed that he died of methanol poisoning. At the time of post-mortem his blood and urine samples were taken for chemical analysis and the report (Ext.P1059) showed presence of methyl alcohol in the samples. Further, on the basis of a disclosure statement made by the appellant [Ext.P413(a)] a plastic can (M.O.98) containing the residue of the spirit sold by him was recovered and seized from his shop. On chemical analysis, the contents of the can were found adulterated with methyl alcohol. On the basis of the evidences led before it, the trial court found and held, and quite rightly, that the spirit sold by the appellant that caused the death of Yohannan and sickness to several other persons was spurious, being contaminated with highly injurious and poisonous substances and held him guilty of Sections 55(a) & (i), 57A and 58 of the (Kerala) Abkari Act (hereinafter 'the Act'). The trial court sentenced the appellant to undergo rigorous imprisonment for two years on each count and a fine of Rs.One Lakh on each count except under Section 57A and in default to undergo simple imprisonment for one year on each count. The trial court also found the appellant guilty under Section 201 of the Penal Code and on that count sentenced him to rigorous imprisonment for six months and a fine of Rs.5,000/- with the default sentence of simple imprisonment for one month. The trial court directed that the sentences of imprisonment shall run concurrently.

3. Against the judgment and order passed by the trial court, appeals were preferred both by the accused, including the present appellant and the State. The State in its appeal

questioned the acquittal of some of the accused and also demanded enhancement of sentence in respect of those who were convicted and sentenced by the trial court. The High Court by its judgment and order dated October 8, 2004 dismissed the appeals of the accused, including the one by the appellant. However, dealing with the question of sentence on the basis of the State's appeal deemed it fit to enhance the appellant's sentence of imprisonment from two years to five years. In this connection, the High Court made the following observations:-

> "….Evidence adduced in this case clearly establishes that A 41 sold illicit arrack on 21.10.2000 and 22.10.2000 and Yohannan died due to methanol poisoning of taking liquor from him and several persons were sustained injuries also. His conviction for offences under Section 55(a) and (i) and under Section 58 are confirmed. Even though he was only a small retail seller, who got liquor from A 25, one person died and several persons were injured. But, he is punished only for two years under Section 55(a) and (i) and punishment should commensurate with the offence. Hence, his conviction and sentence under Section 57A (2) (ii) is confirmed. Under Section 55 maximum punishment is ten years. We are of the opinion that the sentence imposed on him should be enhanced. He is sentenced to undergo rigorous imprisonment for five years (instead of two years as imposed by the Sessions Judge) and to pay a fine of Rs. one Lakh in default to undergo simple imprisonment for six months on each count under Sections 55(a) and (i). His conviction and sentence for other offence are also confirmed. Sentences shall run concurrently."

4. Against the judgment and order passed by the High Court, the accused came to this Court in different batches. In some Special Leave Petitions filed by different accused leave was granted but the Special Leave Petition Nos.237-238 filed by one Sudhakaran @ Sudha and the present appellant was initially dismissed by order dated January 24, 2005. Later on,

the appellant filed Review Petition (Crl.) Nos.613-614 of 2005, which were allowed by order dated November 14, 2005 and leave was granted. By the same order, the appellant was also enlarged on bail.

5. Learned counsel appearing for the appellant did not at all question the conviction of the appellant under the different provisions of the Act. He has, however, vehemently contended that the High Court was completely wrong in enhancing the appellant's sentence and imprisonment from two years to five years. Learned counsel submitted that the only ground on which the High Court has enhanced the appellant's sentence was that the spirit sold by the appellant led to the death of one person. According to the learned counsel, this could not have been the valid ground for giving a heavier punishment.

6. Before considering this submission made by the learned counsel, it will be apposite to take a look at the relevant provisions of the Act, including those under which the appellant has been held guilty. Section 8 of the Act prohibits manufacture, import, export, transport, transit, possession, storage, sales, etc., of arrack and it is in the following terms:-

> "8.(1) Prohibition of manufacture, import, export, transport, transit, possession, storage, sales etc., of arrack.- No person shall manufacture, import, export, transport, [without permit transit], possess, store, distribute, bottle or sell arrack in any form.
>
> (2) If any person contravenes any provisions of sub-section (1), he shall be punishable with imprisonment for a term which may extend to ten years and with fine which shall not be less than rupees one lakh."

7. Section 55 of the Act insofar as relevant for the present, is as under:-

> "55. For illegal import, etc.-Whoever in contravention of this

Act or of any rule or order made under this Act:

(a)imports, exports, [transports, transits or possesses] liquor or any intoxicating drug; or

(b) xxxx

(c) xxxx

(d) xxxx

(e) xxxx; or

(f) xxxx; or

(g) xxxx; or

(h) bottles any liquor for purposes of sale; or

(i) [sells or stores for sale liquor] or any intoxicating drug;][shall be punishable]

(1) for any offence, other than an offence falling under clause (d) or clause (e), with imprisonment for a term which may extend to [ten years and with fine which shall not be less than rupees one lakh and]

(2) for an offence falling under clause (d) or clause (e), with imprisonment for a term which may extend to one year, or with fine which may extend to ten thousand rupees, or with both."

8. Section 57A reads as under:-

"57A. For adulteration of liquor or intoxicating drug with noxious substances, etc.-(1) Whoever mixes or permits to be mixed any noxious substance or any substance which is likely to endanger human life or to cause grievous hurt to human beings, with any liquor or intoxicating drug shall, on conviction, be punishable-

(i) if, as a result of such act, grievous hurt is caused to any person, with imprisonment for a term which shall not be less than two years but which may extend to imprisonment for life, and with fine which may extend to fifty thousand rupees;

(ii) if, as a result of such act, death is caused to any person, with death or imprisonment for a term which shall not be less than three years but which may extend to imprisonment for life, and with fine which may extend to fifty thousand rupees;

(iii) in any other case, with imprisonment for a term which shall not be less than one year, but which may extend to ten years, and with fine which may extend to twenty-five thousand rupees.

Explanation.- For the purpose of this Section and Section 57B, the expression "grievous hurt" shall have the same meaning as in Section 320 of the Indian Penal Code, 1860 (Central Act 45 of 1860).

(2) Whoever omits to take reasonable precautions to prevent the mixing of any noxious substance or any substance which is likely to endanger human life or to cause grievous hurt to human beings, with any liquor or intoxicating drug shall, on conviction, be punishable,-

(i)if as a result of such omission, grievous hurt is caused to any person, with imprisonment for a term which shall not be less than two years but which may extend to imprisonment for lie, and with fine which may extend to fifty thousand rupees;

(ii)if as a result of such omission, death is caused to any person, with imprisonment for a term which shall not be less than three years but which may extend to imprisonment for life, and with fine which may extend to fifty thousand rupees;

(iii) in any other case, with imprisonment for a term which shall not be less than one year but which may extend to ten years, and with fine which may extend to twenty-five thousand rupees.

(3) Whoever possesses any liquor or intoxicating drug in which any substance referred to in sub-section (1) is mixed, knowing that such substance is mixed with such liquor or intoxicating drug shall, on conviction, be punishable with imprisonment for a term which shall not be less than one year but which may extend to ten years, and with fine which may extend to twenty-five thousand rupees.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (Central Act 2 of 1974) no person accused or convicted of an offence under sub-section (1) or sub-section (3) shall, if in custody, be released on bail or on his own bond, unless-

(a) the prosecution has been given an opportunity to oppose the application for such release, and

(b) where the prosecution opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence.

(5) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872)-

(a) where a person is prosecuted for an offence under sub-section (1) or sub-section (2), the burden of proving that he has not mixed or permitted to be mixed or, as the case may be, omitted to take reasonable precautions to prevent the mixing of, any substance referred to in that sub-section with any liquor or intoxicating drug shall be on him;

(b) where a person is prosecuted for an offence under sub-section (3) for being in possession of any liquor or

intoxicating drug in which any substance referred to in sub-section (1) is mixed, the burden of proving that he did not know that such substance was mixed with such liquor or intoxicating drug shall be on him"

9. Section 58 reads as under:-

"58. For possession of illicit liquor.- Whoever, without lawful authority, has in his possession any quantity of liquor or of any intoxicating drug, knowing the same to have been unlawfully imported, transported or manufactured, or knowing [the duty, tax or rental payable under this Act] not to have been paid therefor, [shall be punishable with imprisonment for a term which may extend to ten years and with fine which shall not be less than rupees one lakh]."

10. It may be seen that all the three provisions as contained under Sections 55, 57A and 58 provide for long periods of imprisonment, leaving it to the discretion of the court to fix the exact sentence having regard to the facts and circumstances of a particular case. Section 57A which is one of the Sections under which the appellant is convicted provides for a minimum sentence of three years' imprisonment. When it was pointed out to the learned counsel that under the relevant provisions the sentence of imprisonment could vary from one day to ten years (under Section 55) and from three years to a life term (under Section 57A(2)(ii)) and from one day to ten years under Section 58, he replied that the appellant's conviction was not maintainable under Section 57A(2)(ii) and so far as Sections 55 and 58 are concerned, the relevant considerations for giving a life sentence of imprisonment would be the amount of spirit stored for sale. According to him, the death of a person as a result of sale of the spurious liquor could not have been a ground for imposition of a heavier sentence.

11. We find no substance in the submissions. First, no good reason is given to hold that the appellant's conviction under Section 57 (2) (ii) is not sustainable; secondly, in regard

to the main issue in the case, i.e., whether the consequences of an offence can be taken into consideration for determining the appropriate punishment, a complete answer is to be found in Section 57A itself. Under Section 57A, the adulteration of liquor or the omission to take reasonable precaution to prevent the mixing of any noxious substance with any liquor are made offences. And then different sentences are provided in clauses (i), (ii) and (iii), depending upon the different consequences resulting from the offence. In case of grievous hurt, the minimum sentence is two years' imprisonment, in case of death, three years and in any other case, one year's imprisonment. There is no reason why the same basis may not be adopted for sentencing under the other provisions of the Act, e.g., Sections 8, 55 (a) & (i) and 58.

12. Giving punishment to the wrongdoer is at the heart of the criminal justice delivery, but in our country, it is the weakest part of the administration of criminal justice. There are no legislative or judicially laid down guidelines to assist the trial court in meting out the just punishment to the accused facing trial before it after he is held guilty of the charges. In *State of Punjab v. Prem Sagar*[1] this Court acknowledged as much and observed as under –

> "2. In our judicial system, we have not been able to develop legal principles as regards sentencing. The superior courts except making observations with regard to the purport and object for which punishment is imposed upon an offender, have not issued any guidelines. Other developed countries have done so. At some quarters, serious concerns have been expressed in this behalf. Some committees as for example Madhava Menon Committee and Malimath Committee have advocated introduction of sentencing guidelines."

13. Nonetheless, if one goes through the decisions of this

1. (2008) 7 SCC 550.

Court carefully, it would appear that this Court takes into account a combination of different factors while exercising discretion in sentencing, that is proportionality, deterrence, rehabilitation etc. (See: *Ramashraya Chakravarti v. State of Madhya Pradesh*[2], *Dhananjoy Chatterjee alias Dhana v. State of W.B.*[3], *State of Madhya Pradesh v. Ghanshyam Singh*[4], *State of Karnataka v. Puttaraja*[5], *Union of India v. Kuldeep Singh*[6], *Shailesh Jasvantbhai and another v. State of Gujarat and others*[7], *Siddarama and others v. State of Karnataka*[8], *State of Madhya Pradesh v. Babulal*[9], *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*[10])

14. In a proportionality analysis, it is necessary to assess the seriousness of an offence in order to determine the commensurate punishment for the offender. The seriousness of an offence depends, apart from other things, also upon its harmfulness. The question is whether the consequences of the offence can be taken as the measure for determining its harmfulness? In addition, quite apart from the seriousness of the offence, can the consequences of an offence be a legitimate aggravating (as opposed to mitigating) factor while awarding a sentence. Thus, to understand the relevance of consequences of criminal conduct from a Sentencing standpoint, one must examine: (1) whether such consequences enhanced the harmfulness of the offence; and (2) whether they are an aggravating factor that need to be taken into account by the courts while deciding on the sentence.

2. (2008) 7 SCC 550.
3. (1976) 1 SCC 281.
4. (2003) 8 SCC 13.
5. (2004) 1 SCC 475.
6. (2004) 1 SCC 475.
7. (2006) 2 SCC 359.
8. (2006) 10 SCC 673.
9. (2008) 1 SCC 234.
10. (2009) 6 SCC 498.

15. In *Sentencing and Criminal Justice*, 5th Edition, Cambridge University Press, 2010, Andrew Ashworth cites the four main stages in the process of assessing the seriousness of an offence, as identified in a previous work by Andrew Von Hirsch and Nils Jareborg. (See Pages 108 – 112)

1. Determining the interest that is violated (i.e. physical integrity, material support, freedom from humiliation or privacy/autonomy)

2. Quantification of the effect on the victim's living standard.

3. Culpability of the offender.

4. Remoteness of the actual harm.

16. Ashworth then examines various specific offences to ascertain how seriousness is typically gauged. The most relevant example is that of drug trafficking, where the author notes the problem that the offence lies fairly remote from causing people's deaths. Ashworth further notes that harsh sentences for drug trafficking offences is justified more by deterrent rationales than proportionality concerns, although even the deterrent rationales are beset with problems. (See Pages 128 – 130)

17. Here, it needs to be noted that one major difference between production/sale of spurious liquor and drug trafficking is that in the case of spurious liquor, the consumer does not know what he is consuming, whereas in the case of drugs, the consumer, at least in the initial stages, knowingly and voluntarily chooses to consume the drugs.

18. Ashworth also examines the impact of unintended consequences on sentencing. He notes that there is a tendency to take those into account in manslaughter and for causing death by bad driving. The extent to which unintended consequences may be taken into account would depend, for

instance, on the extent to which the offender was put on notice of the risk of death. Thus, where it is known that driving dangerously or under the influence of alcohol creates risk for the safety of others, there would be a greater emphasis on resulting death while determining the sentence. (See Pages 153 – 154).

19. Arguably, one might surmise that manufacturers of spurious liquor must be able to reasonably foresee that consumption of spurious liquor would affect the health (and possibly life) of others. Thus, there may be some basis for taking into account the unintended consequences while determining sentence. The remoteness of harm would be a factor when a person, by consuming drugs, dies after a period of sustained use. Where a person consuming spurious liquor dies as a result of such consumption, the harm is much more direct and immediate, and remoteness of harm may not be as much of an issue.

20. Germane to the issue under consideration is a decision of the Supreme Court of Appeal of South Africa in *S Nyathi and The State*[11] and we may usefully refer to it. The case relates to the death of six people resulting from the road accident in which a sedan driven by the appellant in that case collided with a minibus taxi. The impact caused the minibus to overturn, killing six of its occupants. Some other passengers were injured.

The appellant was convicted of culpable homicide.

The court found that the collision between the two vehicles had taken place on a blind rise where a double barrier line prohibited overtaking by vehicles coming from either direction. It was the admitted position at the trial that forward visibility was restricted. The court observed that overtaking on a barrier line, and specially on a double barrier line, where a motorist should

11. [2005] ZASCA 134 (23 May 2005)

realise that his inability to observe approaching traffic is compounded by the inability of the traffic in the opposite direction to see him is probably the most inexcusably dangerous thing a road user can do. Coming to the question of sentence, the Court observed:

> "[13] Road accidents with calamitous consequences are frequently caused by inadvertence, often momentary. [Dube v S [2002] JOL (Judgments on Line) 9645 (T), a case mentioned by the regional magistrate, is an example. The appellant was the driver of a bus involved in an accident on a mountain pass which killed twenty eight passengers. On appeal a suspended sentence of two years' imprisonment was substituted for one of six years' imprisonment imposed by the trial court on the footing that the appellant's negligence had been slight.] Overtaking on a double barrier line is not inadvertence. It is a conscious decision to execute a manoeuvre that involves taking a fearfully high risk.

Referring then to some earlier decisions of the Court in paragraph 14 of the judgment it observed as under:-

> "[14] In *S v Nxumalo* 1982 (3) SA 856 (SCA) the court approved a passage from *R v Barnardo* 1960 (3) SA 552 (A) (at 557D-E) where the court held that **although no greater moral blameworthiness arises from the fact that a negligent act caused death, the punishment should acknowledge the sanctity of human life**. It affirmed the *dicta* of Miller J who twenty years earlier in *S v Ngcobo* 1962 (2) SA 333 (N) at 336H-337B had set out the approach to road death cases. At 861H Corbett JA said:
>
> 'It seems to me that in determining an appropriate sentence in such cases the basic criterion to which the Court must have regard is the degree of culpability or blameworthiness exhibited by the accused in committing the negligent act. Relevant to such culpability or blameworthiness would be the extent of the accused's deviation from the norm of reasonable conduct in the circumstances and the foreseeability of the consequences of the accused's negligence. At the same time the actual consequences of the accused's negligence cannot be disregarded. **If they have been serious and particularly if the accused's negligence has resulted in serious injury to others or loss of life, such consequences will almost inevitably constitute an aggravating factor, warranting a more severe sentence than might otherwise have been imposed**.'
>
> (Emphasis Added)

21. Punishment should acknowledge the sanctity of human life. We fully agree.

22. From the above, one may conclude that:

1. Courts ought to base sentencing decisions on various different rationales – most prominent amongst which would be proportionality and deterrence.

2. The question of consequences of criminal action can be relevant from both a proportionality and deterrence standpoint.

3. Insofar as proportionality is concerned, the sentence must be commensurate with the seriousness or gravity of the offence.

4. One of the factors relevant for judging seriousness of the offence is the consequences resulting from it.

5. Unintended consequences/harm may still be properly attributed to the offender if they were

reasonably foreseeable. In case of illicit and underground manufacture of liquor, the chances of toxicity are so high that not only its manufacturer but the distributor and the retail vendor would know its likely risks to the consumer. Hence, even though any harm to the consumer might not be directly intended, some aggravated culpability must attach if the consumer suffers some grievous hurt or dies as result of consuming the spurious liquor.

23. In light of the discussion made above, we are clearly of the view, that the High Court was fully justified in taking into account the death of a person, as a result of consuming the illicit liquor, sold by the appellant as a ground for enhancing his sentence from two years to five years rigorous imprisonment. There was absolutely no illegality or lack of jurisdiction in the order of the High Court and we would have unhesitatingly upheld the order of the High Court but for another reason. It is noted above that a number of appeals against the judgment and order by the High Court came before this Court at the instance of a number of accused. One of them happened to be accused No.25 who was the supplier of the illicit liquor to the appellant and from him the appellant had received the fatal supply that led to the death of Yohannan and sickness of a number of others. The trial court had convicted accused no.25 under Section 57A(2)(ii) of the Act and sentenced him to imprisonment for life and a fine of Rs. fifty thousand with the default sentence of simple imprisonment for six months. He was convicted and sentenced to undergo rigorous imprisonment for five years and a fine of rupees fifty thousand with the default sentence of imprisonment for six months under Section 57A(2)(i) of the Act. He was also convicted under Sections 57A(2)(iii), 55(a)(i) and 58 of the Act. The High Court had maintained the conviction and sentence passed by the trial court. This Court, however, by its judgment and order dated April 4, 2011 in *Chandran v. State of Kerala*[12], maintained the

12. (2011) 5 SCC 161.

conviction of accused no.25 under the various provisions as recorded by the trial court and affirmed by the High Court. However, it accepted the plea made on behalf of accused no.25 to reduce his sentence from a life term to ten years imprisonment. Since this Court has deemed fit to reduce the sentence given to accused no.25 from a life term to ten years rigorous imprisonment, we feel that it will not be fair not to give the same concession to the appellant (accused no.41) who was the last and weakest link in the chain. We, accordingly, reduce his sentence from five years rigorous imprisonment to three years rigorous imprisonment, being the minimum under Section 57A (2) (ii) of the Act. The fines imposed by the courts below for the different offences remain unaltered.

24. In the result, the appeals are dismissed, subject to modification and reduction in sentence, as noted above.

25. The bail bonds of the appellant are cancelled. He will be taken into custody to serve his remainder sentence.

R.P. Appeals dismissed.