PRAVIN GADA AND ANOTHER
v.
CENTRAL BANK OF INDIA AND OTHERS
(Civil Appeal Nos. 8658-8660 of 2012)

DECEMBER 03, 2012

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

Auction Sale - Of the property of company under liquidation - At the behest of the secured creditors - Auction sale confirmed in favour of appellants for Rs. 2.50 crores - Set aside on being challenged - Further auction fetching Rs. 6.45 crores also set aside - Sale in favour of appellants restored - On appeal, Supreme Court passing orders for fresh auction - The highest bid was for Rs. 5.04 crores - Held: The appellants had deposited Rs. 2.50 crores 6 year back and already invested substantial amount in the property - The highest offer came up to Rs. 5.04 crores at such a distance of time - Including the interest component on the amount deposited by the appellants, the total sum would came to Rs. 4.75 crores - Therefore, sale directed to be confirmed in favour of the appellants, subject to their depositing a further sum of Rs. 50 lacs - In view of the concession of the appellants made before High Court regarding their willingness to negotiate with the workmen, High Court directed to deal with the rights of the workmen in an apposite manner, and if required, monitor the same - Corporate Law - Rights of workmen of company under liquidation.

Corporate Law - Company under liquidation - Official Liquidator - Role of - Held: Role of Official Liquidator is not restricted to participation at the stage of disbursement of dues of the workmen, his participation is required also at the stage of conducting of sale.

The Company in question was declared sick by BIFR.

Official Liquidator was appointed. Debt Recovery Tribunal (DRT) allowed the application of the creditor-Bank of the Company for recovery of its dues against the Company. It further directed that on failure to repay the amount, the immovable property of the company would be sold and the sole proceeds would be paid to the applicant-Bank and respondent No.1-Bank in proportion to their respective charges.

The immovable property of the company was sold in auction to the appellants for Rs. 2.50 crores. Respondent No. 1-Bank filed application for setting aside the sale alleging procedural irregularities and prayed for fresh auction. Official Liquidator had also filed its report before DRT stating that the workers of the company had contended that the sale to the appellants was at a price which was neither fair nor reasonable.

The Recovery Officer set aside the sale to the appellants and directed conduct of fresh auction in the presence of secured creditors, the Receiver and Official Liquidator, after notice. Fresh auction was conducted wherein original auction-purchasers (appellants) did not participate. The highest bid was for Rs. 6.45 crores.

On the application of the appellants, the sale was set aside by DRT, directing the Recovery Officer to publish a public notice to determine as to whether the offers higher than the bid of Rs. 6.45 crores could be realized and if no further offers were received, accept the highest bid after inter-se bidding between the earlier bidders.

Appellants filed appeal, which was dismissed by DRAT. The order was challenged in writ court, who remanded the matter to DRAT. After remand, DRAT restored the sale in favour of the appellants. Workers' Union challenged this order and High Court again

remitted the matter to DRAT. After reconsidering the matter, DRAT restored the sale in favour of the appellants.

The matter was challenged by secured creditors and the workmen's Union. The appellants made a submission before the Court that they were ready and willing to negotiate with the workmen, but they were not in a position to do so until the litigation by secured creditors attained finality. High Court allowed the writ petition directing public advertisement inviting bids for the sale of the property. High Court also held that the opinion of DRAT that the power of Official Liquidator was restricted to participation at the stage of disbursement of the dues of the workmen, but not in conducting sale, was not correct.

The present appeals were filed by the appellants. This Court directed fresh auction. As the Court was not satisfied with the auction, it directed further auction. Pursuant thereto auction was conducted and the highest bid was for Rs. 5.04 crores.

Disposing of the appeals, the Court

HELD: 1. As per order of this Court, the auction was conducted and the highest offer in the auction that was tendered was Rs. 5.04 crores. There has been no grievance with regard to the proper publication of the notice for holding of auction. This Court had passed two orders on different occasions to see that the sale is conducted in a fair and transparent manner. Conditions were also imposed so that speculative bids do not come into the sphere of auction. Despite the best of efforts, the maximum price the property fetched was Rs.5.04 crores. A sum of Rs. 2.50 crores was deposited by the present appellants in October 2006 and in the meantime, six years have elapsed. The interest component on the same, till date would have come to rupees 2 crores 25 lacs and

thereby the total sum would come to rupees 4 crores 75 lacs. The possession was taken over by the appellants long back and they had already invested substantial amount. The highest offer in the auction came up to rupees 5.04 crores at such a distance of time. Regard being had to the totality of the circumstances, the sale should be confirmed subject to the appellants depositing a further sum of Rs. 50 lacs before the DRAT within a period of three months from the date of the judgment. The confirmation of sale as has been directed by this Court shall be treated to have attained finality. [Paras 16 and 18] [630-A-G; 632-A-B]

2. The official liquidator had appeared before the recovery officer on number of dates. However, the DRT had returned a finding that he has a restricted role which has been found fault with by the High Court. The finding of the High Court as regards the role of the official liquidator is correct. [Paras 17] [631-F-G]

Rajasthan Financial Corpn. and Anr. v. Official Liquidator and Anr. **AIR 2006 SC 755: 2005 (3) Suppl. SCR 1073 ;** *A.P. State Financial Corporation v. Official Liquidator* **(2000) 7 SCC 291: 2000 (2) Suppl. SCR 288;** *International Coach Builders v. State of Karnataka* **(2003) 10 SCC 482: 2003 (2) SCR 631 - relied on.**

3. Before the Division Bench, the workers union had also challenged the decision of the DRAT. The appellants submitted that while they were ready and willing to negotiate with the workmen, they were not in a position to do so until the litigation which was instituted by the secured creditors attained finality. Keeping in view the interest of the workmen and their rights, the High Court is directed to deal with the rights of the workmen regard being had to the submissions advanced by the appellants in an apposite manner and, if required, monitor the same. As concession was given before a

particular Division Bench, the Chief Justice is requested to place the matter before the same Bench and if it is not possible, at least before the same presiding Judge. [Paras 19 and 20] [632-B-C, F; 633-A-C]

4. The Interlocutory Applications which have been filed for impleadment and withdrawal of the amounts that have been deposited as earnest money are allowed and the bidders who have deposited the money are allowed to withdraw the same. [Para 21] [633-D]

Case Law Reference:

2005 (3) Suppl. SCR 1073	**Relied on**	**Para 17**
2000 (2) Suppl. SCR 288	**Relied on**	**Para 17**
2003 (2) SCR 631	**Relied on**	**Para 17**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8658-8660 of 2012.

From the Judgment & Order dated 20.09.2011 of the High Court of Bombay in Writ Petition (C) No. 2689, 7488 and 7489 of 2011.

V.K. Chaudhary, B.S. Nagar, Rohitash S. Nagar, Rekha Pandey for the Appellants.

Jaideep Gupta, Indu Malhotra, Dinesh Mathur, Nishant Menon, Priyanka Bharti (For Dua Associates), Saurabh Kirpal, Sanjay Agarwal, G.K. Sarkar, Nikhil Jain, Sudarshan Singh Rawat, R.S. Hegde, Chandra Prakash, Mohammed Nazar, A. Ramakrishana, Rajeev Singh for the Respondents.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted.

2. The present appeals by special leave have been preferred questioning the defensibility of the order dated 20th September, 2011 passed by the Division Bench of the High Court of Judicature at Bombay in Writ Petition Nos. 2689 of

2011, 7488 of 2011 and 7489 of 2011 whereby the High Court has quashed the order dated 3rd March, 2011 passed by the Debt Recovery Appellate Tribunal (for short 'the DRAT') wherein the DRAT had set aside the order of the Debt Recovery Tribunal (for short 'the DRT') and restored the confirmation of sale conducted by way of public auction in favour of the respondents, who are the appellants herein.

3. Shorn of unnecessary details, the facts which are essential to be stated for disposal of these appeals are that a company by the name of Jay Electric Wire Corporation Ltd. had a factory at Mysore situate on land admeasuring approximately 4.4 acres comprised in plots 44 and 47 in Serial Nos. 55 and 69 in the Industrial Area of village Habal and Serial No. 33 of Metagally, Hobla Kasba. The said company, which closed down in February, 1995, had about 149 workers. As dispute arose between the workmen and the management because of termination, the matter was referred to the Industrial Tribunal at Mysore after the reference made under Section 10 of the Industrial Disputes Act, 1947 and the said tribunal, vide award dated 5th January, 2001, directed the employer to pay back wages to the workmen with effect from 6th February, 1995 and to continue payment during the subsistence of the relationship of employer and employee between the parties.

4. As the facts are further unfurled, on 18th December, 2006, a recovery certificate was issued by the Deputy Labour Commissioner at Bangalore for recovery of a sum of Rs.4.44 crores towards the dues of the workmen under the award passed by the Industrial Tribunal. A proceeding was initiated before the Company Judge of the High Court of Bombay in 1996 forming the subject-matter of Company Petition No. 336 of 1996. Subsequently, on a reference made by the BIFR under Section 20(1) of the Sick Industrial Companies (Special Provisions) Act, 1985, the company court held that it was just and equitable for the company to be wound up. The official liquidator was appointed as provisional liquidator by order dated 6th October, 2005 to take charge of the books, assets

and business of the company and to exercise necessary powers under the Companies Act, 1956. On 15th October, 2008, the said order was made absolute. The official liquidator was commanded to proceed in the matter in accordance with law to deal with the assets of the company in liquidation.

5. It is pertinent to state here that in the year 1999, the ICICI Bank had instituted a suit before the High Court in its original side for recovery of its dues against the company. The learned single Judge, vide order dated 8th July, 1999, appointed a Receiver who was granted liberty to sell the assets by public auction or by private treaty and to apply the net sale proceeds as between the ICICI Bank and the Central Bank of India which was impleaded as the second defendant to the suit in satisfaction of the respective charges on the immoveable property. The suit eventually stood transferred to the DRT and the DRT, by order dated 26th August, 2003, allowed the application filed by the ICICI Bank Ltd. for a sum of Rs.1.12 crores together with future interest at 12% per annum. It was further directed that on failure on the part of the borrower to repay the amount within six months, the immoveable property would be sold and the net sale proceeds would be paid to the applicant bank and the Central Bank of India in proportion to their respective charges.

6. In June, 2004, a public notice was issued for sale of the moveable and immoveable properties of the borrower and notice for the proposed sale was published in the newspapers. Though the movables of the borrower came to be sold, yet no proper offer was received for the sale of immoveable property. In a meeting dated 24th July, 2006, it was noted that two offers were received, one amounting to Rs.1.10 crores and the other Rs.80 lacs. The Central Bank of India stated that the offer was not acceptable to it. At that stage, the Standard Chartered Bank appeared before the Receiver stating that the ICICI Bank had assigned its debts to it. The meeting convened by the Receiver was adjourned to 9th August, 2006 and eventually, on 21st August, 2006, bidding took place inter se the two bidders who

submitted their offers when the first and second respondents enhanced their bid to Rs.2.50 crores. The meeting was adjourned to 5th September, 2006 and the successful bidder was directed to enhance the amount representing 25% of the offer by 28th August, 2006. In the said meeting, the representative of the Central Bank of India was not present. On 29th September, 2006, a letter was addressed by the Receiver to the advocates of the two banks enclosing the report seeking the confirmation of sale. He also required the banks to send expression of interest in the property from two parties. On receipt of the letter, the Chief Manager of the Central Bank of India visited the office of the Receiver on 17th October, 2006 and informed about the expression of interest of two other bidders who were willing to pay higher price.

7. As is evincible from the Judgment of the High Court, certain meetings took place and the bank had difficulty in contacting the advocate. On 27th October, 2006, when both the bidders arrived at the office of the Receiver, they were informed that the sale had been confirmed in the morning. On 30th October, 2006, an application was filed by the Central Bank of India for setting aside the sale. Many a procedural irregularity was alleged including the one that it had no intimation of the proceeding until it received the letter dated 29th September, 2006 of the Receiver stating that the property had been sold for a sum of Rs.2.50 crores and the sale had been confirmed on 27th October, 2006. It was contended by the Central Bank of India that in the absence of intimation, it had been unable to remain present when the bidding took place on 21st August, 2006. A prayer for fresh auction and to consider the offers submitted by the two bidders who had expressed interest in the purchase of the property was made. It is apt to mention here that the official liquidator had filed report on 1st December, 2006 before the DRT stating that an application had been received from the workers contending that the sale which had been confirmed in favour of the first and second respondents, the appellants herein, was at a price which was neither fair nor

reasonable. A submission was put forth that no notice was sent to the liquidator through the Registrar despite the mandate of law.

8. As is reflected from the proceedings of the fora below and the order passed by the High Court, the Recovery Officer, vide order dated 5th December, 2006, had set aside the confirmation of the sale holding that it was obligatory to ensure that a higher price was fetched for the property and the assets of the company in liquidation, if the sale price offered by an auction purchaser was inadequate. He ultimately set aside the sale and directed for conduct of a fresh auction in the presence of secured creditors, the Receiver and the official liquidator after notice. In pursuance of the said order, on 5th December, 2006, a sale was conducted without making a fresh notification. The Recovery Officer noted that the original auction purchasers did not participate in the fresh bidding process, but the two bids were received by the Recovery Officer and the highest bid amounting to Rs.6.45 crores was offered by one Umrah Developers. Regard being had to the said position, the Recovery Officer directed the bid of Umrah Developers to be accepted and the successful bidder was directed to pay the purchase consideration. The said Umrah Developers deposited the full consideration of Rs.6.45 crores on 10th November 2006 and 11th December, 2006. Taking note of the same, the Recovery Officer declared them as the successful bidder.

9. Being grieved by the aforesaid order, the first and second respondents therein preferred an appeal before the DRT which set aside the sale. Taking note of the facts in entirety, it opined that there was something wrong on the part of the valuer inasmuch as the offer of Rs.6.45 crores was received when the bids were conducted only amongst a few persons and not in the public realm and that was good enough indicative of the fact that the property could fetch a higher value. The DRT further opined that it would have been proper to issue a public notice and invite fresh offers. Being of this view, it directed, while retaining the offers which were received until 5th

December, 2006, that the Recovery Officer should publish a public notice to determine as to whether offers higher than the bid of Rs.6.45 crores of Umrah Developers could be realized and if no further offers were received, the Recovery Officer was directed to accept the highest bid after inter se bidding between the earlier bidders.

10. Being dissatisfied with the aforesaid, an appeal was preferred by the first respondent before the DRAT which granted stay on 26th February, 2007 as a consequence of which the entire process of holding a fresh auction came to a standstill. At this juncture, an application was filed by Umrah Developers to permit it to withdraw the amount which it had deposited. The application was rejected by the DRT which compelled the company to file an application before the tribunal to withdraw the amount and the company was allowed to withdraw 90% of the bid amount leaving the balance, i.e., Rs.64.5 lacs in deposit before the Recovery Officer. Eventually, the DRAT dismissed the appeal by order dated 2nd July, 2008 mainly on the foundation that offer of Rs.6.45 crores was higher than the offer of Rs.2.50 crores furnished by the first and second respondents. The said order came to be challenged before the writ court and during the pendency of the writ proceedings, an application was filed by Umrah Developers for refund of the balance sum which was allowed. The writ petition preferred by the first and second respondents was disposed of on 11th August, 2010 in terms of the agreed minutes. As per the agreed order, the matter stood remanded to DRAT for a fresh decision.

11. As is demonstrable, on remand, the DRAT, by its order dated 15th October, 2010, allowed the appeal and directed restoration of the confirmation of sale in favour of the first and second respondents. The said order of the DRAT was assailed by the workers' union and the High Court remitted the matter to the DRAT for fresh consideration. The DRAT, considering the facts in entirety, allowed the appeal vide order dated 3rd March, 2011 and restored the confirmation of sale. The said

order came to be assailed by the secured creditors and the workmen's union on the ground that the confirmation suffered from material irregularities. The High Court noticed that the DRAT had opined that the power of the official liquidator was restricted to participate at the stage of disbursement of the dues of the workmen but not in conducting of the sale. It did not agree with the said finding on the basis of the proposition of law laid down in *Rajasthan Financial Corpn. and Anr. V. Official Liquidator & Anr.*[1]. While noting that aspect, the High Court proceeded to address the fundamental question whether the procedure that was followed in the sale of the property was fair and proper or whether there was any fraud and material irregularity. It adverted to the facts in a chronological manner and came to hold that the manner in which the sale proceedings had been conducted was neither fair nor transparent as a consequence of which the possible price that could be realized had become an unfortunate casuality. It took note of the offer made by Umrah Developers after a month of confirmation of sale and opined that the proper price had not been realized. The finding of the DRT that the Central Bank of India had remained absent could not be a justification to sustain the manner in which the sale had been conducted as it was manifestly contrary to the basic concept of fairness and transparency. The Court referred to number of authorities to highlight the conception that in every case, the duty of the court is to satisfy itself that the price offered is reasonable and the said satisfaction is to be based on the bedrock of the prevalent market value. Expressing the aforesaid view, the High Court allowed the writ petition, set aside the order of the DRAT dated 3rd March, 2011 and proceeded to direct as follows: -

> "We direct that the Recovery Officer attached to the DRT to issue a public advertisement which shall be published in at least two newspapers, one in English and another in Kannada having circulation in Mysore, inviting bids for the sale of the property. The terms and conditions governing the sale shall be laid down by the Recovery Officer of the DRT, and a fresh valuation shall be carried out on the basis of which the reserve price of the property shall be fixed. We record the statement made on behalf of the Central Bank and the Standard Chartered Bank by their counsel that both the Banks shall cooperate with the Recovery Officer and shall meet all the expenses of the sale, including towards newspaper advertisements. On the request of the two banks, we further clarify that if the Banks are ready and willing to meet the expenses for the issuance of a publication in any additional newspapers, that shall also be permitted by the Recovery Officer at the expenses which have been agreed to be borne by the Banks. We direct the Recovery Officer to expedite the process of sale and to hold a meeting for fixing the terms and conditions within a period of three weeks from today. The sale process should be completed within a period of three months from the date on which an authenticated copy of this order is placed before the Recovery Officer."

12. The said order has been assailed by the first and second respondents before this Court, the successful bidders who had deposited Rs.2.50 crores in pursuance of the order passed by the DRT.

13. At this juncture, it is worthy to note that this Court on 27th March, 2012, after taking note of the High Court's direction, had passed the following order: -

> "This Court while issuing notice on 25th November, 2011, had directed status quo to be maintained by the parties. When the matter was heard for some time it was submitted by Mr. C.A. Sundaram, learned senior counsel for the petitioner that the High Court has grossly erred in directing the sale of the property by inviting bids despite the factum that public auction was not successful and eventually the sale was effected by the direction of the DRT and ultimately the offer of Rs.2.5 crores was accepted from the petitioners herein. The learned senior counsel has urged

1. AIR 2006 SC 755.

many other contentions which need not be referred to in prasenti having regard to the nature of directions which we are going to pass today.

It is worth noting that Mr. Jaideep Gupta, learned senior counsel appearing for the Central Bank of India has filed a chart of the amount due from the original buyer, namely, Jay Electric Wire Corporation. We think it apposite to reproduce the chart in toto:

"1. **Central Bank of India (Respondent No. 1):**

As per the Recovery Certificate dated 6.11.2003 issued by the DRT an amount of Rs.10.99 cores is due and payable which as on 31.3.2012 @ 12% per annum at quarterly rests amounts to Rs.42.41 crores.

2. **Standard Chartered Bank (respondent No. 2):**

As on 26.8.2003 an amount of Rs.1.12 crores is outstanding along with interest @ 12% per annum.

3. **Workmen through Official Liquidator (respondent No. 4) :**

As per the recovery certificate issued by the Deputy Labour Commissioner on 18.12.2006 an amount of Rs.4.44 crores is due and payable as computed until 1999."

It is submitted by Mr. Gupta that in fitness of things and regard being had to the concept of obtaining of the Highest Price in Court sale, having of auction is the warrant and, therefore, auction should be directed to be held. The learned senior counsel further submitted that the property is likely to fetch much more amount than that has been deposited by the petitioners.

Mr. Sundaram, learned senior counsel would contend that the sale had been given effect to in the year 2006 on

acceptance of Rs.2.5 cores and with the efflux of time if there has been a price rise solely on the said base a public auction should not be directed.

Be it noted that at one point of time, a third party had deposited Rs.6 crores to purchase the property but later on he withdrew as the matter was litigated in the Court.

Having heard learned counsel for the parties and regard being had to the totality of the circumstances, we issue the following directions:

(i) The property in question be put to auction by issuing a public advertisement in at least two newspapers one in English and another in Kannada language having wide circulation in the city of Mysore inviting bids for the sale of the property.

(ii) It shall be mentioned in the advertisement that the reserve price is Rs.3 crores and the same shall be deposited before the Recovery Officer of the DRT to enable one to participate in the bid.

(iii) Any one who would not deposit the amount would not be permitted to participate in the auction as speculative bids are to be totally avoided.

(iv) The newspaper publication shall be made within a period of two weeks stipulating that the deposit is a condition precedent for participation in the auction which shall be made before the DRT within a week from the date of publication of the advertisement in the newspapers.

(v) The auction shall be held within a period of two weeks from the issuance of the advertisement which shall state the specified time and place for the auction.

(vi) The petitioners without prejudice to the contentions to be raised and dealt with in these Special Leave Petitions shall participate in the bid without the deposit as they have purchased the property in the year 2006.

(vii) The bid shall not be finalized and the bid sheet shall be produced before this Court in a sealed cover.

We reiterate at the cost of repetition that the above arrangements are subject to the result of the final adjudication in these Special Leave Petitions.

List the matter after five weeks."

14. After the said order came to be passed, I.A. Nos. 4-6 of 2012 were preferred wherein the following order was passed:

"These applications were preferred by the Bank stating that going by the present valuation the property will fetch nearly Rs.10 crores whereas the order stipulates Reserve Price only Rs.3 crores. Hence, the Bank has sought modification of the upset price fixed by the Court.

Learned counsel for the Bank also submitted that as per the Debt Recovery Tribunal Act the time stipulated for auction is thirty days whereas the order directs to conduct the auction within two weeks. To this extent the respondent seeks modification of that direction also.

Learned counsel on the either side submitted that the auction should go on without any delay.

Considering the facts and circumstances of the case we are inclined to dispose of these applications directing the Recovery Officer to go on with the auction within the time limit stipulated in the bid. The question as to whether the upset price has been correctly fixed or not will depend upon the bid amount offered by the bidders in the auction."

15. After the said interlocutory applications were disposed of, the auction took place but this Court was not satisfied since certain aspects were highlighted that caused impediments in obtaining proper offers. This Court in IA 7-9 of 2012, after hearing the learned counsel for the parties and referring to its earlier orders, proceeded to pass the following order: -

"5. In the present application it has been asseverated that in compliance with the order dated 5.7.2012, the Recovery Officer of Debt Recovery Tribunal-I, Mumbai, ordered for publication of the notice in two newspapers which was published on 20.7.2012 calling upon interested parties to give their offer within seven days from the date of publication as directed by this Court vide order dated 27.3.2012. Pursuant to the publication carried in English and Kannada newspapers no other offer whatsoever was received by the Recovery Officer and till 7th only the offer of the petitioners, namely, Praveen Gada and Amarnath Singhla, was received.

6. When the matter was taken up, order dated 30.8.2012 passed in R. P. No. 419 of 2003 was brought to our notice. The said order reads as under: -

"As per directions of the Hon'ble Supreme Court vide its orders dated 27.3.2012 & 5.7.2012, advertisement was published fixing reserve price at Rs. 3.00 Crores.

Only one bid of Shri Pravin Gada & Amarnath Singhla has been received on 07.08.2012 as per public notice. His bid was opened at the scheduled date & time of the auction. He has given offer of Rs. 3 crores. As his participation in auction was without deposit as directed in above orders, there was no question of his depositing EMD.

Relevant columns of Bid Sheet were accordingly filled in and the signature of the bidder has been obtained. As per the directions, the said bid sheet be submitted to the Hon'ble Supreme Court.

Apart from above, 3 offers in closed envelope were received today, but those are not opened & considered in view of the directions of the Hon'ble Supreme Court as per aforesaid orders.

On the date of auction the above 3 closed envelops

containing offers have been received. This being new situation arisen at the time of auction, in my opinion it would be appropriate to bring this fact to the kind notice of the Hon'ble Supreme Court. Hence these 3 closed envelops be also submitted to the Hon'ble Supreme Court.

As per directions of the Hon'ble Supreme Court, the Bid Sheet at Exh. 154 be submitted to the Hon'ble Supreme in a sealed cover."

7. The bid sheets were opened before us and we find that an offer amounting to Rs. 3,30,00,000/- by Kumar Enterprises, Rs. 3,30,00,000/- by Riddishiddhi Bullions Ltd. and Rs. 3,30,00,000/- by Krishna Texturisers Pvt. Ltd. were deposited by way of bank drafts on 29.08.2012 and 30.8.2012 respectively.

8. It is submitted by Mr. Sundaram, learned senior counsel for the petitioners, that as the said offers were not in accord, the same should not be considered and the petitioners should be treated as the highest bidder in the auction. Mr. Rohtagi and Mr. Gupta, learned senior counsel for the Central Bank of India, per contra, submitted that the price of the property as on today is worth more than Rs. 10 crores and the reason for the offerees not coming is that the petitioners are in possession and they have put up a board indicating their name and status. It is urged by them that it is one thing to say that the auction is conducted by virtue of the order passed by this Court and the whole thing is subject to the pendency of the lis but it is another thing to see at the entrance that the board is fixed and the people are not allowed to survey the nature and character of the assets. The photographs of the board that have been put up are filed in Court and we have perused the same. Be it noted, the putting up of the said photographs is not disputed.

9. Regard being had to the facts and circumstances, we are of the considered opinion that there should be a re-

auction and we are inclined to modify the conditions incorporated in the earlier order. Keeping in view the totality of circumstances, we issue the following directions:-

(i) The property in question be put to auction by issuing a public advertisement within two weeks in at least two newspapers, one in English and another in Kannada language, having wide circulation in the city of Mysore inviting bids for the sale of the property.

(ii) It shall be mentioned in the advertisement that the reserved price is Rs. 5 crores and the same shall be deposited by way of bank drafts drawn on a nationalized bank before the Recovery Officer of the DRT to enable one to participate in the bid. The advertisement shall stipulate that the deposit of the reserved price fixed by this Court is a condition precedent for participation in the auction.

(iii) It shall be clearly stated in the advertisement that the property would be available for inspection in presence of the Registrar of Civil Court or any equivalent officer nominated by the Principal District and Session Judge, Mysore, and it is so done to avoid the grievance from any quarter that the property was not available for proper verification. The inspection by any interested party shall be done within one week from the date of advertisement between 11.00 a.m. to 3.00 p.m.

(iv) During the entire period of inspection the concerned officer deputed by the learned Principle District and Sessions Judge, Mysore shall see to it that the board that has been fixed is removed from the site so that there can be inspection of the plot without any kind of pre-conceived notion by the perspective bidders.

(v) The aforesaid reserved price shall be deposited

before the Recovery Officer of the DRT within ten days from the date of the advertisement. Any one who would not deposit the reserved price within the time limit, his bid shall not be considered

(vi) The auction shall be held within a period of two weeks from the date of issuance of the advertisement which shall state the specified time and place for the auction.

(vii) The petitioners without prejudice to the contentions to be raised and dealt with in these Special Leave Petitions shall participate in the auction without the deposit as they have purchased the property in the year 2006.

(viii) The offerees who have already given the bids shall deposit the balance amount to meet the reserved price before the Recovery Officer of the DRT failing which they shall be ineligible to participate in the bid.

(ix) After the submission of the bids there shall be a public auction amongst the eligible offerees to get the maximum price.

(x) The auction shall not be finalized and the bid sheet shall be produced before this Court in a sealed cover for issuance of further directions, if required.

10. We repeat at the cost of repetition that the above arrangements are subject to the result of the final adjudication to the Special Leave Petitions.

11. A copy of the order passed today be sent by fax, email and speed-post to the Principal District Judge, Mysore by the Registry of this Court.

12. List the matters on 1.11.2012."

16. After the aforesaid order was passed, the auction was

conducted and the highest offer in the auction that was tendered was Rs. 5.04 crores. Learned counsel appearing for the said highest bidder filed an application for impleadment and impressed upon this Court for acceptance of the bid. Be it noted, there were other offers amounting to Rs. 3.30 crores and slightly more, but there has been no grievance with regard to the proper publication of the notice for holding of auction. We have so stated as the High Court had set aside the sale essentially on the ground that the sale process was not fair and transparent. This Court had passed two orders on different occasions to see that the sale is conducted in a fair and transparent manner. We had also imposed conditions so that speculative bids do not come into the sphere of auction. Despite the best of efforts, as we have seen, the maximum price the property has fetched is Rs.5.04 crores. It is submitted by Mr. Sundaram and Mr. Choudhary, learned senior counsel, that a sum of Rs. 2.50 crores was deposited by the present appellants in October 2006 and in the meantime, six years have elapsed. It is urged by them that the said amount was kept with the bank and the bank must have dealt with the money as a prudent financial commercial venture and thereby must have earned interest at least at the rate of 15% per annum. Calculated on that basis, it is contended, the interest component by now would have come to rupees 2 crores 25 lacs and thereby the total sum would come to rupees 4 crores 75 lacs. It is also urged by them that the possession was taken over by them long back and they have already invested substantial amount. As is noticeable, the highest offer in the auction has come up to rupees 5.04 crores at such a distance of time. Regard being had to the totality of the circumstances, we are disposed to think that the sale should be confirmed subject to the appellants depositing a further sum of Rs. 50 lacs before the DRAT within a period of three months from today and we order accordingly.

17. At this juncture, it is necessary to address whether the finding of the High Court as regards the role of the official

liquidator is correct or not. In *Rajasthan Financial Corpn.* (supra), while dealing with the role of official liquidator, a three-Judge Bench referred to the pronouncements in *A. P. State Financial Corporatin v. Official Liquidator*[2] and *International Coach Builders v. State of Karnataka*[3] and, in the ultimate eventuate, summed its conclusions. The relevant conclusions are reproduced below: -

> "(i) A Debts Recovery Tribunal acting under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 would be entitled to order the sale and to sell the properties of the debtor, even if a company-in-liquidation, through its Recovery Officer but only after notice to the Official Liquidator or the Liquidator appointed by the Company Court and after hearing him.
>
> xxx xxx xxx
>
> (iv) In a case where proceedings under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 or the SFC Act are not set in motion, the creditor concerned is to approach the Company Court for appropriate directions regarding the realisation of its securities consistent with the relevant provisions of the Companies Act regarding distribution of the assets of the company-in-liquidation."

18. On a perusal of the record, it transpires that the official liquidator had appeared before the recovery officer on number of dates. However, the DRT had returned a finding that he has a restricted role which has been found fault with by the High Court. In our opinion, the High Court is absolutely correct in its analysis and we concur with the same, but, a pregnant one, the fact remains that the High Court had set aside the sale on the foundation that a fair and transparent procedure had not been adopted. Having given due respect to the same, this court had passed orders on earlier occasions which we have reproduced

2. (2000) 7 SCC 291.

3. (2003) 10 SCC 482.

hereinabove to get the auction conducted in a fair and transparent manner and recorded our conclusion. Therefore, the confirmation of sale as has been directed by us shall be treated to have attained finality.

19. Another important facet deserves to be mentioned. Before the Division Bench, the workers union had also challenged the decision of the DRAT. The High Court, while dealing with their submission, has recorded as follows:-

> "During the course of the hearing of these proceedings, the Court has been informed that an effort has been made by the First and Second Respondents to settle the outstanding dues of the workers through an out of Court settlement. Counsel appearing on behalf of the workmen submitted that the workmen would abide by the result of the Petitions which have been filed by the secured creditors and it is only in the event that the Petitions filed by the Banks are dismissed that the workers would be inclined to enter into an out of Court settlement with the First and Second Respondents. Counsel for the First and Second Respondents stated that his clients would be able to resolve the dispute with the workmen only if the Petitions filed by the secured creditors challenging the sale in favour of his clients fail. Counsel appearing on behalf of the First and Second Respondents submitted that while the First and Second Respondents are ready and willing to negotiate with the workmen, they are no in a position to do so until the litigation which has been instituted by the secured creditors attains finality."

20. The aforesaid submission has its own significance in law. We may hasten to clarify that we have confirmed the sale as this Court has undertaken the exercise to have an auction conducted through the competent authority of DRT by adopting a fair, competitive and transparent procedure but that does not mean that the conclusion arrived at by the High Court in that regard is erroneous. Thus, while confirming the sale subject to the conditions imposed hereinbefore, we are disposed to think

that keeping in view the interest of the workmen and their rights, the High Court should deal with the rights of the workmen regard being had to the submissions advanced by the first and second respondents before it in an apposite manner and, if required, monitor the same. As concession was given before a particular Division Bench, we would request the learned Chief Justice to place the matter before the same Bench and if it is not possible, at least before the learned presiding Judge. We have felt so as such a submission was put forth before the Division Bench which had categorically recorded the same and it is not desirable that there should be any kind of deviation with regard to the statement made.

21. Presently to the Interlocutory Applications which have been filed for impleadment and withdrawal of the amounts that have been deposited as earnest money. Regard being had to the facts and circumstances of the case, all impleadment applications are allowed and the bidders who have deposited the money are allowed to withdraw the same.

22. The appeals are accordingly disposed of leaving the parties to bear their respective costs.

K.K.T. Appeals disposed of.

SURAJIT SARKAR
v.
STATE OF WEST BENGAL
(Criminal Appeal No. 2026 of 2009)

DECEMBER 4, 2012

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

Penal Code, 1860 - s. 304 (Part II) - 6 accused including appellant-accused caused death of one person - Two eye-witnesses to the incident - Trial court convicted the appellant-accused u/s. 302 IPC while acquitted the rest of the accused - Order confirmed by High Court - On appeal, held: The appellant-accused is liable to be held guilty of causing death in view of the evidence of the eye-witness PW-7 - The appellant-accused cannot be absolved of his involvement in the offence only because other co-accused were acquitted - However, in view of the nature of injuries on the deceased, the appellant-accused cannot be held guilty of murder - He is liable to be held guilty of offence of culpable homicide not amounting to murder and liable to punished u/s. 304 (Part II).

Code of Criminal Procedure, 1973 - s. 154 - FIR - A cryptic message given on telephone cannot be treated as an FIR because in such case procedural formalities while recording the FIR, cannot be given effect to.

Appellant-accused was prosecuted alongwith 5 other accused for having caused death of one person. As per the prosecution, there were two eye-witnesses (PWs 7 and 8) to the incident. PW3 had telephonically informed the police about the incident. Thereafter PW-1 (the son of the deceased) lodged FIR. Trial court acquitted the other accused persons while convicted the appellant-accused u/s. 302 IPC. Trial court rejected the plea that the intimation given by PW3 should be treated as the FIR and not the complaint lodged by PW-1, holding that

telephonic message given by an unknown person with regard to death of another unknown person could not be treated as FIR. High Court confirmed the conviction of the appellant-accused upholding the finding of the trial court.

In the appeal before this Court, the questions for consideration were whether a cryptic telephonic intimation given to police could be treated as FIR u/s. 154 Cr.P.C.; whether the testimony of the eye-witnesses could be accepted for upholding the conviction of the appellant-accused; whether the conviction of the appellant-accused was justified even though the co-accused were acquitted and whether the appellant-accused was guilty of murder.

Disposing of the appeal, the Court

HELD: 1. It cannot be held that the telephonic call should be treated as the FIR and not the complaint made by PW-1. Section 154 Cr.P.C. makes it clear that even though oral information given by an officer-in-charge of a police station can be treated as an FIR, yet some procedural formalities are required to be completed. They include reducing the information in writing and reading it over to the informant and obtaining his or her signature on the transcribed information. In the case of a telephonic conversation received from an unknown person, the question of reading-over that information to the anonymous informant does not arise nor does the appending of a signature to the information, as recorded, arise. A cryptic message given on telephone cannot be treated as an FIR merely because that information was first in point of time and had been recorded in the Daily Diary of the police station. The object and the purpose of a telephonic message is not to lodge a first information report but a request to the officer-in-charge of the police station to reach the place of occurrence. [Paras 35, 37, 38 and 40] [648-G-H; 649-D-E; 650-B-D]

Ramsingh Bavaji Jadeja v. State of Gujarat **(1994) 2**

SCC 685 : 1994 (2) SCR 239; *Tapinder Singh v. State of Punjab* **(1970) 2 SCC 113:1971(1) SCR 599;** *Soma Bhai v. State of Gujarat* **(1975) 4 SCC 257: 1997 (3) SCR 1071;** *Dhananjoy Chatterjee v. State of West Bengal* **(1994) 2 SCC 220: 1974 (1) SCR 102;** *Mundrika Mahto v. State of Bihar* **(2002) 9 SCC 183: 2002 (3) SCR 575;** *State of Andhra Pradesh v. V.V.Panduranga Rao***(2009) 15 SCC 211: 2009 (7) SCR 421;** *Sidhartha Vashisht v. State (NCT of Delhi)* **(2010) 6 SCC 1: 2010 (4) SCR 103 - relied on.**

2. The conduct of PW-7 was quite unnatural and a little odd. This witness was a neighbour of the victim and it appears from his testimony that after he witnessed the attack on the deceased he did not bother to inform the victim's family, or anybody else and simply went home. This witness further deposed that he came to know of the death of the deceased only the next morning. The investigating officer examined PW-7 only after a gap of more than a month and a half of the incident. PW-8 did not mention the presence of PW-7 at the place of occurrence. This possibility gave rise to another doubt that perhaps PW-7 was not present at the place of occurrence. [Paras 43 and 44] [650-F-H; 651-A-B]

Ganesh Bhavan Patel v. State of Maharashtra **(1978) 4 SCC 371: 1979 (2) SCR 94;** *Banti v. State of M.P.* **(2004) 1 SCC 414: 2003 (5) Suppl. SCR 119;** *Ranbir v. State of Punjab* **(1973) 2 SCC 444: 1974 (1) SCR 102;** *Bodhraj v. State of J&K* **(2002) 8 SCC 45: 2002 (2) Suppl. SCR 67 - relied on.**

Shyamal Ghosh v. State of W.B. **(2012) 7 SCC 646 - distinguished.**

State of U.P. v. Satish **(2005) 3 SCC 114: 2005 (2) SCR 1132 - referred to.**

3. It cannot be laid down as a broad proposition of law that in no case can a defective or shoddy investigation

lead to an acquittal. It would eventually depend on the defects pointed out. If the investigation results in the real culprit of an offence not being identified, then acquittal of the accused must follow. It would not be permissible to ignore the defects in an investigation and hold an innocent person guilty of an offence which he has not committed. The investigation must be precise and focused and must lead to the inevitable conclusion that the accused has committed the crime. If the investigating officer leaves glaring loopholes in the investigation, the defence would be fully entitled to exploit the lacunae. In such a situation, it would not be correct for the prosecution to argue that the Court should gloss over the gaps and find the accused person guilty. If this were permitted in law, the prosecution could have an innocent person put behind bars on trumped up charges. It is clear from the record that the investigation has left unanswered several questions regarding PW-7. Under the circumstances, it cannot be accepted that PW-7 was present at the place and at the time when the deceased was attacked. [Paras 54 and 55] [654-D-H; 655-A]

4. It is true that there is some discrepancy or some gap in the whereabouts of PW-8 between the time of the attack and his returning home but that by itself is not enough to discredit this witness, more so when he was not asked any question on his whereabouts. Also, this discrepancy does not destroy the substratum of the case of the prosecution and therefore there is no reason to throw it out on this ground. PW-8 successfully withstood his cross-examination and he was a credible witness who ought to be believed when he says that he was at the place of occurrence and that he saw his father being attacked by the appellant-accused. [Paras 60, 61 and 62] [656-B-E]

5. Delay per se may not be a clinching factor but when there is a whole range of facts that need to be

explained, but cannot, then the cumulative effect of all the facts could have an impact on the case of the prosecution. [Para 50] [653-A-B]

Visveswaran v. State **(2003) 6 SCC 73 2003 (3) SCR 978;** *C.Muniappan v. State of Tamil Nadu* **(2010) 9 SCC 567: 2010 (10)SCR 262;** *Sheo Shankar Singh v. State of Jharkhand* **(2011) 3SCC 654: 2011 (4) SCR 312 - referred to.**

6. The appellant-accused cannot be absolved of his involvement in the death of the deceased merely because the other accused persons were either not identified by the eye-witnesses or had no role to play in the attack on the deceased. There is the cogent and reliable evidence of PW-8 to hold that the appellant-accused attacked on the deceased which ultimately resulted in his death. [Para 68] [657-G]

Syed Ahmed v. State of Karnataka **(2012) 8 SCC 527: 2012 (7) SCR 887 - relied on.**

Gurcharan Singh v. State of Punjab **AIR 1956 SC 460;** *Komal v. State of U.P.* **(2002) 7 SCC 82;** *Gangadhar Behera v. State of Orissa* **(2002) 8 SCC 381: 2002 (3) Suppl. SCR 183;** *Prathap v. State of Kerala* **(2010) 12 SCC 79: 2010 (10) SCR 241- relied on.**

7. Given the nature of injuries, it cannot be accepted that the appellant-accused intended to cause the death of the deceased or that the injuries were so imminently dangerous that they would, in all probability, cause death. The murder of the deceased would, therefore, be ruled out. Nevertheless, the injuries were quite serious and inflicted on the head of the deceased with an iron rod, as stated by PW-8. The appellant-accused can be credited with the knowledge that if a person is hit with an iron rod on the head, then the act is likely to cause the death of the victim. That being so, it would be more appropriate to hold him guilty of an offence of culpable homicide not

amounting to murder. Since he has been attributed with the knowledge of his actions, he should be punished under the second part of Section 304 IPC. The conviction of the appellant-accused is set aside for the offence of the murder and is held guilty of an offence punishable under the second part of Section 304 IPC. He is sentenced to undergo rigorous imprisonment for a period of 10 years. The fine and default sentence awarded by the trial court are maintained. [Paras 71 and 72] [658-C-G]

Case Law Reference:

1994 (2) SCR 239	**Relied on**	**Para 40**
1971 (1) SCR 599	**Relied on**	**Para 40**
1997 (3) SCR 1071	**Relied on**	**Para 40**
1974 (1) SCR102	**Relied on**	**Para 40**
2002 (3) SCR 575	**Relied on**	**Para 41**
2009 (7) SCR 421	**Relied on**	**Para 41**
2010 (4) SCR103	**Relied on**	**Para 41**
1979 (2) SCR 94	**Relied on**	**Para 45**
2003 (5) Suppl. SCR 119	**Relied on**	**Para 47**
1974 (1) SCR 102	**Relied on**	**Para 48**
2002 (2) Suppl. SCR 67	**Relied on**	**Para 48**
2005 (2) SCR 1132	**Referred to**	**Para 49**
(2012) 7 SCC 646	**Distinguished**	**Para 50**
2003 (3) SCR 978	**Referred to**	**Para 52**
2010 (10) SCR 262	**Referred to**	**Para 52**
2011 (4) SCR 312	**Referred to**	**Para 52**
2012 (7) SCR 887	**Relied on**	**Para 61**
AIR 1956 SC 460	**Relied on**	**Para 64**
(2002) 7 SCC 82	**Relied on**	**Para 65**
2002 (3) Suppl. SCR 183	**Relied on**	**Para 66**
2010 (10) SCR 241	**Relied on**	**Para 67**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2026 of 2009.

From the Judgment and Order dated 24.04.2009 of the Division Bench of the High Court of Calcutta in C.R.A. No. 17 of 1998.

Pradip Ghosh, Rauf Rahim, Yadunandan Bansal for the appellant.

Chanchal Kr. Ganguly Abhijit Sengupta, Sampa Sengupta Ray, Faisal M, B.P. Yadav for the Respondent.

The Judgment of the Court was delivered by

MADAN B. LOKUR, J. 1. The principal issues before us are whether a cryptic telephonic intimation given to the police can be described as a First Information Report for the purposes of Section 154 of the Criminal Procedure; whether the testimony of PW-7 Sanatan Sarkar and PW-8 Achintya Sarkar can be accepted for upholding the conviction of Surajit Sarkar (the appellant); whether Surajit Sarkar can be convicted of murder even though his co-accused have been acquitted and finally whether Surajit Sarkar did commit the murder of Gour Chandra Sarkar.

2. In our view, the first issue must be answered in the negative. We also hold that the testimony of PW-7 Sanatan Sarkar cannot be accepted, but we do accept the testimony of PW-8 Achintya Sarkar. We find no reason to hold that merely because those accused with Surajit Sarkar have been acquitted, he too must be acquitted of the charge against him. However, we find, on the testimony of PW-8 Achintya Sarkar, that Surajit Sarkar is liable to be punished not for the murder of Gour Chandra Sarkar but for culpable homicide not amounting to murder punishable under Section 304 of the Indian Penal Code.

The facts:

3. On 21st March 1992, Susanta Sarkar's father Gour Chandra Sarkar had gone on his cycle to the Gobindapur bazaar in the evening. At about 9.00 pm while he (Susanta Sarkar) was in his house, he heard a cry from his mother. On inquiring from her, he learnt that Bishnu Sarkar informed her that Gour Chandra Sarkar had been murdered at about 8/8.30 pm apparently in front of Bimal Poddar's house.

4. Susanta Sarkar immediately rushed to the spot and found his father lying senseless on the ground with bloody injuries. On raising a noise, some villagers gathered there and advised him to lodge a complaint. Thereafter, he went to his uncle's house (Bishnu Sarkar's father) and wrote out a complaint.

5. Later, he came to know at about 10/10.30 pm that the police had reached the place of occurrence. Thereupon, he too went to the place of occurrence and met the police. In his presence, the police seized some items, including his father's wrist watch and cycle. After the seizure proceedings were over at about 11.55 pm he handed over to the police his complaint addressed to the officer-in-charge Police Station Santipur, District Nadia.

6. In his complaint, Susanta Sarkar stated the broad facts mentioned above, namely, that his father had gone to the Gobindapur bazaar in the evening; that he came to know his father had been murdered at about 8.30/9.00 pm in front of Bimal Poddar's house; that he went to the place of occurrence and found his father lying on the road with a bleeding injury.

7. He also stated in his complaint that there was a dispute between the members of his family and that of Gour Sarkar and some people engaged by him. On 8th March 1992 there was a scuffle between the two parties and a case was pending in that regard. His brother Nimai Sarkar was in jail as a result of that incident. Gour Sarkar's party had also been in jail but had been released a day or two earlier. Susanta Sarkar stated in

his complaint that he firmly believed that six members of Gour Sarkar's party murdered his father Gour Chandra Sarkar due to the grudge that they bore.

8. Based on the complaint given by Susanta Sarkar, a First Information Report (FIR) was registered in Police Station Santipur, District Nadia on 22nd March 1992 at about 00.45 am and formal investigations commenced into offences punishable under Section 302 read with Section 34 and Section 120-B of the Indian Penal Code (for short the IPC) against the six accused persons. On conclusion of the investigations, a charge sheet was filed against them. Charges were framed against the accused persons but they pleaded not guilty and claimed trial.

9. Although the prosecution produced fourteen witnesses, we are concerned with the evidence of only some of them.

10. PW-1 Susanta Sarkar confirmed what he had stated in his complaint. He added that his younger brother Achintya Sarkar (aged about 12/13 years when the incident took place) returned home that night at about 2/2.30 am and informed the witness that Surajit Sarkar, Adhir Sarkar and Sukumar Sarkar had killed Gour Chandra Sarkar. When Achintya Sarkar opposed them, Bara Gopal Sarkar, Jamai Gopal Sarkar and Bhebesh Sarkar chased him and so he fled away. (These were the same persons named by Susanta Sarkar in his complaint). In his cross-examination, Susanta Sarkar stated that he did not ask Achintya Sarkar where he was till 2.30 am.

11. PW-2 Bishnu Sarkar stated that he had gone to the Gobindapur market that evening. When he was returning home, he saw 5/6 persons near the primary school. He could identify Surajit Sarkar in the torchlight. When he proceeded further, he saw Gour Chandra Sarkar lying senseless on the road with injuries on his chest, head and hand etc. He immediately went and narrated what he saw to Gour Chandra Sarkar's wife. Although this witness turned hostile, he stated that he was present when the inquest and seizure of articles took place later that night.

12. PW-3 Parash Biswas was a panchayat member of Gobindapur village. He was in a meeting when he learnt of the murder of Gour Chandra Sarkar. He went to the place of occurrence and saw the dead body. Thereafter, he telephonically informed the police station of the incident but did nothing further. From the deposition of PW-11 Krishnapada Mazumdar of Police Station Santipur, it appears that the telephone call was made around 9.35 pm when a General Diary entry was made by him to the effect that an unknown person gave information about the murder of an unknown person at Arpara, Police Station Santipur, District Nadia.

13. PW-7 Sanatan Sarkar was a neighbor of Gour Chandra Sarkar and an eyewitness to his murder. He testified that he was returning from Gobindapur to Arpara with Achintya Sarkar and Gour Chandra Sarkar at about 8.30 pm on 21st March 1992. On the way, near a primary school, 5/6 persons surrounded Gour Chandra Sarkar. He saw Surajit Sarkar from the light of his torch assaulting Gour Chandra Sarkar with a rod. He also identified Adhir Sarkar and Sukumar Sarkar at the place of occurrence and said that they chased him (Gour Chandra Sarkar). He did not say that Adhir Sarkar and Sukumar Sarkar assaulted Gour Chandra Sarkar and he did not identify anybody else at the place of occurrence. The witness said that he escaped from the place of occurrence and went home. He came to know the next morning that Gour Chandra Sarkar had died. It transpires from the evidence of the investigating officer PW-14 Pradyut Banerjee that even though Sanatan Sarkar was an eyewitness, he was examined only on 10th May 1992 about a month and an half after the incident.

14. PW-8 Achintya Sarkar, son of Gour Chandra Sarkar was also an eyewitness. He was about 12/13 years old when the incident took place. In his testimony he stated that he, his father and Sanatan Sarkar were returning to their village from Gobindapur at about 8/8.30 pm on 21st March 1992. When they were near a school, he saw from his torchlight that Surajit Sarkar was assaulting his father with a rod. Then Sukumar

Sarkar followed by Adhir Sarkar assaulted his father with a rod. He tried to go to his father but was chased away by Gopal Sarkar, Jamai Gopal Sarkar and Bhebesh Sarkar. He was afraid that they might kill him. He stated that he returned home that night at about 2.00 a.m. When the police came to his house thereafter, he narrated the incident to them.

15. PW-9 Dr. Partha Sarathi Saha confirmed the injuries on Gour Chandra Sarkar and stated that a hard, blunt weapon could have caused them. The injuries were:

(1)1½" cut mark over the right front parietal region.

(2) ½" cut mark over the back of right parietal region.

16. There were some abrasion marks over the right ear and right knee. He also found that the right parietal bone was fractured. The membrane and brain matter were ruptured. There was a fracture of the right 6th & 7th ribs and a fracture of the lower end of right radius and dislocation of the right elbow joint. In his cross examination this witness stated that injury (1) and (2) above may be caused by contact with a hard and blunt weapon and even by a fall.

17. PW-14 Pradyut Banerjee the investigating officer confirmed the events as investigated by him. He also confirmed the seizures made and generally supported the case of the prosecution. In his cross-examination, he stated that he examined Achintya Sarkar at his residence at about 2.10 am on 22nd March 1992. At that time, Achintya Sarkar did not say that he was chased away by Gopal Sarkar, Jamai Gopal Sarkar and Bhebesh Sarkar. He had stated that Surajit Sarkar assaulted his father.

Decision of the Trial Court:

18. The principal contention of the defence before the Trial Court was that the telephonic intimation given by PW-3 Parash Biswas must be treated as the FIR for the purposes of Section 154 of the Criminal Procedure Code (for short the Cr.P.C.). Consequently, the complaint lodged by PW-1 Susanta Sarkar

would not be the FIR and the contents thereof would be hit by Section 162 of the Cr.P.C.

19. The Trial Judge rejected this contention holding that the ingredients of Section 154 of the Cr.P.C. were not made out and that the telephonic message given by an unknown person with regard to the death of another unknown person could not be treated as an FIR. In arriving at this conclusion the Trial Judge relied on *Ramsinh Bavaji Jadeja v. State of Gujarat,* (1994) 2 SCC 685.

20. On the merits of the prosecution case, the Trial Court was of the view that even though some of the witnesses were interested witnesses and had some enmity with the accused persons, their evidence could not be thrown out only for this reason. It was held that there was no dispute about the time and place of the incident. There was also no dispute that Gour Chandra Sarkar had met a homicidal death. The only question that remained under these circumstances was who had killed Gour Chandra Sarkar.

21. The Trial Judge held that there was insufficient evidence to implicate Bara Gopal Sarkar, Jamai Gopal Sarkar and Bhebesh Sarkar with the incident. They were not identified by PW-7 Sanatan Sarkar and even according to the testimony of PW-8 Achintya Sarkar they had not dealt any blows on Gour Chandra Sarkar and had only chased him away from the scene of the crime. Accordingly, the Trial Judge acquitted Bara Gopal Sarkar, Jamai Gopal Sarkar and Bhebesh Sarkar.

22. With regard to two other accused persons, namely, Sukumar Sarkar and Adhir Sarkar, the Trial Court held that even though PW-8 Achintya Sarkar had stated in his evidence that they had dealt blows on Gour Chandra Sarkar yet, since during the investigations, PW-8 Achintya Sarkar had informed the investigating officer that he saw only Surajit Sarkar giving blows to Gour Chandra Sarkar, the Trial Judge gave them the benefit of doubt and accordingly acquitted them.

23. The Trial Judge was of the view that there was sufficient

evidence that Surajit Sarkar had assaulted Gour Chandra Sarkar with an iron rod and had caused severe injuries on his head. It was held that the prosecution had successfully proved beyond all reasonable doubt that Surajit Sarkar had murdered Gour Chandra Sarkar. Accordingly, he was held punishable for the offence of murder and sentenced to life imprisonment.

Decision of the High Court:

24. The State did not appeal against the acquittal of the five accused persons. However, Surajit Sarkar filed C.R.A. No. 17 of 1998 which was heard by the Calcutta High Court. By its judgment and order dated 24th April 2009, the High Court upheld the conviction of Surajit Sarkar and the sentence awarded to him.

25. Before the High Court, it was submitted that the complaint made by PW-1 Susanta Sarkar could not be treated as an FIR. This contention was rejected by the High Court holding that the telephonic message received from an unknown person in respect of the murder of another unknown person was cryptic and anonymous and the ingredients of Section 154 of the Cr.P.C. were not made out. As such, it could not be treated as an FIR. The High Court relied on *Tapinder Singh v. State of Punjab,* (1970) 2 SCC 113, *Soma Bhai v. State of Gujarat,* (1975) 4 SCC 257 and Ramsinh Bavaji Jadeja.

26. The second contention before the High Court was that the prosecution witnesses were interested witnesses and therefore their evidence was not credible. The High Court considered this contention and rejected it on the ground that there was no contradiction in the statements of the witnesses.

27. The next contention before the High Court was that there was an infirmity in the FIR since important facts affecting the probability of the case had been left out. The High Court rejected this contention and held that an FIR is not an encyclopedia of the events said to have taken place. The FIR only results in setting the investigative process in motion and in this case the investigation was carried out satisfactorily. The

failure of the complainant to mention from whom he got the information regarding the murder of Gour Chandra Sarkar was not material.

28. It was argued before the High Court that the investigation was shoddy inasmuch as the investigating officer did not seize the torches from which the eyewitnesses had seen the crime. The High Court held that this could not be treated as an omission to discredit the witnesses. For this purpose, reliance was placed on *Balo Jadav v. State of Bihar,* (1997) 5 SCC 360.

29. Continuing with the argument of a shoddy investigation, it was contended that there was considerable delay in the examination of an eyewitness (PW-7 Sanatan Sarkar). The High Court held that since no question was asked of the investigating officer regarding the delay in examination of the witness, the investigation cannot be faulted on this ground. It was held that if asked, the investigating officer could have given an explanation which might have been acceptable. Reliance in this regard was placed on *Ranbir and Ors. v. State of Punjab,* (1973) 2 SCC 444 and *Bodhraj v. State of J & K,* (2002) 8 SCC 45.

30. The last contention urged before the High Court was that since the co-accused had been acquitted after having been given the benefit of doubt, it would not be correct to hold Surajit Sarkar guilty of the offence of murder. This contention was also rejected in view of *Komal v. State of U.P.,* (2002) 7 SCC 82 and *Gangadhar Behera v. State of Orissa,* (2002) 8 SCC 381.

Contentions:

31. Before us, it was contended that the telephonic message received by the Police Station at Santipur and which was noted in the General Diary should be treated as the FIR and not the complaint made by PW-1 Susanta Sarkar.

32. The second contention was that the presence of PW-7 Sanatan Sarkar and indeed of PW-8 Achintya Sarkar at the

place of occurrence was doubtful. In this context, it was pointed out that PW-8 Achintya Sarkar did not mention the presence of PW-7 Sanatan Sarkar at the place of occurrence. As far as PW-8 Achintya Sarkar is concerned, he was not traceable till 2.00 am the next day which by itself casts a doubt on his whereabouts. Moreover, this witness stated that he returned home at 2.00 am on 22nd March 1992 but in his cross-examination he stated that after he fled from the place of occurrence he returned to the same place and saw his father lying dead with bloody injuries. In view of this contradiction, this witness could not be believed.

33. The third contention urged was that the prosecution case looks a little doubtful inasmuch as PW-8 Achintya Sarkar, a boy of 12/13 years did not reach home on the fateful evening till 2.00 am the next day and yet there was no complaint by anybody in the family about the missing child. This was said to be a little odd, and particularly since his father had been murdered, his family ought to have been a little worried about his safety and ought to have made a complaint to the police in this regard. It was submitted that this conduct of Gour Chandra Sarkar's family was inexplicable.

34. The final contention urged was that if five persons were given the benefit of doubt and found not guilty of the murder of Gour Chandra Sarkar, there was no reasonable basis for coming to the conclusion that Surajit Sarkar alone had committed the murder of Gour Chandra Sarkar.

Discussion:

(1) Whether a telephonic intimation is an FIR:

35. As far the first contention is concerned that the telephonic call should be treated as the FIR and not the complaint made by PW-1 Susanta Sarkar, we find no merit in the submission.

36. Section 154 (1) of the Cr.P.C. which is relevant for our purpose reads as follows :-

"154. Information in cognizable cases.

(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

37. A bare reading of this section makes it clear that even though oral information given by an officer in charge of a police station can be treated as an FIR, yet some procedural formalities are required to be completed. They include reducing the information in writing and reading it over to the informant and obtaining his or her signature on the transcribed information.

38. In the case of a telephonic conversation received from an unknown person, the question of reading over that information to the anonymous informant does not arise nor does the appending of a signature to the information, as recorded, arise.

39. However, we are not going into any technicalities on the subject, keeping in mind technological advances made in communication systems. All we need say is that it is now well settled by a series of decisions rendered by this Court that a cryptic telephonic information cannot be treated as an FIR. In this case, the telephonic information is rather cryptic and was recorded in the General Diary as follows:

"Today in the marginally noted time I received an information over Telephone from an unknown person Gobindapur, P.S. Santipur, Nadia that today (21.03.1992) night one unknown person was murdered at Arpara, P.S. Santipur, Nadia.

Accordingly I noted the fact in G.D., and informed the matter to O.C. Santipur P.S. (N).

Sd/-

K.P. Majumdar, S.I."

40. In Ramsing Bavaji Jadeja, this Court relied on *Tapinder Singh and Soma Bhai and Dhananjoy Chatterjee v. State of West Bengal,* (1994) 2 SCC 220 to hold that a cryptic message given on telephone cannot be treated as an FIR merely because that information was first in point of time and had been recorded in the Daily Diary of the police station. It was also held that the object and purpose of a telephonic message is not to lodge a first information report but a request to the officer in charge of the police station to reach the place of occurrence.

41. This view was reiterated in *Mundrika Mahto v. State of Bihar,* (2002) 9 SCC 183, *State of Andhra Pradesh v. V.V. Panduranga Rao,* (2009) 15 SCC 211 and *Sidhartha Vashisht v. State (NCT of Delhi),* (2010) 6 SCC 1. We see no reason to take a view different from the one consistently taken by this Court in all these cases.

42. We may only add that it is a matter of regret that despite the law on the subject being well-settled, such an argument is raised once again.

(2) Presence of PW-7 at the place of occurrence:

43. The investigations into the crime do leave much to be desired as pointed out by learned counsel for Surajit Sarkar. The conduct of PW-7 Sanatan Sarkar was quite unnatural and a little odd and ought to have been looked into by the police. This witness was a neighbour of the victim and it appears from his testimony that after he witnessed the attack on Gour Chandra Sarkar, he did not bother to inform the victim's family, or anybody else and simply went home. This witness further deposed that he came to know of the death of Gour Chandra Sarkar only the next morning.

44. We also find it quite strange that the investigating officer examined PW-7 Sanatan Sarkar only on 10th May 1992 that is after a gap of more than a month and a half of the incident. One charitable explanation for this delay is that PW-8 Achintya Sarkar did not mention the presence of PW-7 Sanatan Sarkar at the place of occurrence. This possibility gave rise to another submission by learned counsel for the Surajit Sarkar that perhaps PW-7 Sanatan Sarkar was not present at the place of occurrence.

45. Learned counsel for Surajit Sarkar relied upon *Ganesh Bhavan Patel v. State of Maharashtra,* (1978) 4 SCC 371 to contend that the delayed examination of PW-7 Sanatan Sarkar throws some doubt on his presence at the place of occurrence. In that case, there was a delay of a few hours by the investigating officer in examining the eyewitnesses and it was observed:

> "Delay of a few hours, simpliciter, in recording the statements of eyewitnesses may not, by itself, amount to a serious infirmity in the prosecution case. But it may assume such a character if there are concomitant circumstances to suggest that the investigator was deliberately marking time with a view to decide about the shape to be given to the case and the eyewitnesses to be introduced."

46. We are concerned with a case where there is a delay of a month and a half in examining an eyewitness. Perhaps what can charitably be said in defence of the investigating officer in the present case, unlike in *Ganesh Bhavan Patel,* is that it was not mentioned to him that PW-7 Sanatan Sarkar was an eyewitness. Even so, it reflects very poorly on the investigations.

47. Learned counsel for the State relied upon a passage from *Banti v. State of M.P.,* (2004) 1 SCC 414. This passage reiterates a principle earlier laid down that the investigating officer must be specifically asked to furnish an explanation for

the delay in examination of a witness. The passage is as follows:

> "As regards the delayed examination of certain witnesses, this Court in several decisions has held that unless the investigating officer is categorically asked as to why there was delay in examination of the witnesses the defence cannot gain any advantage therefrom. It cannot be laid down as a rule of universal application that if there is any delay in examination of a particular witness, the prosecution version becomes suspect. It would depend upon several factors. If the explanation offered for the delayed examination is plausible and acceptable and the court accepts the same as plausible, there is no reason to interfere with the conclusion (See *Ranbir v. State of Punjab* [(1973) 2 SCC 444] and *Bodhraj v. State of J&K* [(2002) 8 SCC 45])."

48. In *Banti* the delay in examining the eyewitnesses was two days, while in *Ranbir Singh* the delay was apparently of four days and in *Bodhraj* it was apparently about one week. In none of these decisions was the investigating officer asked to give an explanation for the delay in examination of a witness.

49. In *State of U.P. v. Satish,* (2005) 3 SCC 114 relied on by learned counsel for the State, the reason for the delay in examination of the witnesses is not quite clear. But, this Court reiterated the two principles earlier recognized, namely, that mere delay in examination of a witness does not make the prosecution version suspect and that the investigating officer must be asked the reason for the delay in examination of the witness. *Ganesh Bhavan Patel* was explained by observing that delay in examination of the witnesses was not the only determinative factor - in fact, there were several factors taken together along with the delayed examination of witnesses that provided the basis for acquittal.

50. Finally, reference was made by learned counsel for the *State to Shyamal Ghosh v. State of W.B.,* (2012) 7 SCC 646

to contend that the delayed examination of a witness will not vitiate the prosecution case. We agree that delay per se may not be a clinching factor but when there is a whole range of facts that need to be explained but cannot, then the cumulative effect of all the facts could have an impact on the case of the prosecution.

51. If the evidence on record is looked at in perspective, namely, that PW-7 Sanatan Sarkar an eyewitness to the incident did not bother to inform anybody in the family of Gour Chandra Sarkar about the assault on his neighbour; that this eyewitness was examined by the investigating officer more than a month and a half after the occurrence; that the presence of this witness was not mentioned by PW-8 Achintya Sarkar also an eyewitness to the incident, leads us to have some doubt about the presence of PW-7 Sanatan Sarkar at the place of occurrence.

52. Learned counsel for the State submitted while relying on *Visveswaran v. State,* (2003) 6 SCC 73, C. *Muniappan v. State of Tamil Nadu,* (2010) 9 SCC 567 and *Sheo Shankar Singh v. State of Jharkhand,* (2011) 3 SCC 654 that a defective investigation need not necessarily result in the acquittal of an accused person.

53. In *Visveswaran* all that this Court observed was that:

> "In defective investigation, the only requirement is of extra caution by courts while evaluating evidence. It would not be just to acquit the accused solely as a result of defective investigation. Any deficiency or irregularity in investigation need not necessarily lead to rejection of the case of prosecution when it is otherwise proved."

Similarly, in *Muniappan* this Court held:

> "The law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory

> investigation, the faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence dehors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth."

Finally in *Sheo Shankar Singh* it was held as follows:

> "Deficiencies in investigation by way of omissions and lapses on the part of investigating agency cannot in themselves justify a total rejection of the prosecution case."

54. We are not prepared to accept as a broad proposition of law that in no case can defective or shoddy investigations lead to an acquittal. It would eventually depend on the defects pointed out. If the investigation results in the real culprit of an offence not being identified, then acquittal of the accused must follow. It would not be permissible to ignore the defects in an investigation and hold an innocent person guilty of an offence which he has not committed. The investigation must be precise and focused and must lead to the inevitable conclusion that the accused has committed the crime. If the investigating officer leaves glaring loopholes in the investigation, the defence would be fully entitled to exploit the lacunae. In such a situation, it would not be correct for the prosecution to argue that the Court should gloss over the gaps and find the accused person guilty. If this were permitted in law, the prosecution could have an innocent person put behind bars on trumped up charges. Clearly, this is impermissible and this is not what this Court has said.

55. It is clear from the record that the investigation has left unanswered several questions regarding PW-7 Sanatan Sarkar. Under the circumstances, it is difficult to accept that PW-7

Sanatan Sarkar was present at the place and at the time when Gour Chandra Sarkar was attacked.

(3) Evidence of PW-8 Achintya Sarkar:

56. We are now left only with the evidence of PW-8 Achintya Sarkar. In the case of this witness also the facts are a little odd in as much as when the crime took place he was about 12/13 years old. When he was chased away by Gopal Sarkar, Jamai Gopal Sarkar and Bhebesh Sarkar, he naturally feared for his life and went into hiding. It is not clear what his movements were thereafter.

57. In his deposition, PW-8 Achintya Sarkar stated that he came back to the place of occurrence and saw the dead body of his father. This could have been only around midnight on 21st March 1992 after the inquest proceedings were over and the seizure of some items at the place of occurrence was concluded by the police. Assuming this to be so, it is not clear where PW-8 Achintya Sarkar hid himself after that and why. In any event, he came back home only at 2.00 am on 22nd March 1992 when he told his brother PW-1 Susanta Sarkar about the incident and soon thereafter narrated the events to the investigating officer.

58. While the reaction of PW-8 Achintya Sarkar is understandable, what is not understandable is the conduct of his family. The members of his family seem to have not taken any action to find out the whereabouts of PW-8 Achintya Sarkar after they came to know about the murder of Gour Chandra Sarkar. We would imagine that on coming to know of the murder, the primary concern of the family would have been the safety of PW-8 Achintya Sarkar. However, no efforts appear to have been made to locate his whereabouts or to search for him or even to inform the police about his disappearance.

59. However, merely because PW-8 Achintya Sarkar and his family acted a little strangely would not necessarily lead to the conclusion that this witness should not be believed. There is nothing on record to suggest that he was not at the place of occurrence when his father Gour Chandra Sarkar was attacked.

There is also nothing on record which could lead to any inference or conclusion that PW-8 Achintya Sarkar made up a story about the attack on his father by Surajit Sarkar.

60. It is true that there is some discrepancy or some gap in the whereabouts of PW-8 Achintya Sarkar between the time of the attack and his returning home at 2.00 a.m. on 22nd March 1992 but that by itself is not enough to discredit this witness, more so when he was not asked any question on his whereabouts.

61. Also, this discrepancy does not destroy the substratum of the case of the prosecution and therefore there is no reason to throw it out on this ground. What is a minor discrepancy has recently been dealt with in *Syed Ahmed v. State of Karnataka,* (2012) 8 SCC 527 (authored by one of us, Lokur, J.) and the view expressed therein need not be repeated.

62. We find that PW-8 Achintya Sarkar successfully withstood his cross-examination and we agree with the Trial Court and the High Court that he was a credible witness who ought to be believed when he says that he was at the place of occurrence and that he saw his father Gour Chandra Sarkar being attacked by the Surajit Sarkar.

(4) **Acquittal of co-accused:**

63. The final contention of learned counsel for Surajit Sarkar was that since five of the accused persons were given the benefit of doubt there is no reason why he should not be given the benefit of doubt.

64. In *Gurcharan Singh v. State of Punjab,* AIR 1956 SC 460 this Court held, in a case where some accused persons were acquitted and some others were convicted, as follows:

> "The highest that can be or has been said on behalf of the appellants in this case is that two of the four accused have been acquitted, though the evidence against them, so far as the direct testimony went, was the same as against the appellants also; but it does not follow as a necessary corollary that because the other two accused have been

acquitted by the High Court the appellants also must be similarly acquitted."

65. Learned counsel for the State drew our attention to *Komal* in which it was held that merely because some of the accused persons have been acquitted by being given the benefit of doubt does not necessarily mean that all the accused persons must be given the benefit of doubt. It was observed that:

"….the complicity of two accused persons who were armed with guns having been doubted by the High Court itself, they have already been acquitted which cannot in any manner affect the prosecution case so far as the appellants are concerned against whom the witnesses have consistently deposed and their evidence has been found to be credible."

66. Similarly, in *Gangadhar Behera* reliance was placed on *Gurcharan Singh* and it was held:

"Merely because some of the accused persons have been acquitted, though evidence against all of them, so far as direct testimony went, was the same does not lead as a necessary corollary that those who have been convicted must also be acquitted. It is always open to a court to differentiate the accused who had been acquitted from those who were convicted."

67. *Gangadhar Behera* was cited with approval somewhat recently in *Prathap v. State of Kerala,* (2010) 12 SCC 79.

68. We agree that Surajit Sarkar cannot be absolved of his involvement in the death of Gour Chandra Sarkar merely because the other accused persons were either not identified by the eyewitnesses or had no role to play in the attack on Gour Chandra Sarkar. There is the cogent and reliable evidence of PW-8 Achintya Sarkar to hold that Surajit Sarkar attacked Gour Chandra Sarkar which ultimately resulted in his death. The contention of learned counsel for Surajit Sarkar is rejected.

69. We may mention that learned counsel for Surajit Sarkar

submitted that there was a delay in forwarding the FIR to the concerned Magistrate. Since no foundation has been laid for this contention nor was this contention urged either before the Trial Court or before the High Court we see no reason to entertain it at this stage.

Is it a case of murder:

70. What now remains to be considered is whether Surajit Sarkar intended to murder Gour Chandra Sarkar or is it a case of culpable homicide not amounting to murder?

71. Given the nature of injuries, it is difficult to accept the view that Surajit Sarkar intended to cause the death of Gour Chandra Sarkar or that the injuries were so imminently dangerous that they would, in all probability, cause death. The murder of Gour Chandra Sarkar would, therefore, be ruled out. Nevertheless, the injuries were quite serious and inflicted by Surajit Sarkar on Gour Chandra Sarkar's head with an iron rod, as stated by PW-8 Achintya Sarkar. We can surely credit Surajit Sarkar with the knowledge that if a person is hit with an iron rod on the head, then the act is likely to cause the death of the victim. That being so, in our opinion, it would be more appropriate to hold Surajit Sarkar guilty of an offence of culpable homicide not amounting to murder. Since we attribute to him the knowledge of his actions, he should be punished under the second part of Section 304 of the IPC.

Conclusion:

72. Accordingly, we set aside the conviction of Surajit Sarkar for the offence of the murder of Gour Chandra Sarkar. However, we hold him guilty of an offence punishable under the second part of Section 304 of the IPC. He is sentenced to undergo rigorous imprisonment for a period of 10 (ten) years. The fine and default sentence awarded by the Trial Court are maintained.

73. The appeal is disposed of on the above terms.

K.K.T. Appeal disposed of.

AKIL @ JAVED
v.
STATE OF NCT OF DELHI
(Criminal Appeal No. 1735 of 2009)

DECEMBER 06, 2012

[SWATANTER KUMAR AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

Penal Code, 1860 - ss. 302 and 392 - Murder and robbery - Conviction by courts below - On appeal, Held: Conviction justified in view of the account of eye-witnesses, recovery of stolen articles and identification of the accused.

Witness - Witness declared hostile by prosecution - Not treated as hostile by the Court - Evidentiary value - Discussed.

*Criminal Administration of Justice - Speedy trial - Need for the courts dealing with cases involving a serious offence to proceed with the trial on day to day basis until the trial is concluded as stipulated in s. 309 Cr.P.C - In the instant case adjournment of the case for two months for cross-examination amounts to flouting the provisions u/ss. 231 and 309 Cr.P.C., and the decision in *Rajdeo Sharma and **Shambhu Nath cases - Direction to forward a copy of present decision to all the High Courts to specifically follow the instructions issued in *Rajdeo Sharma and in **Shambhu Nath cases by issuing appropriate circular, if already not issued - Direction to trial courts to strictly adhere to the procedure prescribed u/ss. 231 and 309 Cr.P.C. in order to ensure speedy trial - Code of Criminal Procedure, 1973 - ss. 231 and 309.*

The appellant-accused, along-with co-accused was prosecuted for robbery and murder. The prosecution case was that three intruders including the appellant-accused, entered the house of complainant (PW 17)

armed with revolvers and knife. They snatched a gold ring and locket from the deceased and also a cash of Rs.100/150. Thereafter, they robbed cash, a mobile phone and jewels. When the appellant attempted to molest the complainant, the deceased raised a protest, at which the appellant shot him dead. They left the scene of occurrence, after bolting the door from outside. The prosecution examined PWs.17, 19, 20, 23 and 25 as eye-witnesses. When the appellant and one co-accused were arrested in another case under Arms Act, their involvement in the present case was detected. There was recovery of stolen items from them. They were identified by PW-20. Charges were framed against them u/ss. 392/34, 302/34, 354 and 411/34 IPC. The trial Court convicted them for the offences u/ss. 302/34 and 392/34 IPC. The High Court confirmed the conviction of the appellant. The conviction of the co-accused u/s. 392/34 IPC was confirmed while he was acquitted u/s. 302/34 IPC.

The present appeal was filed by the appellant-accused. He contended that the reliance on PW 20 was not correct as he had turned hostile in his cross-examination as regards the identification of the appellant; and that reliance placed upon the recoveries of the articles from the person of the accused was not justified.

Dismissing the appeal, the Court

Held: 1.1 The conviction and sentence imposed on the appellant does not call for interference. The sequence of events, as per the prosecution, was consistently maintained by complainant - PW.17 before the Court which was fully supported by the other eye-witnesses, namely, PWs.19, 20, 23 and 25. PW 20 was not treated as a hostile witness in spite of diametrically opposite version stated by him as regards the identity of the appellant. Nevertheless, both the Courts below proceeded to hold

that the identity made by PW.20 could not be ignored. The judgment of the trial court as well as that of the High Court has elaborately considered and found that while the other witnesses could not identify the appellant and the other co-accused even in the court, PW.20 was able to identify the appellant. The trial court adjourned the case for cross-examination of PW.20 by two months on the request on behalf of the appellant and according to the High Court such a long adjournment provided scope for maneuvering. [Paras, 8, 11 and 20] [671-H; 673-C-H; 682-E-F]

Kunju Muhammed alias Khumani and Anr. v. State of Kerala **(2004) 9 SCC 193;** *Nisar Khan alias Guddu and Ors. v. State of Uttaranchal* **(2006) 9 SCC 386;** *Mukhtiar Ahmed Ansari v. State (NCT of Delhi)* **(2005) 5 SCC 258: 2005 (3) SCR 797;** *Raja Ram v. State of Rajasthan* **(2005) 5 SCC 272 - relied on.**

Paramjeet Singh alias Pamma v. State of Uttarakhand **(2010) 10 SCC 439: 2010 (11) SCR 1064;** *Suraj Mal v. State (Delhi Administration)* **(1979) 4 SCC 725 - referred to.**

1.2 Another important factor which weighed with the Courts below to find them guilty was the identity of the materials which were recovered from the appellant and the co-accused, when the appellant and the other accused were arrested under the Arms Act. A 'Rado watch' and a 'gold chain' were recovered from the personal search of the appellant. Search was conducted by PW.14. He testified such fact that the said recovery was made by him from the person of the appellant. PW.17 clearly identified both the articles as belonging to her which were stealthily removed from her possession. In so far as the said part of evidence is concerned (viz), as regards the recovery, the plea of the accused that no public witness was joined at the time of arrest of the accused in spite of prior information which was available

with the police, was rightly rejected by both the courts below as unsustainable. The version of PW.14 in this regard was unassailable. The Courts below righty held that non-mentioning of the recovered articles in the FIR was a very minor discrepancy and on that score such a diabolic offence committed by the accused could not be ignored. The plea that the material objects were shown to PW.17 is also trivial and that does not cause any serious dent in the case of the prosecution. In the said circumstances, it was for the appellant to explain as to how he came into possession of the articles whether it was owned by him or in what other manner those articles came into his possession. In his statement u/s. 313 Cr.P.C, the appellant did not even attempt to explain it away or claim ownership. Thus, the recoveries from the appellant along with the co-accused having been proved in the manner known to law, those were well established incriminating circumstances demonstrated before the courts below and there was no contra evidence for the appellant and the co-accused to get rid of the offences alleged. Having regard to the said piece of evidence relating to the recoveries prevailing on record the presence of the appellant along with the co-accused at the place of occurrence in the manner described by the witnesses, namely, PWs.17, 19, 20, 23 and 25 was clinching enough to rope in the appellant along with the co-accused in the commission of the crime as alleged in the complaint and found proved against both of them. [Paras 14 and 15] [674-H; 675-A-H; 676-A-B]

State of Punjab v. Wassan Singh and Ors. **AIR 1981 SC 697: 1981 (2) SCR 615;** *Sohrab and Anr. v. State of Madhya Pradesh* **AIR 1972 SC 2020: 1973 (1) SCR 472;** *Appabhai and Anr. v. State of Gujarat* **AIR 1988 SC 696;** *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat* **AIR 1983 SC 753: 1983 (3) SCR 280;** *Sanjay alias Kaka v. State (NCT of Delhi)* **2001-(CR)-GJX-0071-SC;** *Ezhil and Ors. v. State of Tamil*

Nadu **2002 II A.D. (Cr.) S.C. 613;** *State of Maharashtra v. Suresh* **(2000) 1 SCC 471: 1999 (5) Suppl. SCR 215;** *Nallabothu Venkaiah v. State of Andhra Pradesh* **2002 VI AD (S.C.) 521 - referred to.**

2.1 There is dire need for the courts dealing with cases involving a serious offence to proceed with the trial on day to day basis in de die in diem until the trial is concluded. The trial court dealing with sessions case is cautioned to ensure that there are well settled procedures laid down under the Code of Criminal Procedure as regards the manner in which the trial should be conducted in sessions cases in order to ensure dispensation of justice without providing any scope for unscrupulous elements to meddle with the course of justice to achieve some unlawful advantage. Under Section 231 Cr.P.C., it has been specifically provided that on the date fixed for examination of witnesses as provided u/s. 230 Cr.P.C., the Session's Judge should proceed to take all such evidence as may be produced in support of the prosecution and that in his discretion may permit cross-examination of any witnesses to be deferred until any other witness or witnesses have been examined or recall any witness for further cross-examination. Section 309 Cr.P.C lays down conditions for granting adjournments. The High Court of Delhi by its Circular No.1/87 dated 12th January 1987, in Clause 24A directed all the Sessions Judges and Assistant Sessions Judges to follow the provisions of s. 309(1) and (2) Cr.P.C, Criminal Rules of Practice, Kerala, 1982 and Circulars and instructions on the list system, in order to ensure the speedy disposal of Sessions cases. [Paras 25, 27] [685-A-D; 687-B-C]

Badri Prasad v. Emperor **(1912) 13 Crl. L.J. 861;** *Lt. Col. S.J. Chaudhary v. State (Delhi Administration)* **(1984) 1 SCC 722: 1984 (2) SCR 438;** *State of U.P. v. Shambhu Nath*

Singh and Ors. **(2001) 4 SCC 667: 2001 (4) SCC 667 - relied on.**

Chandra Sain Jain and Ors. v. The State **1982 Crl. L.J. NOC 86 (ALL);** *The State v. Bilal Rai and Ors.* **1985 Crl. L.J. NOC 38 (Delhi);** *State v. Ravi Kant Sharma and Ors.* **120 (2005) DLT 213 - approved.**

2.2 In the fact situation of the present case, where PW.20 was cross-examined after two months solely at the instance of the appellant's counsel on the simple ground that the counsel was engaged in some other matter in the High Court on the day when PW.20 was examined-in-chief, the adjournment granted by the trial court at the relevant point of time only disclose that the court was oblivious of the specific stipulation contained in Section 309 Cr.P.C. which mandate the requirement of sessions trial to be carried on a day to day basis. The trial Court has not given any reason much less to state any special circumstance in order to grant such a long adjournment of two months for the cross-examination of PW.20. Everyone of the caution indicated in the decision of this Court reported in **Rajdeo Sharma* case was flouted with impunity. In the said decision a request was made to all the High Courts to remind all the trial Judges of the need to comply with Section 309 Cr.P.C. in letter and spirit. In fact, the High Courts were directed to take note of the conduct of any particular trial Judge who violated the above legislative mandate and to adopt such administrative action against the delinquent judicial officer as per the law. [Para 34] [694-G-H; 695-A-C]

2.3 In spite of the specific directions issued by this Court and reminded once again in ***Shambhu Nath* case such recalcitrant approach was made by the trial court unmindful of the adverse serious consequences affecting the society at large flowing therefrom. Therefore, even while disposing of this appeal by confirming the

conviction and sentence imposed on the appellant by the trial Judge, as confirmed by the High Court, the Registry is directed to forward a copy of this decision to all the High Courts to specifically follow the instructions issued by this Court in the decision reported in **Rajdeo Sharma* case and reiterated in ***Shambhu Nath* case by issuing appropriate circular, if already not issued. If such circular has already been issued, to ensure that such directions are scrupulously followed by the trial courts without providing scope for any deviation in following the procedure prescribed in the matter of a trial of sessions cases as well as other cases as provided u/s. 309 Cr.P.C. In this respect, the High Courts will also be well advised to use their machinery in the respective State Judicial Academy to achieve the desired result. [Para 35] [695-D-H; 696-A]

Rajdeo Sharma v. State of Bihar* **1998 Crl. L.J. 4596; ***State of U.P. v. Shambhu Nath Singh and Ors.* **(2001) 4 SCC 667: 2001 (4) SCC 667 - relied on.**

2.4 Directions are issued in the light of the provisions contained in Section 231 r/w Section 309 Cr.P.C. for the trial court to strictly adhere to the procedure prescribed therein in order to ensure speedy trial of cases and also rule out the possibility of any maneuvering taking place by granting undue long adjournment for mere asking. [Para 36] [696-B-C]

Case Law Reference:

1981 (2) SCR 615	**Referred to**	**Para 16**
1973 (1) SCR 472	**Referred to**	**Para 16**
AIR 1988 SC 696	**Referred to**	**Para 16**
1983 (3) SCR 280	**Referred to**	**Para 16**
2001-(CR)-GJX-0071-SC	**Referred to**	**Para 16**
2002 II A.D. (Cr.) S.C. 613	**Referred to**	**Para 16**

1999 (5) Suppl. SCR 215	**Referred to**	**Para 16**
2002 VI AD (S.C.) 521	**Referred to**	**Para 16**
2010 (11) SCR 1064	**Referred to**	**Para 20**
(1979) 4 SCC 725	**Referred to**	**Para 20**
(2004) 9 SCC 193	**Relied on**	**Para 21**
(2006) 9 SCC 386	**Relied on**	**Para 22**
2005 (3) SCR 797	**Relied on**	**Para 23**
(2005) 5 SCC 272	**Relied on**	**Para 24**
(1912) 13 Crl. L.J. 861	**Relied on**	**Para 28**
1982 Crl. L.J. NOC 86 (ALL)	**Approved**	**Para 29**
1985 Crl. L.J. NOC 38 (Delhi)	**Approved**	**Para 30**
1984 (2) SCR 438	**Relied on**	**Para 31**
120 (2005) DLT 213	**Approved**	**Para 32**
2001 (4) SCC 667	**Relied on**	**Para 33 and 35**
1998 Crl. L.J. 4596	**Relied on**	**Para 34**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1735 of 2009.

From the Judgment and Order dated 16.09.2005 of the High Court of Delhi at New Delhi in Criminal Appeal No. 134 of 2003.

Subramonium Prasad, Rajat Khattry and Varun Tandon for the Appellant.

B. Chahar, P.K. Dey, Sadhana Sandhu, B.V. Balramdas and Anil Katiyar for the Respondent.

The Judgment of the Court was delivered by

FAKKIR MOHAMED IBRAHIM KALIFULLA, J. 1. First

accused is the appellant before us. The challenge is to the judgment of the Division Bench of the High Court of Delhi in Criminal Appeal No.134/2003 dated 16.09.2005. The High Court by its common judgment in Criminal Appeal No.166/2003 preferred by the second accused and Criminal Appeal No.134 of 2003 preferred by the appellant before us confirmed the conviction of the appellant for offences under Section 302 as well as under Section 392 read with Section 34 IPC.

2. The genesis of the case of the prosecution was that one Shama Parveen was living in House No.A-32/15, Main Road No.66, Maujpur, that while she was using the first floor as her residential premises she had her own shop in the ground floor where she was dealing with air-coolers and the business of real-estate. She had three sons living with her apart from her mother. In another portion of the same premises her maternal uncle one Mohd. Jamil (Mammu) was having his own business. One Salvinder alias Kake friend of Shama Parveen used to frequently visit her house. On 27.10.1998 Shama Parveen returned back to her house along with Salvinder after making certain purchases from the market and after her return appellant and two other persons entered her house and they were armed with revolvers and also a knife. After entering the house they enquired about Mammu and when Shama Parveen replied that he had gone to fetch vegetables the accused snatched a gold ring, locket and cash amounting to Rs.100/150 from Salvinder. They demanded the keys of the almirah of Shama Parveen and out of force when she handed over the keys the accused opened the almirah and removed sum of Rs.15000/- kept in the almirah apart from sum of Rs.2,50,000/- kept in the locker. They also removed a mobile phone and some other ornaments apart from ear rings and a necklace from the person of Shama Parveen. While so, Mohd. Jamil alias Mammu also entered the house and another friend of Shama Parveen, namely, Nasreen and her husband Jeeta also came there. Shama Parveen's mother was already present in the house. After committing robbery, the appellant stated to have attempted to molest Shama Parveen and when Salvinder protested to such an

attempt of the appellant questioning as to why even after removing the valuables they are indulging in such molestation, the appellant stated to have retarded towards him asking him to shut up and also simultaneously fired a shot on his forehead. Salvinder stated to have fell down on the bed. The three accused thereafter stated to have left the place with the robbed items and cash by locking the door outside the house. After 10-15 minutes one of the sons of Shama Parveen, namely, Danish entered the house who untied all the victims and thereafter the injured Salvinder was taken to the hospital where he was declared 'brought dead'. Based on the statement of Shama Parveen the police registered a crime under Sections 392/354/302 read with Section 34 IPC at Police Station Seelampur, Delhi.

3. Be that as it may, based on a secret information the appellant and the second accused were arrested by officials of the Special Cell, Lodhi Colony from Sunlight Colony, Seema Puri while they came there in a vehicle bearing Registration No.DL-2C-B 1381. Pursuant to the arrest when a search was made on the person of the second accused a loaded country-made pistol was recovered from his pant pocket. On the personal search made on the appellant he was also found in possession of another country-made pistol along with live cartridges. Cases were registered against them under the Arms Act vide FIR No.717 and 718/1998 at Police Station Seema Puri. Further recoveries were also made from the person of the appellant, namely, a gold chain and a 'Rado' wrist watch. Based on the further investigation it came to light that they were involved in the incident on 27.10.1998 at the residence of Shama Parveen. The investigation further revealed apart from the appellant and second accused two other accused were also involved but they continued to remain absconding and, therefore, they were declared as proclaimed offenders.

4. The trial Court framed charges against the appellant and the second accused under Section 392/34, 302/34, 354 and

411/34 IPC. The trial Court ultimately convicted the appellant as well as second accused for offences under Sections 302 read with 34 and 392 read with 34 IPC. They were acquitted of the offence under Section 354 IPC as there was no evidence against them. The appellant and the second accused were imposed with a sentence of life imprisonment for the offence under Section 302 read with 34 IPC apart from a fine of Rs.5000/- each and in default to undergo rigorous imprisonment for one year. They were also imposed with a sentence of 10 years rigorous imprisonment for the offence under Section 392 read with 34 IPC apart from a fine of Rs.5000/- each and in default to undergo rigorous imprisonment for one year.

5. The Division Bench having dealt with the appeal of the appellant in extentso ultimately found that the second accused could not be roped in for the offence falling under Section 302 read with 34 IPC though his conviction under Section 392 read with 34 IPC could be confirmed. The Division Bench of the High Court, therefore, partly allowed the appeal of the second accused and he was acquitted of the charge under Section 302 read with 34 IPC while his conviction under Section 392 read with 34 IPC was confirmed. The appeal preferred by the appellant, however, came to be dismissed. Being aggrieved of the said judgment of the Division Bench the appellant has come forward with this appeal.

6. We heard Mr. Subramonium Prasad, learned counsel for the appellant and Mr. B. Chahar, learned senior counsel for the respondent. The learned counsel for the appellant submitted that the case of the prosecution was based on the ocular evidence of the eye-witnesses and that almost all of them turned hostile insofar as identification of the accused, that PW.20 who alone identified the accused in his chief-examination also turned hostile in the course of the cross-examination. The learned counsel, therefore, contended that the evidence of PW.20 could not have been relied upon for the conviction and sentence imposed. The learned counsel then contended that the Courts

below relied upon the articles recovered, namely, the jewels and the watch for convicting the appellant. According to learned counsel PW.17, who identified the articles, made it clear that those articles were already shown to her and, therefore, the reliance placed upon such recoveries was not justified. The learned counsel further contended that the recovery of arms from the appellant and the other accused were not connected to the offence and that no weapon was marked before the Court to connect the crime. By referring to the decision of this Court reported in *Paramjeet Singh alias Pamma V. State of Uttarakhand* - (2010) 10 SCC 439 in particular paragraph 10 of the said decision the learned counsel contended that however gruesome the offence may be, an accused can be convicted only based on legal evidence. The learned counsel also referred to Section 155 of the Evidence Act and contended that the version of PW.20 in the light of his later version in the cross-examination relating to the identity of the appellant no credence can be given as that would defeat the very basis of the principle relating to conviction in a criminal case. The learned counsel also relied upon *Suraj Mal V. State (Delhi Administration)* - (1979) 4 SCC 725 for the proposition that where the witnesses made inconsistent statements in their evidence either at one stage or at different stages, the testimony of such witnesses becomes unreliable and unworthy of credence. The learned counsel, therefore, submitted that the reliance placed upon the version of PW.20 who made inconsistent statement about the identity of the appellant was wholly invalid and unreliable. The learned counsel, therefore, contended that the conviction and sentence imposed on the appellant are liable to be set aside.

7. As against the above submission Mr. B. Chahar, learned standing counsel for the State submitted that the relevant fact to be kept in mind is the criminality of the offenders involved in this case where out of four accused two of them continue to abscond even as on date who have been declared as proclaimed offenders. The learned counsel, therefore, submitted that the approach of the trial Court and the High Court in

weighing the evidence of the witnesses and relied upon was well justified. The counsel for the State also brought to our notice the attempt of the Investigating Officer by moving the concerned Magistrate, who allowed him to interrogate the accused in the case under the Arms Act for 30 minutes, to hold a Test Identification Parade of the accused which included the appellant and the appellant along with the co-accused refused to participate in the Test Identification Parade. Further it was pointed out that their refusal to participate would result in drawing an adverse inference against them. But yet it is stated that the appellant and the other accused persisted in their refusal by stating that they were shown to the witnesses and that their photographs were also taken. The learned counsel submitted that such a stand of the appellant and the other accused was a lame excuse inasmuch as the information about the arrest of the accused was given to the Investigating Officer only on 4th November 1998 when they were formally arrested in the present case and that the Investigating Officer was thereafter allowed to interrogate the accused for about 30 minutes only and that too in the Court premises. The request of the Investigating Officer to hold Test Identification Parade was stated to be on the very next date, namely, 5th November, 1998. The learned counsel then submitted that the identity of the articles, namely, 'Rado watch' and 'gold chain' recovered from the appellant was duly identified by PW.14 and PW.17, the S.I. who conducted the search on the accused and the complainant respectively and that both of them were recovered on the same day. The learned counsel, therefore, submitted that the conviction and sentence imposed on the appellant does not call for interference.

8. Having heard learned counsel for the appellant as well as the counsel for the State, having bestowed our serious consideration to the respective submissions, the material on record and the relevant provisions, we are convinced that the conviction and sentence imposed on the appellant does not call for interference.

9. When we consider the submissions of learned counsel for the appellant the same was two-fold. According to learned counsel the identity of the appellant vis-à-vis the offence alleged was not made out. As regards the recoveries it was contended that here again the same was not proved in the manner known to law. Since, in the impugned judgment the High Court has dealt with both the contentions in extenso and also with minute details, we are of the view that by making reference to various reasoning stated therein the contention of the appellant can be satisfactorily dealt with which we shall do in the later part of this judgment. In that respect it can be stated that the prosecution examined PWs.17, 19, 20, 23 and 25 as eye-witnesses to the crime. In fact such a claim of the prosecution was never in dispute. The narration of the event that occurred on 27.10.1998 at House No.A-32/15, Main Road No.66, Maujpur, as described by those witnesses was not in controversy.

10. The sequence of events were that on that day at about 6:00 p.m three intruders in the age group of 20 to 22 years entered the place of occurrence and that out of the three persons two were armed with revolvers and one was possessing a knife. The description of those persons and their physical features were also mentioned by the complainant by stating that one of them was thin, whitish in complexion and had a cut mark on his right cheek. The other one was described as fair coloured, without moustaches and tall. The third person was described as a person with round face and well built. After entering the house they asked for the whereabouts of Mammu who was examined as PW.20. Thereafter, they snatched a gold ring from the person of deceased Salvinder and also a locket and cash of Rs.100/150 from him. Then they asked the complainant, who was in possession of the keys of the almirah, noticing the keys were in her hand bag, when she opened her hand bag to pay some cash to a juiceman. The intruders forced her to handover the keys of the almirah by threatening to shoot at her as well as her children with the revolver. Thereafter, they robbed cash kept in the almirah to the tune of Rs.15000/- and

another sum of Rs.2,50,000/- in the locker and also a mobile phone and jewels kept in the almirah. They also stated to have removed Valiya, a gold chain and three rings which the complainant was wearing. After robbing of the complainant's cash and jewels and other materials when the appellant attempted to molest the complainant the deceased stated to have raised a protest at which point of time the appellant stated to have shouted at the deceased by saying that he was talking too much by pointing the revolver towards him and shot him which snatched away the life of the deceased. According to the complainant, thereafter, they bolted the door from outside the house and left the scene of occurrence.

11. This sequence was consistently maintained by complainant - PW.17 before the Court which was fully supported by the other eye-witnesses, namely, PWs.19, 20, 23 and 25. When it came to the question of identifying the accused, out of the three only two, appellant and co-accused alone, were apprehended and proceeded against and they were in Court. Since the other accused was absconding and continue to abscond even as on date the trial Court proceeded with the trial. When it came to the question of such identification, the judgment of the trial Court as well as that of the High Court has elaborately considered and found that while the other witnesses could not identify the appellant and the other co-accused even in the Court. PW.20 was able to identify the appellant as the person who attempted to molest the complainant - PW.17 and when the deceased raised a protest the appellant shot him and thereafter the deceased fell down. Unfortunately, on 18.09.2000, the trial Court adjourned the case for cross-examination of PW.20 by two months. His cross-examination was conducted only on 18.11.2000 as the case was adjourned. The reason for the adjournment was a mere request on behalf of the appellant that his counsel was busy in the High Court. The High Court in the impugned judgment has stated that such a long adjournment provided scope for maneuvering.

12. In the course of cross-examination PW.20 made a different statement as regards the identity of the appellant by stating that he was tutored by Inspector Rajinder Gautam who met him before his examination-in-chief. In the light of the said development it was contended on behalf of the appellant that irrespective of the crime as described by the eye-witnesses taken place on the fateful day there was absolutely no legally acceptable evidence to connect the appellant with the crime. Learned counsel relied upon Section 155 of the Evidence Act in support of his submission. The learned counsel also relied upon the decisions reported in *Paramjeet Singh* (supra) and *Suraj Mal* (supra). We can also refer to some of the decisions reported in *Kunju Muhammed alias Khumani and another V. State of Kerala* - (2004) 9 SCC 193, *Nisar Khan alias Guddu and others V. State of Uttaranchal* - (2006) 9 SCC 386, *Mukhtiar Ahmed Ansari V. State (NCT of Delhi)* - (2005) 5 SCC 258 and *Raja Ram V. State of Rajasthan* - (2005) 5 SCC 272 in respect of the said proposition of law.

13. Both the trial Court as well as the High Court ignored the inconsistency in the statement of PW.20 as regards the identity of the appellant and proceeded to rely upon what was stated by him in the chief-examination while convicting the appellant and ultimately imposing him the sentence. It is relevant to mention that the appellant as well as the co-accused were charged under Section 392 IPC as well apart from the charge under Section 302 read with 34 IPC. In fact, we find from the judgment of the trial Court that specific charge was framed against the appellant for the offences under Sections 302 read with 34 and 392 read with 34 IPC. They were charged under Section 354 read with 34 IPC and were acquitted for the said offence.

14. As we come back to the offence alleged against the appellant, as noted earlier, the charge was both under Section 302 read with 34 and 392 read with 34 IPC. Leaving aside the identity aspect dealt with by the Courts below, as far as the appellant and the other accused are concerned, another

important factor which weighed with the Courts below to find them guilty was the identity of the materials which were recovered from the appellant and the co-accused on 03.11.1998 when the appellant and the other accused were arrested under the Arms Act. A 'Rado watch' and a 'gold chain' were recovered from the personal search of the appellant. Search was conducted by S.I. A.S. Rawat who was examined as PW.14. He testified such fact that the said recovery was made by him from the person of the appellant. PW.17 clearly identified both the articles as belonging to her which were stealthily removed from her possession. In so far as the said part of evidence is concerned (viz), as regards the recovery, it was contended that no public witness was joined at the time of arrest of the accused in spite of prior information which was available with the police. The said contention was rightly rejected by both the Courts below as unsustainable.

15. As far as the identity of the recovery of articles was concerned, the version of PW.14 was unassailable. It was only contended that the identity by PW.17, as regards the 'Rado watch', cannot be relied upon inasmuch as the same was not mentioned in the FIR. Here again, the Courts below righty rejected the said argument inasmuch as it was a very minor discrepancy and on that score such a diabolic offence committed by the accused cannot be ignored. The other contention that the material objects were shown to PW.17 is also trivial and that does not cause any serious dent in the case of the prosecution. In the said circumstance it was for the appellant to explain as to how he came into possession of the articles whether it was owned by him or in what other manner those articles came into his possession. In this respect it was noted by the Courts below that in his statement under Section 313 Cr.P.C he did not even attempt to explain it away or claim ownership. He stated to have simply denied of the recovery made from him. In such circumstances, recoveries from the appellant along with the co-accused having been proved in the manner known to law, those were well established incriminating

circumstances demonstrated before the Courts below and there was no contra evidence for the appellant and the co-accused to get rid off the offences alleged. Having regard to the said piece of evidence relating to the recoveries prevailing on record the presence of the appellant along with the co-accused at the place of occurrence in the manner described by the witnesses, namely, PWs.17, 19, 20, 23 and 25 was clinching enough to rope in the appellant along with the co-accused in the commission of the crime as alleged in the complaint and found proved against both of them.

16. At this juncture we feel it appropriate to refer certain conclusions of the trial Court as well as the High Court as regards the recoveries from the appellant and the co-accused to add credence to our conclusions. Such conclusions of the trial Court are found in paragraphs 18 to 27. The relevant portions are found in paragraphs 2, 18, 26 and 27. In the rest of the paragraphs, namely, 19 to 24 the trial Judge has referred to the decisions of this Court reported in *State of Punjab V. Wassan Singh and Others* - AIR 1981 SC 697, *Sohrab and another V. State of Madhya Pradesh* - AIR 1972 SC 2020, *Appabhai and another V. State of Gujarat* - AIR 1988 SC 696, *Bharwada Bhoginbhai Hirjibhai V. State of Gujarat* - AIR 1983 SC 753, *Sanjay alias Kaka V. State (NCT of Delhi)* - 2001-(CR)-GJX-0071-SC, *Ezhil & Ors. V. State of Tamil Nadu* - 2002 II A.D. (Cr.) S.C. 613, *State of Maharashtra V. Suresh* - (2000) 1 SCC 471, *Nallabothu Venkaiah V. State of Andhra Pradesh* - 2002 VI AD (S.C.) 521. The relevant findings are found in paragraphs 2, 18, 26 and 27 which readS as under:

> "2. ….During personal search of accused Akil one Rado wrist watch and one gold chain were also recovered which were seized vide memo Ex.PW.14/A after being sealed with the seal of ASR. The articles were got identified from Smt. Shama Parveen before Sh. S.K. Sharma, Ld. M.M. on 28.1.99. Thus, the police pinned the murder and robbery upon them and booked them under sections 392/354/302/411/34 IPC. On 5.11.98, I.O. Inspector Rajinder

Singh moved an application for holding test identification parade of both the accused persons. Both the accused refused to join TIP.

18. ….In the instant case SI A.S. Rawat stated that one country made pistol, two live cartridges, one rado watch and golden watch were recovered from accused Akil @ Javed. However, SI Jasod Singh stated that a golden chain was recovered from accused Murslim. The recovery memo shows that their goods were recovered from the possession of accused Akil.

26. The last submission made by the Ld. defence counsel was that no reliance should be placed on the identification parade of the goods in question because Shama Parveen, PW2, stated that she had identified the goods in the police station before joining the T.I.P.

27. If these goods do not belong to Smt. Shama Parveen, why did not the accused claim it? To whom these goods belong? In the court Shama Parveen has clearly, specifically and unequivocally stated that these goods belonged to her. Nobody has disputed this fact. The T.I.P. of goods like watch or chain is not that necessary. Such like goods can be identified by a person who uses it everyday. Identification or non-identification of such like goods before the T.I.P. is meaningless and does not carry much weight."

17. The High Court on its part has stated as under in paragraphs 10, 24, 25, 26, 27, 28 and 30.

"10. Before we proceed to deal with the submissions as referred to above, what needs to be emphasized is that during arguments before us, it was not the case of the appellants that on the day of the commission of the offence, Shama Parveen and deceased Salvinder were not present in house No. A-32/15, Main Road no.66, Mauzpur, Delhi. It was also not their case that no robbery had taken place or Salvinder had not been murdered. We say so since on

these aspects the witnesses for the prosecution were not subjected to cross-examination by the appellants. Even otherwise, the fact that Shama Parveen and Salvinder were present at the above mentioned house, the further fact that three persons had barged into that house, robbed the lady of her jewellery and other items, and thereafter, tried to outrage her modesty which when objected to by Salvinder cost him his life at the hands of one of the intruders, stand proved beyond doubt from the statements of PW- 17- Shama Parveen, PW-19 Gurmeet Singh, PW-23 Noorjahan and PW-25 Smt. Gurdeep Kaur, all of whom, by and large deposed as per the FIR lodged by Shama Parveen to the police soon after the incident. Thus, to that extent, we would be justified in saying that there was no challenge to the prosecution version. We may say at the cost of repetition that the only defense taken by the accused persons was that they were not the persons who committed either the robbery or the murder of Salvinder.

24. It is in evidence that on 3rd November, 1998 when the appellants were arrested under the Arms Act, certain recoveries were made from their persons. We are here concerned with the `Rado wrist' watch and a `gold chain' which were recovered from the personal search of accused Akil. It was S.I. A. S. Rawat who had conducted the personal search of the said accused after he was apprehended at Sunlight Colony. He appeared before the Trial Judge as PW-14 and testified to the effect that he recovered a `Rado' wrist watch and a gold chain from the person of accused Akil. It was not the case of appellant Akil that the said `Rado' wrist watch or gold chain were owned by him. Even in his statement recorded under Section 313 Cr. P.C, he made no such claim. He simply denied that any recovery was made from him. On the other hand, Shama Parveen, identified the two articles and claimed that they belonged to her. The recovery of articles Therefore stands proved from the evidence of these two witnesses.

25. It was next submitted by the learned counsel for the appellants that the prosecution though examined three witnesses namely, SI Satyajit Sareen (PW-3), SI Jasood Singh (PW-18) and SI A. S. Rawat (PW-14) to prove the recovery of 'Rado' wrist watch and 'gold chain' from accused Akil but it was only SI A.S.Rawat who spoke about the recovery of those articles from the accused. The other two were silent about the same. It was therefore contended that had the recoveries been actually effected as claimed by the prosecution all the three witnesses would have spoken about the same. Responding to the contention, it was submitted by learned counsel for the State, Ms. Mukta Gupta, that after the apprehension of both the appellants, the raiding party got divided into two groups and the search of the two appellants was taken separately. One raiding party was headed by SI Satyajit Sareen and the other by SI A. S. Rawat. It was for this reason that SI Satyajit Sareen was silent about the recovery effected from accused Akil. Learned counsel also pointed out that SI Jasood Singh was in the raiding party headed by SI Satyajit Sareen and that is why, he too was silent with regard to the recovery of a `Rado' wrist watch and a gold chain. The Explanation so tendered by the counsel is borne out from the evidence of SI Satyajit Sareen and SI Jasood Singh.

26. It was also contended by the learned counsel for the appellants that the recovery of a `Rado' wrist watch and a 'gold chain' were liable to be disbelieved because no public witness was joined at the time the accused persons were arrested, even though, police had prior information of their arrival. The mere fact of non-joining a public witness, to our mind, will not ipso- facto make the evidence of the police witnesses suspect, unreliable or untrustworthy. In any case, we find from the evidence of SI Satyajit Sareen that after receiving the secret information, the police did make efforts to join public witnesses in the raiding party. As per

him, they requested 4-5 passersby to join them but they all offered reasonable excuses for not joining. Significantly, no suggestion was put to PW-3 Satyajit Sareen in cross-examination that no public witness was asked to join the raiding party.

27. ….In the present case, as noticed above, SI Satyajit Sareen has specifically deposed that the persons from the public were asked to join the raiding party but none agreed. The facts of the two cases are therefore not comparable.

28. It was further contended by counsel for the appellant that before the complainant Shama Parveen identified the `Rado' wrist watch and 'gold chain' before the Metropolitan Magistrate, Shri S. K. Sharma (PW-13) those articles were shown to her in the Police Station. In support, reference was made to the cross-examination of Shama Parveen, where she has stated that these two items were shown to her in the Police Station and it was thereafter that she had identified those items in the Court. While it is true that Shama Parveen did say so in her cross-examination but we are not inclined to attach much importance to it. The reason is that PW-14 SI A.S. Rawat who conducted the personal search of appellant Akil stated in his evidence that after the articles were recovered from him, they were kept in a parcel and were sealed with the seal of ASR. On the other hand, the Metropolitan Magistrate PW-13 who conducted the TIP stated in his evidence that when the case property was produced before him for getting it identified, it was found sealed with the seal of ASR. The evidence of these two witnesses when read together goes to show that the seal was intact and it was opened only before the Metropolitan Magistrate. In this context, the evidence of Head Constable Purushotam Kumar PW 28 is also relevant. As per him, on 3.11.1998, the special staff of N/E had deposited in the Malkhana of police station Seemapuri, amongst other articles, a chain and a `Rado' watch regarding which entries were made at Serial no.

3363 and 3364 of the Malkhana register. It was further deposed by him that on 28th January, 1999, the chain and the `Rado' wrist watch were transferred from the Malkhana of police station Seemapuri to the Malkhana of Police Station Seelampur vide Serial no. 3363 in connection with the case FIR No.777/98 under Sections 392/354 IPC. It follows from the testimony of this witness that the case property containing the `Rado' wrist watch and 'gold chain' all through remained in the police station Seemapuri, till it was transferred to Police Station Seelampur on 28th January, 1999 and on that very day, the TIP was got done before the Metropolitan Magistrate. Where then was there any occasion for the Investigating Officer of this case to show the case property to Shama Parveen in the Police Station before it was got identified by her? In any case, assuming it was so shown, how does this fact falsify her claim that the `Rado' wrist watch and the chain belonged to her? Once she had identified the articles as belonging to her the onus to prove that they did not belong to her or that they belonged to Akil or if they did not belong to him how he came to be in possession of the same, was on none else than Akil. He having failed to discharge that onus we find no reason to disbelieve Shama Parveen, moreso, as Akil has not claimed those articles to be his.

30. In view of Section 8, the conduct of accused Akil in having been found in possession of the robbed articles is a relevant fact which also connects him, as well as, accused Murasalin with the crime for they both worked as a team which is further borne out from the fact that they were found together when arrested in the case under the Arms Act and when the recovery of 'Rado' wrist watch and 'gold chain' was made."

(Emphasis added)

18. Having regard to the above conclusions of the Courts below, with which we fully concur, we are convinced that the

conviction and sentence imposed on the appellant was well justified and we do not find any good grounds to interfere with the same.

19. In the earlier part of our judgment we have referred to the reliance placed upon by the trial Court as well as by the High Court on the evidence of PW.20 as regards the identity of the appellant. Both the Courts had made a pointer to the adjournment granted at the instance of the accused for the cross-examination of PW.20. The chief-examination of PW.20 was recorded on 18.09.2000 and for the purpose of cross-examination the case was adjourned by two months and was posted on 18.11.2000. The reason for adjournment was a request on behalf of the appellant that his counsel was busy in the High Court. PW.20 identified the appellant as the person who attempted to molest the complainant PW.17 and that when the same was questioned by the deceased the appellant shot at him who fell down on the bed and who was later declared dead by the doctors. However, in the cross-examination PW.20 stated that the identity of the appellant on the earlier occasion was at the instance of Inspector Rajinder Gautam who tutored him to make such a statement.

20. It is also relevant to note that the said witness was not treated as a hostile witness in spite of diametrically opposite version stated by him as regards the identity of the appellant. Nevertheless, both the Courts below proceeded to hold that the identity made by PW.20 cannot be ignored. By relying upon Section 155 of the Evidence Act and also the decision reported in *Paramjeet Singh alias Pamma* (supra) and *Suraj Mal* (supra) learned counsel for the appellant contended that such a testimony of the witness is wholly unreliable. In *Paramjeet Singh alias Pamma* (supra), this Court held that howsoever gruesome an offence may be and revolt the human conscience, an accused can be convicted only on legal evidence and not on surmises and conjecture. In the decision reported in *Suraj Mal* (supra) it was held that where witnesses make two inconsistent statements in their evidence either at one stage

or at two stages, the testimony of such witnesses become unreliable and unworthy of credence and in the absence of special circumstance no conviction can be based on the evidence of such witnesses.

21. Apart from the above decisions relied upon by learned counsel for the appellant, we ourselves have noted in the decisions reported in *Kunju Muhammed alias Khumani* (supra), *Nisar Khan alias Guddu* (supra), *Mukhtiar Ahmed Ansari* (supra), *Raja Ram* (supra), wherein this Court has specifically dealt with the issue as regards hostile witness who was not treated hostile by the prosecution and now such evidence would support the defence (i.e.) the benefit of such evidence should go to the accused and not to the prosecution. In paragraph 16 of the decision reported in *Kunju Muhammed alias Khumani* (supra), this Court has held as under:

> "16. We are at pains to appreciate this reasoning of the High Court. This witness has not been treated hostile by the prosecution, and even then his evidence helps the defence. We think the benefit of such evidence should go to the accused and not to the prosecution. Therefore, the High Court ought not to have placed any credence on the evidence of such unreliable witness."

22. In *Nisar Khan alias Guddu* (supra) in paragraph 9 this Court has held as under:

> "9....We are of the view that no reasonable person properly instructed in law would allow an application filed by the accused to recall the eyewitnesses after a lapse of more than one year that too after the witnesses were examined, cross-examined and discharged."

23. In *Mukhtiar Ahmed Ansari* (supra), this Court in paragraphs 29 and 30 dealt with the hostile witness who was not declared hostile and the extent to which the version of the said witness can be relied upon as under:

> "29. The learned counsel for the appellant also urged that

> it was the case of the prosecution that the police had requisitioned a Maruti car from Ved Prakash Goel. Ved Prakash Goel had been examined as a prosecution witness in this case as PW 1. He, however, did not support the prosecution. The prosecution never declared PW 1 "hostile". His evidence did not support the prosecution. Instead, it supported the defence. The accused hence can rely on that evidence.
>
> 30. A similar question came up for consideration before this Court in *Raja Ram v. State of Rajasthan*. In that case, the evidence of the doctor who was examined as a prosecution witness showed that the deceased was being told by one K that she should implicate the accused or else she might have to face prosecution. The doctor was not declared "hostile". The High Court, however, convicted the accused. This Court held that it was open to the defence to rely on the evidence of the doctor and it was binding on the prosecution."

24. In the decision reported in *Raja Ram* (supra) a similar issue was dealt with in paragraph 9 and was held as under:

> "9. But the testimony of PW 8 Dr. Sukhdev Singh, who is another neighbour, cannot easily be surmounted by the prosecution. He has testified in very clear terms that he saw PW 5 making the deceased believe that unless she puts the blame on the appellant and his parents she would have to face the consequences like prosecution proceedings. It did not occur to the Public Prosecutor in the trial court to seek permission of the court to heard (sic declare) PW 8 as a hostile witness for reasons only known to him. Now, as it is, the evidence of PW 8 is binding on the prosecution. Absolutely no reason, much less any good reason, has been stated by the Division Bench of the High Court as to how PW 8's testimony can be sidelined."

25. We have referred to the above legal position relating to the extent of reliance that can be placed upon a hostile

witness who was not declared hostile and in the same breath, the dire need for the Courts dealing with cases involving such a serious offence to proceed with the trial commenced on day to day basis in de die in diem until the trial is concluded. We wish to issue a note of caution to the trial Court dealing with sessions case to ensure that there are well settled procedures laid down under the Code of Criminal Procedure as regards the manner in which the trial should be conducted in sessions cases in order to ensure dispensation of justice without providing any scope for unscrupulous elements to meddle with the course of justice to achieve some unlawful advantage. In this respect, it is relevant to refer to the provisions contained in Chapter XVIII of the Criminal Procedure Code whereunder Section 231 it has been specifically provided that on the date fixed for examination of witnesses as provided under Section 230, the Session's Judge should proceed to take all such evidence as may be produced in support of the prosecution and that in his discretion may permit cross-examination of any witnesses to be deferred until any other witness or witnesses have been examined or recall any witness for further cross-examination.

26. Under Section 309 of Cr.P.C. falling under Chapter XXIV it has been specifically stipulated as under:

> **"309. Power to postpone or adjourn proceedings.**-(1) In every inquiry or trial, the proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded.
>
> Provided that when the inquiry or trial relates to an offence under Sections 376 to Section 376 D of the Indian Penal Code (45 of 1860), the inquiry or trial shall, as far as possible, be completed within a period of two months from the date of commencement of the examination of witnesses.
>
> (2) If the court, after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:
>
> Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time:
>
> Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing:
>
> Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him.
>
> Explanation 1 - If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence and it appears likely that further evidence may be obtained by a remand this is a reasonable cause for a remand.
>
> Explanation 2 - The terms on which an adjournment or postponement may be granted include, in appropriate cases, the payment of costs by the prosecution or the accused."

27. In this context it will also be worthwhile to refer to a circular issued by the High Court of Delhi in Circular No.1/87 dated 12th January 1987. Clause 24A of the said circular reads as under:

> "24A disturbing trend of trial of Sessions cases being

adjourned, in some cases to suit convenience of counsel and in some others because the prosecution is not fully ready, has come to the notice of the High Court. Such adjournments delay disposal of Sessions cases.

The High Court considers it necessary to draw the attention of all the Sessions Judges and Assistant Sessions Judges once again to the following provisions of the Code of Criminal Procedure, 1973, Criminal Rules of Practice, Kerala, 1982 and Circulars and instructions on the list system issued earlier, in order to ensure the speedy disposal of Sessions cases.

1.(a) In every enquiry or trial, the proceedings shall be held as expeditiously as possible, and, in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded. (Section 309 (1) Crl.P.C.).

(b) After the commencement of the trial, if the court finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable. If witnesses are in attendance no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded, in writing. (Section 309 (2) Cr.P.C.).

2. Whenever more than three months have elapsed between the date of apprehension of the accused and the close of the trial in the Court of Sessions, an explanation of the cause of delay, (in whatever court it may have occurred) shall be furnished, while transmitting the copy of the judgment. (Rule 147 Crl. Rules of Practice).

3. Sessions cases should be disposed of within six weeks

of their institution, the date of commitment being taken as the date of institution in Sessions Cases. Cases pending for longer periods should be regarded as old cases in respect of which explanations should be furnished in the calendar statements and in the periodical returns. (High Court Circular No. 25/61 dated 26th October 1961).

4. Sessions cases should be given precedence over all other work and no other work should be taken up on sessions days until the sessions work for the day is completed. A Sessions case once posted should not be postponed unless that is unavoidable, and once the trial has begun, it should proceed continuously from day to day till it is completed. If for any reason, a case has to be adjourned or postponed, intimation should be given forthwith to both sides and immediate steps be taken to stop the witnesses and secure their presence on the adjourned date.

On receipt of the order of commitment the case should be posted for trial to as early a date as possible, sufficient time, say three weeks, being allowed for securing the witnesses. Ordinarily it should be possible to post two sessions cases a week, the first on Monday and the second on Thursday but sufficient time should be allowed for each case so that one case does not telescope into the next. Every endeavour should be made to avoid telescoping and for this, if necessary, the court should commence sitting earlier and continue sitting later than the normal hours. Judgment in the case begun on Monday should ordinarily be pronounced in the course of the week and that begun on Thursday the following Monday. (Instructions on the list system contained in the O.M. dated 8th March 1984).

All the Sessions Judges and the Assistant Sessions Judges are directed to adhere strictly to the above provisions and instructions while granting adjournments in Sessions Cases.

28. In this context some of the decisions which have specifically dealt with such a situation which has caused serious inroad into the criminal jurisprudence can also be referred to. In one of the earliest cases reported in *Badri Prasad V. Emperor* - (1912) 13 Crl. L.J. 861, a Division Bench of the Allahabad High Court has stated the legal position as under:

"....Moreover, we wish to point out that it is most inexpedient for a Sessions trial to be adjourned. The intention of the Code is that a trial before a Court of Session should proceed and be dealt with continuously from its inception to its finish. Occasions may arise when it is necessary to grant adjournments, but such adjournments should be granted only on the strongest possible ground and for the shortest possible period.....

(Emphasis added)

29. In a decision reported in *Chandra Sain Jain and Others V. The State* - 1982 Crl. L.J. NOC 86 (ALL) a Single Judge has held as under while interpreting Section 309 of Cr.P.C.

"Merely because the prosecution is being done by C.B.I. or by any other prosecuting agency, it is not right to grant adjournment on their mere asking and the Court has to justify every adjournment if allowed, for, the right to speedy trial is part of fundamental rights envisaged under Art. 21 of the Constitution, 1979 Cri LJ 1036 (SC), Foll."

(Emphasis added)

30. In the decision reported in *The State V. Bilal Rai and Others* - 1985 Crl. L.J. NOC 38 (Delhi) it has been held as under:

"When witnesses of a party are present, the court should make every possible endeavour to record their evidence and they should not be called back again. The work fixation of the Court should be so arranged as not to direct the

presence of witnesses whose evidence cannot be recorded. Similarly, cross-examination of the witnesses should be completed immediately after the examination in chief and if need be within a short time thereafter. No long adjournment should be allowed. Once the examination of witnesses has begun the same should be continued from day to day."

(Emphasis added)

31. In the decision reported in *Lt. Col. S.J. Chaudhary V. State (Delhi Administration)* - (1984) 1 SCC 722, this Court in paragraphs 2 and 3 has held as under:

"2. We think it is an entirely wholesome practice for the trial to go on from day-to-day. It is most expedient that the trial before the Court of Session should proceed and be dealt with continuously from its inception to its finish. Not only will it result in expedition, it will also result in the elimination of manoeuvre and mischief. It will be in the interest of both the prosecution and the defence that the trial proceeds from day-to-day. It is necessary to realise that Sessions cases must not be tried piecemeal. Before commencing a trial, a Sessions Judge must satisfy himself that all necessary evidence is available. If it is not, he may postpone the case, but only on the strongest possible ground and for the shortest possible period. Once the trial commences, he should, except for a very pressing reason which makes an adjournment inevitable, proceed de die in diem until the trial is concluded.

3. We are unable to appreciate the difficulty said to be experienced by the petitioner. It is stated that his Advocate is finding it difficult to attend the court from day-to-day. It is the duty of every Advocate, who accepts the brief in a criminal case to attend the trial from day-to- day. We cannot over-stress the duty of the Advocate to attend to the trial from day-to-day. Having accepted the brief, he will be committing a breach of his professional duty, if he so fails

to attend. The criminal miscellaneous petition is, therefore, dismissed."

(Emphasis added)

32. In a recent decision of the Delhi High Court reported in *State V. Ravi Kant Sharma and Ors.* - 120 (2005) DLT 213, a Single Judge of the High Court has held as under in paragraph 3:

"3. True the Court has discretion to defer the cross-examination. But as a matter of rule, the Court cannot orders in express terms that the examination-in-chief of the witnesses is recorded in a particular month and his cross-examination would follow in particular subsequent month. Even otherwise it is the demand of the criminal jurisprudence that criminal trial must proceed day-to-day. The fixing of dates only for examination-in-chief of the lengthy witnesses and fixing another date i.e. 3 months later for the purposes of cross-examination is certainly against the criminal administration of justice. Examination-in-chief if commenced on a particular date, the Trial Judge has to ensure that his cross-examination must conclude either on the same date or the next day if cross-examination is lengthy or can continue on the consecutive dates. But postponing the cross-examination to a longer period of 3 month is certainly bound to create legal complications as witnesses whose examination-in-chief recorded earlier may insist on refreshing their memory and therefore such an occasion should not be allowed to arise particularly when it is the demand of the criminal law that trial once commence must take place on day-to-day basis. For these reasons, the order passed by the learned Additional Sessions Judge to that extent will not hold good in the eyes of law and therefore the same is liable to be set aside. Set aside as such. Learned Additional Sessions Judge should refix the schedule of dates of examination of prosecution witnesses and shall ensure that

examination-in-chief once commences cross-examination is completed without any interruption."

(Emphasis added)

33. In a comprehensive decision of this Court reported in *State of U.P. V. Shambhu Nath Singh and Others* - (2001) 4 SCC 667 the legal position on this aspect has been dealt with in extenso. Useful reference can be made to paragraphs 10, 11 to 14 and 18:

"10. Section 309 of the Code of Criminal Procedure (for short "the Code") is the only provision which confers power on the trial court for granting adjournments in criminal proceedings. The conditions laid down by the legislature for granting such adjournments have been clearly incorporated in the section. It reads thus:

309. xxxx xxxx xxxx

11. The first sub-section mandates on the trial courts that the proceedings shall be held expeditiously but the words "as expeditiously as possible" have provided some play at the joints and it is through such play that delay often creeps in the trials. Even so, the next limb of the sub-section sounded for a more vigorous stance to be adopted by the court at a further advanced stage of the trial. That stage is when examination of the witnesses begins. The legislature which diluted the vigour of the mandate contained in the initial limb of the sub-section by using the words "as expeditiously as possible" has chosen to make the requirement for the next stage (when examination of the witnesses has started) to be quite stern. Once the case reaches that stage the statutory command is that such examination "shall be continued from day to day until all the witnesses in attendance have been examined". The solitary exception to the said stringent rule is, if the court finds that adjournment "beyond the following day to be necessary" the same can be granted for which a condition is imposed on the court that reasons for the same should

be recorded. Even this dilution has been taken away when witnesses are in attendance before the court. In such situation the court is not given any power to adjourn the case except in the extreme contingency for which the second proviso to sub-section (2) has imposed another condition,

> "provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing".
>
> (emphasis supplied)

12. Thus, the legal position is that once examination of witnesses started, the court has to continue the trial from day to day until all witnesses in attendance have been examined (except those whom the party has given up). The court has to record reasons for deviating from the said course. Even that is forbidden when witnesses are present in court, as the requirement then is that the court has to examine them. Only if there are "special reasons", which reasons should find a place in the order for adjournment, that alone can confer jurisdiction on the court to adjourn the case without examination of witnesses who are present in court.

13. Now, we are distressed to note that it is almost a common practice and regular occurrence that trial courts flout the said command with impunity. Even when witnesses are present, cases are adjourned on far less serious reasons or even on flippant grounds. Adjournments are granted even in such situations on the mere asking for it. Quite often such adjournments are granted to suit the convenience of the advocate concerned. We make it clear that the legislature has frowned at granting adjournments on that ground. At any rate inconvenience of an advocate is not a "special reason" for bypassing the mandate of Section 309 of the Code.

14. If any court finds that the day-to-day examination of witnesses mandated by the legislature cannot be complied with due to the non-cooperation of the accused or his counsel the court can adopt any of the measures indicated in the sub-section i.e. remanding the accused to custody or imposing cost on the party who wants such adjournments (the cost must be commensurate with the loss suffered by the witnesses, including the expenses to attend the court). Another option is, when the accused is absent and the witness is present to be examined, the court can cancel his bail, if he is on bail (unless an application is made on his behalf seeking permission for his counsel to proceed to examine the witnesses present even in his absence provided the accused gives an undertaking in writing that he would not dispute his identity as the particular accused in the case).

18. It is no justification to glide on any alibi by blaming the infrastructure for skirting the legislative mandates embalmed in Section 309 of the Code. A judicious judicial officer who is committed to his work could manage with the existing infrastructure for complying with such legislative mandates. The precept in the old homily that a lazy workman always blames his tools, is the only answer to those indolent judicial officers who find fault with the defects in the system and the imperfections of the existing infrastructure for their tardiness in coping with such directions."

(Emphasis added)

34. Keeping the various principles, set out in the above decisions, in mind when we examine the situation that had occurred in the case on hand where PW.20 was examined-in-chief on 18.09.2000 and was cross examined after two months i.e. on 18.11.2000 solely at the instance of the appellant's counsel on the simple ground that the counsel was engaged in some other matter in the High Court on the day when PW.20 was examined-in-chief, the adjournment granted by the trial

Court at the relevant point of time only disclose that the Court was oblivious of the specific stipulation contained in Section 309 of Cr.P.C. which mandate the requirement of sessions trial to be carried on a day to day basis. The trial Court has not given any reason much less to state any special circumstance in order to grant such a long adjournment of two months for the cross-examination of PW.20. Everyone of the caution indicated in the decision of this Court reported in *Rajdeo Sharma V. State of Bihar* - 1998 Crl. L.J. 4596 was flouted with impunity. In the said decision a request was made to all the High Courts to remind all the trial Judges of the need to comply with Section 309 of the Code in letter and spirit. In fact, the High Courts were directed to take note of the conduct of any particular trial Judge who violates the above legislative mandate and to adopt such administrative action against the delinquent judicial officer as per the law.

35. It is unfortunate that in spite of the specific directions issued by this Court and reminded once again in *Shambhu Nath* (supra) such recalcitrant approach was being made by the trial Court unmindful of the adverse serious consequences affecting the society at large flowing therefrom. Therefore, even while disposing of this appeal by confirming the conviction and sentence imposed on the appellant by the learned trial Judge, as confirmed by the impugned judgment of the High Court, we direct the Registry to forward a copy of this decision to all the High Courts to specifically follow the instructions issued by this Court in the decision reported in *Rajdeo Sharma* (supra) and reiterated in *Shambhu Nath* (supra) by issuing appropriate circular, if already not issued. If such circular has already been issued, as directed, ensure that such directions are scrupulously followed by the trial Courts without providing scope for any deviation in following the procedure prescribed in the matter of a trial of sessions cases as well as other cases as provided under Section 309 of Cr.P.C. In this respect, the High Courts will also be well advised to use their machinery in the respective State Judicial Academy to achieve the desired

result. We hope and trust that the respective High Courts would take serious note of the above directions issued in the decisions reported in *Rajdeo Sharma* (supra) which has been extensively quoted and reiterated in the subsequent decision of this Court reported in *Shambhu Nath* (supra) and comply with the directions at least in the future years.

36. In the result, while we upheld the conviction and sentence imposed on the appellant, we issue directions in the light of the provisions contained in Section 231 read along with Section 309 of Cr.P.C. for the trial Court to strictly adhere to the procedure prescribed therein in order to ensure speedy trial of cases and also rule out the possibility of any maneuvering taking place by granting undue long adjournment for mere asking. The appeal stands dismissed.

K.K.T. Appeal dismissed.

KOTAK MAHINDRA BANK LTD.
v.
HINDUSTAN NATIONAL GLASS & IND. LTD. AND ORS.
(Civil Appeal No. 8916 of 2012)

DECEMBER 11, 2012

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

Bank/Banking - Master Circular on wilful default issued by Reserve Bank of India - Whether covers a derivative transaction - Held: In view of the mischief the Master Circular seeks to remedy and the purpose of the Master Circular, the definition of 'wilful default' would be construed to mean not only wilful defaults of dues by a borrower to the bank under lender-borrower relationship, but also wilful defaults of dues by a client of the bank under other banking transactions such as bank guarantees and derivative transactions - Reserve Bank of India, Act, 1934 - ss. 45A(c)(v), 45C and 45E.

Interpretation of Statutes: Rule of construction - Held: Words in a statute or a document are to be interpreted in the context or subject-matter in which the words are used and not according to its literal meaning.

The question for consideration in the present appeals against the judgments passed by the Calcutta High Court and the Bombay High Court, which arose was whether the Master Circular on wilful default issued by Reserve Bank of India would cover the cases of willful default under a derivative transaction or it was confined only to a wilful default by a borrower of the bank in a lender-borrower relationship.

Allowing the appeal No. 8916 of 2012 and dismissing the appeal Nos. 8917 and 8918 of 2012, the Court.

HELD: 1. The Master Circular on wilful default issued

by Reserve Bank of India, covers not only wilful defaults of dues by a borrower to the bank but also covers wilful defaults of dues by a client of the bank under other banking transactions such as bank guarantees and derivative transactions. [Para 39] [739-C]

2. From the definition of wilful default in the Master Circular, it is evident that a wilful default would be deemed to have occurred in any of the events mentioned in sub-clauses (a), (b), (c) and (d) of clause 2.1 of the Master Circular. These sub-clauses use the word "lender" and for this reason the Calcutta High Court has taken a view in the impugned judgment that the Master Circular applies only to a lender-borrower relationship and a party who has defaulted in meeting its payment obligation to the bank under the derivative transaction is not covered by the Master Circular. The Calcutta High Court has gone by a literal interpretation of the word "lender" in sub-clauses (a), (b), (c) and (d) in the definition of wilful default in clause 2.1 of the Master Circular. This approach of the Calcutta High Court in interpreting the Master Circular is not correct because it is a settled principle of interpretation that the words in a statute or a document are to be interpreted in the context or subject-matter in which the words are used and not according to its literal meaning. [Paras 28 and 29] [727-C-G]

'Principles of Statutory Interpretation' by *G.P. Singh* (11th Edition) - referred to.

3. The Bombay High Court has come to the conclusion in the impugned judgment that the Master Circular covers also a default in complying with the payment obligations under derivative transactions by relying on the language of not only the Master Circular dated 01.07.2009 but also of the circulars issued by the RBI on 08.08.2008, 13.10.2008, 29.10.2008, 09.04.2009 and 01.07.2010 which relate to prudential norms, assets

classification as non-performing assets, etc. This approach of the Bombay High Court in interpreting the Master Circular is also not correct because the subject matter of the circulars of the RBI issued on 08.08.2008, 13.10.2008, 29.10.2008, 09.04.2009 and 01.07.2010 do not relate to wilful default. These circulars are not even amending or clarifying the definition of wilful default in the Master Circular. The circulars do not constitute the context or the subject-matter in which the definition of wilful default in the Master Circular has to be construed. The context will only include parimateria circulars issued by the RBI, but will not include circulars issued by the RBI on subject-matters other than wilful default. [Para 30] [729-C-G]

4. The Master Circular originated pursuant to the instructions of the Central Vigilance Commission, on the subject "improving vigilance administration in banks", which required collection of information on wilful defaults of Rs.25 lakhs and above. These instructions of the Central Vigilance Commission covered "all cases of wilful default of Rs.25 lakhs and above" and were not confined to only wilful default by a borrower of his dues to the bank in a lender-barrower relationship. Thus, all cases of wilful defaults of Rs.25 lakhs and above were to be reported by the banks to the RBI and not just cases of defaults by borrowers of loans or advances from banks. [Paras 31 and 32] [730-B-C; 731-C-D]

5. The mischief that was sought to be remedied was that banks are not exploited by parties who have the capacity to pay their dues to the banks but who willfully avoid paying their dues to the banks.The purpose of the Master Circular was to have a system to disseminate credit information pertaining to wilful defaulters amongst banks and financial institutions so that no further bank finance is made available to such wilful defaulters from

such banks and financial institutions. [Paras 32 and 34] [731-D; 732-B-C]

6. It is evident from the language of sub-clause (v) of Section 45A(c) of the Reserve Bank of IndiaAct,1934 that credit information means not only any information relating to matters in sub-clauses (i),(ii),(iii) and (iv), but also relates to any other information which the bank considers to be relevant for the more orderly regulation of credit or credit policy. Hence, "credit information" is not confined to information relating to a borrower of the bank, but may also relate to a constituent of the bank who intends to take some credit from the bank. The purpose of the Master Circular being to caution banks and financial institutions from giving any further bank finance to a wilful defaulter, credit information cannot be confined to only the wilful defaults made by existing borrowers of the bank, but will also cover constituents of the bank, who have defaulted in their dues under banking transactions with the banks and who intend to avail further finance from the banks. [Para 34] [732-H; 733-A-C]

7. In view of the mischief that the Master Circular seeks to remedy and the purpose of the Master Circular, the words used in the definition of 'wilfuldefault' in clause 2.1 of the Master Circular would be interpreted to mean not only a wilful default by a unit which has defaulted in meeting its repayment obligations to the lender, but also to mean a unit which has defaulted in meeting its payment obligations to the bank under facilities such as a bank guarantee. The word 'lender' in sub-clauses (a), (b), (c) and (d) means the "bank" because "payment obligations" mentioned in clause (a) do not ordinarily refer to obligations to a lender and clause (d) has used the expression "bank/lender". [Para 35] [733-D-F]

8. Paragraph 2.6 of the Master Circular states inter alia that in cases where a letter of comfort and/or the

guarantees furnished by the companies within the group on behalf of the wilfully defaulting units are not honoured when invoked by the banks/financial institutions, such group of companies should also be reckoned as wilful defaulters. It is, thus, clear that non-funded facilities such as a guarantee is covered by the Master Circular and when a guarantee is invoked by a bank/financial institution but is not honoured, the defaulting constituent of the bank is treated as a wilful defaulter even though it may not have borrowed funds from the bank in the form of advances or loans. [Para 35] [733-G-H; 734-A-B]

9. The scheme of Collection and Dissemination of information on cases of wilful default of Rs.25 lakhs and above was framed by the RBI in the year 1999 when the derivative transactions were not part of the country's economy. Under the FEMA Regulations, 2000, only the banks were authorized to deal with the derivative transactions. Section 45V introduced along with other provisions of Chapter IIID in the 1934 Act by the Reserve Bank of India (Amendment) Act, 2006 declared that transactions in derivatives, as may be specified by the RBI from time to time, shall be valid, if at least one of the parties to the transaction is the bank, a scheduled bank, or such other agency falling under the regulatory purview of the RBI under the 1934 Act, FEMA Act or any other Act or instrument having the force of law, as may be specified by the RBI from time to time. Derivative transactions in India thus were valid only if they were with any bank or any other agency falling under the regulatory purview of the RBI because they would have a substantial bearing on the credit system and credit policy in respect of which the RBI has regulatory powers under the 1934 Act and Banking Regulation Act,1949. Such derivative transactions may not involve a lender-borrower relationship between the bank and its constituent, but dues by a constituent remaining unpaid to a bank may

affect the credit policy and the credit system of the country. Information relating to defaulters of dues under derivative transactions who intend to take additional finance from the bank obviously will come within the meaning of credit information u/s. 45A(c)(v) of the 1934 Act. [Para 36] [734-B-G]

10. Information relating to a party, who has defaulted in payment of its dues under derivative transactions being credit information may be called for from the banking company by the RBI under sub-section (1) of Section 45C of the 1934 Act. Sub-section (2)(a) of Section 45E clearly provides that nothing in Section 45E shall apply to the disclosure by any banking company, with the previous permission of the RBI, of any information furnished to the RBI under Section 45C. Thus, confidentiality of any credit information either by virtue of any other law or by virtue of any agreement between the bank and its constituent cannot be a bar for disclosure of such credit information including information relating to a derivative transaction of the RBI under sub-section (1) of Section 45C. [Para 37] [736-F; 737-C-D]

11. It is not correct to say that the Master Circular has penal consequences and, therefore, has to be literally and strictly construed. Clause 4.3 of the Master Circular states that there is scope even under the exiting legislations to initiate criminal action against wilful defaulters depending upon the facts and circumstances of the case under the provisions of Sections 403 and 415 of the IPC and the banks and financial institutions are strictly advised to seriously and promptly consider initiating criminal action based on the facts and circumstances of each case under the above provisions of the IPC. Thus, the Master Circular by itself does not have penal consequences, whereas Sections 403 and 415 of the IPC have penal consequences. The provisions of Sections 403 and 415 of the IPC obviously have to be strictly construed as

these are penal provisions and will get attracted depending on the facts and circumstances of each case, but the provisions of the Master Circular need not be strictly construed. [Para 38] [737-E; 738-C-E]

Commissioner of Sales Tax, M.P. v. Jaswant Singh Charan Singh **1967 (2) SCR 720;** *Bombay Steam Navigation Co. (1953) Private Ltd. v. C.I.T., Bombay* **1965 (1) SCR 770;** *C.I.T., Lucknow v. Bazpur Co-operative Sugar Ltd.* **1989 Supp. (2) SCC 240: 1989 (2) SCR 840;** *Ram Ratan Gupta v. Director of Enforcement, Foreign Exchange Regulation and Anr.* **1966 (1) SCR 651;** *Bhuwalka Steel Industries Ltd. v. Bombay Iron & Steel Labour Board and Anr.* **(2010) 2 SCC 273: 2009 (16) SCR 618;** *ICICI Bank Ltd. v. Official Liquidator of APS Star Industries Ltd.* **(2010) 10 SCC 1: 2010 (12) SCR 644;** *Tolaram Relumal and Anr. v. State of Bombay* **1955 (1) SCR 158;** *Chandigarh Housing Board v. Major General Devinder Singh and Anr.* **(2007) 9 SCC 67: 2007 (3) SCR 1049;** *Delhi Airtech Services Private Limited and Anr.v. State of Uttar Pradesh and Anr.* **(2011) 9 SCC 354: 2012 (12) SCR 191;** *Shah and Co., Bombay v. State of Maharashtra and Anr.* **1967 (3) SCR 466;** *Rajshree Sugars and Chemicals Ltd. v. Axis Bank Ltd.* **(2008) 8 MLJ 261;** *Desh Bandhu Gupta and Co. and Ors. v. Delhi Stock Exchange Association Ltd.* **(1979) 4 SCC 565: 1979 (3) SCR 373;** *Peerless General Finance and Investment Co. Ltd and Anr. v. Reserve Bank of India* **(1992) 2 SCC 343: 1992 (1) SCR 406;** *Ganesh Bank of Kurundwad Ltd. and Ors. v. Union of Indiaand Ors.* **(2006) 10 SCC 645: 2006 (5) Suppl. SCR 437;** *Joseph KuruvillaVellukunnel v. Reserve Bank of India* **1962 Supp (3) SCR 632;** *Common Cause (A Registered Society) v. Union of India and Anr.* **(2010) 11 SCC 528: 2010 (10) SCR 124;** *Securities and Exchange Board of India v. Ajay Agarwal* **(2010) 3 SCC 765: 2010 (3) SCR 70;** *Executive Engineer, Southern Electricity Supply Company of Orissa Ltd. (SouthCo) and Anr. vs. Sri Seetaram Rice Mill* **(2012) 2 SCC 108: 2011 (15) SCR 211;** *Rattan Chand Hira Chand v. Askar Nawaz Jung (Dead) by L.Rs and Ors.* **(1991) 3 SCC 67: 1991 (1) SCR 327 - cited.**

Lord Loreburn in Macbeth v. Chislett **(1910) A.C. 220, 224;** *Tournier v. National Provincial and Union Bank of England* **(1924) 1 KB 461- cited.**

Case Law Reference:

1967 (2) SCR 720	Cited	Para 11
(1910) A.C. 220, 224	Cited	Para 11
1965 (1) SCR 770	Cited	Para 11
1989 (2) SCR 840	Cited	Para 11
1966 (1) SCR 651	Cited	Para 11
2009 (16) SCR 618	Cited	Para 11
2010 (12) SCR 644	Cited	Para 12, 21
1955 (1) SCR 158	Cited	Para 12
2007 (3) SCR 1049	Cited	Para 12
2012 (12) SCR 191	Cited	Para 12
1967 (3) SCR 466	Cited	Para 12
(2008) 8 MLJ 261	Cited	Para 13
1979 (3) SCR 373	Cited	Para 14, 21
1992 (1) SCR 406	Cited	Para 14, 21
(1924) 1 KB 461	Cited	Para 18
2006 (5) Suppl. SCR 437	Cited	Para 21
1962 Supp (3) SCR 632	Cited	Para 21
2010 (10) SCR 124	Cited	Para 21

2010 (3) SCR 70	**Cited**	**Para 25**
2011 (15) SCR 211	**Cited**	**Para 25**
1991 (1) SCR 327	**Cited**	**Para 26**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8916 of 2012.

From the Judgment & Order dated 01.09.2009 of the High Court of Calcutta in Writ Petition No. 7729 (w) of 2009.

WITH

C.A. Nos. 8917 & 8918 of 2012.

C.A. Sundram, Soli J. Sorabjee, Chander Uday Singh, Dr. Abhishek Manu Singhvi, Jaideep Gupta, Bhaskar P. Gupta, Dushyant Dave, S. Ganesh, Ashok H. Desai, Dhavram Juneja, Rohini Musa, Tanuj, Krishnan Dev, Sony Bhatt, Kirat Nagra, Senthil Jagadeesan, Shyel Trehan, Hitesh Jain, Diya Kapur, Pooja Tidka, Nikhil Pillai, Arjun Puri, Vikas Mehta, Amit Bhandari, Manik Joshi, Chetan Kapadia, R.N. Karanjawala, Manik Karanjawala, Ruby Singh Ahuja, Ruchira Gupta, Jatin Mongia, Deepti Sarin, Siddhant Kochhar (for Karanjawala & Co.), Pritesh Kapur, Mehernaz Mehta, Arjun Singh Puri, Ishan Gaur, Kuldeep S. Parihar, H.S. Parihar, Ratnakar Banerjee, Snehal Kakrania, Sanjeev Kapoor (for Khaitan & Co.), Sumeet Lall, Abhishek Khare, Bharat Sangal, Vikram Trivedi, Sachin Chandrana, Srijana Bana, Ramandeep Kaur, L.K. Bhushan, Anirudh Arun Kumar, Hoshedar Wadia, Fraser Alexander (for Dua Associates) for the appearing parties.

The Judgment of the Court was delivered by

A.K. PATNAIK, J.

CIVIL APPEAL No. 8916 OF 2012

(Arising out of SLP (C) NO. 29599 of 2009)

1. Leave granted.

2. This is an appeal against the order dated 01.09.2009 of the Calcutta High Court in Writ Petition No. 7729(W) of 2009.

3. The facts very briefly are that the appellant-bank sanctioned Derivatives/Forward Contracts facility to respondent no.1 upto a limit of Rs.2,00,00,000/- (rupees two crores) only for the purpose of hedging foreign currency exposures by its letter dated 10.01.2006. On behalf of the respondent no.1-company, its Joint Managing Director acknowledged the receipt of the sanction letter dated 10.01.2006 of the appellant and accepted and agreed to be bound by the terms and conditions of the sanction letter as well as the annexures thereto being authorized by the resolution of the Board of Directors of the respondent no.1-company. Thereafter, on 17.01.2006 the appellant and the respondent no.1 entered into the International Swaps and Derivatives Association (ISDA) Master Agreement. Between January, 2006 to January, 2007 the appellant executed nine derivative transactions with the respondent no.1. On the request of the respondent no.1, the appellant enhanced the limit of Derivatives/Forward Contracts facility of the respondent no.1 to Rs. 10,00,00,000/- (rupees ten crores) only for the purpose of hedging adverse foreign exchange fluctuations and to enter into derivative transactions by letter dated 31.01.2007. During January, 2007 to August, 2007, the appellant executed various derivatives transactions with respondent no.1. In August, 2007, on the request of respondent no.1, the appellant once again increased the limit for Derivatives/Forward Contracts facility to Rs.20,00,00,000/- (rupees twenty crores) only for the purpose of hedging adverse foreign exchange fluctuations and entering into derivative transactions by letter dated 09.08.2007. On 06.09.2007, the appellant entered into derivative transactions FXOPT 20536, 20540 and 20544. Thereafter, on 05.03.2008 and 12.03.2008 the appellant informed the respondent no.1 that a sum of Rs.2,43,12,000/- (rupees two crores forty three lacs and twelve thousand) only had become due and payable on 10.03.2008 by the respondent no.1. The respondent no.1, however, did not pay the sum. On 01.07.2008 the Reserve Bank of India (for short 'the RBI') issued the Master Circular on Wilful Defaulters.

4. The Master Circular on Wilful Defaulters (for short "the Master Circular") contained instructions of the RBI to banks and financial institutions regarding reporting of wilful defaulters to other banks and financial institutions and the measures to be imposed on wilful defaulters by such banks and financial institutions. By letter dated 22.10.2008, the appellant intimated the respondent no.1 that it had classified the respondent no.1 as a wilful defaulter as it had defaulted to pay an amount of Rs.2,76,01,908.79 and interest thereon totalling to Rs.14,62,61,186.69 and respondent no.1 by its replies dated 04.11.2008 and 21.11.2008 through its Advocate contended that neither the appellant was a "lender" nor the respondent no.1 was a "borrower" within the meaning of "wilful default" in the Master Circular and, therefore, action under the Master Circular cannot be taken against the respondent no.1. By letter dated 02.02.2009, the appellant informed the respondent no.1 that the replies dated 04.11.2008 and 21.11.2008 of the respondent no.1 have been referred to the Grievance Redressal Committee of the appellant-bank for consideration and the Grievance Redressal Committee has fixed a meeting on 25.02.2009 at 10.00 A.M. at the office of the bank at Nariman Point, Mumbai, and that the respondent no.1 can represent its case in the hearing before the Grievance Redressal Committee. The respondent no.1 then made a representation dated 06.03.2009 before the Grievance Redressal Committee of the appellant-bank contending that the Master Circular does not apply to foreign exchange derivative transactions and was restricted only to the acts of lending by the bank and borrowing by the bank's constituents and as there was no lending by the appellant-bank to the respondent no.1 in any manner from the appellant-bank, the entire proceedings against the respondent no.1 under the Master Circular should be dropped. While the matter was pending before the Grievance Redressal Committee, the respondent no.1 filed Writ Petition No.269 of 2009 before the Calcutta High Court and by order dated 27.03.2009 the Calcutta High Court dismissed the writ petition taking a view that the matter was pending before

the Grievance Redressal Committee. Thereafter, on 07.04.2009, the Grievance Redressal Committee of the appellant-bank after hearing the respondent no.1, declared the respondent no.1 as a wilful defaulter under the Master Circular and further resolved that the respondent no.1-company and its directors be reported to the Credit Information Bureau (India) Ltd., RBI or such other institution/agency as may be required by RBI in terms of its Master Circular. The appellant accordingly intimated the aforesaid decision of the Grievance Redressal Committee of the appellant-bank to the respondent no.1 and the RBI by two separate letters dated 07.04.2008. Aggrieved, the respondent no.1 filed Writ Petition No.7729 (W) of 2009 in the Calcutta High Court and by the impugned judgment, the Calcutta High Court held that the Master Circular applied only to lending transactions of a bank or financial institution and as in the foreign exchange derivative transactions between the appellant and respondent no.1, there was no such lending transactions and the appellant was not the lender and the respondent no.1 was not the borrower, the respondent no.1 could not be declared as a wilful defaulter in terms of the Master Circular and accordingly no action could be taken against the respondent no.1 under the Master Circular. By the impugned judgment, the Calcutta High Court, therefore, set aside the decision dated 07.04.2009 of the appellant-bank and allowed the writ petition of the respondent no.1. Aggrieved, the appellant has filed this appeal.

5. Mr. C.A. Sundaram, learned senior counsel appearing for the appellant, submitted that the High Court has not correctly interpreted the Master Circular. He referred to the counter affidavit filed on behalf of the RBI before the High Court to show that the Master Circular had been issued by the RBI inter alia in exercise of its powers under the Banking Regulation Act, 1949 (for short 'the 1949 Act') and that Sections 21 and 35A of the 1949 Act make it clear that the directions/guidelines issued by the RBI are mandatory and binding on the clients. He argued that Paragraph 2.1 of the Master Circular defines

the term "Wilful Default" as a default by a unit in meeting its payment/repayment obligations to the lender, but the word "lender" has not been defined in the Master Circular. He submitted that the RBI, which has issued the Master Circular, has in its counter affidavit before the High Court stated that the intention of the RBI while issuing the Master Circular was to cover all eventualities where "payment/repayment obligations" exist and therefore the Master Circular would cover all banking transactions including off balance-sheets transactions, such as, derivatives, guarantees, Letters of Credit, etc. He referred to Sections 45U of the Reserve Bank of India Act, 1934 (for short 'the 1934 Act'), which defines in Clause (a) the word "derivative" and also to Section 45V of the 1934 Act which is titled "Transactions in derivatives" and submitted that the derivative transactions with banks had been declared to be valid by law. He submitted that the word "borrower" has been defined in Clause (b) of Section 45A of the 1934 Act to mean any person to whom any credit limit has been sanctioned by any banking company and has been still more widely defined in Clause (b) of Section 2 of the Credit Information Companies (Regulation) Act, 2005 (for short 'the 2005 Act') to mean not only a person who has been granted loan or any other credit facility by the credit institution, but also a client of a credit institution. He referred to the definition of "Client" in Clause (c) of Section 2 of the 2005 Act to show that "Client" includes a person who has not only obtained or seeks to obtain financial assistance from a credit institution, but also obtains assistance in any other form or manner. He submitted that Clause (d) of Section 2 of the 2005 Act defines the expression "credit information" more widely to include not only loans but any other non-funding based facility granted to all its borrowers as well as any other matter which the RBI may consider necessary for inclusion in the credit information to be collected. He submitted that the Foreign Exchange Management (Foreign Exchange Derivative Contracts) Regulations, 2000 (for short 'the FEMA Regulations') had been made by the RBI under Section 47 of the Foreign Exchange Management Act, 1999 (for short "the FEMA") and

Regulation 2(v) of the FEMA Regulations defines "foreign exchange derivative contract" to mean a financial transaction or an arrangement in whatever form and by whatever name called, whose value is derived from price movement in one or more underlying assets. He referred to Schedule-I of the FEMA Regulations to show that foreign exchange derivative contract was permissible for a person resident in India. Mr. Sundaram vehemently argued that as the purpose of the Master Circular is to ensure that the clients of the banks who had defaulted in their payment/repayment obligations of the dues to the banks are not given additional finance, a client of the bank who had defaulted in not paying its dues to the bank under a foreign exchange derivative transaction would also be covered under the Master Circular. He submitted that as the respondent no.1 had defaulted in making payment of Rs.1,56,08,084.70 as on 29.12.2008 on account of foreign exchange derivative transactions, the appellant was required by the instructions of the RBI in the Master Circular to report the case to the RBI as well as other banks and financial institutions as a wilful defaulter. He submitted that the High Court was, therefore, not right in setting aside the decision dated 07.04.2009 of the appellant-bank and allowing the writ petition of the respondent no.1.

6. Mr. Bhaskar P. Gupta, learned senior counsel for the respondent no.1, on the other hand, submitted that under the Master Circular a wilful default can arise only out of a lender - borrower relationship between the bank and its constituent and, therefore, unless the bank has given a loan or an advance to its constituent, the question of wilful default under the Master Circular does not arise. He submitted that a reading of the Master Circular would show that a declaration of a wilful defaulter has severe consequences for the party declared as a wilful defaulter, such as squeezing of credit under clause 2.5(a) of the Master Circular and criminal liability under clause 4.3 of the Master Circular. He argued that considering the severe consequences that follow a declaration of wilful defaulter, the definition of "wilful default" in the Master Circular which

refers to defaults in repayment obligations to a "lender" has to be strictly construed. He cited the decisions of this Court in *Bijaya Kumar Agarwala v. State of Orissa* [(1996) 5 SCC 1] and *Sakshi v. Union of India & Ors.* [(2004) 5 SCC 518] for the proposition that a statute enacting an offence or imposing a penalty is to be strictly construed. He submitted that a derivative transaction does not involve lending of funds by way of a loan or an advance by the bank to its constituent and, therefore, the dues under a derivative transaction will not fall in any of the sub-clauses (a) to (d) of clause 2, which defines a wilful defaulter for the purpose of the Master Circular. He argued that there is a fundamental difference between a loan/advance and a derivative transaction and the fundamental difference is that in the case of a derivative transaction, either party could be required to effect payment depending on the change in interest rate, foreign exchange rate credit rating or credit index, price of securities as will be clear from Section 45U of the 1934 Act, whereas in the case of a loan or an advance, it is the borrower alone which has to effect payment. He submitted that in none other circulars issued after the Master Circular of 01.07.2008 there is any change in the definition of 'wilful defaulter' so as to bring in defaulters of payment of dues under the derivative transactions within the meaning of 'wilful defaulters'. In this context, he referred to the Master Circulars dated 01.07.2009, 01.07.2010, 01.07.2011 and 01.07.2012. He vehemently argued that if the RBI intended to include defaulters of dues under the derivative transactions within the meaning of the expression "wilful defaulter", the RBI could have changed the definition of "wilful defaulter" in the subsequent Master Circulars.

7. Mr. Bhaskar P. Gupta next submitted that the stand of the RBI before the High Court in the affidavits filed on its behalf was that the question as to whether there was a lender-borrower relationship between the appellant and the respondent no.1 under the contract between them and whether there was a legally enforceable obligation between the appellant and the

respondent no.1 are issues which can be determined by a civil court in a properly instituted suit in accordance with law and it is not possible for the RBI to interpret the contract between the appellant and the respondent no.1 and express any opinion in that regard and that determination of such issues arising under a contract cannot be done in a proceeding under Article 226 of the Constitution and hence the writ petition of the respondent no.1 was liable to be dismissed. He submitted that the RBI cannot now take a stand before this Court in this appeal that the respondent no.1 was a wilful defaulter covered by the Master Circular inasmuch as it had not paid its dues to the appellant under the derivative transactions. He submitted that if the RBI was aggrieved by the finding in the impugned judgment of the Calcutta High Court that the Master Circular did not apply to dues under a derivative transaction, it could have filed a Special Leave Petition under Article 136 of the Constitution against the impugned judgment of the Calcutta High Court, but the RBI has not done so. According to him, therefore, the impugned judgment of the Calcutta High Court should be sustained by this Court in this appeal.

CIVIL APPEAL No. 8917 OF 2012

(Arising out of SLP (C) NO. 27730 of 2011)

8. Leave granted.

9. This is an appeal against the judgment dated 23/24.08.2011 of the Bombay High Court in Writ Petition (Lodg.) No. 204 of 2011.

10. The facts very briefly are that the appellant no.1, a pharmaceutical company, agreed to enter into foreign exchange derivative transactions with respondent no.1-bank to hedge its foreign currency risks arising out of export of its products and for this purpose executed an International Swaps and Derivative Association (ISDA) Master Agreement on 29.08.2005. During 2006-2008, the appellant and respondent no.1-bank entered into nine foreign exchange derivative transactions, out of which four were foreign currency swap transactions and five were

foreign currency option transactions. On 01.07.2010, the Reserve Bank of India (for short 'the RBI') issued a Master Circular on Wilful Defaulters (for short 'the Master Circular'). The Master Circular contained instructions of the RBI to banks and financial institutions regarding reporting of wilful defaulters to other banks and financial institutions and the measures to be imposed on wilful defaulters by such banks and financial institutions. Respondent no.1 issued a notice dated 15.10.2010 to the appellant no.1 to show-cause why the respondent no.1 should not classify the appellant no.1 as a wilful defaulter under the Master Circular, as the appellant no.1 had not paid the dues to the tune of of Rs.2.92 Crores under three of the derivative transactions. In the said show- cause notice, the appellant no.1 was also informed that it can make a representation against the decision of the respondent no.1 to classify the appellant no.1 as wilful defaulter to the Grievance Redressal Committee of the respondent no.1-bank. The appellant no.1 submitted its reply dated 20.11.2010 to the respondent no.1-bank contending that the Master Circular was applicable to dues arising out of a lender-borrower relationship and as the alleged dues arise under the derivative transactions and not against a credit facility sanctioned by the bank, there was no lender-borrower relationship between the respondent no.1-bank and the appellant and, therefore, the Master Circular was not applicable to the case of the appellant. The Grievance Redressal Committee of the respondent no.1-bank considered the reply of the appellant no.1 and by its decision dated 28.01.2011 held that the appellant no.1 was a wilful defaulter covered by the Master Circular as it had defaulted in its obligations to the bank towards the derivative transactions. The appellant no.1 filed Writ Petition No. 204 of 2011 challenging the decision dated 28.01.2011 of the Grievance Redressal Committee of the respondent no.1-bank and by order dated 24.08.2011, the Bombay High Court quashed the order dated 28.01.2011 of the Grievance Redressal Committee of the respondent no.1-bank on the ground that the order was passed in breach of principles of natural justice inasmuch as the

appellant no.1 was not heard before the order was passed. The Bombay High Court, however, held in the impugned judgment dated 24.08.2011 that the Master Circular covered default by a party in complying with the payment obligations under derivative transactions and observed that it will be open to the Grievance Redressal Committee to pass fresh orders in accordance with law after complying with the principles of natural justice. Aggrieved by the finding of the Bombay High Court in the impugned judgment that the Master Circular covers defaults in complying with the payment obligations under derivative transactions, the appellants have filed this appeal.

11. Mr. Soli J. Sorabjee, learned counsel for the appellant, submitted that the High Court has not correctly interpreted the Master Circular and has erroneously recorded a finding that wilful default covers defaults in complying with payment obligations under derivative transactions by relying on circulars issued by the RBI on 08.08.2008, 13.10.2008, 29.10.2008, 09.04.2009 and 01.07.2010 which do not relate to wilful defaults but relate to prudential norms, assets classification as non-performing assets, etc. He submitted that it is a settled principle of statutory interpretation that a definition in one Act should not be imported into another Act and referred to the decision of this Court in *Commissioner of Sales Tax, M.P. v. Jaswant Singh Charan Singh* [1967 (2) SCR 720] in which a reference to other Acts to construe an Act has been critically commented by Lord Loreburn in *Macbeth v. Chislett* [(1910) A.C. 220, 224] as a "new terror in the construction of Acts". He vehemently submitted that the Master Circular should be construed on its own terms and language and so construed, it will be clear that the basic postulate and the underlying assumption of the Master Circular is existence of a lender-borrower relationship and that the Master Circular does not contemplate nor cover a creditor and debtor relationship. He relied on the decisions of this Court in *Bombay Steam Navigation Co.* (1953) *Private Ltd. v. C.I.T., Bombay* [1965 (1) SCR 770], *C.I.T., Lucknow v. Bazpur Co-operative Sugar Ltd.* [1989 Supp. (2) SCC 240] and *Ram Ratan Gupta v. Director of Enforcement, Foreign Exchange*

Regulation & Anr. [1966 (1) SCR 651] in which the distinction between a loan and a debt has been judicially brought out to say that whereas a loan of a money results in a debt, every debt is not a loan. He submitted that in a loan transaction, therefore, there is a lender and a borrower, but in a transaction which is not a loan there is no lender and no borrower, but there may be a creditor and a debtor. He submitted that in a derivative transaction the dues payable by a party to the bank may be a debt and the bank may be a creditor and such party may be a debtor, but the bank in a derivative transaction is not a lender and such party from whom the dues are payable to the bank is not a borrower. He further submitted that the interpretation given by the RBI to the Master Circular cannot be accepted by the Court by recourse to the doctrine of contemporanea expositio as this doctrine was applicable to ancient statutes and has no application to modern statutes as has been noted in Principles of Statutory Interpretation (12th Edn. 2010) by Justice G.P. Singh at pages 341-349. He further submitted that if the doctrine of contemporanea expositio is applicable, the interpretation given by the RBI in the Master Circular may have some weight, but cannot be decisive as interpretation of the Master Circular, in the facts of the present case, is a judicial function to be performed by the Court. In support of this proposition, he relied on *Bhuwalka Steel Industries Ltd. v. Bombay Iron & Steel Labour Board & Anr.* [(2010) 2 SCC 273]. He submitted that the RBI could have issued a Circular or a Press Note and made a public declaration that a defaulter of payment obligations under a derivative transaction to the bank is also covered by the Master Circular before the matter reached the Court. He submitted that after the matter reaches the Court, the RBI cannot file affidavits taking a stand that defaulters of dues under derivative transactions to the bank are covered by the Master Circular.

12. Mr. Sorabjee referred to Section 6 of the 1949 Act to show that a bank can engage in several businesses other than lending such as deal in derivatives and such business will not

fall within the core banking business of the bank under clauses (a) to (o) of Section 6 of the 1949 Act and it will also not constitute lending. He referred to the decision in *ICICI Bank Ltd. v. Official Liquidator of APS Star Industries Ltd.* [(2010) 10 SCC 1] in which this Court has broadly categorised the functions of the banking company into two parts, namely, core banking of accepting deposits and lending and miscellaneous functions and services. Accordingly to him, derivative is a part of the miscellaneous parts of functions and services provided by the bank and do not create a lender-borrower relationship. He submitted that the Master Circular contemplates grave consequences affecting the right of a person under Article 19(1)(g) of the Constitution of India to carry on any trade, business or occupation and should be strictly construed as otherwise it will be exposed to the challenge of unconstitutionality. In support of this argument, he relied on the decisions of this Court in *Tolaram Relumal & Anr. v. State of Bombay* [1955 (1) SCR 158], *Chandigarh Housing Board v. Major General Devinder Singh & Anr.* [(2007) 9 SCC 67], *Delhi Airtech Services Private Limited & Anr. v. State of Uttar Pradesh & Anr.* [(2011) 9 SCC 354] and *Shah & Co., Bombay v. State of Maharashtra & Anr.* [1967 (3) SCR 466].

13. Mr. Dushyant Dave and Mr. S. Ganesh, learned senior counsel appearing for respondent no.1-bank, submitted that the derivative transactions between the appellant no.1 and respondent no.1 are swaps and options and the liability of the appellant no.1 to the respondent no.1 under these transactions arose on the settlement date. They referred to the decision of the Madras High Court in *Rajshree Sugars & Chemicals Ltd. v. Axis Bank Ltd.* [(2008) 8 MLJ 261] in which four categories of derivative transactions have been described including swaps and options. In this decision, the Madras High Court has taken note of the fact that a swap is an agreement made between two parties to exchange payments on regular future dates and the option gives the holder the right to buy or sell an underlying asset at a future date at a predetermined price. They also

referred to the ISDA agreement between the appellant no.1 and the respondent no.1 to explain the nature of the derivative transactions between the appellant no.1 and the respondent no.1. They submitted that as the appellant no.1 did not pay dues amounting to Rs.29.2 million under the derivative transactions, the respondent no.1 issued a notice to the appellant dated 15.10.2010 to show cause why the respondent no.1 should not classify the appellant as a wilful defaulter under the Master Circular and also informed the respondent no.1 that it could make a representation against the decision to classify it as a wilful defaulter to the Grievance Redressal Committee of the respondent no.1-bank. They submitted that the appellant no.1 did make a representation and was also subsequently heard, but the Grievance Redressal Committee held that the appellant was a wilful defaulter under the Master Circular.

14. They further submitted that the RBI has always treated a derivative transaction as a facility granted by a bank to its customer in order to enable the customer to manage its risks arising from fluctuations in foreign exchange and interest rates. They referred to the Master Circular as well as the other Circulars dated 02.07.2007, 13.10.2008, 08.12.2008 and 09.04.2009 to show that a derivative transaction is a non-funded credit facility enjoyed by a borrower from a bank. They submitted that both Section 45A(b) of the 1934 Act and Section 2(c) of the 2005 Act define a "borrower" as covering a person to whom "any credit facility" has been granted, including any credit facility other than a loan. They submitted that, therefore, the word "borrower" in the Master Circular covers not only a loanee but also any other customer of the bank enjoying a credit facility such as a derivative transaction. They submitted that the Master Circular is an administrative circular issued by the RBI in exercise of its regulatory power and, therefore, can be clarified by the RBI where a doubt arises as to whether derivative transactions are covered under the Master Circular and the RBI has clarified in its affidavit filed before this Court that the derivative transactions are covered by the Master Circulation. They cited the decision of this Court in *Desh Bandhu Gupta and Co. and others v. Delhi Stock Exchange Association Ltd.* [(1979) 4 SCC 565] that an administrative construction placed by the authority or officers charged with executing a statute generally should be clearly wrong before it is overturned and is entitled to considerable weight. They also referred to the decision of this Court in *Peerless General Finance & Investment Co. Ltd and another v. Reserve Bank of India* [(1992) 2 SCC 343] wherein it has been held that Courts are not to interfere with economic policy which is the function of the expert bodies and submitted that the view taken by the RBI that dues under derivative transactions covered by the Master Circular should not be disturbed by this Court.

CIVIL APPEAL No. 8918 OF 2012

(Arising out of SLP (C) NO. 28477 of 2011)

15. Leave granted.

16. This is an appeal against the judgment dated 23/24.08.2011 of the Bombay High Court in Writ Petition (Lodg.) No. 345 of 2011.

17. The facts briefly are that the appellant no.1 carries inter alia the business of PVC pipes and PVC resins and the appellant no.2 is its Assistant Managing Director and Chief Officer. The appellant no.1 entered into several derivative transactions with respondent no.3-bank named as USD/JPY Target Profit Forward Transactions during the years 2007-2008. On 01.07.2009, the Reserve Bank of India (for short 'the RBI'), respondent no.1, issued a Master Circular on Wilful Defaulters (for short 'the Master Circular'). The Master Circular contained instructions of the RBI to the banks and financial institutions regarding reporting of wilful defaulters to other banks and financial institutions and the measures to be imposed on wilful defaulters by the said banks and financial institutions. The respondent no.3-bank issued a demand notice dated 20.08.2009 to the appellant no.1 calling upon the appellant to pay USD 20,821,480.40 with interest thereon as dues of the appellant no.1 to the respondent no.3-bank under the derivative

transactions. As the appellant no.1 did not pay the said dues, the respondent no.3 issued a notice dated 19.04.2010 to the appellant to show cause why the appellant will not be classified as a wilful defaulter under the Master Circular. The appellant no.1 replied vide its letter dated 10.05.2010 denying the allegations made by the respondent no.3-bank in the notice dated 19.04.2010 and requesting the respondent no.3-bank to give a fair and reasonable opportunity to place its representation before the Grievance Redressal Committee of the respondent no.3-bank before a final decision is taken to classify the appellant no.1 as a wilful defaulter. The Grievance Redressal Committee of the respondent no.3-bank heard the appellant no.1 on 13.12.2010, but passed an order on 20.01.2011 declaring the appellant no.1 as a wilful defaulter. Aggrieved, the appellants filed Writ Petition (lodg.) No. 345 of 2011 before the Bombay High Court challenging the order dated 20.01.2011 of the Grievance Redressal Committee. By the impugned judgment, the Bombay High Court held that the Master Circular covers the outstanding claims of respondent no.3-bank against the appellant no.1 arising out of the foreign exchange derivative transactions. The High Court, however, left it open to the Grievance Redressal Committee to pass fresh orders after complying with the principles of natural justice. The appellants have, therefore, filed this appeal.

18. Dr. A.M. Singhvi, learned senior counsel appearing for the appellants, submitted that in the present case the respondent no.3-bank has not sanctioned any credit or other facility for derivative transactions in favour of the appellant no.1 and as such there was no International Swaps and Derivatives Association (ISDA) agreement between the appellant and the respondent no.3 for the derivative transactions. He submitted that a foreign exchange derivative contract means a financial transaction or an arrangement whose value is derived from price movement in one or more underlying assets. He submitted that under the FEMA Regulations any authorized person including an authorized dealer, a money changer, a financial banking unit, or any other person can deal with foreign

exchange derivatives and thus foreign exchange derivative transactions are not essentially banking transactions. He explained that the banks have to get a separate licence to be an authorized person to deal with foreign exchange derivatives. He submitted that Chapter III-A of the 1934 Act relates to the collection and furnishing of credit information and a reading of Section 45A in Chapter III-A would show that credit information covers only information in relation to borrowers to whom any credit limit has been sanctioned by any banking company. He vehemently argued that in any case Section 45E in Chapter III-A of the 1934 Act clearly provides that any credit information contained in any statement submitted by a banking company under Section 45C or furnished by the bank to any banking company under Section 45D shall be treated as confidential. He submitted that any information relating to a derivative transaction entered into by a customer of the bank cannot, therefore, be disclosed by the bank either to the RBI or to any other bank. He also cited the decision of the King's Bench in *Tournier v. National Provincial and Union Bank of England* [(1924) 1 KB 461] for the proposition that there is an implied contract between the bank and the customer that the bank will not disclose any information relating to the customer to any third party. He submitted that any disclosure of information relating to the defaults made by the customer of his obligations under a derivative transaction will be breach of the implied contract of confidentiality between the bank and its customer. He submitted that similarly the 2005 Act covers only the "credit information" as defined in the 2005 Act and as dues under a foreign exchange derivative transaction is not "credit information" within the meaning of the expression as defined in the 2005 Act, any disclosure of information relating to foreign exchange derivative transactions by the bank with its customer is not authorized under the 2005 Act. He submitted that the FEMA and the 'FEMA Regulations' which comprehensively deal with the foreign exchange derivatives and the 1949 Act also do not authorize disclosure of any information relating to derivative transactions affecting the customer of the bank.

19. Mr. Singhvi reiterated the arguments of Mr. Sorabjee that the Master Circular covers the dues under the borrower-lender relationship between the customer and the bank. He submitted that as derivative transactions did not involve a borrower-lender relationship at all, it could not become a borrower-lender subsequently on default of payment of the demand made by the bank under the derivative transaction. He submitted that the RBI has not given any definite opinion as to whether the dues under a derivative transaction would be covered under the Master Circular and in any case the opinion of the RBI is not consistent and is in conflict with the statutory provisions. He cited *Desh Bandhu Gupta and Co. and Others v. Delhi Stock Exchange Association Ltd.* [(1979) 4 SCC 565] to submit that the interpretation given by the RBI to the Master Circular could not have any controlling effect on the Courts and if occasion arises, will have to be disregarded by the Courts for cogent and persuasive reasons. He finally submitted that if the Master Circular is construed to cover derivative contracts it will have the effect of black listing the customers who resist demands made by the banks towards their alleged dues under the derivative transactions and will ruin their business as well as their reputation and the Master Circular will become arbitrary and violative of Article 14 of the Constitution. He submitted that as the Master Circular has a penal effect, it has to be strictly construed and so construed, it will cover only a lender-borrower relationship and not the relationship between the bank and its customer in a derivative transaction. He submitted that the impugned judgment of the High Court therefore should be set aside.

20. Mr. Ashok Desai, learned senior counsel appearing for the respondent no.3, in reply, submitted that the Master Circular has been issued by the RBI in exercise of its powers under the 1934 Act and, therefore, for interpreting the Master Circular, the functions of the RBI under the 1934 Act have to be kept in mind. He referred to the preamble of the 1934 Act to show that the RBI has been constituted to inter alia operate

the credit system of the country to its advantage. He also referred to the statement of objects and reasons of the Amendment Act of 26 of 2006 in which a reference has been made to the crucial role that derivative plays in re-allocating and mitigating the risks of corporates, banks and other financial institutions. He submitted that it is by the Amendment Act 26 of 2006 that various provisions were introduced in the 1934 Act in Chapter III-D for regulation of transactions in derivatives. He submitted that transactions in derivative therefore have an important bearing on the credit policy or credit system of the country and the views of the RBI whether the Master Circular would cover the dues under derivative transaction are decisive and should not be discarded by the Court.

21. He cited *Ganesh Bank of Kurundwad Ltd. & Ors. v. Union of India & Ors.* [(2006) 10 SCC 645] for the proposition that when two views are possible, the view of the regulating body, such as the RBI, should be accepted by the Court in matters falling within the domain of the RBI. He also relied on *Joseph Kuruvilla Vellukunnel v. Reserve Bank of India* [1962 Supp (3) SCR 632] in which the functions of the RBI including the functions relating to operation of the credit system of the country to its advantage have been discussed. He cited *Peerless General Finance & Investment Company Ltd. and Another v. Reserve Bank of India and others* [(1992) 2 SCC 343] in which this Court has held that the RBI has a large contingent of expert advice relating to matters affecting the economy of the country and nobody can doubt the bonafides of the RBI in issuing directions to the banks and it is not the function of the courts to sit in judgment over matters of economic policy and it must necessarily be left to the expert bodies. He also relied on *ICICI Bank Ltd. v. Official Liquidator of APS Star Industries Ltd. and Others* (supra) in which this Court has discussed the power of the RBI under the 1934 Act to regulate the business of banking companies and to control their management in certain situations. He submitted that in the aforesaid decision, reference has also been made to the

permission of the RBI required if a banking company seeks to deal in derivative. He submitted that in *Desh Bandhu Gupta and Co. and others v. Delhi Stock Exchange Association Ltd.* [(1979) 4 SCC 565] in which the principle of contemporanea expositio applied to interpretation of statutes or any other document has been discussed. He submitted that in *Common Cause (A Registered Society) v. Union of India and Another* [(2010) 11 SCC 528] this Court has held that it is neither within the domain of the courts nor the scope of judicial review to embark upon an enquiry as to whether a particular public policy is wise or not and submitted that these comments were made by the Court while dealing with the issue of reduction of non-performing assets in the books of banks.

22. Mr. Desai also referred to the provisions of Chapter III-A of the 1934 Act on Collection and Furnishing of Credit Information and in particular Section 45A(b) and 45A(c) and submitted that information regarding dues under derivative transactions will come within the expression "credit information". He submitted that disclosure of such credit information is not hit by Section 45E of the 1934 Act as has been made clear in the language of the said section. He submitted that the Bombay High Court, therefore, has correctly interpreted the Master Circular and held that it also applies to dues under derivative transactions and the narrow view taken by the Calcutta High Court that the Master Circular will only apply to dues under a lender-borrower relationship is not correct.

The stand of the RBI in the three Civil Appeals:

23. Mr. Jaideep Gupta, learned senior counsel appearing for the RBI, submitted that the RBI did not challenge the judgment of the Calcutta High Court because it was not necessary for the RBI for two reasons: (i) one of the parties, namely Kotak Mahindra Bank Limited, had challenged the judgment of the Calcutta High Court and the RBI was a respondent in the Special Leave Petition filed by the Kotak Mahindra Bank Limited and (ii) the issue was also pending

before the Bombay High Court which could take a view different from that of the Calcutta High Court. He submitted that at no stage, therefore, the RBI has accepted the judgment of the Calcutta High Court that the Master Circular did not cover wilful default of dues under derivative transactions. He submitted that the Bombay High Court has taken the correct view that the Master Circular will apply to the dues receivable by a bank under derivative transactions.

24. He referred to the language of the Master Circular to show that it covered both funded facilities such as loans and advances and non-funded facilities such as bank guarantees and derivative transactions. He referred to clause 2.6 of the Master Circular to show that when bank guarantees were invoked and are not honoured by the defaulting units on whose behalf the bank guarantee has been furnished, the defaulters are to be treated as wilful defaulters under the Master Circular. He argued that similarly when dues become payable under derivative transactions but the customer does not pay the dues, the customer becomes a wilful defaulter. He submitted that the definition of wilful defaulter in clause 2.1 of the Master Circular makes it clear in sub-clause (a) that a wilful default will cover also a case where a unit has defaulted in meeting its payment obligations to the lender even if it has a capacity to honour the said obligation. He submitted that in a lender-borrower relationship, there may be a repayment obligation to the lender but no payment obligation, whereas in a non-funded facility such as bank guarantee or a derivative transaction, there is no repayment obligation but a payment obligation. He submitted that a unit which has defaulted in meeting its payment obligation under a derivative transaction is thus covered under the Master Circular. He also referred to sub-clause (d) of clause 2.1 of the Master Circular in which the expression "bank/lender" finds place. He submitted that this sub-clause would show that the words "bank" and "lender" have been used interchangeably in the Master Circular and therefore the expression "lender" in the definition of sub-clauses (a), (b), (c) & (d) would include a bank.

He submitted that the word "lender" in sub-clauses (a), (b), (c) & (d) of the definition of wilful defaulter would therefore mean the bank and not the bank as a lender.

25. Mr. Jaideep Gupta submitted that a reading of Section 45V of the 1934 Act would show that transactions in a derivative, as may be specified by the RBI from time to time, shall be valid and therefore derivative transactions are under the regulatory purview of the RBI. He submitted that the Master Circular has to be interpreted keeping in view this regulatory power of the RBI and a purposive interpretation is to be given to the Master Circular. He cited the decisions of this Court in *Securities and Exchange Board of India v. Ajay Agarwal* [(2010) 3 SCC 765] in which the purpose of the Act was taken into consideration while interpreting the provisions of the Act. He also relied on *Executive Engineer, Southern Electricity Supply Company of Orissa Ltd. (SouthCo) and another vs. Sri Seetaram Rice Mill* [(2012) 2 SCC 108] in which this Court while interpreting the provisions of the Electricity Act, 2003, held that a construction which will improve the workability of the statute and make it more effective and purposive, should be preferred to any other interpretation which may lead to undesirable results.

26. He submitted that the definition of wilful defaulter in the Master Circular need not be altered by the RBI as and when new products such as the derivatives come into market as according to the RBI the definition of wilful defaulter is wide enough to cover such new products which come into market with the growth of the economy. He referred to the observations of this Court in *Rattan Chand Hira Chand v. Askar Nawaz Jung (Dead) by L.Rs and Others* [(1991) 3 SCC 67] that the legislature has often failed to keep pace with the changing needs and values and to provide for all contingencies and eventualities and it is, therefore, not only necessary but obligatory on courts to step into fill the lacuna. He also placed reliance on the comments of G.P. Singh's Principles of Statutory Interpretation (11th Edition) at p. 328 in this regard.

He also relied on the observation of this Court in *ICICI Bank Limited v. Official Liquidator of APS Star Industries Ltd. and Others* (supra) that while interpreting the Banking Regulation Act, 1949, one needs to keep in mind not only the framework of the banking law as it stood in 1949 but also the growth and the new concepts that have emerged in the course of time. He submitted that when a Master Circular was issued, it contemplated all kinds of wilful defaulters of dues to the bank and when new products such as derivative transactions come into economy, the Courts will have to interpret the Master Circular in an expansive way so as to cover dues to the bank under such new products.

Interpretation of the Master Circular by the Court:

27. In these appeals, the only question that we are called upon to decide is whether a wilful default in meeting payment obligations to a bank under a derivative transaction will be covered under the Master Circular. The definition of wilful default is in para 2.1 of the Master Circular dated 01.07.2008 and the Master Circular dated 01.07.2009 and is the same. We, therefore, extract clause 2.1 of the Master Circular dated 01.07.2008, hereinbelow:

"2.1 Definition of wilful default

The term "wilful default" has been redefined in supersession of the earlier definition as under:

A "wilful default" would be deemed to have occurred if any of the following events is noted:-

(a) The unit has defaulted in meeting its payment/ repayment obligations to the lender even when it has the capacity to honour the said obligations.

(b) The unit has defaulted in meeting its payment/ repayment obligations to the lender and has not utilized the finance from the lender for the specific purposes for which finance was availed of but has diverted the funds for other purposes.

(c) The unit has defaulted in meeting its payment/ repayment obligations to the lender and has siphoned off the funds so that the funds have not been utilized for the specific purpose for which finance was availed of, nor are the funds available with the unit in the form of other assets.

(d) The unit has defaulted in meeting its payment/ repayment obligations to the lender and has also disposed of or removed the movable fixed assets or immovable property given by him or it for the purpose of securing a term loan without the knowledge of the bank/lender."

28. We find from the definition of wilful default in the Master Circular quoted above that a wilful default would be deemed to have occurred in any of the events mentioned in sub-clauses (a), (b), (c) and (d) of clause 2.1. These sub-clauses use the word "lender" and for this reason the Calcutta High Court has taken a view in the impugned judgment that the Master Circular applies only to a lender-borrower relationship and thus only a wilful default by a borrower to the bank which has lent funds by way of loans and advances would be covered under the Master Circular and a party who has not borrowed any money from a bank and has availed the facility of derivative transaction from a bank and has defaulted in meeting its payment obligation to the bank under the derivative transaction is not covered by the Master Circular. The Calcutta High Court, therefore, has gone by a literal interpretation of the word "lender" in sub-clauses (a), (b), (c) and (d) in the definition of wilful default in clause 2.1 of the Master Circular.

29. This approach of the Calcutta High Court in interpreting the Master Circular, in our considered opinion, is not correct because it is a settled principle of interpretation that the words in a statute or a document are to be interpreted in the context or subject-matter in which the words are used and not according to its literal meaning. In Principles of Statutory Interpretation, 13th Edition, 2012, Justice G.P. Singh has given this explanation to the rule of literal construction at page 94:

"When it is said that words are to be understood first in their natural, ordinary or popular sense, what is meant is that the words must be ascribed that natural, ordinary or popular meaning which they have in relation to the subject-matter with reference to which and the context in which they have been used in the statute. Brett, M.R. called it a "cardinal rule" that "Whenever you have to construe a statute or document you do not construe it according to the mere ordinary general meaning of the words, but according to the ordinary meaning of the words as applied to the subject-matter with regard to which they are used". "No word", says Professor H.A. Smith "has an absolute meaning, for no words can be defined in vacuo, or without reference to some context". According to Sutherland there is a "basic fallacy" in saying "that words have meaning in and of themselves", and "reference to the abstract meaning of words", states Craies, "if there be any such thing, is of little value in interpreting statutes". In the words of Justice Holmes: "A word is not a crystal transparent and unchanged; it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used." Shorn of the context, the words by themselves are "slippery customers". Therefore, in determining the meaning of any word or phrase in a statute the first question to be asked is - "What is the natural or ordinary meaning of that word or phrase in its context in the statute? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the Legislature, that it is proper to look for some other possible meaning of the word or phrase. The context, as already seen, in the construction of statutes, means the statute as a whole, the previous state of the law, other statutes in pari materia, the general scope of the statute and the mischief that it was intended to remedy."

We will, therefore, have to interpret the word "wilful default" in

the Master Circular by reading the Master Circular as a whole, looking at the provisions of the 1934 Act and the 1949 Act under which the RBI has powers to issue circulars and instructions to the banks, the purpose for which the Master Circular was issued and the mischief that the Master Circular intends to remedy because these constitute the context and the subject-matter in which the definition of wilful default finds place in the Master Circular.

30. The Bombay High Court, on the other hand, has come to the conclusion in the impugned judgment that the Master Circular covers also a default in complying with the payment obligations under derivative transactions by relying on the language of not only the Master Circular dated 01.07.2009 but also of the circulars issued by the RBI on 08.08.2008, 13.10.2008, 29.10.2008, 09.04.2009 and 01.07.2010 which do not relate to wilful default but relate to prudential norms, assets classification as non-performing assets, etc. This approach of the Bombay High Court in interpreting the Master Circular, in our considered opinion, is also not correct because the subject matter of these circulars of the RBI issued on 08.08.2008, 13.10.2008, 29.10.2008, 09.04.2009 and 01.07.2010 do not relate to wilful default but relate to prudential norms, assets classification as non-performing assets etc. These circulars issued by the RBI on 08.08.2008, 13.10.2008, 29.10.2008, 09.04.2009 and 01.07.2010 may have been issued by the RBI but these are not circulars amending or clarifying the definition of wilful default in the Master Circular. The circulars issued by the RBI on 08.08.2008, 13.10.2008, 29.10.2008, 09.04.2009 and 01.07.2010 on which the Bombay High Court has relied on while interpreting the definition of wilful default in the Master Circular do not constitute the context or the subject-matter in which the definition of wilful default in the Master Circular has to be construed. The context will only include pari materia circulars issued by the RBI, but will not include circulars issued by the RBI on subject-matters other than wilful default.

31. On a reading of the paragraph in the Master Circular

titled "Introduction", we find that pursuant to the instructions of the Central Vigilance Commission for collection of information on wilful defaults of Rs.25 lakhs and above, a scheme was framed by the RBI with effect from 01.04.1999 under which the banks and notified All India Financial Institutions were required to submit to the RBI the details of the wilful defaulters. Hence, the Master Circular originated pursuant to the instructions of the Central Vigilance Commission and these instructions are contained in a communication dated 27.11.1998 of the Central Vigilance Commission on the subject "improving vigilance administration in banks". The instructions have been issued by the Central Vigilance Commission in exercise of its powers under Section 8(1)(h) of the Central Vigilance Commission Ordinance, 1998, whereunder it exercises superintendence over the vigilance administration of the various Ministries of the Central Government or Corporations established by or under any Central Act, Government Companies, Societies and local authorities owned or controlled by the Central Government. Para 2.3 of the aforesaid instructions issued by the Central Vigilance Commission is extracted hereinbelow:

"2.3 **Lack of communication between Banks**

2.3.1 All cases of willful default of Rs.25 lakhs and above will be reported by all banks to RBI as and when they occur or are detected.

2.3.2 Whether a matter is a case of willful default will be decided in each bank by a Committee of Officers.

2.3.3 The RBI will circulate the information received from the banks of wilful default, every three months. The data with the RBI will also be accessible directly by the banks concerned after the WAN is installed in position.

2.3.4 There should be greater intra bank communication about willful default, frauds, cheating cases etc. so that the same bank does not get exploited in different branches by the same defaulting parties."

32. It will be clear from the language of the aforesaid instructions issued by the Central Vigilance Commission that all cases of wilful default of Rs.25 lakhs and above were to be reported by all the banks to the RBI as and when they occur or are detected and the RBI was required to circulate the information received from the banks of wilful default every three months and there was to be greater intra bank communication about the wilful defaults. These instructions of the Central Vigilance Commission covered to "all cases of wilful default of Rs.25 lakhs and above" and were not confined to only wilful default by a borrower of his dues to the bank in a lender-barrower relationship. Thus, it will be clear from the aforesaid instructions of the Central Vigilance Commission that all cases of wilful defaults of Rs.25 lakhs and above were to be reported by the banks to the RBI and not just cases of defaults by borrowers of loans or advances from banks and the mischief that was sought to be remedied was that banks are not exploited by parties who have the capacity to pay their dues to the banks but who willfully avoid paying their dues to the banks.

33. Pursuant to the aforesaid instructions of the Central Vigilance Commission, the RBI circulated a Scheme for Collection and Dissemination of information on cases of wilful default of Rs.25 lacs and above which was to come into force with effect from 01.04.1999. Sub-para (ii) of the scheme in Para 2 of the Circular dated 20.02.1999 is extracted hereinbelow:

> "2(ii) The scheme will cover all non-performing borrowal accounts with outstandings (funded facilities and such non-funded facilities which are converted into funded facilities) aggregating Rs.25 lakhs and above."

It will be clear from the language of sub-para (ii) of Para 2 of the scheme quoted above that the scheme was to cover not only funded facilities, but also non-funded facilities which are converted into funded facilities. Thus, the scheme relating to Collection and Dissemination of information on cases of wilful

default of Rs.25 lacs and above was to cover not only loans and advances which are funded facilities, but also facilities which do not relate to loans and advances.

34. When we look at the Master Circular, we find that the purpose of the Master Circular is "to put in place a system to disseminate credit information pertaining to wilful defaulters for cautioning banks and financial institutions so as to ensure that further bank finance is not made available to them". Hence, the purpose of the Master Circular is to have a system to disseminate credit information pertaining to wilful defaulters amongst banks and financial institutions so that no further bank finance is made available to such wilful defaulters from such banks and financial institutions. The expression "credit information" has not been defined in the Master Circular, but has been defined in Section 45A(c) of the 1934 Act as follows:

> "45A(c). ''credit information'' means any information relating to-
>
> (i) the amounts and the nature of loans or advances and other credit facilities granted by a banking company to any borrower or class of borrowers;
>
> (ii) the nature of security taken from any borrower or class of borrowers for credit facilities [granted to him or to such class;
>
> (iii) the guarantee furnished by a banking company for any of its customers or any class of its customers;
>
> (iv) the means, antecedents, history of financial transactions and the credit worthiness of any borrower or class of borrowers;
>
> (v) any other information which the Bank may consider to be relevant for the more orderly regulation of credit or credit policy.]

It will be clear from the language of sub-clause (v) of Section 45A(c) of the 1934 Act quoted above that credit information

means not only any information relating to matters in sub-clauses (i),(ii),(iii) and (iv), but also relates to any other information which the bank considers to be relevant for the more orderly regulation of credit or credit policy. Hence, "credit information" is not confined to information relating to a borrower of the bank, but may also relate to a constituent of the bank who intends to take some credit from the bank. The purpose of the Master Circular being to caution banks and financial institutions from giving any further bank finance to a wilful defaulter, credit information cannot be confined to only the wilful defaults made by existing borrowers of the bank, but will also cover constituents of the bank, who have defaulted in their dues under banking transactions with the banks and who intend to avail further finance from the banks.

35. Keeping in mind the mischief that the Master Circular seeks to remedy and the purpose of the Master Circular, we interpret the words used in the definition of 'wilful default' in clause 2.1 of the Master Circular to mean not only a wilful default by a unit which has defaulted in meeting its repayment obligations to the lender, but also to mean a unit which has defaulted in meeting its payment obligations to the bank under facilities such as a bank guarantee. According to us the word 'lender' in sub-clauses (a), (b), (c) and (d) means the "bank" because "payment obligations" mentioned in clause (a) do not ordinarily refer to obligations to a lender and clause (d) has used the expression "bank/lender". Moreover, the instructions of the Central Vigilance Commission pursuant to which the scheme relating to Collection and Dissemination of credit information on wilful defaulters was formulated by the RBI were to cover "all cases of wilful defaults of Rs.25 lakhs and above". Also Paragraph 2.6 of the Master Circular states inter alia that in cases where a letter of comfort and/or the guarantees furnished by the companies within the group on behalf of the willfully defaulting units are not honoured when invoked by the banks/financial institutions, such group companies should also be reckoned as wilful defaulters. It is, thus, clear that non-funded

facilities such as a guarantee is covered by the Master Circular and when a guarantee is invoked by a bank/financial institution but is not honoured, the defaulting constituent of the bank is treated as a wilful defaulter even though it may not have borrowed funds from the bank in the form of advances or loans.

36. The scheme of Collection and Dissemination of information on cases of wilful default of Rs.25 lakhs and above was framed by the RBI in the year 1999 when the derivative transactions were not part of the country's economy. Under the FEMA Regulations, 2000 only the banks were authorized to deal with the derivative transactions. Section 45V introduced along with other provisions of Chapter IIID in the 1934 Act by the Reserve Bank of India (Amendment) Act, 2006 declared that transactions in derivatives, as may be specified by the RBI from time to time, shall be valid, if at least one of the parties to the transaction is the bank, a scheduled bank, or such other agency falling under the regulatory purview of the RBI under the 1934 Act, FEMA Act or any other Act or instrument having the force of law, as may be specified by the RBI from time to time. Derivative transactions in India thus were valid only if they were with any bank or any other agency falling under the regulatory purview of the RBI because they would have a substantial bearing on the credit system and credit policy in respect of which the RBI has regulatory powers under the 1934 and 1949 Acts. Such derivative transactions may not involve a lender-borrower relationship between the bank and its constituent, but dues by a constituent remaining unpaid to a bank may affect the credit policy and the credit system of the country. Information relating to defaulters of dues under derivative transactions who intend to take additional finance from the bank obviously will come within the meaning of credit information under Section 45A(c)(v) of the 1934 Act.

37. We do not find force in the submission of Dr. A.M. Singhvi that any information relating to a party who has defaulted in payment of its dues under derivative transactions cannot be disclosed by a bank to the RBI or any other bank

because of an implied contract between the bank and its customer or by Section 45E of the 1934 Act. Sections 45C and 45E of the 1934 Act are extracted hereinbelow:

"45C. **Power to call for returns containing credit information.-**(1) For the purpose of enabling the bank to discharge its functions under this chapter, it may at any time direct any banking company to submit to it such statements relating to such credit information and in such form and within such time as may be specified by the Bank from time to time.

(2) A banking company shall, notwithstanding anything to the contrary contained in any law for time being in force or in any instrument regulating the constitution thereof or in any agreement executed by it, relating to the secrecy of its dealings with its constituents, be bound to comply with any direction issued under sub-section (1)."

"45E. **Disclosure of information prohibited.**-(1) Any credit information contained in any statement submitted by a banking company under Section 45C or furnished by the bank to any banking company under Section 45D shall be treated as confidential and shall not, except for the purposes of this Chapter, be published or otherwise disclosed.

(2) Nothing in this section shall apply to-

(a) the disclosure by any banking company, with the previous permission of the bank, of any information furnished to the bank under Section 45C;

(b) the publication by the bank, if it considers necessary in the public interest so to do, of any information collected by it under section 45C, in such consolidated form as it may think fit without disclosing the name of any banking company or its borrowers;

(c) the disclosure or publication by the banking company or by the bank of any credit information to any other banking company or in accordance with the practice and usage customary among bankers or as permitted or required under any other law:

Provided that any credit information received by a banking company under this clause shall not be published except in accordance with the practice and usage customary among bankers or as permitted or required under any other law.

(d) The disclosure of any credit information under the Credit Information Companies (Regulation) Act, 2005 (30 of 2005)

(3) Notwithstanding anything contained in any law for the time being in force, no Court, Tribunal or other authority shall compel the bank or any banking company to produce or to give inspection of any statement submitted by that banking company under section 45C or to disclose any credit information furnished by the bank to that banking company under Section 45D."

We have already held that information relating to a party who has defaulted in payment of its dues under derivative transactions to the bank is credit information within the meaning of Section 45A(c)(v) of the 1934 Act. Sub-section (1) of Section 45C of the 1934 Act provides that the RBI may at any time direct any banking company to submit to it such statements relating to such credit information and in such form and within such time as may be specified by the RBI from time to time. Hence, information relating to a party, who has defaulted in payment of its dues under derivative transactions being credit information may be called for from the banking company by the RBI under sub-section (1) of Section 45C of the 1934 Act. Sub-

section (2) of Section 45C of the 1934 Act further provides that the banking company shall, notwithstanding anything to the contrary contained in any law for time being in force or in any instrument regulating the constitution thereof or in any agreement executed by it, relating to the secrecy of its dealings with its constituents, be bound to comply with any direction issued under sub-section (1). Sub-section (1) of Section 45E says that such credit information shall be treated as confidential and shall not be published or otherwise disclosed "except for the purposes of this Chapter", but sub-section (2)(a) of Section 45E clearly provides that nothing in Section 45E shall apply to the disclosure by any banking company, with the previous permission of the RBI, of any information furnished to the RBI under Section 45C. Thus, confidentiality of any credit information either by virtue of any other law or by virtue of any agreement between the bank and its constituent cannot be a bar for disclosure of such credit information including information relating to a derivative transaction of the RBI under sub-section (1) of Section 45C.

38. We do not also find any force in the submission of Mr. Mr. Bhaskar P. Gupta that the Master Circular has penal consequences and, therefore, has to be literally and strictly construed. Clause 4.3 of the Master Circular, which contemplates criminal action by banks/financial institutions, is extracted hereinbelow:

"4.3 Criminal Action by Banks/FIs

It is essential to recognize that there is scope even under the exiting legislations to initiate criminal action against wilful defaulters depending upon the facts and circumstances of the case under the provisions of Sections 403 and 415 of the Indian Penal Code (IPC) 1860. Banks/ FIs are, therefore, advised to seriously and promptly consider initiating criminal action against wilful defaulters or wrong certification by borrowers, wherever considered necessary, based on the facts and circumstances of each case under the above provisions of the IPC to comply with

our instructions and the recommendations of JPC.

It should also be ensured that the penal provisions are used effectively and determinedly but after careful consideration and due caution. Towards this end, banks/ FIs are advised to put in place a transparent mechanism, with the approval of their Board, for initiating criminal proceedings based on the facts of individual case."

All that the aforesaid clause 4.3 of the Master Circular states is that there is scope even under the exiting legislations to initiate criminal action against wilful defaulters depending upon the facts and circumstances of the case under the provisions of Sections 403 and 415 of the Indian Penal Code, 1860 and the banks and financial institutions are strictly advised to seriously and promptly consider initiating criminal action based on the facts and circumstances of each case under the above provisions of the IPC. Thus, the Master Circular by itself does not have penal consequences, whereas Sections 403 and 415 of the IPC have penal consequences. The provisions of Sections 403 and 415 of the IPC obviously have to be strictly construed as these are penal provisions and will get attracted depending on the facts and circumstances of each case, but the provisions of the Master Circular need not be strictly construed. As we have held, the Master Circular has to be construed not literally but in its context and the words used in the definition of "wilful defaulter" in the Master Circular have to draw their meaning from the context in which the Master Circular has been issued.

39. We are also not impressed with the argument of Mr. Soli J. Sorabjee that the Master Circular contemplates grave consequences affecting the right of a person under Article 19(1)(g) of the Constitution of India to carry on any trade, business or occupation and should be strictly construed as otherwise it will be exposed to the challenge of unconstitutionality. No challenge was made by the writ petitioners before the Bombay High Court to the constitutionality of the Master Circular and the challenge by the writ petitioners

before the Calcutta High Court was to the constitutionality of only Paragraph 3 of the Master Circular relating to the Grievance Redressal Mechanism. Hence, we are not called upon to decide in these appeals whether the Master Circular violates the right of a person under Article 19(1)(g) of the Constitution of India. Similarly, we cannot consider in these appeals, the contention raised by Dr. A. M. Singhvi that the Master Circular has the effect of black listing a bank's client and would, therefore, be arbitrary and violative of Article 14 of the Constitution. In these Civil Appeals, we are concerned with the interpretation of the Master Circular and on interpretation of the Master Circular, we find that the Master Circular covers not only wilful defaults of dues by a borrower to the bank but also covers wilful defaults of dues by a client of the bank under other banking transactions such as bank guarantees and derivative transactions.

40. In the result, we hold that wilful defaults of parties of dues under a derivative transaction with a bank are covered by the Master Circular and this we hold not because the RBI wants us to take this view, because this is our judicial interpretation of the Master Circular. The impugned judgment of the Calcutta High Court is set aside and the impugned judgment of the Bombay High Court is sustained. We make it clear that we have not expressed any opinion on the individual transactions between the bank and the parties and our judgment is based solely on the interpretation of the Master Circular. Accordingly, the appeal filed by Kotak Mahindra Bank Ltd. against the judgment of the Calcutta High Court is allowed and the appeals filed against the judgment of the Bombay High Court by different parties are dismissed. The parties, however, shall bear their own costs.

I.A. for intervention stands disposed of.

K.K.T. Appeals disposed of.

OMA @ OMPRAKASH AND ANR.
v.
STATE OF TAMIL NADU
(Criminal Appeal No.143 of 2007)

DECEMBER 11, 2012

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

Penal Code, 1860 - ss. 395, 396 and 397 - Prosecution under - Offences committed by the two appellants-accused with the nine absconding accused - Arrest of the appellants (A1 and A2) after 10 years in some other case - Conviction by trial court and award of death sentence - High Court upheld conviction, but altered the sentence to life imprisonment - The appeal to this Court abated against A1 due to his death - Held: Prosecution failed to prove its case beyond reasonable doubt so far as A2 is concerned - No TI Parade was conducted in respect of A2 and the witnesses could not properly identify him in the court - The recovery of the weapon stated to be at the instance of A2 cannot be connected to the crime - Hence his conviction and sentence not correct.

Sentence/Sentencing - Award of death sentence - Propriety of - Held: Clear reasoning and analysis are the basic requirements in a judicial decision - Criminal courts to decide the cases, examining the relevant facts and evidence placed before them, applying binding precedents - Opinions of Judges or academicians, predilection, fondness, inclination, proclivity on any subject, however eminent they are, shall not influence a decision making process - The manner in which death sentence was awarded in the instant case, is in complete disregard of the tests laid down by Supreme Court in awarding death sentence -The special reasons which weighed with the trial court to award the death sentence exposes the ignorance of the trial Judge of the criminal jurisprudence of India - He needs fine tuning and

proper training - National Judicial Academy and State Judicial Academies should educate the judicial officers in this regard so that they do not commit such serious errors in future - Judgment.

The prosecution case was that the appellants and nine other absconding accused entered the house of PW 2, armed with iron rods, with the intention of committing burglary. In the process of burglary, they killed husband of PW2, by strangulating him with a rope and also assaulted PW2, PW5, PW6 and PW1 with iron rod. Appellants (A1 and A2) were apprehended after a period of ten years, in connection with some other case and nine other accused persons are still absconding. An identification parade was conducted in respect of A1, but not in respect of A-2. Pursuant to a disclosure made by A-2, the iron rod used 10 years back, was recovered. The trial court found them guilty u/ss. 395, 396 and 397 IPC and sentenced them to death for offences committed u/s. 396 IPC. The High Court confirmed the conviction but modified the sentence u/s. 396 IPC to that of life imprisonment. During pendency of the appeal before this Court, A-1 died and the appeal against him abated.

Allowing the appeal, the Court

HELD:

Per K.S. Radhakrishnan:

1.1 The prosecution could not establish the guilt of the second accused beyond reasonable doubt. The High Court, therefore, committed a gross error in awarding life sentence to A2. The conviction and sentence awarded to A-2 is set aside. [Paras 38 and 39] [764-E-F]

1.2 In the instant case, FIR was registered against unknown persons. A2 was arrested after ten years in

connection with some other crime. PW1 and PW2 could not have identified A2 in the court at that distance of time. They were guided by the photographs repeatedly shown by the police. Evidently, the witnesses did not know the accused earlier, hence the accused could be identified only through a test identification parade which was not done in this case, so far as A-2 is concerned. A-2 was not named in the FIR, nor any identification parade was conducted to identify him by the witnesses. It is rather impossible to identify the accused person when he is produced for the first time in the court i.e. after ten years since he was unknown to the witnesses. It is a glaring defect which goes to the root of the case since none of the witnesses had properly identified the accused. [Paras 30, 31 and 35] [761-F-H; 763-D-E]

Mohd. Iqbal M. Shaikh v. State of Maharashtra **(1998) 4 SCC 494: 1998 (2) SCR 734;** *Ravindra Alias Ravi Bansi Gohar v. State of Maharashtra and Ors.* **(1998) 6 SCC 609: 1998 (3) SCR 978;** *Ravi alias Ravichandran v. State represented by Inspector of Police* **(2007) 15 SCC 372: 2007 (5) SCR 766 - relied on.**

1.3 It is the case of prosecution that one rod was also used for the murder of the deceased persons in this case, but that rod was not recovered. One rod stated to have been recovered at the instance of A2 could not be connected with the crime. PW 5 in his examination-in-chief had stated that the accused had attacked him with a similar rod that was being shown to him which would indicate that the witness could not conclusively connect the rod which was used for committing the crime. Further, the rod was recovered after a period of ten years of the incident and it is highly doubtful, whether it was used for the commission of the offence. Further, the prosecution case is that a rope was used for the strangulation of the deceased, but the rope was not recovered. It is for the

prosecution to prove that the object recovered has nexus with the crime. In the instant case, the prosecution could not prove that the rod recovered had any nexus with the crime alleged to have been committed by A-2. [Paras 36, 37 and 38] [763-F-H; 764-A-E]

Dwarkadas Gehanmal v. State of Gujarat **(1999) 1 SCC 57;** *Mustkeem alias Sirajudeen v. State of Rajasthan* **(2011) 11 SCC 724: 2011 (9) SCR 101 - relied on.**

2.1 The manner in which Sessions Court has awarded death sentence in the instant case, is in complete disregard of the tests laid down by this Court for determining the rarest of rare cases. The Sessions Court had gone astray in referring to the views expressed by the then Chief Justice of Madras High Court in a lecture, which advice according to the Sessions Judge was taken note of by another Judge in delivering a judgment in 'rowdy panchayat system'. The trial Judge has not given the citation of that judgment nor has he given any explanation, as to how that judgment is applicable to the instant case. Thus the Court is not in a position to know how that judgment is relevant or applicable in awarding death sentence. The casual approach made by the Sessions Court in awarding the death sentence is disturbing. The special reasons which weighed with the Sessions Judge to award the death sentence exposes the ignorance of the Judge of the criminal jurisprudence of this country. The 'special reasons' was only predilection or inclination of the trial Judge to award death sentence, thus purely judge-centric. He has not discussed the aggravating or mitigating circumstances of this case, the approach was purely 'crime-centric'. The trial Judge while importing the criminal jurisprudence of America or the Arab countries lost sight of the fact that the Criminal Jurisprudence of India or Indian society does not recognize those types

of barbaric sentences. The trial Judge has adopted a very strange reasoning by saying that since the accused persons had come from a far-away State, about 2000 km to "our state" for committing robbery and murder, death sentence would be imposed on them. He needs fine tuning and proper training. The trial Judge is also not correct in opining that the imposition of death sentence u/s. 396 IPC is the only weapon in the hands of judiciary under the prevailing law to help to eliminate the crime. Judiciary has neither any weapon in its hands nor uses it to eliminate crimes. Duty of the Judge is to decide cases which come before him in accordance with the Constitution and laws, following the settled judicial precedents. A Judge is also part of the society where he lives and also conscious of what is going on in the society. Judge has no weapon or sword. Judge's greatest strength is the trust and confidence of the people, whom he serves. [Paras 12, 13, 14, 15, 16, 17, 18 and 19] [753-H, 754-A-C; 756-G-H; 757-A-F; 758-D-F]

Bachan Singh v. State of Punjab **(1980) 2 SCC 684;** *Machhi Singh and Ors. v. State of Punjab* **(1983) 3 SCC 470: 1983 (3) SCR 413;** *Jagmohan Singh v. State of U.P.* **(1973) 1 SCC 20: 1973 (2) SCR 541;** *Ronal James v. State of Maharashtra* **(1998) 3 SCC 625: 1998 (2) SCR 162;** *Allauddin Mian v. State of Bihar* **(1989) 3 SCC 5: 1989 (2) SCR 498;** *Naresh Giri v. State of M.P.* **(2001) 9 SCC 615: 2001 (4) Suppl. SCR 298- relied on.**

William Henry Furman v. State of Georgia **408 U.S. 238 (1972);** *Gregg v. Georgia* **428 U.S. 153 (1976) - referred to.**

2.2 Clear reasoning and analysis are the basic requirements in a judicial decision. Judicial decision is being perceived by the parties and by the society in general as being the result of a correct application of the legal rules, proper evaluation of facts based on settled

judicial precedents and judge shall not do anything which will undermine the faith of the people. [Para 19] [758-F-G]

2.3 Criminal Court while deciding criminal cases shall not be guided or influenced by the views or opinions expressed by Judges on a private platform. The views or opinions expressed by the Judges, jurists, academicians, law teachers may be food for thought. Even the discussions or deliberations made on the State Judicial Academies or National Judicial Academy, only update or open new vistas of knowledge of judicial officers. Criminal Courts have to decide the cases before them, examining the relevant facts and evidence placed before them, applying binding precedents. Judges or academicians opinions, predilection, fondness, inclination, proclivity on any subject, however eminent they are, shall not influence a decision making process, especially when judges are called upon to decide a criminal case which rests only on the evidence adduced by the prosecution as well as by the defence and guided by settled judicial precedents. National Judicial Academy and State Judicial Academies should educate the judicial officers in this regard so that they will not commit such serious errors in future. [Para 21] [759-B-E]

Per Dipak Misra: (Concurring):

1. This Court, on number of occasions, has dealt with under what circumstances death penalty could be imposed and what are the mitigating factors not to impose such punishment. Article 141 of the Constitution of India stipulates that the law declared by the Supreme Court shall be binding on all Courts within the territory of India. The reasons ascribed by the trial Judge are required to be tested on the bedrock of precedents in their conceptual and perceptual eventuality. [Paras 2 and 15] [765-B; 772-E]

Bachan Singh v. State of Punjab **(1980) 2 SCC 684;** *Jagmohan Singh v. State of U.P.* **(1973) 1 SCC 20: 1973 (2) SCR 541;** *Gurbaksh Singh Sibbia v. State of Punjab* **(1980) 2 SCC 565: 1980 (3) SCR 383- followed.**

Machhi Singh and Others v. State of Punjab **(1983) 3 SCC 470: 1983 (3) SCR 413;** *Lehna v. State of Haryana* **(2002) 3 SCC 76: 2002 (1) SCR 377;** *Haresh Mohandas Rajput v State of Maharshtra* **(2011) 12 SCC 56: 2011 (14) SCR 921;** *Sham Alias Kishore Bhaskarrao Matkari v. State of Maharashtra* **(2011) 10 SCC 389: 2011 (11) SCR 744;** *Mohammed Ajmal Mohammad Amir Kasab alias Abu Mujahid v. State of Maharashtra* **(2012) 9 SCC 1- relied on.**

C. Muniappan v. State of T.N. **(2010) 9 SCC 567: 2010 (10) SCR 262** *Dara Singh v. Republic of India* **(2011) 2 SCC 490: 2011 (1) SCR 929;** *Surendra Koli v. State of U.P.* **(2011) 4 SCC 80: 2011 (2) SCR 939;** *Mohd. Mannan v. State of Bihar* **(2011) 5 SCC 509: 2011 (7) SCR 354;** *Sudam v. State of Maharashtra* **(2011) 7 SCC 125: 2011 (6) SCR 1104 - referred to.**

2. In the instant case, the trial Judge referred to the prevalence of death sentence in certain countries and observed that in certain countries where law provides "slashing", "beheading", "taking the organ for organ" like 'eye for eye', 'tooth for tooth' to the accused, it shows the growth of criminal jurisprudence. That apart, he had referred to the speech of the then Chief Justice of the High Court, and it is clearly demonstrable that the same has influenced his appreciation, analysis and perception. Being influenced by the erroneous notions of law and speech of the Chief Justice, may be understanding it totally out of context, his passion and prejudices have dominated over his reasoning faculties and the result, is devastating. [Para 16] [772-F-H; 773-A]

3. A Judge presiding over a criminal trial has the

sacrosanct duty to demonstrate that he applies the correct principles of law to the facts regard being had to the precedents in the field. A Judge trying a criminal case has a sacred duty to appreciate the evidence in a seemly manner and is not to be governed by any kind of individual philosophy, abstract concepts, conjectures and surmises and should never be influenced by some observations or speeches made in certain quarters of the society but not in binding judicial precedents. He should entirely ostracise prejudice and bias. The bias need not be personal but may be an opinionated bias. It is his obligation to understand and appreciate the case of the prosecution and the plea of the defense in proper perspective, address to the points involved for determination and consider the material and evidence brought on record to substantiate the allegations and record his reasons with sobriety sans emotion. He must constantly keep in mind that every citizen of this country is entitled to a fair trial and further if a conviction is recorded it has to be based on the guided parameters of law. [Paras 17 and 18] [773-C-G]

Hindustan Times Ltd. v. Union of India and Ors. **(1998) 2 SCC 242: 1998 (1) SCR 4;** *State of W. B. Ors. v. Shivanand Pathak and Ors.* **(1998) 5 SCC 513: 1998 (1) SCR 811 - relied on.**

4. When sentence is imposed, it has to be based on sound legal principles, regard being had to the command of the statute, nature of the offence, collective cry and anguish of the victims and, above all, the "collective conscience" and doctrine of proportionality. Neither the vanity of the Judge, nor his pride of learning in other fields should influence his decision or imposition of sentence. He must practise the conscience of intellectual honesty and deal with the matter with all the experience and humility at his command. He should remind himself

that some learning does not educate a man and definitely not a Judge. The learning has to be applied with conviction which is based on proper rationale and without forgetting that human nature has imperfect expression when founded bereft of legal principle. He should not usher in his individual satisfaction but adjudge on objective parameters failing which the whole exercise is likely to be named "monstrous legalism". He should not be swayed away with any kind of sensational aspect and individual predilections. If it is done, the same would tantamount to entering into an area of emotional labyrinth or arena of mercurial syllogism. [Paras 18 and 19] [774-A-D; 775-D]

5. In a criminal trial, while recording the sentence, he should have been guided and governed by established principles and not by personal notions or even ideas of eminent personalities Binding judgments should be the Bible of a Judge and there should not be any deviation. The trial court judges should refrain themselves from engaging in innovative creativity or "borrowed creativity" which has no sanction in Law. [Para 20] [775-H; 776-A-B]

Case Law Reference:

In the judgment of K.S. Radhakrishnan, J.:

(1980) 2 SCC 684	**relied on**	**Para 12**
1983 (3) SCR 413	**relied on**	**Para 12**
1973 (2) SCR 541	**relied on**	**Para 12**
1998 (2) SCR 162	**relied on**	**Para 14**
1989 (2) SCR 498	**relied on**	**Para 14**
2001 (4) Suppl. SCR 298	**relied on**	**Para 14**
408 U.S. 238 (1972)	**referred to**	**Para 16**
428 U.S. 153 (1976)	**referred to**	**Para 16**

1998 (2) SCR 734	**relied on**	**Para 31**
1998 (3) SCR 978	**relied on**	**Para 32**
2007 (5) SCR 766	**relied on**	**Para 33**
(1999) 1 SCC 57	**relied on**	**Para 36**
2011 (9) SCR 101	**relied on**	**Para 36**

In the judgment of Dipak Misra, J. :

(1980) 2 SCC 684	**followed**	**Para 3**
1973 (2) SCR 541	**followed**	**Para 3**
1980 (3) SCR 383	**followed**	**Para 5**
1983 (3) SCR 413	**relied on**	**Para 7**
2002 (1) SCR 377	**relied on**	**Para 11**
2011 (14) SCR 921	**relied on**	**Para 12**
2011 (11) SCR 744	**referred to**	**Para 12**
2010 (10) SCR 262	**referred to**	**Para 12**
2011 (1) SCR 929	**referred to**	**Para 12**
2011 (2) SCR 939	**referred to**	**Para 12**
2011 (7) SCR 354	**referred to**	**Para 12**
2011 (11) SCR 744	**relied on**	**Para 13**
2011 (6) SCR 1104	**relied on**	**Para 14**
1998 (1) SCR 4	**relied on**	**Para 17**
1998 (1) SCR 811	**relied on**	**Para 19**

CRIMINAL APPELLATE JURISDICTION : CRIMINAL APPEAL NO. 143 OF 2007.

From the Judgment and Order dated 27.07.2006 of the High Court of Judicature at Madras in Criminal Appeal No. 566 of 2006.

Sanjay Jain, Sudhakar Kulwant, Rachna Golcha, Afshan Pracha for the Appellants.

C. Paramasivam, M. Yogesh Kanna (for B. Balaji) for the Respondent.

The Judgments of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. Appellants, herein, were awarded death sentence by the trial court after having found them guilty under Sections 395, 396 and 397 of Indian Penal Code (for short 'IPC'). They were sentenced to death by hanging under subsection 5 of Section 354 of Criminal Procedure Code for offences committed under Section 396 IPC. The trial court after noticing that, the accused persons came from a State about 2000 k.m. away from Tamil Nadu, held as follows:

> "In this case, the accused came from a state about 2000 k.m. from our state and they did not think that the victims were also human like them but they thought only about the well being of their family and their own life and committed the fear of death amongst the common public of our state by committing robbery and murder for about 11 years. Therefore, this court is of the opinion that the death sentence that would be imposed on them would create a fear amongst the criminals who commit such crime and further this case is a rarest of rare case that calls for the imposition of death sentence."

2. We have noticed that the trial Court, among other grounds, was also influenced by a speech made by the then Chief Justice of Tamil Nadu as well as a judgment delivered by another learned Judge of Madras High Court on rowdy panchayat system. Following that judgment and the provision under Section 396 IPC, the trial court held that the accused deserves no sympathy and he be sent to the gallows.

3. The trial court then placed the matter before the Madras High Court for confirmation of the death sentence awarded to the accused persons. Meanwhile, the accused persons also preferred criminal appeal No. 566 of 2006 against the award of death sentence. The appeal was partly allowed and conviction against Accused Nos. 1 and 2 under Sections 395, 396 and 397 IPC were confirmed but the sentence under Section 396 IPC was modified to that of life imprisonment instead of death sentence. Against which, accused Nos. 1 and 2 came up with this appeal. While this appeal was pending, the first appellant (A1) died and the second appellant (A2) has prosecuted this appeal.

4. The prosecution case is as follows:

The appellants and nine other absconding accused persons entered the house of one Lakshmi (PW 2) at 1 O' clock in the night of 07.06.1995 with the intention of committing burglary with iron rods in their hands and burgled 17 tolas of gold and Rs.5,000/- in cash. In that process, it was alleged that they had strangulated Doctor Mohan Kumar, husband of PW 2 with a rope and thereby killed him. It was alleged that the accused assaulted PW 2, her son Sudhakar (PW 5) and other son Sakthivel (PW 6). While escaping, they had also attacked Bormin Varghese (PW 1) with iron rod. FIR Cr. No. 403 of 1995 under Sections 396, 397 IPC was registered at 5.30 am on 07.06.1995 at Police Station Walajapet on the statement of one Patrick Varghese recorded by PW 7. Post Mortem of the deceased was conducted at 2.30 p.m. on 07.06.1995.

5. The prosecution could not nab the accused persons for over ten years. A2 was arrested on 26.02.2005 in connection with some other case in Cr. No. 59 of 1996. It is the prosecution case that his finger prints tallied with the ones lifted from the place of occurrence in that other case. Further, it was also stated, as per the investigation, A2 made a disclosure and pursuant to that the iron rod (M.O. 1) used 10 years back was

recovered.

6. A1 was arrested on 21.09.2005 by the special team in connection with some other case in Cr. No. 352 of 2004 of Sri Perumbatoor Police Station. An identification parade was conducted so far as A1 is concerned on 20.10.2005 in which PW 10, Karthik an Auto Driver said to have identified A1. Later, the charge-sheet was filed by PW 15 on 23.12.2005 and charges under Sections 395, 396 and 397 IPC were framed against the accused persons on 24.03.2006.

7. The prosecution examined 15 witnesses to prove the case against the accused persons. Statements of the accused persons were recorded under Section 313 Cr.P.C. on 17.04.2006.

8. The trial court, as already indicated, convicted both the accused persons on 21.04.2006 for the offences under Sections 395, 396 and 397 IPC. The trial court granted life imprisonment under Section 395 and fine of Rs.1,000/- and they were sentenced to death for the offence under Section 396 IPC. They were also sentenced for RI for 7 years under Section 397 IPC.

9. The High Court, as already indicated, vide judgment dated 27.07.2006 converted the sentence of death to life imprisonment under Section 396 IPC and rest of the sentence on other heads were confirmed.

10. Shri Sanjay Jain, learned counsel appearing for the appellant (A2) submitted that the trial court and the High Court had committed a grave error in convicting the accused persons. Learned counsel challenged his conviction mainly on two grounds: one on the ground of non-conducting the identification parade so far as accused No.2 is concerned and other on the ground of recovery of alleged iron rod. Learned counsel submitted that A2 was arrested after ten years of incident and was not properly identified by any of the witnesses. Learned counsel also highlighted the contradictions in the evidence of PW1, PW2 and PW15 and brought out the lacuna in the

evidence of those witnesses. It was pointed out that the identification parade was conducted only in respect of A1 who is no more and so far as A2 is concerned, no identification parade was conducted. Further, it was pointed out that the photograph of the appellant was shown to PW 1 which was marked with the objection of the accused. Further, learned counsel pointed out that none of the witnesses in their deposition had stated that they could identify A2. Learned counsel pointed out that it was the prosecution case that a rod was used for committing the crime but was not recovered and the one alleged to have recovered had nothing to do with the crime. Learned counsel submitted that the prosecution miserably failed to prove the case against the appellant beyond reasonable doubt and that this is a fit case where this Court should have given the benefit of doubt and the accused be acquitted.

11. Shri C. Paramasivam, learned counsel appearing for the State submitted that the High Court has rightly confirmed the conviction of the appellant and reduced the sentence to life imprisonment. Learned counsel submitted that there is no fixed rule with regard to the period within which test identification parade be held. Further, it was pointed out that no motive was alleged against the prosecution for the delay in conducting test identification parade. Learned counsel also submitted that even in the absence of test identification parade, the identification of accused persons by the witnesses in court is a substantive piece of evidence. Further, it was also pointed out that the gang of dacoits from Haryana and Rajasthan States used to come down to state of Tamil Nadu and commits heinous crimes like dacoity and murder and after arrest of those accused persons, several undetected cases could be detected and few of the accused persons have been convicted. Learned counsel submitted that the trial court and the High Court have rightly convicted the accused persons relying on the evidence of PW 1, PW 2, PW 5 and PW 10.

12. We are unhappy in the manner in which Sessions Court

has awarded death sentence in the instant case. The tests laid down by this Court for determining the rarest of rare cases in *Bachan Singh v. State of Punjab* (1980) 2 SCC 684 and *Machhi Singh & Ors. v. State of Punjab* (1983) 3 SCC 470 and other related decisions like *Jagmohan Singh v. State of U.P.* (1973) 1 SCC 20, were completely overlooked by the Sessions Court. The Sessions Court had gone astray in referring to the views expressed by the then Chief Justice of Madras in a lecture delivered at Madurai, which advice according to the Sessions Judge was taken note of by another learned Judge in delivering a judgment in rowdy panchayat system. Sessions Judge has stated that he took into consideration that judgment and the provision in Section 396 of the Indian Penal Code to hold that the accused had committed the murder and deserved death sentence. Further, the trial court had also opined that the imposition of death sentence under Section 396 IPC is the only weapon in the hands of the judiciary under the prevailing law to help to eliminate the crime and the judgment of the trial court should be on that ground.

13. It is apposite to refer to the special reasons which weighed with the Sessions Judge to award the death sentence which reads as follows:

> "36. In this case, it has been decided by this court to impose the maximum sentence of death to be imposed on the accused No. 1 and 2, under Section 396 of the Indian Penal Code, under Section 354(3) of the Criminal Procedure Code, the special reasons for awarding such sentence to be given show that the case is a case of rarest of rare cases. Therefore, this court gives the following reasons:
>
> (a) xxx xxx xxx
>
> (b) Before the enactment of Criminal Procedure Code, many years ago, civilization has come into existence. From the rule of Kingdom to the rule of people

and the democracy and constitution came into existence in many countries. In these circumstances, the death sentence is prevailing in all the countries in different from and that sentence is imposed on such criminal who deserves for the same. We all know that more particularly in the court in like America, the sentence like 'lynching' has attained the legal form and given to the deserving criminals and in Arab countries the law provide for imposing sentence like 'slashing', 'beheading' taking the organ for organ like 'eye for eye', 'tooth for tooth'. The above mentioned facts are the development of criminal jurisprudence. Therefore, this court is of the opinion that it is proper to impose death sentence to the accused in this case.

(c) xxx xxx xxx

(d) xxx xxx xxx

(e) In this case, the accused came from a State about 2000 k.m. from our State and they did not think that the victims were also human like them but they thought only about the wellbeing of their family and their own life and committed the fear of death amongst the common public of our State by committing robbery and murder for about 11 years. Therefore, this court is of the opinion that the death sentence that would be imposed on them would create a fear amongst the criminals who commit such crime and further this case is a rarest of rare cases that call for the imposition of death sentence.

(f) The honorable Chief Justice of High Court of Madras, Justice A. P. Shah while delivering a lecture at Madurai said strict laws should be enacted as regard to Child abuse and the persons committing the crime should be punished accordingly. This advise was taken note of the honorable Justice Karpagavinayagm while delivering a judgment on rowdy panchayat system. He ordered that the government should enact suitable law to eliminate this

menace. Taking this judgment into consideration and that there is a provision in Section 396 of the Indian Penal Code that the people involved in dacoity can be imposed with death sentence, the accused who have committed the murder without any pity deserve to be imposed with the death sentence. This court is also of the opinion that the imposition of death sentence under Section 396 of the Indian Penal Code is the only weapon in the hands of the judiciary under the prevailing law to help to eliminate the crime. Accordingly this judgment should be. Therefore, this court is of the view that the death sentence should be imposed on the accused."

(emphasis added)

14. We cannot countenance any of the reasons which weighed with the Sessions Judge in awarding the death sentence. Reasons stated in para 36(b) and (e) in awarding death sentence in this case exposes the ignorance of the learned judge of the criminal jurisprudence of this country.

15. Section 354(3) of the Code states whenever a Court awards death sentence, it shall record special reasons. Going by the current penological thought, imprisonment of life is the rule and death sentence is an exception. The legislator's intent behind enacting Section 354(3) clearly demonstrates the concern of the legislature. This principle has been highlighted in several judgments of this Court apart from the judgments already referred to. Reference may also be made to few of the judgments of this Court, such as *Ronal James v. State of Maharashtra,* (1998) 3 SCC 625; *Allauddin Mian v. State of Bihar,* (1989) 3 SCC 5; *Naresh Giri v. State of M.P.,* (2001) 9 SCC 615 etc. We are disturbed by the casual approach made by the Sessions Court in awarding the death sentence. The 'special reasons' weighed with the trial judge to say the least, was only one's predilection or inclination to award death sentence, purely judge-centric. Learned judge has not discussed the aggravating or mitigating circumstances of this case, the approach was purely 'crime-centric'.

16. We are really surprised to note the "special reasons" stated by the trial judge in para 36(b) of the judgment. We fail to see why we import the criminal jurisprudence of America or the Arab countries to our system. Learned trial judge speaks of sentence like "lynching" and described that it has attained legal form in America. Lynching means kill someone for an alleged offence without a legal trial, especially by hanging. Learned judge failed to note that the constitutionality of death sentence came up for consideration before the U.S. Supreme Court in *William Henry Furman v. State of Georgia* 408 U.S. 238 (1972), which involved three persons under death sentence, more than 600 prisoners on death row. Five Judges invalidated the death penalty, four dissented and the Court held that death penalty to be cruel and unusual punishment in violation of the 8th and 14th amendments. Later in *Gregg v. Georgia* [428 U.S. 153 (1976)], the court laid down the concern expressed in Furman. In the United States, some States have done away with death sentence as well. The judges' inclination to bring in alleged system of lynching to India and to show it as special reason is unfortunate and shows lack of exposure to criminal laws of this country. Learned trial judge while showing special reasons referred to law prevailing in Arab countries, like imposing sentence of 'slashning' beheading, taking organ for organ like "eye for eye", "tooth for tooth" and says those are the developments of criminal jurisprudence. Learned judge then says that the accused persons in the present case also deserve death sentence. Learned judge lost sight of the fact that the Criminal Jurisprudence of this country or our society does not recognize those types of barbaric sentences. We are surprised to see how those factors have gone into one's mind in awarding death sentence.

17. We are also not concerned with the question whether the criminals have come from 20 km away or 2000 km away. Learned judge says that they have come to "our state", forgetting the fact that there is nothing like 'our state' or 'your state'. Such parochial attitude shall not influence or sway a judicial mind.

Learned judge has further stated, since the accused persons had come from a far away state, about 2000 km to "our state" for committing robbery and murder, death sentence would be imposed on them. Learned judge has adopted a very strange reasoning, needs fine tuning and proper training..

18. Learned trial judge in para 36(f) has also referred to a judgment of the High Court rendered by a learned Judge of the High Court on "rowdy panchayat system". Learned trial judge has stated that he has taken into consideration that judgment also in reaching the conclusion that death sentence be awarded. We are not in a position to know how that judgment is relevant or applicable in awarding death sentence. Learned trial judge has also not given the citation of that judgment or has given any explanation, as to how that judgment is applicable to the case on hand.

19. Learned trial judge has also opined that the imposition of death sentence under Section 396 of the IPC is the only weapon in the hands of judiciary under the prevailing law to help to eliminate the crime. Judiciary has neither any weapon in its hands nor uses it to eliminate crimes. Duty of the judge is to decide cases which come before him in accordance with the constitution and laws, following the settled judicial precedents. A Judge is also part of the society where he lives and also conscious of what is going on in the society. Judge has no weapon or sword. Judge's greatest strength is the trust and confidence of the people, whom he serves. We may point out that clear reasoning and analysis are the basic requirements in a judicial decision. Judicial decision is being perceived by the parties and by the society in general as being the result of a correct application of the legal rules, proper evaluation of facts based on settled judicial precedents and judge shall not do anything which will undermine the faith of the people.

20. We also fail to see how the reasons stated in para 36(f) be a guiding factor to award death sentence. One of the Code of Conduct recognized at the Bangalore Conference of the year 2001 reads as follows:

"A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducement, pressures, threats or interference, direct or indirect, from any quarter or for any reason."

21. Criminal Court while deciding criminal cases shall not be guided or influenced by the views or opinions expressed by Judges on a private platform. The views or opinions expressed by the Judges, jurists, academicians, law teachers may be food for thought. Even the discussions or deliberations made on the State Judicial Academies or National Judicial Academy at Bhopal, only update or open new vistas of knowledge of judicial officers. Criminal Courts have to decide the cases before them examining the relevant facts and evidence placed before them, applying binding precedents. Judges or academicians opinions, predilection, fondness, inclination, proclivity on any subject, however eminent they are, shall not influence a decision making process, especially when judges are called upon to decide a criminal case which rests only on the evidence adduced by the prosecution as well as by the defence and guided by settled judicial precedents. National Judicial Academy and State Judicial Academies should educate our judicial officers in this regard so that they will not commit such serious errors in future.

22. The High Court of Madras heard the Criminal Appeal No. 566/2006 filed by the accused Nos. 1 and 2, along with Referred Trial 1 of 2006. The High Court, however, did not confirm the death sentence awarded by the trial Court, but awarded life sentence to both the accused persons. As already indicated, we are, in this case, concerned only with the conviction and sentence awarded on the 2nd accused, since 1st accused is no more.

23. We may indicate at the outset that the accused persons were apprehended after a period of ten years from the date of the incident and nine other accused persons are still

absconding. The incident had taken place on 07.06.1995 and the accused persons were arrested on 26.02.2005 from Rajasthan in connection with some other case ie. Cr. No. 59 of 1996. The prosecution version that A-2 finger prints tallied with ones lifted from the place of occurrence in Cr. No. 59 of 1996. Further, it is also the prosecution case that A2 made a disclosure and pursuant to that iron rod (M.O. No.1) used 10 years back was recovered. An identification parade was conducted so far as A1 is concerned on 20.10.2005, who is now no more. However, no identification parade was conducted so far as A-2 is concerned. It has come out in evidence that the photographs of A-2 was shown to PW 1 by the police on 30.10.2005 and asked him to identify the accused and on identification by PW 1, the accused was interrogated by the police. In cross-examination, PW1 has stated as follows:

"Accused No.2 attacked me before I could see him and make any enquiry. He assaulted me with a rod. I could not see with which hand he assaulted me. It is incorrect to suggest that the accused did not assault me as stated by me."

24. PW 1 also further stated in cross-examination as follows:

"There was light only after the neighbors switched on the light. It was dark earlier. It is incorrect to suggest that it is not possible to see the accused in the darkness."

25. PW 2 - Lakshmi, wife of the deceased in her examination-in-chief stated as follows:

"I opened my eyes and saw. When I saw, accused Nos. 1 and 2 were present amongst the persons. I fainted immediately. There was commotion in my house."

26. In cross-examination, she has stated as follows:

"In the police interrogation, I did not tell that the accused Nos. 1 and 2 were present in the incident that took place in my house."

27. PW 5, brother of PW 1, in his examination-in-chief has stated as follows:

> "At that time accused Nos. 1 and 2 attacked me with the rod. I fell down and fainted. When I regained consciousness I was in the room of my father. My father, my mother and younger brother sustained injuries. I asked my mother to wake up my father. Myself and my mother tried to wake up my father. After that neighbors admitted us in the hospital. I remember it was in the C.M.C. hospital. The accused attacked me similar rod that is being showed to me by you. Material object No. 1 is the rod."

28. In cross-examination, PW 5 stated as follows:

> "In the police enquiry I told that I did not know what happened as I was sleeping. I do not remember whether I told the doctor in the hospital at Valajah that I was assaulted by unknown persons……In the police interrogation, I did not tell that I had seen the accused No. 1 and 2……."

29. The investigation officer stated that he did not receive any documents about the arrest of the appellant (A2) and he had not mentioned in the final report about the crimes that had taken place in other States.

30. We may indicate that in the instant case, FIR was registered against unknown persons. A2, as already stated, was arrested after ten years on 26.02.2005 in connection with some other crime. We fail to see how PW1 and PW2 could identify A2 in the court at this distance of time. They were guided by the photographs repeatedly shown by the police.

31. Evidently, the witnesses did not know the accused earlier, hence the accused could be identified only through a test identification parade which was not done in this case, so far as A-2 is concerned. In this connection, we may refer to the judgment of this court in *Mohd. Iqbal M. Shaikh v. State of*

Maharashtra (1998) 4 SCC 494 wherein this Court held that:

> "If the witness did not know the accused persons by name but could only identify from their appearance then a test identification parade was necessary, so that, the substantive evidence in court about the identification, which is held after fairly a long period could get corroboration from the identification parade. But unfortunately the prosecution did not take any steps in that regard and no test identification parade had been held."

32. This Court in *Ravindra Alias Ravi Bansi Gohar v. State of Maharashtra and Others* (1998) 6 SCC 609 deprecated the practice of showing the photographs for indentifying the culprits and held as follows:

> "The identification parade belongs to the investigation stage and they serve to provide the investigating authority with materials to assure themselves if the investigation is proceeding on the right lines. In other words, it is through these identification parades that the investigating agency is required to ascertain whether the persons whom they suspect to have committed the offence were the real culprits - and not by showing the suspects or their photographs. Such being the purpose of identification parades, the investigating agency, by showing the photographs of the suspects whom they intended to place in the TI parade, made it farcical. If really the investigating agency was satisfied that PWs 2 and 12 did know the appellants from before and they were in fact amongst the miscreants, the question of holding the TI parade in respect of them for their identification could not have arisen."

33. In *Ravi alias Ravichandran v. State represented by Inspector of Police* (2007) 15 SCC 372, this Court held that:

> "A judgment of conviction can be arrived at even if no test identification parade has been held. But when a first information report has been lodged against unknown

persons, a test identification parade in terms of Section 9 of the Evidence Act, is held for the purpose of testing the veracity of the witness in regard to his capability of identifying persons who were unknown to him."

34. Further, it is also held that:

"It was incumbent upon the prosecution to arrange a test identification parade. Such test identification parade was required to be held as early as possible so as to exclude the possibility of the accused being identified either at the police station or at some other place by the witnesses concerned or with reference to the photographs published in the newspaper. A conviction should not be based on a vague identification."

35. A-2, it may be noted, was not named in the FIR, nor any identification parade was conducted to identify him by the witnesses. It is rather impossible to identify the accused person when he is produced for the first time in the court i.e. after ten years since he was unknown to the witnesses. We are of the view that it is a glaring defect which goes to the root of the case since none of the witnesses had properly identified the accused.

36. We may notice that it is the case of prosecution that one rod was also used for the murder of the deceased persons in this case, but that rod was not recovered. One rod stated to have been recovered at the instance of A2 could not be connected with the crime. PW 5 in his examination-in-chief had stated that the accused had attacked him with a similar rod that was being shown to him which would indicate that the witness could not conclusively connect the rod which was used for committing the crime. Further, the rod was recovered after a period of ten years of the incident and it is highly doubtful, whether it was used for the commission of the offence. Further, the prosecution case is that a rope was used for the strangulation causing death to Dr. Mohan Kumar, but the rope was not recovered.

37. In *Dwarkadas Gehanmal v. State of Gujarat* (1999) 1 SCC 57, this Court has held that it is for the prosecution to prove that the object recovered has nexus with the crime. This Court in *Mustkeem alias Sirajudeen v. State of Rajasthan* (2011) 11 SCC 724 held, "what is admissible under Section 27 of the Act is the information leading to discovery and not any opinion formed on it by the prosecution." This Court held as follows:

"With regard to Section 27 of the Act, what is important is discovery of the material object at the disclosure of the accused but such disclosure alone would not automatically lead to the conclusion that the offence was also committed by the accused. In fact, thereafter, burden lies on the prosecution to establish a close link between discovery of the material object and its use in the commission of the offence. What is admissible under Section 27 of the Act is the information leading to discovery and not any opinion formed on it by the prosecution."

38. In this case, the prosecution could not prove that the rod recovered has any nexus with the crime alleged to have been committed by A-2. We are of the view that the prosecution, therefore, could not establish the guilt of the second accused beyond reasonable doubt. The High Court, therefore, committed a gross error in awarding life sentence to A2.

39. This appeal is, therefore, allowed and the conviction and sentence awarded to A-2 is set aside. We are informed that the accused has already served the jail sentence for more than eight years now. A-2 is, therefore, set at liberty, unless he is wanted in any other case.

DIPAK MISRA, J. 1. I respectfully concur with the conclusion and views expressed by my learned Brother Radhakrishnan, J. However, with regard to the ratiocination made by the learned Sessions Judge while imposing the death sentence, I propose to record my views in addition especially

in the context of the reasons which have already been reproduced by my learned brother.

2. Article 141 of the Constitution of India stipulates that the law declared by the Supreme Court shall be binding on all Courts within the territory of India. The reasons ascribed by the learned trial Judge are required to be tested on the bedrock of precedents in their conceptual and perceptual eventuality.

3. In *Bachan Singh v. State of Punjab*[1], the majority, after deliberating many an aspect, came to hold that the provision under Section 302 of the Indian Penal Code which provides for imposition of death penalty neither violates the letter nor the ethos and Article 19 of the Constitution. Testing the said provision on the anvil of Articles 14 and 21 of the Constitution, it reaffirmed the view taken by this Court in *Jagmohan Singh v. State of U.P.*[2] and held that death penalty does not violate Articles 14, 19 and 21 of the Constitution.

4. The majority proceeded to answer the question whether the Court can lay down standards or norms restricting the area of imposition of death penalty to narrow the categories of murders and, in that context, it opined that standardisation of the sentencing process would tend to sacrifice at the altar of blind uniformity, in fact, indeed there is a real danger of such mechanical standardisation degenerating into a bed of procrustean cruelty. Thereafter, the Bench proceeded to state thus:-

> "As Judges, we have to resist the temptation to substitute our own value-choices for the will of the people. Since substituted judicial "made-to-order" standards, howsoever painstakingly made, do not bear the people's imprimatur, they may not have the same authenticity and efficacy as the silent zones and green belts designedly marked out and left open by Parliament in its legislative planning for fair play of judicial discretion to take care of the variable,

1. (1980) 2 SCC 684.
2. (1973) 1 SCC 20.

> unpredictable circumstances of the individual cases, relevant to individualised sentencing. When Judges, acting individually or collectively, in their benign anxiety to do what they think is morally good for the people, take upon themselves the responsibility of setting down social norms of conduct, there is every danger, despite their effort to make a rational guess of the notions of right and wrong prevailing in the community at large and despite their intention to abide by the dictates of mere reason, that they might write their own peculiar view or personal predilection into the law, sincerely mistaking that changeling for what they perceive to be the community ethic. The perception of "community" standards or ethics may vary from Judge to Judge."
>
> [Emphasis added]

5. The majority referred to the decision in *Gurbaksh Singh Sibbia v. State of Punjab*[3] and stated that the observations made therein aptly applied to the desirability and feasibility of laying down standards in the area of sentencing discretion. In the case of *Gurbaksh Singh* (supra), the Constitution Bench had observed thus:-

> "Judges have to decide cases as they come before them, mindful of the need to keep passions and prejudices out of their decisions."

6. After stating broad guidelines relating to the mitigating circumstances, the majority ultimately ruled thus:-

> "Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and Figures, albeit incomplete, furnished by the Union of India, show that in the past, courts have inflicted the extreme penalty with extreme infrequency - a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing

3. (1980) 2 SCC 565.

discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guide-lines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3) viz. that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."

7. In *Machhi Singh and Others v. State of Punjab*[4], a three-Judge Bench explained the concept of rarest of rare cases by stating that the reasons why the community as a whole does not endorse the humanistic approach reflected in "death sentence-in-no-case" doctrine are not far to seek. In the first place, the very humanistic edifice is constructed on the foundation of "reverence for life" principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realized that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent for those who have no scruples in killing others if it suits their ends. Every member of the community owes a debt to the community for this protection.

8. After stating about the feeling of the community and its desire for self preservation, the Court observed that the community may well withdraw the protection by sanctioning the death penalty. Thereafter, it ruled thus:-

4. (1983) 3 SCC 470.

"But the community will not do so in every case. It may do so "in rarest of rare cases" when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty."

9. Emphasis was laid on certain aspects, namely, manner of commission of murder, motive for commission of murder, anti social or socially abhorrent nature of the crime, magnitude of crime and personality of the victim of murder. After so stating, the propositions emerged from *Bachan Singh* (supra) were culled out which are as follows:-

"(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

10. Thereafter, the Court stated that to apply the said guidelines, the following questions are required to be asked and answered:-

"(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?"

11. In *Lehna v. State of Haryana*[5] a three-Judge Bench, after referring to the pronouncements in *Bachan Singh* (supra) and *Machhi Singh* (supra), ruled under what circumstances the collective conscience of the community is likely to be shocked. We may fruitfully quota a passage from the same:-

"A convict hovers between life and death when the question of gravity of the offence and award of adequate sentence comes up for consideration. Mankind has shifted from the state of nature towards a civilized society and it is no longer the physical opinion of the majority that takes away the liberty of a citizen by convicting him and making him suffer a sentence of imprisonment. Award of punishment following conviction at a trial in a system wedded to the rule of law is the outcome of cool deliberation in the court room after adequate hearing is afforded to the parties, accusations are brought against the accused, the prosecuted is given an opportunity of meeting the accusations by establishing his innocence. It is the outcome of cool deliberations and the screening of the material by the informed man i.e. the Judge that leads to determination of the lis.

The principle of proportion between crime and punishment is a principle of just desert that serves as the foundation of every criminal sentence that is justifiable. As a principle of criminal justice it is hardly less familiar or less important than the principle that only the guilty ought to be punished. Indeed, the requirement that punishment not be

5. (2002) 3 SCC 76.

disproportionately great, which is a corollary of just desert, is dictated by the same principle that does not allow punishment of the innocent, for any punishment in excess of what is deserved for the criminal conduct is punishment without guilt."

[Emphasis added]

12. In *Haresh Mohandas Rajput v State of Maharshtra*[6], the Bench referred to the principles in *Bachan Singh* (supra) and *Machhi Singh* (supra) and proceeded to state as follows:-

"The rarest of the rare case" comes when a convict would be a menace and threat to the harmonious and peaceful coexistence of the society. The crime may be heinous or brutal but may not be in the category of "the rarest of the rare case". There must be no reason to believe that the accused cannot be reformed or rehabilitated and that he is likely to continue criminal acts of violence as would constitute a continuing threat to the society. The accused may be a menace to the society and would continue to be so, threatening its peaceful and harmonious coexistence. The manner in which the crime is committed must be such that it may result in intense and extreme indignation of the community and shock the collective conscience of the society. Where an accused does not act on any spur-of-the-moment provocation and indulges himself in a deliberately planned crime and meticulously executes it, the death sentence may be the most appropriate punishment for such a ghastly crime. The death sentence may be warranted where the victims are innocent children and helpless women. Thus, in case the crime is committed in a most cruel and inhuman manner which is an extremely brutal, grotesque, diabolical, revolting and dastardly manner, where his act affects the entire moral fibre of the society e.g. crime committed for power or political ambition or indulging in organised criminal activities, death

6. (2011) 12 SCC 56.

sentence should be awarded. (See *C. Muniappan v. State of T.N.*[7], *Dara Singh v. Republic of India*[8], *Surendra Koli v. State of U.P.*[9], *Mohd. Mannan v. State of Bihar*[10] and *Sudam v. State of Maharashtra*[11].)"

13. In *Sham Alias Kishore Bhaskarrao Matkari v. State of Maharashtra*[12], while dealing with the justifiability of imposition of death penalty, the Court took note of the aggravating and mitigating circumstances and eventually opined that though the appellant therein caused death of three persons, he had no pre-plan to do away with the family of his brother and the quarrel started due to the land dispute and, in fact, on the fateful night, he was sleeping with the other victims in the same house and in those circumstances and other material placed clearly showed that he had no pre-plan or predetermination to eliminate the family of his brother. The Bench also took note of his antecedents and did not agree with the view expressed by the High Court which had enhanced the sentence from life to death on the ground that it was a rarest of the rare case where extreme penalty of death was called for.

14. Recently, in *Mohammed Ajmal Mohammad Amir Kasab alias Abu Mujahid v. State of Maharashtra*[13], the Court referred to the earlier decisions and taking note of the terrorist attack from across the border, the magnitude of unprecedented enormity on all scales, the conspiracy behind the attack, the preparation and training for the execution, and more importantly, its traumatizing effect, opined that it was the rarest of rare case to come before this Court since the birth of Republic. The Bench, in that context, expressed thus:-

7. (2010) 9 SCC 567.
8. (2011) 2 SCC 49.
9. (2011) 4 SCC 80.
10. (2011) 5 SCC 509.
11. (2011) 7 SCC 125.
12. (2012) 10 SCC 389.
13. (2012) 9 SCC 1.

> "Putting the matter once again quite simply, in this country death as a penalty has been held to be constitutionally valid, though it is indeed to be awarded in the "rarest of rare cases when the alternative option (of life sentence) is unquestionably foreclosed". Now, as long as the death penalty remains on the statute book as punishment for certain offences, including "waging war" and murder, it logically follows that there must be some cases, howsoever rare or one in a million, that would call for inflicting that penalty. That being the position we fail to see what case would attract the death penalty, if not the case of the appellant. To hold back the death penalty in this case would amount to obdurately declaring that this Court rejects death as lawful penalty even though it is on the statute book and held valid by the Constitutional Benches of this Court."

15. We have referred to the aforesaid decisions to highlight that this Court, on number of occasions, has dealt with under what circumstances death penalty could be imposed and what are the mitigating factors not to impose such punishment. Illustrative guidelines have been provided, and, needless to say, it would depend upon the facts of each case. No strait-jacket scale can be provided as has been said in number of pronouncements.

16. As is obvious from the reasoning of the learned Sessions Judge, he has referred to the prevalence of death sentence in certain countries and observed that in certain countries where law provides "slashing", "beheading", "taking the organ for organ" like 'eye for eye', 'tooth for tooth' to the accused, it shows the growth of criminal jurisprudence. That apart, he had referred to the speech of the then learned Chief Justice of the High Court, and it is clearly demonstrable that the same has influenced his appreciation, analysis and perception. Being influenced by the erroneous notions of law and speech of the learned Chief Justice, may be understanding it totally out of context, his passion and prejudices have

dominated over his reasoning faculties and the result, as I perceive, is devastating.

17. In *Hindustan Times Ltd. v. Union of India and Others*[14], a two-Judge Bench of this Court referred to an article On Writing Judgments, by Justice Michael Kirby of Australia[15] wherein it has been highlighted, apart from any facet that the legal profession is entitled to have, it demonstrated that the Judge has the correct principles in mind, has properly applied them and is entitled to examine the body of the judgment for the learning and precedent that they provide and further reassurance of the quality of the judiciary which is the centre-piece of our administration of justice. Thus, the fundamental requirement is that a Judge presiding over a criminal trial has the sacrosanct duty to demonstrate that he applies the correct principles of law to the facts regard being had to the precedents in the field. A Judge trying a criminal case has a sacred duty to appreciate the evidence in a seemly manner and is not to be governed by any kind of individual philosophy, abstract concepts, conjectures and surmises and should never be influenced by some observations or speeches made in certain quarters of the society but not in binding judicial precedents. He should entirely ostracise prejudice and bias. The bias need not be personal but may be an opinionated bias.

18. It is his obligation to understand and appreciate the case of the prosecution and the plea of the defense in proper perspective, address to the points involved for determination and consider the material and evidence brought on record to substantiate the allegations and record his reasons with sobriety sans emotion. He must constantly keep in mind that every citizen of this country is entitled to a fair trial and further if a conviction is recorded it has to be based on the guided parameters of law. And, more importantly, when sentence is imposed, it has to be based on sound legal principles, regard

14. (1998) 2 SCC 242.

15. *.[(1990) (vol. 64. Australian Law Journal, p. 691)]

being had to the command of the statute, nature of the offence, collective cry and anguish of the victims and, above all, the "collective conscience" and doctrine of proportionality. Neither his vanity nor his pride of learning in other fields should influence his decision or imposition of sentence. He must practise the conscience of intellectual honesty and deal with the matter with all the experience and humility at his command. He should remind himself that some learning does not educate a man and definitely not a Judge. The learning has to be applied with conviction which is based on proper rationale and without forgetting that human nature has imperfect expression when founded bereft of legal principle. He should not usher in his individual satisfaction but adjudge on objective parameters failing which the whole exercise is likely to be named "monstrous legalism". In this context, I may profitably reproduce the profound saying of Sir P. Sidney :-

> "In forming a judgment, lay your hearts void of fore-taken opinions; else, whatsoever is done or said will be measured by a wrong rule; like them who have the jaundice, to whom everything appeareth yellow."

19. In this context, I may usefully refer to the pronouncement in *State of W. B. Others v. Shivanand Pathak and Others*[16], wherein the High Court had affirmed the death sentence imposed by the learned Sessions Judge. The High Court had commenced the judgment with the expression that it was one of the most sensational trials of the recent years and the murder is a diabolical one because the innocent persons have been killed by the police officers who were supposed to be the protectors of law-abiding citizens. Commenting on the said expression, this Court observed thus:-

> "We are constrained to observe that the High Court has not kept in view the several decisions of this Court and has not examined the circumstances proved while considering the question of sentence but on the other hand, have been

16. (1998) 5 SCC 513.

swayed away with the fact that the trial is a sensational one, and therefore, the officials must be awarded the extreme penalty of death. We do not find that it is a correct appreciation of the law on the subject dealing with the award of death penalty, even if a conviction under Sections 302/34 IPC is sustained. The learned Sessions Judge also came to the conclusion that the case can be treated to be the rarest of rare cases as police officials on whose shoulders the safety of citizens lies and being the protectors of the society are accused for killing of three civilians without any provocation and resistance."

[Underlining is ours]

From the aforesaid, it is graphically clear that a judge, while imposing sentence, should not be swayed away with any kind of sensational aspect and individual predilections. If it is done, the same would tantamount to entering into an area of emotional labyrinth or arena of mercurial syllogism.

20. In the case at hand, as is perceptible, the learned trial Judge has primarily been guided by some kind of notion and connected them with civilized world and democracy which, in my considered opinion, should not have been at all referred to. He should remember the language of Article 302 of IPC and the precedents that govern the field for imposition of death penalty. In that event, the perception might have been wrong but it could not have been said that it is based on some kind of personal philosophy. Thus, the view expressed does not sustain the concept of law and rather, on the contrary, exhibits a sanctuary of errors. Speeches or deliberations in any academic sphere are not to be taken recourse to unless they are in consonance with binding precedents. A speech sometimes may reflect a personal expression, a desire and, where a view may not be appositely governed by words, is likely to confuse the hearers. It is a matter of great remorse that the learned trial Judge had ventured to enter into such kind of adventure. It can be stated with certitude that in a criminal trial,

while recording the sentence, he should have been guided and governed by established principles and not by personal notions or even ideas of eminent personalities Binding judgments should be the Bible of a Judge and there should not be any deviation. I have said so, so that the trial Court judges are appositely guided and refrain themselves from engaging in innovative creativity or "borrowed creativity" which has no sanction in Law.

21. Consequently, the appeal stands allowed, the judgment of conviction and order of sentence are set aside and the appellant is directed to be set at liberty forthwith unless he is required to be detained in any other case.

K.K.T. Appeal allowed.

DR. MOHAMMAD KHALIL CHISTI
v.
STATE OF RAJASTHAN
(Criminal Appeal No. 634 of 2012 etc.)

DECEMBER 12, 2012

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

Penal Code, 1860 - s. 324 - Death of one and injuries to persons on complainant as well as accused side - Cross-FIRs - Accused convicted u/ss. 302 and 324 r/w. s. 34 IPC by courts below - Appeal by three accused - Held: Evidence suggests that accused were also victims of armed aggression at the hands of the deceased and complainant party - Non-explanation of the injuries on the accused shows that prosecution suppressed the real genesis of the occurrence - The two sets of evidence led by the prosecution being discrepant with each other, the accused would have the benefit of such discrepancy - Accused can be held responsible only for their individual acts and not for the acts with the aid of s. 34 - In view of their individual acts, the appellants can only be convicted u/s. 324 - Their sentence reduced to period already undergone.

Criminal Trial :

Non-explanation of injuries on the accused -Effect of - Held: Non-explanation of the injuries on accused leads to the inferences: (1) that the prosecution has suppressed the genesis of the occurrence;(2) that the witnesses who denied the presence of the injuries, are unreliable; (3) that if defence version explains the injuries, it creates doubt on the prosecution case - The non-explanation assumes greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one -

However, the non-explanation of the injuries may not affect the prosecution case, where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, that it outweighs the effect of the non-explanation.

Contradictory Evidence - Effect of - Where prosecution leads two sets of evidence each one contradicting and striking at the other, accused would have the benefit of such situation - Both sides can be convicted for their individual acts and normally no right of private defence is available to either party.

Constitution of India, 1950 - Article 136 - Scope and ambit of - Held: Article 136 confers discretionary power to be exercised sparingly to interfere in cases where grave miscarriage of justice has resulted - It does not confer a right of appeal - The Court in exercise of its powers under Art. 136 not to reopen the findings of the High Court, when there are concurrent findings of facts, no question of law is involved and the conclusion is not perverse.

The incident in question in the present appeals, resulted in death of one person and injuries to some, on both sides. Cross FIRs were filed by both the parties. The appellants-accused along-with accused 'F' were implicated in FIR No. 90/1992. In the cross-case, six accused were prosecuted. The trial court, in the present case convicted all the accused u/s. 302 and 324 r/w. s. 34 IPC. They were awarded life sentence. High Court confirmed their conviction and sentence.

The accused in the cross-case were tried separately and were convicted by the trial court u/ss. 307/149, 148 and 324/149 IPC. The appeal against the order is still pending before High Court.

Instant appeals were filed by A-1, A-2 and A-3.

Disposing of the appeals, the Court

HELD: 1.1 The analysis of the prosecution case has led two sets of evidence. The evidence adduced suggests that the accused in the present appeals are to some extent victims of armed aggression at the hands of the deceased and his companions. The evidence of the witnesses show that the complainant's party were armed with sword, hockey sticks etc., hurled abuses, threw stones on the inmates and exhorted to kill A-2 and A-4. Therefore, the appellants are justified in claiming that the complainants group was responsible for the incident and the injuries caused to them. [Paras 30 and 15] [794-G; 805-F-H; 806-A]

1.2 PW-3, PW-6, PW-13 and PW-18, the eye-witnesses did not offer any explanation to the admitted injuries received by A-4 and A-3. In the absence of any explanation by the prosecution, they can be held guilty of suppressing the real genesis of the occurrence. No doubt, they supported the prosecution stand, and relying on their evidence, even if the Court accepts the case of the prosecution, in view of the statement of official witnesses, namely, PWs 4 and 5, the complainants who were accused in the cross-case were also responsible for their individual act. [Paras 31 and 16] [794-H; 795-C-D; 806-C-E]

1.3 It is the duty of the prosecution to explain the injuries sustained by the accused and establish the genesis of the incident by placing acceptable materials. Where the prosecution fails to explain the injuries on the accused, two results follow: (1) that the evidence of the prosecution witness is untrue and (2) that the injuries probabilize the plea taken by the appellants. In a murder case, non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the court can draw the following inferences: "(1) that the prosecution has suppressed the genesis and

the origin of the occurrence and has thus not presented the true version;(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable; (3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case." [Paras 27 and 20] [800-A-D; 804-D-E]

Lakshmi Singh and Ors. v. State of Bihar **(1976) 4 SCC 394 - relied on.**

1.4 The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one. However, there may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This principle would apply to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, that it outweighs the effect of the omission on the part of the prosecution to explain the injuries. [Para 21] [800-E-G]

Waman and Ors. v. State of Maharashtra **(2011) 7 SCC 295: 2011 (6) SCR 1072- relied on.**

1.5 In the present case, there is enough material to show that in the course of the very same incident A-4 and A-3 also sustained injuries. In fact, A-4 sustained grievous injury by use of sharp edged weapon. However, these injuries were not explained at all by the prosecution. The prosecution failed to prove the genesis of the incident and in fact they suppressed the same. [Paras 27 and 19] [799-E; 804-F]

1.6 The analysis of the materials clearly show that two versions of the incident adduced by the prosecution are discrepant with each other. In such a situation where the prosecution leads two sets of evidence each one which contradicts and strikes at the other and shows it to be unreliable, the result would necessarily be that the Court would be left with no reliable and trustworthy evidence upon which the conviction of the accused might be based. The accused would have the benefit of such situation. Both sides can be convicted for their individual acts and normally no right of private defence is available to either party and they will be guilty of their respective acts. [Para 32] [806-F-G, H; 807-A]

Raghubir Singh v. State of Rajasthan and Ors. **(2011) 12 SCC 235: 2011 (10) SCR 739;** *Krishnan v. State of Tamil Nadu* **(2006) 11 SCC 304: 2006 (4) Suppl. SCR 536;** *Babulal Bhagwan Khandare and Anr. v. State of Maharashtra* **(2005) 10 SCC 404: 2004 (6) Suppl. SCR 633 - relied on.**

1.7 Having regard to the role attributed to A-2, there is no scope for invoking the applicability of Section 34 IPC against him. Even independent witnesses, viz., PWs 4 and 5 do not attribute any overt act to him. Even if the evidence of prosecution witnesses that A-2 was having a sword and PW-3 sustained injuries at his instance is accepted, considering his individual act, he can only be convicted u/s. 324 IPC and taking note of his age and of the fact that he was in custody for about one year and four months, the ends of justice would be met by altering the sentence to the period already undergone. [Paras 33 and 38] [807-B; 808-F-G]

1.8 A-2- being a national of Pakistan, as per the order of this Court, had deposited a sum of Rs. 5 lakhs as security with the Registry of this Court for visiting his home country, i.e., Pakistan. In view of the conclusion that no further custody is required, the Registry is

directed to return the said amount to A-2 or his nominee forthwith. It is further directed that if the passport or any other document of the appellant is in the custody of the trial court or any other authority of the Government of India, they are directed to return the same to him and he is free to return to his country without any restriction. Taking note of his age and academic qualification etc., to facilitate such course, the concerned department of the Government of India is directed to issue necessary visa and complete all the formalities for his smooth return to his country. [Para 39] [809-A-B, C-E]

1.9 A-1 and A-3 cannot be punished and fastened the liability of individual acts committed by them with the aid of Section 34 IPC, without acceptable materials. Though the prosecution witnesses mentioned that these appellants had a pistol, they did not state whether anyone was hit by that pistol fire and no specific evidence was led in that the shot emanated from the pistol in their hand. Even PW-3 stated that these appellants fired from their pistols but no one was hit from that fire. PWs 4 and 5 also did not attribute any overt done by them and categorically stated that the complainant's party was the armed aggressors. [Para 35 and 36] [807-E-F, H; 808-A]

1.10 In the absence of evidence of fire shots from the revolvers of A-1 and A-3 and in view of the statement of PWs 3, 6, 13 and 18 alleging against the present appellants, in order to bring the matter within a free fight, both sides have to come armed and prepared to do battle, must be applied in the present case with the result that each accused would be liable for his individual act alone. [Para 37] [808-D-E]

1.11 Thus A-1 and A-3, taking note of their individual acts, can only be convicted u/s. 324 IPC. In view of the fact that A-1 and A-3 have served approximately 11 and 10 months respectively, the same would be sufficient and

no further imprisonment is required, hence, both of them are directed to be released forthwith, if they are not required in any other case. [Para 40] [809-F-G]

2. It is correct that evidence in cross-case cannot be relied upon. In the present case, neither the trial court nor the High Court relied on the evidence led in the cross-case but the same were tried separately and in fact appeals are still pending before the High Court against the conviction in the cross case. [Para 28] [804-G; 805-B]

Mitthulal and Anr. v. The State of Madhya Pradesh **(1975) 3 SCC 529 - referred to.**

3. This Court in exercise of its powers under Article 136 of the Constitution will not reopen the findings of the High Court when there are concurrent findings of facts and there is no question of law involved and the conclusion is not perverse. Article 136 of the Constitution does not confer a right of appeal on a party. It only confers discretionary power on this Court to be exercised sparingly to interfere in suitable cases where grave mis-carriage of justice has resulted from illegality or misapprehension or mistake in reading evidence or from ignoring, excluding or illegally admitting material evidence. [Para 29] [805-C-E]

Sambhu Das alias Bijoy Das and Anr. v. State of Assam **(2010) 10 SCC 374: 2010 (11) SCR 493 -relied on.**

Case Law Reference:

(1976) 4 SCC 394	**relied on**	**Para 20**
2011 (6) SCR 1072	**relied on**	**Para 22**
2011 (10) SCR 739	**relied on**	**Para 24**
2006 (4) Suppl. SCR 536	**relied on**	**Para 25**
2004 (6) Suppl. SCR 633	**relied on**	**Para 26**
(1975) 3 SCC 529	**referred to**	**Para 28**
2010 (11) SCR 493	**relied on**	**Para 29**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal NO. 634 of 2012.

From the Judgment & Order dated 20.12.2011 of the High Court of Judicature for Rajasthan bench at Jaipur in D.B. Criminal Appeal No. 189 of 2011.

WITH

Crl. A. No. 635 of 2012.

Uday U. Lalit, K.T.S. Tulsi, Mukul Gupta, Jasbir Singh Malik, AAG, Nitin Sangra, Gaurav Agrawal, Ravinder Singh Aadil Singh Boparai, M. Khan, Ravindra S. Garia, Rahul Verma, Pragati Neekhra Varun Punia, Irshad Ahmad, Ranjana Narayan, B.K. Prasad for the appearing parties.

The judgment of the Court was delivered by

P. SATHASIVAM, J. 1. These appeals are directed against the common judgment and order dated 20.12.2011 passed by the High Court of Judicature for Rajasthan, Bench at Jaipur in D.B. Criminal Appeal Nos. 189 and 188 of 2011 whereby the Division Bench of the High Court dismissed the appeals filed by the appellants herein and affirmed the judgment dated 31.01.2011 passed by the Court of Additional Sessions Judge (Fast Track) No.1, Ajmer in Sessions Case No.157 of 2001.

2. **Brief facts**

(a) The case relates to a fight between two groups of Khadim Mohalla, Jhalra, Ajmer which culminated into the death of one Idris and registration of 2 FIRs being Nos. 90 and 91 of 1992.

(b) On 14.04.1992, an altercation took place between Khalil Chisti (A-2) and Khurshid Pahalwan – cousin of Aslam Chisti (the complainant in FIR No. 90 of 1992) during a function at the house of one Shabbir on account of old rivalry. On the same evening, Khurshid had called Idris-cousin brother of Shabbir for

having the matter resolved by way of a compromise between the two parties. In pursuance of the same, Idris, Shamim, Aslam, Mustqueem, Asif, Sagir and Javed (relatives) proceeded towards the house of Khalil Chisti where they found Khalil Chisti (A-2), Yasir Chisti (A-1), Akil Chisti (A-3) and Farukh Chisti (A-4) who were already present there. On entering the house, they realized that Khalil (A-2) was having sword in his hand and Farukh (A-4) was holding a gun whereas Yasir and Akil were having revolvers and the accused party immediately closed the door from behind and Khalil Chisti (A-2) shouted "no one should escape, kill all of them." On seeing their intention, the complainant party tried to run in order to save their lives at which time Farukh (A-4) fired a shot at Idris which resulted into injury to his right eye. Khalil (A-2) also gave a sword blow to the complainant-Aslam Chisti which struck on his forehead and Yasir and Akil also opened fire. Later on, considering the injured to have been shot dead, the accused persons fled away. Subsequently, Khurshid and Shamim had taken Aslam Chisti and Idris to the hospital where Idris succumbed to his injuries.

(c) On the same day, i.e., on 14.04.1992, Aslam Chisti lodged an FIR being No. 90 of 1992 at Police Station Ganj, Ajmer against Yasir (A-1), Khalil (A-2), Akil (A-3) and Farukh (A-4).

(d) On the same day, at about 10:30 to 11:00 p.m., another FIR being No. 91 of 1992 was registered at P.S. Ganj, Ajmer on the statement made by Akil Chisti, while under treatment, wherein he stated that at about 5:00 to 5:30 p.m., when he along with other persons were sitting in his house, he suddenly noticed pelting of stones on the grills of the house. When all of them went on the roof top to understand the matter, they found Idris, Shamim, Aslam, Mustqueem, Asif, Sagir and Javed standing there duly armed with weapons. On enquiring about the same, Idris stabbed Farukh (A-4) with a knife and Shamim opened fire on Akil (A-3) which missed the target. In the meantime, Akil (A-3) brought a rifle of his father but Sagir, Asif

and Javed snatched the same from him and Aslam stabbed him into his waist from behind leading to his collapse. Asif also opened fire on to him which hit Idris. A number of persons had gathered in the neighbourhood on hearing the hue and cry.

(e) After investigation, chargesheets were filed against 4 persons, namely, Yasir, Khalil, Akil and Farukh in FIR No. 90 of 1992 and against 6 persons, namely, Shamim, Aslam, Mustqueem, Asif, Sagir and Javed in Cross FIR No. 91 of 1992 and both the cases were committed to the Court of Additional Sessions Judge (Fast Track) No.1, Ajmer and were registered as Sessions Case No. 157/2001 (FIR No.90/1992) and Sessions Case No. 178/2001 (FIR No.91/1992).

(f) The trial Court, by judgment dated 31.01.2011 in Sessions Case No. 157 of 2001, convicted Farukh Chisti (A-4), Yasir Chisti (A-1) and Akil Chisti (A-3) under Sections 302 and 324 read with Section 34 of the Indian Penal Code, 1860 (in short 'the IPC') whereas Khalil Chisti (A-2) was convicted under Sections 302 and 324 of the IPC. A-1, A-2, A-3 and A-4 were sentenced to undergo RI for life along with a fine of Rs. 20,000/-, in default, to further undergo RI for a period of 6 months for the offence punishable under Section 302 of IPC. They all were further sentenced to undergo simple imprisonment for 2 years along with a fine of Rs. 2,000/-, in default, to further undergo simple imprisonment for 1 month for the offence punishable under Section 324 read with Section 34 of IPC.

(g) On the same day, the trial Court convicted the accused persons in Session Case No. 178 of 2001 and sentenced all of them to suffer RI for 10 years alongwith a fine of Rs.10,000/-, in default, to further undergo RI for 6 months for the offence punishable under Section 307 read with Section 149 of IPC. They were further sentenced to RI for 2 years under Section 148 of IPC, RI for 3 years with a fine of Rs.1,000/-, in default, to undergo RI for one month under Section 452 and RI for 2 years under Section 324 read with Section 149 of IPC. Challenging the said judgment, all the accused persons named in FIR 91 of 1992 filed Criminal Appeal No. 131 of 2011 before the High

Court which is still pending. (h) Challenging the judgment in Session Case No. 157/2001, Yasir Chisti and Akil Chisti filed D.B. Criminal Appeal No. 188/2011, Dr. Mohammad Khalil Chisti filed D.B. Criminal Appeal No. 189 of 2011 and Farukh Chisti filed D.B. Criminal Appeal No. 423 of 2011 before the High Court. By a common judgment dated 20.12.2011, the High Court dismissed all the appeals and affirmed the judgment passed by the trial Court.

(i) Aggrieved by the said judgment, Dr. Mohammad Khalil Chisti preferred Criminal Appeal No. 634 of 2012 and Yasir Chisti and Akil Chisti preferred Criminal Appeal No. 635 of 2012 before this Court. 3) Heard Mr. Uday U. Lalit, learned senior counsel for Dr. Mohammed Khalil Chisti –appellant in Criminal Appeal No. 634 of 2012, Mr. K.T.S. Tulsi, learned senior counsel for Yasir Chisti and Akil Chisti, appellants in Criminal Appeal No. 635 of 2012, Mr. Rahul Verma, learned counsel and Jasbir Singh Malik, learned Additional Advocate General for the State in both the appeals and Mr. Mukul Gupta, learned senior counsel for the Union of India in Criminal Appeal No. 634 of 2012.

Contentions:

4. After taking us through FIR No. 90 of 1992 and Cross FIR No. 91 of 1992 dated 14.04.1992, the entire material relied on by the prosecution and defence, the decision of the trial Court in Session Case No. 157 of 2001 and Session Case No. 178 of 2001 and the reasoning of the impugned decision of the High Court, Mr. Lalit as well as Mr. K.T.S. Tulsi, learned senior counsel contended that the members of the complainants' party were aggressors, they formed an unlawful assembly armed with various weapons and had climbed upon the roof of their premises in order to beat the accused persons in furtherance of their common object. It is further submitted that the appellants/accused persons had not committed any offence and whatever they did was in exercise of their right of private defence. There is no evidence on record to show that the

accused persons were having any common object to commit murder of the deceased-Idris. They further submitted that the trial Court as well as the High Court failed to take into consideration the fact that the complainant party including Idris, Aslam, Asif, Shamim, Mustqueem, Sagir and Javed were duly armed and had come to the place of the accused persons. In such circumstances, the accused appellants deserve to get the benefit of right of private defence on their person. They also submitted that there is no explanation by the prosecution as to how Farukh (A-4) and Akil (A-3) sustained injuries. They also contended that the prosecution suppressed the true genesis of the incident.

5. On the other hand, learned counsel for the State submitted that the judgment of the trial Court as well as the High Court is based on evidence and in the light of the settled principles of law. It is pointed out that the accused appellants, after full preparation, sent a message to Khurshid, Shamim, Idris and other members of the complainant party to meet at their house. It is pointed out that as soon as the members of the complainant party started climbing the stairs of their house and moved towards the roof top, the accused appellants followed them and inflicted injuries by use of various weapons, consequently, Idris and Aslam were seriously injured and later on Idris succumbed to his injuries. Finally, they submitted that the prosecution has proved its case beyond reasonable doubt and the impugned judgment does not suffer from any infirmity or illegality.

6. We have carefully considered the rival submissions and perused all the relevant materials.

Discussion:

7. It is not in dispute that in respect of the same incident that took place on 14.04.1992, there had been two FIRs, namely, FIR No. 90 of 1992 and Cross FIR No. 91 of 1992. In these appeals, we are concerned about FIR No. 90 of 1992 in which the present appellants and one Farukh were implicated

as accused. The said FIR was registered on the basis of a complaint made by one Syed Md. Aslam who was examined as PW-3. He is a resident of Mian House, Khadim Mohalla, Ajmer. In the complaint, it has been stated that on 14.04.1992, on the occasion of "Peela Ki Rasm" at the place of Shabbir, an altercation took place between Khalil Chisti (A-2) and Khurshid Pahalwan on account of old rivalry following which Khurshid had called his brother Idris in the evening in order to finally sort out the matter by way of a compromise. When Idris, Shamim-his relative and Md. Aslam Chisti-the complainant went to the house of Khurshid at that time, one Tariq Mohammed informed them that Khalil Chisti is calling them for a compromise following which, all of them, namely, Idris, Shamim, Md. Aslam, Khurshid, his brother Sagir went to the house of Khalil. On reaching there, they found that Khalil, Farukh, Yasir and Akil were present there at home. It has been further stated that having entered into the house, the accused party closed the door from behind and Khalil shouted that "they should not escape, kill all of them". It has been further stated that Khalil was armed with a sword and Farukh was carrying a rifle. When they tried to escape, at that time, Farukh (A-4) opened fire on Idris (deceased) which hit at his right eye and he fell down. Khalil (A-2) gave a blow with the sword to the head of Md. Aslam Chisti-the complainant which struck on his forehead and hit his temple and eye. Akil (A-3) and Yasir (A-1), who were armed with revolvers also opened fire. All the accused persons ran away and Khurshid and Shamim had taken Idris to the hospital where he succumbed to his injuries. The above statement was recorded at 5.45 p.m. on 14.04.1992.

8. Though we are not directly concerned about the cross FIR No. 91 of 1992 dated 14.04.1992, in view of the plea and the defence of the present appellants, it is desirable to note down the contents of the same. The complainant in this cross FIR is Akil Chisti (A-3), the appellant in the present appeal. The following persons were shown as accused, namely, Idris, Shamim, Aslam, Mustqueem, Asif, Sagir and Javed. According to the complainant, Akil Chisti, who is a resident of Baitool,

Jhalra, Dargah Sharief, Ajmer that on 14.04.1992 at 5 to 5.30 p.m., when he was in the room of Farukh Chisti, they suddenly noticed pelting of stones on the grills of their house. When they went on the roof top, they found that Idris, his brother Shamim, Aslam, Mustqueem, Asif, Sagir and Javed were standing there, armed with weapons and Shamim was armed with a country-made pistol. When Farooq questioned about pelting of stones, Idris stabbed him with a knife. Shamim opened fire on him which missed him. It has been further stated that Akil-the complainant brought a 12-bore licensed rifle of his father but Sagir, Asif and Javed snatched it from him and Aslam inflicted stab wounds in his waist from behind and he fell down. Asif opened fire from his rifle which missed him and hit Md. Idris. A number of persons had gathered in the neighbourhood who raised a clamour "maar diya maar diya". These people assaulted them by entering inside their house. The above statement was recorded at 10.30 p.m. by SHO Police Station, Ajmer.

9. It is relevant to note that in respect of FIR No. 90 of 1992, the present appellants and one Farukh were convicted and sentenced to life imprisonment by the trial Court as affirmed by the High Court. It is brought to our notice that in respect of cross FIR No. 91 of 1992, the same trial Judge on the same day i.e. 31.01.2011 convicted and sentenced all of them for various offences and the appeals filed against those convictions is still pending in the High Court.

10. Now, let us consider the witnesses and materials relied on by the prosecution and the defence.

Aslam Chisti (PW-3):

11. In his evidence, he deposed that deceased Idris was his cousin and Khurshid and Sahir were also his cousins. Shamim is his real younger brother. He identified Khalil Chisti (A-2), a Pakistani citizen in the Court. He was familiar with accused Farukh, Yasir and Akil. He narrated that he came to know from his father that some altercation took place between

Khalil Chisti (A-2) and Khurshid Pahalwan on account of old rivalry on the occasion of "Peela ki Rasm" at the place of Shabbir. He further narrated that in the evening of 14.04.1992, when he was at his home with his brothers Shamim and Idris, the son of Khurshid came to their residence and informed that his father was calling all of them. After reaching there, Khurshid asked them to sort out the matter. In the meantime, one Tariq Mohammad informed them that Khalil Chisti (A-2) has called them for a meeting. He along with others went to the residence of Khurshid. From there, he, along with the deceased-Idris, Shamim, Khurshid, Sagir, Javed, Mustqueem and Asif proceeded towards the house of Khalil and on reaching there they noticed that Khalil was standing at the entrance. On their entering into the house of Khalil, the other persons present there closed the door from behind and Khalil shouted to kill all of them. In order to save their lives, he along with Idris, Shamim, Asif and others climbed over the Baitool Manzil and reached the roof top of Kaptan house. At that time, accused Khalil, Farukh, Yasir and Akil came to that place and Khalil was carrying a bare sword and Farukh was armed with a rifle, Yasir and Akil were holding rifles. Farukh fixed the target and shot fired his brother Idris. The bullet had hit on the right eye of Idris leading to his collapse there itself. Khalil hit two injuries of sword in his skull and forehead. Akil and Yasir had also opened fires from their respective revolvers but they managed to escape. He admitted that the fire triggered from the revolver of Akil and Yasir had hit none. In the course of the above narration, PW-3 admitted that two police personnel had arrived on the roof top, particularly, when Akil and Yasir were firing. From the evidence of PW-3, it is clear that though he narrated the prosecution case about the involvement of the present appellants as well as the role of Farukh, he admitted the arrival of two police personnel, viz., Bhanwar Singh (PW-4) and Bhanwarlal Sharma (PW-5) on the roof top when Akil and Yasir were firing.

Bhanwar Singh (PW-4):

12. At the relevant time, PW-4 was posted as LHC at

Police Post Tripolia Gate, Police Station Ganj, Ajmer. In his evidence, he has stated that on 14.04.1992, at about 4.30 p.m., he received information from wireless control room that a quarrel has broken out at Jhalra. On receiving the said information, PW-4 and Bhanwar Lal Sharma (PW-5), reached the spot and went to the house of Ahmed Chisti. On enquiry, they came to know that some altercation took place on the issue of children in the morning. In order to make a call to the Control Room, both of them went to the room situated at the first floor of house of one Ahmed Chisti and while they were returning, they found 5-6 persons duly armed with sword and hockey sticks climbed upstairs from the ground. They tried to prevent them but they didn't stop. Out of them, he knew Shamim, Aslam and Idris. He further deposed that they were shouting "bring out Farukh", "bring out Pakistani (A-2) and where he is, we will kill him". He also stated that in spite of their intervention, the assailants reached at the roof top of the second floor of that house. Both PWs 4 and 5 followed them. He also stated that he had seen Farukh Chisti (A-4) with a 12 bore gun with him. Khalil (A-2), Yasir and Akil were having swords with them. Farukh went to the roof and fired from his gun and the shot hit the right eye of Idris, because of which, he died on the spot. When PW-5 came in between, he also sustained injuries. He was there at the same place till 11.30 p.m. and after 11.30 p.m. he went to Tripolia Gate, P.S. made necessary entries in the daily diary in his own handwriting which is Exh. P-3. He left constable Bhanwar Lal Sharma (PW-5) at the place of incident.

13. Since PW-4 contradicted his statement made under Section 161 of the Code of Criminal Procedure, 1973 (in short 'the Code'), the Public Prosecutor sought for permission to cross examine him. Even in the cross-examination, he admitted that he made a statement to police and at the time of incident, deceased-Idris and others were armed with swords and hockey sticks and they were going upstairs which is Exh. P-4. Though PW-4 turned hostile, to some extent, he being a police constable, on receipt of information and after recording the

same in the diary he left the police station along with Bhanwar Lal Sharma (PW-5) another police constable to the spot and noticed that the complainant parties rushed towards the roof top with sword and hockey sticks. It is also clear that the present accused appellants were inside the house of Khalil Chisti and the complainant's group reached there with arms. It has been also made clear that he was accompanied by another constable PW-5 and after noticing the incident, he rushed to P.S. Tripoli and made necessary entries leaving PW-5 at the spot. As rightly pointed out by learned senior counsel for the appellants, the presence of PWs 4 and 5 at the relevant spot and time cannot be disputed. It is also clear from the evidence of PW-4 that the complainant parties reached the spot armed with sword and hockey sticks. The presence of the complainants with arms is the subject matter of Cross FIR No. 91 of 1992.

Bhanwar Lal Sharma (PW-5):

14. At the relevant time, he was posted as a police constable with the police station of Tripolia Gate and was on duty on 14.04.1992. According to him, on that day, around 4.30 p.m., he and another constable PW-4 received an information on wireless from the Police Control Room in Tripolia P.S. that some fight is going on at Jhalra. On hearing such information, both of them went to Jhalra and noticed that there was no such brawl. In order to inform the same to the Control Room, they went to the house of one Ahmed Chisti by using the stairs. At the same time, he noticed Shamim (A-6 in Cross FIR) running upstairs with hockey stick in his hand, Aslam (A-1 in Cross FIR) armed with sword and two more people who were armed with weapons were going upstairs. Both of them (PW-4 and (PW-5) tried to stop them but they did not stop. Both of them went to the Chisti Manzil's room and on the roof, they noticed Shamim Chisti and others were abusing Farukh and others and then they went to Jamil Chisti's room and started pelting stones. After seeing the seriousness of the situation and to avoid untoward incident, PW-5 went downstairs to call other

police staff while PW-4 remained on the roof. He also heard the sound of a shot being fired. When he came back after making a call, he saw Idris was lying on the Kaptan's room and was bodily injured. At the place of incident where Idris was lying, a 12-bore gun was also found 10-15 ft. away from the spot. He also explained that based on his message, other police men came to the spot. He also mentioned the injuries sustained by him when they were trying to stop Shamim and others on the stairs. He further narrated that in the midnight, around 12.50 a.m., they came to Tripolia Gate P.S. and made necessary entries of their arrival time which is Exh. P-3. Since he contradicted his statement under Section 161 of the Code, the Public Prosecutor sought permission of the court in order to cross-examine him. Even in the cross-examination, he asserted that at the time of the incident only Shamim (A6 in Cross FIR) was throwing stones downstairs with full force in Jamil Chisti's house. He also mentioned about the fights and FIRs were registered against Aslam and Shamim.

15. Like PW-4, PW-5 narrated the incident starting from the receipt of wireless message till the clash at Jamil Chisti's house. It is relevant to point out that PWs 4 and 5 were not associated with any group, on the other hand, they were policemen of the Tripoli P.S. having jurisdiction over the area. The entries in the concerned registers of their departure and arrival to the police station also prove their statement. In the light of their statement, we have carefully analyzed their evidence and it is clear that the complainant's party came to the spot with weapons like sword, hockey sticks and few from that group also pelted stones. These aspects, though the trial Court and the High Court failed to give credence, the appellants are justified in claiming that the complainants group was responsible for the incident and the injuries caused to them.

Evidence of PWs 6, 13 and 18:

16. At the instance of the counsel for the State, we were taken through the evidence of PWs 6, 13 and 18. No doubt, they supported the prosecution stand and claim that it was the

appellants who caused the injuries and, particularly, Idris died due to the shot fired by Farukh using his revolver. They also stated that they sustained injuries due to the sword used by Khalil Chisti (A-2). It is also their claim that the other two accused Yasir Chisti and Akil Chisti, A-1 and A-3 respectively used revolver but their shots had hit none. Like PWs 6, 13 and 18, PW-3 who sustained sword injury at the instance of A2 also explained about the prosecution case. It is also seen from the evidence of PW-3 that Farukh (A-4) also sustained injuries for which there is no explanation by the prosecution. Relying on the evidence of PWs 3, 6 13 and 18 even if we accept the case of the prosecution, the statement of official witnesses examined on the side of the prosecution, namely, PWs 4 and 5 clearly show that the complainants were rushing towards the house of Chisti with sword and hockey sticks and also pelted stones. In these circumstances, as rightly pointed out by the counsel for the appellants, the complainants who were accused in the cross case were also responsible for their individual act.

Occurrence at the residence of A2:

17. All the prosecution witnesses, namely, PWs 3, 4, 5, 6 13 and 18 deposed that the incident occurred at the residence of A-2, namely, Chisti Manzil. It is also clear from the categorical statement of two police constables, viz., PWs 4 and 5 that on receipt of a phone call, they left Tripoli PS and reached the house of Kaptan which is adjacent to Chisti Manzil. It is clear that it was not the appellants/accused who went out of their house with arms, but even according to the prosecution witnesses, the incident took place at the residence of A-2. It is also clear that all of them entered the said house with weapons like sword and hockey sticks which we have already noted from the evidence relied on by the prosecution.

No explanation as to how Farukh (A-4) and Akil (A3) sustained injuries:

18. The prosecution document, viz., injury report of Farukh dated 14.04.1992 and injury report of Akil dated 14.04.1992 have been placed as Annexure P-5 (Colly). The injury report

relating to Farukh Chisti (A-4) issued by the Department of Medical Jurist, J.L.N. Medical College and Hospital, Ajmer reads as under:

"Admitted in MSW II, Time-5.45 p.m. date – 14.4.1992, 839/92

Department of Medical and Health, Rajasthan, Jaipur

Injury Report Form

Accompanied by Police

Injury Report of Shri Farukh Chisti s/o Shri Sadiq Chisti, age 26 years,

Caste-Muslim, Resident of Khadim Mohalla, Ajmer, Police ReportNo……dated…….enclosed.

Nature of injury of slash, wound, crushing etc.	Size of each injury in inches, length, width and depth	Hurt on which part of the body	Normal or grievous	Which type of weapon caused hurt	Identification mark of the injured	X-Ray Tajbeez	Special descrip--tion
1	2	3	4	5	6	7	8
1. Stab wound 4x0.5 cm x depth in on umbilical region, right lateral to umbilical obliquely placed 2. Stab 4x3/4 cm x on left lateral side of chest wall 6 cm below axilla in mid axillur line. 3. Stab wound 3x1x? on left scapular region Injured in the state of shock				Sharp	M.F.1 ½ x ½ cm old scar on left side of right leg upper third		Fresh
					Opinon after surgical note		

Sd/-
Dr. V.D. Kavia, MD
Reader, Head of Department
Department of Medical Jurist
J.L.N. Medical College and Hospital, Ajmer"

Operative notes of Farukh Chisti reads as follows:

Operative notes

Patient Name : Farukh Chishti

No. 9741

Date : 14/4/92

Surgical Pathology – Stab wound

1. Abdomen
2. Lt. Chest
3. Back

Anaesthesia – G.A.

Operation – Explanatory haprotomy and repair of the tear in stomach.

Incision – Continuation of the stab wound (Rt. Paramedian) – Onexploration it was found that there was a tear in the anterior stomach wallup to the serosa. The vessel was bleeding which was ligated and tearsutured and closed in layers.

The wounds on the chest (Lt. side and back were muscle deep and suturedin single layer.

Dr. Neera Jain — Surgeons
Dr. Sanjay Kolani — Dr. B.L. Laddha
Dr. K.K. Dangayeh
Dr. Paramjeet Singh
Dr. Ashok Naraina

Forwarded in original to SHO, PS Ganj in continuation to IR No. 839/92Injury Nos. 2 & 3 are simple and Injury No. 1 is grievous (dangerous) innature."

The injury report of Akil Chisti (A-3) reads as under:

"Admitted in MSW II, Time-5.45 p.m. date – 14.4.1992, 839/92Department of Medical and Health, Rajasthan, Jaipur

Injury Report Form

Injury Report of Shri Akil Chisti s/o Shri Jamil Chisti, age 24 years, Caste-Muslim, Resident of Police Report No……..dated…….enclosed.

Nature of injury of slash, wound, crushing etc.	Size of each injury in inches, length, width and depth	Hurt on which part of the body	Normal or grievous	Which type of weapon caused hurt	Identification mark of the injured	X-Ray Tajbeez	Special descrip--tion
1	2	3	4	5	6	7	8
stab wound 4x1 cm x..... Back of left region Obliquely placed				Sharp	M.	3x1 cm	Fresh
					Opinion after surgical note	Old scar on outer side of back and right heal	

Sd/-
Dr. V.D. Kavia, MD
Reader, Head of Department
Department of Medical Jurist
J.L.N. Medical College and Hospital, Ajmer"

Operative notes of Akil Chisti reads thus:

"Operative notes

Patient Name : Akil Chisti

R.No. 9740

Date : 14/4/92

Surgical Pathology –Cut wound back

Anaesthesia – L.A.

Operation – Repair of the wound.

Notes : There was a wound on the back side near midline in lumber regionwhich was muscle deep and sutured in layers.

Dr. Neera Jain Surgeons
Dr. Sanjay Kolani Dr. B.L. Laddha
Dr. K.K. Dangayeh
Dr. Paramjeet Singh
Dr. Ashok Naraina

Sd/

(Dr. K.K. Dangayeh)

Forwarded in original to SHO, PS Ganj in continuation to IR No. 840/92Injury No. 1 is simple in nature."

19. The above 'injury reports' of Farukh Chisti and Akil Chisti as well as their respective 'operative notes' clearly show that both of them sustained injuries on 14.04.1992 in the same incident. The report relating to Farukh shows that he sustained stab wound injuries due to the use of sharp edged weapons. Operative notes relating to him also show that injury Nos. 2 and 3 are simple and injury no. 1 is grievous (dangerous) in nature. Injury report relating to Akil Chisti also shows that he sustained stab wound injuries by use of sharp edged weapon. Though all the relevant aspects, namely, the injuries sustained by two accused appellants are available in the materials placed by the prosecution, there is no explanation at all as to how they sustained those injuries. In other words, the prosecution failed to prove the genesis of the incident and in fact they suppressed the same.

20. In *Lakshmi Singh and Others vs. State of Bihar,* (1976) 4 SCC 394, this Court held that:

> "… … It is well settled that fouler the crime, higher the proof, and hence in a murder case where one of the accused is proved to have sustained injuries in the course of the same occurrence, the non-explanation of such injuries by the prosecution is a manifest defect in the prosecution case andshows that the origin and genesis of the occurrence had beendeliberately suppressed which leads to the irresistible conclusion that the prosecution has not come out with a trueversion of the occurrence. … …"

It is clear that where the prosecution fails to explain the injuries on the accused, two results follow: (1) that the evidence of the prosecution witness is untrue and (2) that the injuries probabilize the plea taken by the appellants. In a murder case, non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the court can draw the following inferences:

> "(1) that the prosecution has suppressed the genesis and theorigin of the occurrence and has thus not presented the trueversion;
>
> (2) that the witnesses who have denied the presence of theinjuries on the person of the accused are lying on a mostmaterial point and therefore their evidence is unreliable; (3) that in case there is a defence version which explains theinjuries on the person of the accused it is rendered probableso as to throw doubt on the prosecution case."

21. It is further clear that the omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one. However, there may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This principle would apply to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, that it outweighs the effect of the omission on the part of the prosecution to explain the injuries.

22. In *Waman and Others vs. State of Maharashtra,* (2011) 7 SCC 295 wherein one of us (P. Sathasivam, J.) reiterated the very same principles and held that:

> "36. Ordinarily, the prosecution is not obliged to explain eachinjury on an accused even though the injuries might

havebeen caused in the course of occurrence, if the injuries areminor in nature, however, if the prosecution fails to explain agrievous injury on one of the accused persons which is established to have been caused in the course of the same occurrence then certainly the court looks at the prosecutioncase with a little suspicion on the ground that the prosecutionhas suppressed the true version of the incident. However, ifthe evidence is clear, cogent and creditworthy then non-explanation of certain injuries sustained by the deceased orinjury on the accused ipso facto cannot be the basis to discardthe entire prosecution case."

23. Mr. Tulsi, learned senior counsel for the appellants in Criminal Appeal No. 635 of 2012 contended by pointing out that since the complainant's were the aggressors, armed with sword, hockey sticks and pelted stones, the appellants/accused are entitled to avail the right of private defence for which he relied on various principles enunciated by this Court.

24. In *Raghubir Singh vs. State of Rajasthan and Ors.* (2011) 12 SCC 235, the following conclusion in para 16 has been pressed into service:

"16. In the light of the facts that have been enumerated above, itwould be seen that the observations of the High Court that bothsides had come to do battle appears to be justified as this is anassessment on an appreciation of the evidence which cannot besaid to be palpably wrong so as to invite the intervention of thisCourt. The observation in *Gajanand* case that in order to bring thematter within a free fight both sides have to come armed andprepared to do battle must be applied in the present case with theresult that each accused would be liable for his individual act."

25. In *Krishnan vs. State of Tamil Nadu,* (2006) 11 SCC 304, the following principles have been relied on:

"15. It is now well settled that the onus is on the accused to establish that his action was in exercise of the right of

privatedefence. The plea can be established either by letting indefence evidence or from the prosecution evidence itself, butcannot be based on speculation or mere surmises. The accused need not take the plea explicitly. He can succeed inhis plea if he is able to bring out from the evidence of theprosecution witnesses or other evidence that the apparentcriminal act was committed by him in exercise of his right ofprivate defence. He should make out circumstances that would have reasonably caused an apprehension in his mindthat he would suffer death or grievous hurt if he does notexercise his right of private defence. There is a clear distinction between the nature of burden that is cast on an accused under Section 105 of the Evidence Act (read withSections 96 to 106 of the Penal Code) to establish a plea ofprivate defence and the burden that is cast on the prosecution under Section 101 of the Evidence Act to proveits case. The burden on the accused is not as onerous as that which lies on the prosecution. While the prosecution is requiredto prove its case beyond a reasonable doubt, the accused candischarge his onus by establishing a preponderance of probability (vide *Partap v. State of U.P, Salim Zia v. State of U.P.* and *Mohinder Pal Jolly v. State of Punjab*.

16. In *Sekar v. State* this Court observed: (SCC p. 355) "A plea of right of private defence cannot be based on surmises and speculation. While considering whether the rightof private defence is available to an accused, it is not relevantwhether he may have a chance to inflict severe and mortalinjury on the aggressor. In order to find whether right ofprivate defence is available or not, the injuries received by theaccused, the imminence of threat to his safety, the injuries caused by the accused and the circumstances whether theaccused had time to have recourse to public authorities are allrelevant factors to be considered. Whether in a particular setof circumstances, a person acted in the exercise of the rightof private defence, is a

question of fact to be determined onthe facts and circumstances of each case. No test in the abstract for determining such a question can be laid down. Indetermining this question of fact, the court must consider allthe surrounding circumstances. It is not necessary for theaccused to plead in so many words that he acted in self-defence. If the circumstances show that the right of privatedefence was legitimately exercised, it is open to the courtto consider such a plea. In a given case, the court canconsider it even if the accused has not taken it, if the same is available to be considered from the material on record."

(emphasis supplied)

17. The above legal position was reiterated in *Rizan v. State of Chhattisgarh*. After an exhaustive reference to several decisions of this Court, this Court summarised the nature ofplea of private defence required to be put forth and thedegree of proof in support of it, thus: (SCC pp. 670-71, para13)

"Under Section 105 of the Evidence Act, 1872, the burden ofproof is on the accused, who sets up the plea of self-defence,and, in the absence of proof, it is not possible for the court topresume the truth of the plea of self-defence. The court shallpresume the absence of such circumstances. It is for theaccused to place necessary material on record either byhimself adducing positive evidence or by eliciting necessaryfacts from the witnesses examined for the prosecution. *An accused taking the plea of the right of private defence isnot required to call evidence; he can establish his plea byreference to circumstances transpiring from the prosecution evidence itself.* The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accuseddischarging any burden. When the right of private defence ispleaded, the defence must be a reasonable and probableversion satisfying the

court that the harm caused by theaccused was necessary for either warding off the attack orfor forestalling the further reasonable apprehension from theside of the accused. The burden of establishing the plea ofself-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record. …

The accused need not prove the existence of the right ofprivate defence beyond reasonable doubt. It is enough for him to show as in a civil case that the preponderance ofprobabilities is in favour of his plea."

(emphasis supplied)"

26. In *Babulal Bhagwan Khandare and Another vs. State of Maharashtra,* (2005) 10 SCC 404, this Court held that non-explanation of the injuries sustained by the accused at about the time of occurrence or in the course of altercation is a very important circumstance. It was further held that the right of self defence is a very valuable right, serving a social purpose and should not be construed narrowly.

27. It is clear that it is the duty of the prosecution to explain the injuries sustained by the accused and establish the genesis of the incident by placing acceptable materials. In the case on hand, we have already pointed out there is enough material to show that in the course of the very same incident Farukh (A-4) and Akil (A-3) also sustained injuries. In fact, Farukh sustained grievous injury by use of sharp edged weapon. However, these injuries were not explained at all by the prosecution.

28. Mr. Jasbir Singh Malik, learned counsel for the State by relying on a decision of this Court reported in *Mitthulal and Another vs. The State of Madhya Pradesh,* (1975) 3 SCC 529 submitted that evidence in cross case cannot be relied upon. It is true that in the said decision, this Court held that it has not accepted the procedure followed by the High Court which has based its conclusion not only on the finding recorded in the case against the appellants therein and the four other accused but also taken into account the evidence recorded in the cross case

against Ganpat, Rajdhar and others. This Court held that the course adopted by the High Court was clearly impermissible. There is no dispute about the said proposition and in fact in the case on hand, neither the trial court nor the High Court relied on the evidence led in the cross case but the same were tried separately and in fact appeals are still pending before the High Court against the conviction in the cross case.

29. The other decision relied on by the State counsel is reported in *Sambhu Das alias Bijoy Das and Another vs. State of Assam,* (2010) 10 SCC 374 which shows that this Court in exercise of its powers under Article 136 of the Constitution will not reopen the findings of the High Court when there are concurrent findings of facts and there is no question of law involved and the conclusion is not perverse. The above proposition holds good. We also reiterate that Article 136 of the Constitution does not confer a right of appeal on a party. It only confers discretionary power on this Court to be exercised sparingly to interfere in suitable cases where grave mis-carriage of justice has resulted from illegality or misapprehension or mistake in reading evidence or from ignoring, excluding or illegally admitting material evidence.

Summary:

30. The analysis of the prosecution case, undoubtedly, has led two sets of evidence. The evidence adduced suggest that the accused in the present appeals are to some extent victims of armed aggression at the hands of the deceased and his companions. We have pointed out that Tariq Mohammad (PW-1) deposed that he saw Idris (deceased) with a knife in his hand, Mohd. Aslam (PW-3), Sagir (PW-6), Shamim (PW-18) and others armed with sticks left for the house of the Farukh (A-4). It was also deposed by him that he tried to stop Idris and others but in vain. Bhanwar Singh (PW-4) and Bhanwar Lal Sharma (PW-5) –the police constables, examined on the side of the prosecution, were present at the scene of offence. We have already dealt with the evidence of these two witnesses which clearly show that the complainant's party, i.e., accused

in FIR No. 91 of 1992 were armed with sword, hockey sticks etc. and entered into Chisti Manzil, hurled abuses, threw stones on the inmates and exhorted to kill Khalil Chisti (A-2) and Farukh (A-4). These persons also deposed that Idris (deceased) and the accused in FIR No. 91 of 1992 were the aggressors in the incident. PWs 4 & 5 were categorized as independent witnesses by the trial Court. Even in their evidence, they did not attribute any specific overt act to Khalil (A-2). M.A. Tariq I.O. (PW-25) also deposed that the complainant's party forcibly entered the house of the appellants herein with the intent to attack them.

31. Mohd. Aslam (PW-3), Sagir Ahmed (PW-6), Sayeed Javed (PW-13) and Shamim (PW-18) were examined as eye witnesses to the occurrence. Admittedly, none of them offered any explanation to the admitted injuries received by Farukh (A-4) and Akil (A-3). We have already adverted to the details as to the injury report relating to these persons. In the absence of any explanation by the prosecution, we are of the view that they are guilty of suppressing the real genesis of the occurrence. The trial Court had also condemned the evidence of PW-18 for narrating a parrot like version and also pointed out numerous improvements made.

32.The analysis of the materials clearly show that two versions of the incident adduced by the prosecution are discrepant with each other. In such a situation where the prosecution leads two sets of evidence each one which contradicts and strikes at the other and shows it to be unreliable, the result would necessarily be that the Court would be left with no reliable and trustworthy evidence upon which the conviction of the accused might be based. Though the accused would have the benefit of such situation and the counsel appearing for the appellants prayed for acquittal of the appellants of all the charges, in view of the principles which we have already discussed, we are of the view that each accused can be fastened with individual liability taking into consideration the specific role or part attributed to each of the accused. In other words, both sides can be convicted for their individual

acts and normally no right of private defence is available to either party and they will be guilty of their respective acts.

33. Having regard to the facts and circumstances of the role attributed to Khalil (A-2), we are of the view that there is no scope for invoking the applicability of Section 34 IPC against him. Even independent witnesses, viz., PWs 4 and 5 do not attribute any overt act to him.

34. As rightly pointed out by the learned counsel for the appellants, in the light of the case and cross-case, it would be in the fitness of things that the respective appeals preferred by the appellants against Session Case No. 157 of 2011 and the one preferred by the convicts in Sessions Case No. 178 of 2011 ought to have been heard and disposed of simultaneously by the High Court. Unfortunately, such recourse has not been adopted by the High Court and we were informed that the other appeal (Crl. Appeal No. 131 of 2011) relating to Sessions Case No. 178 of 2011 is still pending on the file of the High Court.

35. Coming to the other accused, namely, Yasir Chisti (A-1) and Akil Chisti (A-3), they cannot be punished and fastened the liability of individual acts committed by them with the aid of Section 34 IPC without acceptable materials. Though the prosecution witnesses mentioned that these appellants had a pistol, they did not state whether anyone was hit by that pistol fire and no specific evidence was led in that the shot emanated from the pistol in their hand. Even Mohd. Aslam (PW-3) -the informant, stated before the Court that these appellants fired from their pistols but no one was hit from that fire.

36. As discussed earlier, the evidence of PWs 4 & 5 – police constables, clearly shows that the complainant's party was armed with sword and hockey sticks and were abusing and pelting stones. Sagir (PW-6), though deposed that the present appellants had a revolver and they fired from that pistol, without telling whether anybody was injured from such firing. PW-4 – one of the prosecution witnesses, police constable, had denied □that these appellants had revolvers, in fact, PWs 4 and 5 did

not attribute any overt done by the appellants, i.e., A-1 and A-3 and categorically stated that the complainant's party was the armed aggressors. It is relevant to point out that on the same day in Sessions Case No. 178 of 2001, the informant along with five other co-accused was convicted under Sections 307, 324, 326, 452 and 148 IPC read with Section 149 IPC. We are also satisfied that though the prosecution witnesses have stated that these appellants were having revolvers, the evidence of PWs 4 & 5 clearly shows that the complainant's party were aggressors and the present appellants were not carrying any revolver.

37. In the light of the facts that have been enumerated above, particularly, from the evidence of PWs 4 & 5 – police constables attached to the Tripolia Police Chowki, P.S. Ganj, and the materials abundantly show that the deceased and the complainant's party were also armed with sword and hockey sticks. In the absence of evidence of fire shot from the revolvers of A-1 and A-3 and in view of the statement of PWs 3, 6, 13 & 18 alleging against the present appellants, in order to bring the matter within a free fight both sides have to come armed and prepared to do battle must be applied in the present case with the result that each accused would be liable for his individual act alone.

Conclusion:

38. In the light of the above discussion, even if we accept the evidence of prosecution witnesses that A-2 was having a sword and PW-3 sustained injuries at his instance, considering his individual act, he can only be convicted under Section 324 of IPC and taking note of his age and of the fact that he was in custody from 14.04.1992 till 09.05.1992 during the trial and again from 31.01.2011 to 12.04.2012 (roughly one year and four months), we feel that the ends of justice would be met by altering the sentence to the period already undergone. The conviction and sentence is modified to □the extent mentioned above and Criminal Appeal No. 634 of 2012 is disposed of accordingly.

39. By order dated 10.05.2012, this Court directed Dr. Mohammad Khalil Chisti – being a national of Pakistan-appellant in Crl.A. No. 634 of 2012 or his nominee to deposit a sum of Rs. 5 lakhs as security with the Registry of this Court within a period of two weeks from that date and on fulfilling the above condition, the appellant was permitted to leave India and visit his home country, i.e., Pakistan. It is informed to us that the said condition has been complied with and an amount of Rs. 5 lakhs was deposited. By another order dated 17.09.2012, this Court directed the Registry to invest the amount deposited by the appellant in an interest bearing account in any Nationalised Bank initially for a period of one year. In view of our conclusion that no further custody is required, the Registry is directed to return the said amount to Dr. Mohammed Khalil Chisti or his nominee forthwith. It is further directed that if the passport or any other document of the appellant is in the custody of the trial Court or any other authority of the Government of India, they are directed to return the same to him and he is free to return to his country without any restriction. Taking note of his age and academic qualification etc., to facilitate such course, the concerned department of the Government of India is directed to issue necessary visa and complete all the formalities for his smooth return to his country.

40. In the light of the evidence and conclusion in respect of Yasir Chisti (A-1) and Akil Chisti (A-3), the appellants in Criminal Appeal No. 635 of 2012, taking note of their individual acts, they can only be convicted under Section 324 of IPC and also in view of the fact that A-1 and A-3 have served approximately 11 and 10 months respectively, the same would be sufficient and no further imprisonment is required, hence, both of them are directed to be released forthwith, if they are not required in any other case.

41. With the above modification, both the appeals are disposed of accordingly.

K.K.T. Appeals disposed of.

MAA VAISHNO DEVI MAHILA MAHAVIDYALAYA
v.
STATE OF U.P. & ORS.
(Writ Petition (Civil) No. 276 of 2012)

DECEMBER 13, 2012.

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

Education/Educational Institutions - Professional educational institutions - Affiliation - Cut off date for affiliation fixed by Supreme Court in a judgment - Universities declining to grant affiliation - Challenged by the institutions before High Court as well as Supreme Court by filing writ petitions - High Court dismissed Writ Petitions on the ground that it had no jurisdiction to extend the cut-off date provided in the judgment of Supreme Court - Held: The authorities were not wrong in rejecting the applications for affiliation in view of the cut-off date as fixed by Supreme Court - Grant of recognition by NCTE under NCTE Act is the condition precedent for grant of affiliation by the examining body/University - The concerned Department of the State or the affiliating body can lay down guideline or policy only in conformity with the directions issued by NCTE - The NCTE Act being the law enacted by centre would be supreme and the state law must give way in favour of central law to the extent of repugnancy - The conditions imposed by NCTE while granting recognition, shall prevail and cannot be altered, re-examined or infringed under the garb of state law - Operation of the University Act would be enforceable in case of technical colleges only when the condition prescribed by the University for grant and continuation of affiliation is in conformity with the norms and guidelines prescribed by NCTE -Once the relevant Schedules are prescribed under Regulations or judge-made law, no one is entitled to carve out exceptions to the prescribed Schedules - The defaulting body would be liable for the proceedings for

contempt of courts and for departmental disciplinary action - There is some over-lapping and contradiction between the dates and period stated under the Regulations inter se and even with reference to judgments of the Court - In order to avoid the ambiguity and confusion, fresh schedule is prescribed, in relation to recognition and affiliation- Contempt of Courts Act, 1971 - National Council for Teachers Education Act, 1993 - ss. 14(1)(a) and 16 - NCTE (Form of application for recognition, the time limit of submissions of application, determination of norms and standards for recognition of teacher education programmes and permission to start new course or training) Regulations, 2002 - National Council for Teachers Education (Recognition, Norms and Procedure) Regulations, 2005 - National Council for Teacher Education (Recognition, Norms and Procedure) Regulations, 2009 - Constitution of India, 1950 - VII Schedule - List I Entry 66 and List III Entry 25.

Constitution of India, 1950 - Art. 254, VII Schedule, List I and List III - Where the field is covered by the Parliamentary Law in terms of List I and List III, subject to the exceptions stated in Art. 254, the law made by the State Legislature would, to the extent of repugnancy would be void - The test of repugnancy/conflict is not restricted to the obedience of one resulting in disobedience of other but even where result of one would be in conflict with the other..

The Supreme Court, in the case of *College of Professional Education and Ors. vs. State of Uttar Pradesh, recorded that for the academic year 2012-13 and subsequent academic years, the educational institutions and the State Government arrived at a broad consensus regarding the procedure and terms and conditions of admission, recognition and affiliation. A Schedule for admission was provided by the Court for the academic year 2012-13. The court fixed a cut-off date for affiliation. The colleges which were affiliated upto

7.7.2011 alone were permitted to participate in the counseling for the academic year 2011-12. For the next consecutive academic years, the colleges which were permitted to participate in the counseling, were the ones which received affiliation on or before 10th May of that year.

Some Colleges of the State, which did not receive affiliation from the Universities, filed writ petitions before High Court, challenging the order of the Universities declining to grant affiliation. The writ petitions were dismissed by High Court primarily on the ground that the court had no jurisdiction to extend the cut-off date as provided in the judgment of Supreme Court in the case of *College of Professional Education. Appeals have been filed challenging the judgment of High Court. Some institutions filed writ petitions before this Court, challenging the order declining grant of affiliation.

Disposing of the appeals and the writ petitions, the Court

HELD: 1.1. The National Council for Teachers Education Act, 1993 (NCTE Act) is a special act enacted to cover a particular field, i.e. teacher training education and, thus, has to receive precedence over other laws in relation to that field. No institution or body is empowered to grant recognition to any institution under the NCTE Act or any other law for the time being in force, except the NCTE itself. Grant of recognition by the Council is a condition precedent to grant of affiliation by the examining body to an institute. [Para 41] [849-G-H; 850-A]

1.2. The non-obstante language of Section 16 of the NCTE Act requires the affiliating body to grant affiliation only after recognition or permission has been granted by the NCTE. The provisions of Section 16 give complete supremacy to the expert body/NCTE in relation to grant

of recognition. In fact, it renders the role of other bodies consequential upon grant and/or refusal of recognition. When the NCTE is called upon to consider an application for grant of recognition, it has to consider all the aspects in terms of Section 14(1)(a) of the NCTE Act. The amplitude of this provision is very wide and hardly leaves any matter relatable to an educational institution outside its ambit. Thus, the NCTE is a supreme body and is vested with wide powers to be exercised with the aid of its expertise, in granting or refusing to grant recognition to an educational institution. The NCTE is the paramount body for granting the approval/recognition not only for commencing of fresh courses but even for increase in intake, etc. The Council has to ensure maintenance of educational standards as well as strict adherence to the prescribed parameters for imparting of such educational courses, including the infrastructure. The provision and scheme of the NCTE Act is pari materia to that of the Medical Council of India Act, 1956 and the All India Council for Technical Education Act, 1987 etc. [Para 42] [850-A-E]

1.3. The Council is the authority constituted under the Central Act with the responsibility of maintaining standards of education and judging upon the infra-structure and facilities available for imparting such professional education. Its opinion is of utmost importance and shall take precedence over the views 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 guideline or policy which would be in conflict with the Central statute or the standards laid down by the Central body. State can frame its policy for admission to such professional courses but such policy again has to be in conformity with the directives issued by the Central body. [Para 47] [855-F-H; 856-A]

State of Tamil Nadu and Anr. v. Adhiyaman Educational and Research Institute and Ors. **(1995) 4 SCC 104: 1995 (2) SCR 1075;** *Jaya Gokul Educational Trust v. Commissioner and Secretary toGovernment Higher Education Deptt., Thiruvananthapuram, Kerala State and Anr.* **(2000) 5 SCC 231: 2000 (2) SCR 1234;** *Maharashtra v. Sant Dnyaneshwar Shikshan Shastra Mahavidyalaya and Ors.* **(2006) 9 SCC 1: 2006 (3) SCR 638 - relied on.**

1.4. In the present cases, while the State grants its approval, and University its affiliation, for increased intake of seats or commencement of a new course/college, its directions should not offend and be repugnant to what has been laid down in the conditions for approval granted by the Central authority or Council. What is most important is that all these authorities have to work ad idem as they all have a common object to achieve i.e. of imparting of education properly and ensuring maintenance of proper standards of education, examination and infrastructure for betterment of educational system. [Para 47] [856-A-C]

2.1. The NCTE Act was enacted by the Parliament with reference to Entry 66 of List I of Schedule VII of the Constitution. There is no such specific power vested in the State Legislature under List II of the Seventh Schedule. Entry 25 of List III of the Seventh Schedule is the other Entry that provides the field for legislation both to the State and the Centre, in relation to education, including technical education, medical education and Universities; vocational and technical training and labour. The field is primarily covered by the Union List and thus, the State can exercise any legislative power under Entry 25, List III but such law cannot be repugnant to the Central law. Wherever the State law is irreconcilable with the Central law, the State Law must give way in favour of the Central law to the extent of repugnancy. This will

show the supremacy of the Central law in relation to professional education, including the teacher training programmes. [Para 48] [856-D-G]

Dr. Preeti Srivastava and Anr. v. State of Madhya Pradesh and Ors. **(1999) 7 SCC 120: 1999 (1) Suppl. SCR 249 - followed.**

Medical Council of India v. State of Karnataka **(1998) 6 SCC 131: 1998 (3) SCR 740;** *S. Satyapal Reddy v. Government of A.P.* **(1994) 4 SCC 391;** *Jaya Gokul Educational Trust v. Commissioner and Secretary to Government Higher Education Deptt.,Thiruvananthapuram, Kerala State and Anr.* **(2000) 5 SCC 231: 2000 (2) SCR 1234;** *State of Tamil Nadu and Anr. v. Adhiyaman Educational and Research Institute and Ors.* **(1995) 4 SCC 104: 1995 (2) SCR 1075;** *Maharashtra v. Sant Dnyaneshwar Shikshan Shastra Mahavidyalaya and Ors.* **(2006) 9 SCC 1: 2006 (3) SCR 638;** *Engineering Kamgar Union v. Electro Steels Castings Ltd.and Anr.* **(2004) 6 SCC 36: 2004 (1) Suppl. SCR 301- relied on.**

2.2. Wherever the field is covered by the Parliamentary law in terms of List I and List III, the law made by the State Legislature would, to the extent of repugnancy, be void. Of course, there has to be a direct conflict between the laws. The direct conflict is not necessarily to be restricted to the obedience of one resulting in disobedience of other but even where the result of one would be in conflict with the other. It is difficult to state any one principle that would uniformly be applicable to all cases of repugnancy. It will have to be seen in the facts of each case while keeping in mind the laws which are in conflict with each other. Where the field is occupied by the Centre, subject to the exceptions stated in Article 254, the State law would be void. [Para 53] [863-G-H; 864-A-B]

2.3. In the present case, the provisions of the NCTE Act is a Central legislation referable to Entry 66 of List I of the Seventh Schedule. Thus, no law enacted by the State, which is in conflict with the Central Law, can be permitted to be operative. [Para 54] [864-C]

2.4. There is a possibility of some conflict between a University Act or Ordinance relating to affiliation with the provisions of the Central Act. In such cases, after coming into operation of the Central Act, the operation of the University Act would be deemed to have become unenforceable in case of technical colleges. The provisions of the Universities Act regarding affiliation of technical colleges and conditions for grant of continuation of such affiliation by university would remain operative but the conditions that are prescribed by the university for grant and continuation of affiliation must be in conformity with the norms and guidelines prescribed by the NCTE. [Para 56] [864-F-H; 865-A]

2.5. Under Section 14 and particularly in terms of Section 14(3)(a) of the Act, the NCTE is required to grant or refuse recognition to an institute. It has been empowered to impose such conditions as it may consider fit and proper keeping in view the legislative intent and object in mind. In terms of Section 14(6) of the Act, the examining body shall grant affiliation to the institute where recognition has been granted. Granting recognition is the basic requirement for grant of affiliation. It cannot be said that affiliation is insignificant or a mere formality on the part of the examining body. It is the requirement of law that affiliation should be granted by the affiliating body in accordance with the prescribed procedure and upon proper application of mind. Recognition and affiliation are expressions of distinct meaning and consequences. The purpose of recognition and affiliation is different. In the context of the Act,

affiliation enables and permits an institution to send its students to participate in public examinations conducted by the examining body and secure the qualification in the nature of degrees, diploma and certificates. On the other hand, recognition is the licence to the institution to offer a course or training in teaching education. The affiliating body/examining body does not have any discretion to refuse affiliation with reference to any of the factors which have been considered by the NCTE while granting recognition. [Para 57] [865-B-G]

Chairman, Bhartia Education Society v. State of Himachal Pradesh and Ors. **(2011) 4 SCC 527: 2011 (2) SCR 461 - relied on.**

2.6. Once the affiliating body acts within the fundamentals of Section 14 of the Act, possibility of a conflict can always be avoided. The fields which are sought to be covered under the provisions of Section 37 of the Universities Act and the Statutes of various universities are clearly common to the aspects which are squarely covered by the specific language under the Act. That being so, all State laws in regard to affiliation in so far as they are covered by the Act must give way to the operation of the provisions of the Act. The requirements which have been examined and the conditions which have been imposed by the NCTE shall prevail and cannot be altered, re-examined or infringed under the garb of the State Law. The affiliating/examining body and the State Government must abide by the proficiency and command of the NCTE's directions. Existence of building, library, qualified staff, financial stability of the institution, accommodation, etc. are the subjects which are specifically covered under Section 14(3)(b) of the Act. Thus, they would not be open to re-examination by the State and the University. If the recognition itself was conditional and those conditions have not been satisfied, in such circumstances, within the ambit and scope of

Sections 46 and 16 of the Act, the affiliating body may not give affiliation and inform the NCTE forthwith of the shortcomings and non-compliance of the conditions. In such situation, both the Central and the State body should act in tandem and, with due coordination, come to a final conclusion as to the steps which are required to be taken in regard to both recognition and affiliation. But certainly, the State Government and the University cannot act in derogation to the NCTE. [Paras 59 and 61] [866-D; 867-G-H; 868-A-E]

St. John Teachers Training Institute v. Regional Director, National Council for Teacher Education **(2003) 3 SCC 321: 2003 (1) SCR 975 - relied on.**

2.7. The State opinion, as contemplated under Section 37 of the University Act, to the extent it admits to overreach, is reconcilable and its results are not in its orientation to the directives of the NCTE are void and inoperative to the extent they can be resolved in which case clear precedence is to be given to the directives of the NCTE during such resolution. The opinion of the State, therefore, has to be read and construed to mean that it would keep the factors determined by the NCTE intact and then examine the matter for grant of affiliation. The role of the State Government is minimised at this stage which, in fact, is a second stage. It should primarily be for the University to determine the grant or refusal of affiliation and role of the State should be bare, minimum non-interfering and non-infringing. [Para 62] [868-F-H; 869-A]

2.8. Once it grants recognition, then such grant attains supremacy viz-a-viz the State Government as well as the affiliating body. Normally, these questions cannot be re-agitated at the time of grant of affiliation. Once the University conducts inspection in terms of its Statutes or Act, without offending the provisions of the Act and

conditions of recognition, then the opinion of the State Government at the second stage is a mere formality unless there was a drastic and unacceptable mistake or the entire process was vitiated by fraud or there was patently eminent danger to life of the students working in the school because of non-compliance of a substantive condition imposed by either of the bodies. In the normal circumstances, the role of the State is a very formal one and the State is not expected to obstruct the commencement of admission process and academic courses once recognition is granted and affiliation is found to be acceptable. [Para 63] [869-D-G]

2.9. The exercise of discretion by the State Government and affiliating body has to be within the framework of the Act, the Regulations and conditions of recognition. The Court stated that the State Government or the Union Territory has to necessarily confine itself to the guidelines issued by the NCTE while considering application for grant of 'No Objection Certificate'. Minimization of the role of the State at the second stage can also be justified on the ground that affiliation primarily is a subject matter of the University which is responsible for admission of the students laying down the criteria thereof, holding of examinations and implementation of the prescribed courses while maintaining the standards of education as prescribed. [Para 64] [870-A-D]

St. John Teachers Training Institute v. Regional Director, National Council for Teacher Education **(2003) 3 SCC 321: 2003 (1) SCR 975 - relied on.**

Maharashtra v. Sant Dnyaneshwar Shikshan Shastra Mahavidyalaya and Ors. **(2006) 9 SCC 1;** *Bhartia Education Society v. State of Himachal Pradesh and Ors.* **(2011) 4 SCC 527: 2011 (2) SCR 461 - referred to.**

3.1. Once the relevant Schedules have been

prescribed under the Regulations or under the Judge made law, none, whosoever it be, is entitled to carve out exceptions to the prescribed Schedule. Adherence to the Schedule is the essence of granting admission in a fair and transparent manner as well as to maintain the standards of education. The purpose of providing a time schedule is to ensure that all concerned authorities act within the stipulated time. The prescribed schedules under the Regulations and the judgments must be strictly adhered to without exceptions. None in the hierarchy of the State Government, University, NCTE or any other authority or body involved in this process can breach the Schedule for any direct or indirect reason. Anybody who is found to be defaulting in this behalf is bound to render himself or herself liable for initiation of proceedings under the provisions of the Contempt of Courts Act, 1971 as well as for a disciplinary action in accordance with the orders of the Court. Adherence to Schedule achieves the object of the Act and its various aspects. Disobedience results in unfair admissions, not commencing the courses within the stipulated time and causing serious prejudice to the students of higher merit resulting in defeating the rule of merit. [Paras 65, 66 and 67] [870-E-F; 871-A-C, F]

3.2. The Court adopts and reiterates the Schedule stated by this Court in the case of *College of Professional Education in relation to admission as well as recognition and affiliation. The process for grant of recognition, affiliation and thereby sanctioning of commencement of the courses in terms of the Regulations and the orders of this Court gives an outer period of approximately 270 days, i.e. 9 months, from 1st September to 10th May of the year immediately preceding the concerned academic year. Thus, for the entire process to be within this framework, it must be completed within the afore-stated period. The process inter alia includes various steps including comments of the State,

inspection of the institution and compliance of the various conditions afore-noted in the order of recognition and affiliation by the affiliating body. [Paras 68 and 69] [871-G; 872-A-C]

3.3. There appear to be some over-lapping periods and even contradictions between the dates and periods stated under the regulations inter se and even with reference to the judgments of this Court prescribing the Schedule. For example in terms of the judgment of this Court in the case of *College of Professional Education the last date for grant of affiliation is 10th May of the concerned year, but as per Regulation 5.5 of the NCTE Regulations, 2009, the last date for grant of recognition is 15th May of the relevant year. Similarly, there is an overlap between the period specified in Regulation 7.1 and that under Regulation 7.2. Such overlapping is likely to cause some confusion in the mind of the implementing authority as well as the applicant. Thus, it is necessary for this Court to put to rest these avoidable events and unnecessary controversies. Compelled with these circumstances and to ensure that there exists no ambiguity, uncertainty and confusion, the Court directs and prescribes a fresh schedule upon a cumulative reading of the Regulations and judgments of this Court in relation to recognition and affiliation. [Para 70] [872-D-H]

3.4. The schedule stated in the case of *College of Professional Education and in this judgment in relation to admissions, recognition, affiliation and commencement of courses shall be strictly adhered to by all concerned including the NCTE, the State Government and the University/examining body. In the event of disobedience of schedule and/or any attempt to overreach or circumvent the judgment of this Court and the directions contained herein, the concerned person shall render himself or herself liable for proceedings

under the Contempt of Courts Act, 1971 and even for departmental disciplinary action in accordance with law. [Para 74] [878-F-H; 879-A]

3.5. The NCTE/ State Government/ Examining or affiliating body are directed to consider the applications and pass appropriate orders granting or refusing to grant recognition/affiliation to the petitioner institutions within three months from the date of the judgment. If the institutions are aggrieved from the order passed by the authorities in terms of clause 'C', they will be at liberty to challenge the same in accordance with law. The NCTE shall circulate the copy of this judgment to all Regional Committees, concerned State Governments and all affiliating bodies and also put the some on its website for information of all stakeholders and public at large. [Para 74] [879-B-D]

College of Professional Education and Ors. vs. State of Uttar Pradesh* **(2013) SCC 721 - relied on.

4.1. There is no fault with the view taken by the authorities concerned in rejecting the application or not granting application for affiliation on the ground that there was a cut-off date and/or the conditions of recommendation/affiliation had not been satisfied. 10th of May has been provided as the cut-off date, after which no affiliation for the current academic year would be granted. This, being the law stated by this Court, is binding on all concerned, including any authority. The authorities have rightly acted in declining to entertain and/ or refusing affiliation to the institutions being beyond the cut-off date. Adherence to the schedule was the obligation of the authorities and the institutions cannot raise any grievance in that regard. The said time schedule must become operative in all respects and nobody should be permitted to carve exceptions to this mandatory direction. [Para 71] [876-A-D]

4.2. The plea has been taken by the respondents University/State that conditions of affiliation have not been satisfied. It is not for this Court to examine the compliance or breach of conditions and their extent in the special leave petitions or writ petitions as the case may be. The disputes are of very serious nature. They will squarely fall beyond the ambit of appellate or writ jurisdiction by this Court. This is for the specialised bodies to examine the matters upon physical verification and to proceed with the application of the institute in accordance with law. [Para 72] [876-D-E, G-H; 877-A]

4.3. Vide order dated 26th July, 2012 a stay in regard to counseling and admission was granted by this Court. However, the stay was vacated by order dated 27th September, 2012. In furtherance to the above order, the admissions had been granted in the recognised and affiliated institutes. The interim order dated 27th September, 2012 is made absolute. In the colleges which were neither recognised nor affiliated, whether or not included in the list of counseling, no admissions were given to the students. The petitioner/appellant colleges fall in that category. No relief can be granted to them in the present writ petitions and appeals except issuance of certain directions. [Paras 73 and 74] [877-A-B; 878-D-E]

Case Law Reference:

1995 (2) SCR 1075	**Relied on**	**Para 43, 51**
2000 (2) SCR 1234	**Relied on**	**Para 45, 51**
2006 (3) SCR 638	**Relied on**	**Para 46, 52, 56, 64**
1998 (3) SCR 740	**Relied on**	**Para 48**
1999 (1) Suppl. SCR 249	**Followed**	**Para 49**
(1994) 4 SCC 391	**Relied on**	**Para 50**

2004 (1) Suppl. SCR 301	**Relied on**	**Para 52**
2003 (1) SCR 975	**Relied on**	**Para 59**
(2013) Vol. 2 SCC 721	**Relied on**	**Para 70, 74**

CIVIL ORIGINAL JURISDICTION

Under Article 32 of the Constitution of India

W.P (C) No. 276 of 2012

WITH

C.A. No. 9064/2012, 9065/2012, 9066/2012, 9067/2012, 9068/2012, 9069/2012, 9070/2012, 9071/2012, 9072/2012, 9073/2012, 9074/2012, 9075/2012, 9076/2012, 9078/2012, 9077/2012, 9062/2012, 9063/2012 W.P (C) No. 296 of 2012, 306 of 2012, 307 of 2012, 329 of 2012, 354 of 2012, 345 of 2012, 346 of 2012, 347 of 2012, 349 of 2012, 350 of 2012, 354 of 2012, 395 of 2012, 389 of 2012, 397 of 2012.

Krishnan Venugopal, Jayant Bhushan, S.R. Singh, P.N. Mishra, Pramod Swarup, Pooja Dhar, Udai U.S. Rathore, Gaurav Agrawal, Rajesh Srivastava, Meenesh Dubey, D.P. Pande, S.R. Setia, Raghvendra Singh, Sanjay Sharawat, Aditya Kant Sharma, Ritesh Agarwal, Aneesh Mittal, Rita Chaudhary, Madhur Jain, Sunil Kumar Jain, D.N. Dubey, Avnish Singh, Ujjawal Pandey, Sushant K. Yadav, Yash Pal Dhingra, Satyendra Kumar, Sunita Bhardwaj, Bijendra Singh, Shail Kumar Dwivedi, Siddharth Krishna Dwivedi, C.D. Singh, Ayesha Chaudhary, Amitesh Kumar, Ravi Kant, Gopal Singh, Ameet Singh, Pareena Swarup, Sushma Verma, Mukul Singh, Praveen Swarup and Vishwajit Singh for the appearing parties.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. Leave granted in all the Special Leave Petitions.

2. In the case of College of *Professional Education and*

Others Vs. State of Uttar Pradesh [Civil Appeal No.5914 of 2011 decided on 22nd July, 2011], this Court recorded that for the academic year 2012-2013 and subsequent academic years, the institutions and the State Government have arrived at a broad consensus regarding the procedure and terms and conditions of admission, recognition and affiliation. The terms and conditions which have been agreed and had received the approval of the court were noticed in great detail in that judgment. For the academic year 2012-2013 and subsequent years, the following schedule for admission was provided :

1.	Publication of Advertisement	01.02.2011
2.	Sale of Application Forms and their submission	10.02.2012 to 10.03.2012
3.	Date of Entrance Examination	20.04.2012 to 25.04.2012
4.	Declaration of Result	25.05.2012 to 30.05.2012
5.	Commencement and completion of counseling	01.06.2012 to 25.06.2012
6.	Last Date of Admissions after counseling	28.06.2012
7.	Commencement of Academic Session	01.07.2012

3. The Court further directed that for the academic year, there would be only one counseling. It was to continue for a period of 25 days and was to be conducted as per the directions contained in the judgment. Having provided for the various facets in relation to the manner, procedure and methodology to be adopted for admissions, the court also provided for the time by which affiliation should be granted to the colleges for the relevant academic year. Clause VI(b) of the judgment which has bearing upon the matters in issue before us reads as under:-

"(b) After the counseling is over, the concerned University will continue to allot the candidates from the above mentioned waiting list against the vacant seats till all the seats in the colleges are filled up. It is further submitted that the organizing university will provide students only to the existing B.Ed. College and all those B.Ed. Colleges which will get affiliation upto dated 07.07.2011 will not be considered for counseling to the year 2011-12 and for the next consecutive years and onward the colleges which will be get affiliated on or before 10th of May of that year, would be considered for counseling."

4. As is clear, the Court had fixed a cut-off date for affiliation. The colleges which were affiliated upto 7th July, 2011 only were permitted to participate in the counseling for the academic year 2011-2012. For the next consecutive academic years, the colleges which were permitted to participate in the counseling were the ones' which received affiliation on or before 10th May of that year. In other words, the colleges which did not receive affiliation by the said cut-off date were not to be included in the counseling.

5. Some of the colleges in the State of Uttar Pradesh which had not received affiliation filed writ petitions challenging the order of the universities declining grant of affiliation to them. These writ petitions came to be dismissed by different judgments of the High Court of Judicature at Allahabad, Lucknow Bench, inter alia, but primarily on the ground that the court had no jurisdiction to extend the cut-off date as provided in the judgment of this Court in the case of *College of Professional Education* (supra).

6. In 17 special leave petitions, different petitioners have challenged the judgments of the concerned High Court before this Court. The petitioners in 15 writ petitions have approached this Court under Article 32 of the Constitution of India challenging the order of the university/authorities declining to grant affiliation again in view of the cut-off date fixed by this Court.

7. These writ petitions and appeals have raised common questions of law on somewhat different facts. Thus, we propose to dispose of these writ petitions and appeals by this common judgment. Before we dwell upon the real controversy arising for consideration of the Court in the present case, it will be necessary for the court to refer to the facts in some of the writ petitions/appeals.

Facts

Writ Petition (Civil) No. 276 of 2012

8. It is the case of the petitioner that Maa Vaishno Devi Shiksha Samiti, a society registered under the provisions of the Societies Registration Act, 1860 had been imparting education in various disciplines as main object. In furtherance to its stated objects, the society opened Maa Vaishno Devi Mahila Mahavidyalaya (for short, the "College") to conduct courses in education (B.A., B.Ed.) in the year 2007. Initially, the college started with B.A. course and was granted affiliation by Dr. Ram Manohar Lohia Avadh University (for short, the 'University') in accordance with law. Thereafter, the college intended to conduct B.Ed course for which it applied for grant of affiliation and recognition to the respective authorities. On 24th September, 2010, the National Council for Teacher Education (for short "NCTE") granted recognition to the petitioner college for conducting B.Ed. courses of secondary level of one year with annual intake for 100 students from the academic session 2010-2011.

9. In furtherance to the request of the College, the University conducted inspection of the College and thereupon recommended its case to the State Government. On 6th July, 2011 the State Government granted permission to accord temporary affiliation to the petitioner to run B.Ed classes for one year on self-finance basis for the academic year 2011-2012. Subsequently, on 22nd July, 2011, as already noticed, the judgment of this Court came to be passed in the case of *College of Professional Education and Ors.* (supra) fixing the

time schedule for grant of affiliation. A strict timeline was laid down for application, examination, counseling and admissions with the academic session to begin on 1st July, 2012.

10. Para VI of the judgment dated 22nd July, 2011 does have an element of ambiguity. While noticing the submissions and passing appropriate directions, the court noticed "it is further submitted that the organizing university will provide students only to the existing B.Ed. College and all those B.Ed. colleges which will get affiliation dated 7th July, 2011 will not be considered for counseling to the year 2011-12 and for the next consecutive year and onward, the colleges which will get affiliated on or before 10th of May of that year would be considered for counseling.....". It is obvious that there is something amiss prior to the words 'will not' appearing immediately after the date of 7th July, 2011. Obviously, what the court meant was that the colleges which are affiliated or which will get affiliation upto 7th July, 2011 are the colleges to which the organizing university will provide students, but other colleges which get affiliation after 7th July, 2011 will not be considered for counseling for the year 2011-2012. Furthermore, for subsequent academic years, the colleges to which the students will be provided would be the colleges which attain affiliation by 10th May of that year. That is the spirit of the directions. Thus, we must read and construe the judgment in that fashion.

11. Reverting to the facts of the present case, the University granted temporary affiliation to the college for the academic year 2011-12 on 27th August, 2011 with intake capacity of 100 seats. The petitioner college claims that it had got permanent recognition from NCTE for B.Ed. courses. In face of this, the name of the petitioner college was inducted in the list of colleges for which the counselling was held by the organizing university for the academic year 2011-12. Since the petitioner college had received temporary affiliation for B.Ed. classes only for one year, it again approached the University and the State Government for grant of permanent affiliation for the

subsequent academic years and completed all the formalities as well as requested the authorities to constitute an Inspection Team as required under the law. In the meanwhile, the Department of Higher Education, State of Uttar Pradesh, issued an office order dated 11th January, 2012 vide which the time schedule for seeking affiliation as directed by the court was fixed. The last date for submission of proposal to the concerned university was 10th March, 2012. The proposal received was to be forwarded to the Government by the University latest by 25th March, 2012 and the State Government was required to grant approval by 10th April, 2012. This date of 10th April, 2012, in fact, stood extended upto 10th May, 2012, the date fixed by this Court. The University constituted a three member team to inspect the college which submitted its report on 26th February, 2012. The Report is stated to have been submitted finding that the petitioner was possessed of adequate building, infrastructure and funds for running the B.Ed. course and recommended permanent affiliation. It is the case of the petitioner that all relevant documents and fees for grant of permanent affiliation were submitted to the University on 5th March, 2012, i.e., five days prior to the last date for submission of proposal. The University took lot of time and finally on 10th April, 2012, it informed the petitioner that some more documents were required to be submitted. The petitioner submitted the required documents on 11th April, 2012. This application was forwarded by the University to the State Government only on 20th April, 2012 along with approval in Form 'A'. For the academic year 2012-13, the organizing university had held the Joint Entrance Test for all UP colleges on 23rd April, 2012. The result of the same was declared and admission and counseling sessions were scheduled to be held between 7th June, 2012 to 22nd June, 2012. The petitioner college seriously apprehended that it may not be able to participate in the counseling for the academic year 2012-2013 because of the delay caused by the University and the State Government, particularly keeping in view the cut-off date of 10th May, fixed

by the Court. Consequently, the petitioner along with others filed writ petition being Writ Petition (Civil) No. 2417(M/S) of 2012 in the High Court of Judicature at Allahabad, Lucknow Bench. This Writ Petition came to be disposed of by the order of the Court dated 9th May, 2012. The Court, while noticing the directions of this Court as contained in its order dated 22nd July, 2011, directed the respondents to consider petitioner's case on the basis of their eligibility as required for affiliation and take decision while expressing the hope that the State would do its best in the matter. The petitioner has contended that though a number of deficiencies were noticed in the other colleges, yet most of the colleges were granted conditional permission for affiliation giving time to remove the deficiencies pointed out in the order. Unlike other colleges, the State Government vide its Order dated 10th May, 2012, had rejected the application of the petitioner and pointed out various deficiencies. The relevant part of the order reads as under:-

> "(3) In the sequence of the said orders of the Hon'ble High Court, Lucknow Bench, Lucknow, after the last date i.e. 25.03.2012 prescribed by the Government, the proposals for affiliation for B.Ed. course of the referred university were considered. After due consideration, in the impugned affiliation proposal the following discrepancies have been found:-
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> 1. For granting of affiliation, on the University level the certificate of the committee organized has not been received.
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> 2. The inspection report of the inspection board and the details of the area of classes in the letter of the University have not been mentioned.
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> 3. The boundary walls of the university are not plastered and the photograph of the boundary walls of only one side has been received and on the second floor of the university construction work is partly going on. In front of the rooms of the second

floor railings have not been constructed due to which a serious accident is possible.

4. The result of B.Ed. has not been received. The University with the deficiency of the result of examination has made conditional recommendation on the Format-A.

5. In relation to not being charged with group cheating/copying the educational session in the report of the controller of examination is not clear.

6. The fire extinguishing certificate has been issued on 15.02.2009. The certificate till date has not been received.

7. The NBC has been signed by the Additional Engineer/Superintending Engineer but the letter umber and date is not mentioned.

8. The details of payment of monthly salary from the bank to the teachers are not received. The record of the months of December 2011 and January and February 2012 has been made available.

(4) Therefore, in view of the abovementioned discrepancies the State Government under section 37(2) of the U.P. State University Act, 1973 (as amended by the U.P. State University Amendment Act, 2007) at Graduation level has for Maa Vaishno Devi Women University, Siyaram Nagar, Devrakot, Faizabad under the Education system has not found it eligible for a prior permission of affiliation for B.Ed. course with a capacity of 100 seats since under the autonomous scheme from educational session 2012-2013. In sequence of it the writ petition no. 2417(M/S)/2012 and in others also which are in question, in compliance to the order dated 09.05.2012 of the Hon'ble High Court the application of Sh. Chedi Lal Verma, Manager, Maa Vaishno Devi Women University, Siyaram Nagar, Devrakot, Faizabad dated 09.05.2012 is accordingly dismissed."

12. The petitioner has submitted that it removed the objections as pointed out in the said letter and informed the authorities on 18th May, 2012. On the same very date, the petitioner made a representation to the State Government stating that objections had been removed and the case of the petitioner may be considered for affiliation. No response was received to the said representation. Being left with no other option, the petitioner filed another writ petition being WP (M/S) No.3499 of 2011 before the same court praying inter alia that the order dated 10th May, 2012 passed by the State Government be quashed, for issuance of a direction requiring respondent No. 2 to include the petitioner college in the counseling for B.Ed. course for the academic year 2012-13 and for direction that the petitioner college be deemed to have received affiliation, temporarily at least. This writ petition was finally disposed of by a Bench of that Court vide its order dated 13th June, 2012. The relevant part of the order reads as under:-

"The arguments of the learned counsel for the petitioner in view of the recommendations of the University appears to be correct. Accordingly, the order dated 10.5.2012 contained in Annexure-1 to the writ petition is hereby set aside. The matter is remitted back to the State Government to decide it afresh in the light of the recommendations of the University and the letter of the institution contained at page 50 subject to their information available on record and the State Government shall take a decision, expeditiously, say within a period of ten days' from the date a certified copy of this order is produced before it.

Subject to above, the writ petition is finally disposed of."

13. As is clear from the above direction, the matter was remitted to the State Government. The order dated 10th May, 2012 was set aside and the State Government was directed to consider the case afresh. This was primarily on the basis that according to the petitioner, the University had recommended the case and had forwarded its approval in Form

A showing no deficiencies. The State Government, without any inspection, had rejected the request for affiliation and other colleges had been given temporary affiliation.

14. On the very next day i.e. on 14th June, 2012, the petitioner again made a representation to the State Government to consider its case in accordance with the directions of the Court in the order dated 13th June, 2012. Again, vide order dated 21st June, 2012, the State Government rejected the application of the petitioner. The State Government referred to the schedule for counseling as well as for grant of affiliation in terms of the order of this Court dated 22nd July, 2011. The State Government referred to the Schedule for counseling as well as for grant of affiliation in terms of order dated 22nd November, 2011. It rejected the application being beyond the cut-off date of 10th May. It also mentioned in paragraphs VI of the said order that certain compliances had not been done till that date by the college and again eight defects of non-compliance were pointed out in the said order.

15. The petitioner claims to have been seriously prejudiced by the order dated 21st June, 2012 as it was denied the chance to participate in the counseling process for the academic year 2012-2013 onwards.

16. To the averred facts there is not much controversy. Primarily, the respondents have raised two pleas (i) firstly that the deficiencies had not been removed in their entirety and secondly that the cut-off date fixed by this Court by its order dated 22nd July, 2011 does not permit the State to grant affiliation to the petitioner college for the current academic year.

SLP (C) No.21695 of 2012

17. The petitioner is a private unaided institution run by a registered society namely Aman Educational and Welfare Society. The Society started the Aman Institution of Education and Management (for short the "College") and had applied for grant of recognition for running the B.Ed. course. The college was inspected and recognition was granted by the NCTE on

30th September, 2008. The State Government had granted affiliation subject to fulfillment of conditions stated therein, which amongst others contained a stipulation that admission of the students shall be made only after affiliation by the examining body before the commencement of the academic session and admission shall be completed well before the cut-off date. For the academic year 2009-2010, the University conducted the inspection on 12th March, 2011 and forwarded its recommendation for grant of permanent affiliation. Similar recommendations were also made on 7th July, 2011 for the academic year 2011-2012. The State Government, in view of these recommendations granted permission for temporary affiliation for one year with effect from 1st July, 2011 for the academic year 2011-2012. The students were also provided to the college against the sanctioned 100 seats for that academic year. The petitioner college had applied for extension of affiliation for the academic session 2012-2013 and the University had sent its recommendations to the State Government vide its letter dated 3rd December, 2011. Vide letter dated 9th April, 2012, respondent No. 1 had brought out certain deficiencies. On 13th April, 2012, the petitioner submitted necessary documents. However, again certain deficiencies were pointed out by the State Government vide its letter dated 18th April, 2012. The petitioner claims to have removed these deficiencies and intimated respondent No. 1 vide its letter dated 20th April, 2012. Thereafter the University had sent its recommendations vide letter dated 9th May, 2012. According to the petitioner, thereafter the State Government did not point out any substantive deficiencies and, in fact, no deficiencies. According to them, though there were no deficiencies, the State Government vide its letter dated 9th May, 2012 refused to grant affiliation to the petitioner and pointed out certain deficiencies and informed that the institution was not found fit for grant of affiliation for 100 seats. The petitioner had challenged this order of the State Government before the High Court. It was the case of the petitioner that there were no shortcomings or deficiencies in the Institute. Furthermore,

number of other similarly placed institutions had been granted permission/affiliation and had been given time to remove the deficiencies. Thus, the order of the respondent was arbitrary.

18. It may be noticed that apprehending its exclusion from the counseling, the petitioner had filed a writ petition being Writ Petition (M/S) No.2572 of 2012 before the High Court of Judicature at Allahabad, Lucknow Bench in which vide its order dated 28th May, 2012, the Court had directed the respondent authorities to consider the case of the petitioner college afresh. In this order, the court had also noticed "the court finds that all shortcomings as pointed out by the State Government stand removed. Therefore, in these circumstances, it is provided that the State Government may take a fresh decision in light of the present facts and additional evidence which had been brought on record by the petitioner and pass fresh orders in accordance with law, within a period of ten days." In furtherance to the order of the High Court, the State Government still persisted with the fact that there were deficiencies in the infrastructure and other requirements of the petitioner college and while noticing the deficiencies which were still persisting, the State Government vide letter dated 11th June, 2012 rejected the application for grant of affiliation. The following deficiencies were noticed:-

"1.	Lasted inspection report was not found	Deficiency is still exists there.
2.	Certificate from the Bank for the payment to teachers and details of payment to the remaining teachers	Certificate of payment of was not provided with the representation
3.	Affidavits and Agreement of the proposed teachers for the year 2008-2009 not provided and for the years 2012-2013	Deficiency is still exists.

4.	Appointment letters of proposal teachers are not provided	Deficiency is still exists.
5.	C.A. Balance Sheet for one Year only	Balance sheet of CA is provided
6.	Fire fighting certificate is not mentioned	Deficiency is still exists
7.	Certificate from NCB or equivalent officer (Executive Engineer)	Deficiency is still exists
8.	Affidavit of manager on stamp paper of Rs. 50/- is not mentioned	Deficiency is still exists

xxxxx xxxx xxxx xxxx

10. In respect B.Ed. Education course in the Special Leave Petition bearing no. 13040/2010, titled College of professional Education and ors vs. UP State and others, Vide order dt. 22.7.2011 passed by the Hon'ble High Court in the said petition for fixing the time table to the concerned and fixed last date for permission 10.5.2012, and after expiry of the aforesaid all the deficiency have to be fulfilled, otherwise it shall be contempt of the Court.

Therefore in the precept the petitioner Institute, there is no occasion to provide a chance, if the proposal of the petitioner university proposed for the year 2013-14 the same can be considered accordingly, therefore the representation of the petitioner dt. 30.5.2012.

Therefore, the orders in the Writ Petition no. 2972 (MS) 2012 of the petitioner, *Aman Institute of Management and education, Duhai, Ghaziabad, Vs. UP State,* In compliance of order dated 28.5.2012 is being sent."

19. The petitioner challenged the legality and correctness

of the order dated 11th June, 2012 before the High Court in Writ Petition (M/S) No. 3607 of 2012. The High Court dismissed the writ petition but made certain observations which were in favour of the petitioner. The operative part of the order reads as under:-

> "Assuming that the petitioner is qualified to be affiliated, even then petitioner cannot be granted any indulgence on account of cut-off date fixed by the apex court i.e. 10.5.2012. This Court does not have any power to reschedule the time schedule fixed by the apex court. The petitioner, if is aggrieved by the said cut-off date, is at liberty to approach the apex court for clarification and further orders, so that they are able to convince the apex court regarding their rightful claim.
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> In the present case, the Court feels that there is no shortcoming in the petitioner-institution at the moment and the State Government has acted unmindfully, but it has to be looked into at this juncture whether the cut-off date can be by-passed. No such direction is possible at the hands of this 3 Court and, therefore, any direction in favour of the petitioner will amount to violating the orders passed by the apex court.
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> The argument of learned counsel for the petitioner that the opposite parties themselves have not followed the time schedule as fixed by the apex court can be looked into and can be gone into by the apex court. But this Court feels that no such direction for allocation of students can be issued in favour of the petitioner at this juncture.
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> The writ petition is accordingly dismissed.

20. Aggrieved from the said judgment, the college has filed the appeal by way of special leave.

Writ Petition (Civil) No. 350 of 2012

21. This petition has been filed under Article 32 of the Constitution of India by three petitioner colleges which are

being run and managed by the Society registered under the Societies Registration Act, 1860. Vide order dated 24th January, 2007, the NCTE at its 113th Meeting held on 18th/19th January, 2007 considered the application moved by the first petitioner for grant of recognition to run B.Ed. courses in the institution and granted the same. However, in its 141st Meeting, the Northern Regional Committee (for short "NRC") refused recognition to the first petitioner vide order dated 25th January, 2010. This order was subsequently modified upon appeal by the first petitioner, but without any effective relief. Being dissatisfied, the first petitioner filed Writ Petition No. 3836 (M/B) of 2010 before the High Court of Judicature at Allahabad. The Court passed order dated 14th May, 2010, in furtherance to which an inspection was conducted under Section 17 of the NCTE Act, 1993. Thereafter the first petitioner filed another Writ Petition No. 7248 of 2010 before the same court in which vide order dated 20th April, 2011, the Court took note of the fact that the NCTE had failed to comply with the direction of passing final order within one month and directed the concerned authorities to comply with the order dated 14th May, 2010, and required them to explain their conduct. However, in the meanwhile, this Court passed the order dated 22nd July, 2011 in the case of the College of Professional Education (supra) fixing 10th May as the cut-off date for grant of affiliation to colleges for running of courses for the current academic year. The petitioner colleges Nos. 1 and 2 got affiliation from the Ram Manohar Lohiya Avadh University, Faizabad, Uttar Pradesh, in accordance with the Uttar Pradesh State Universities Act, 1973 (for short, 'the Universities Act'). Petitioner No.1 college was accorded affiliation vide order dated 25th August, 2011 for 100 seats in the B.Ed. course for one year. In furtherance to order of the High Court, the petitioner No.1 was asked to furnish certain details. The response submitted by Petitioner No.1 was considered by the NRC of the NCTE in its 190th Meeting and it decided to restore the recognition for B.Ed. courses with annual intake of 100 seats in continuation of the previous recognition order dated 24th January, 2007. Accordingly, the

order dated 28th December, 2011, was passed by the NRC of the NCTE. Thereafter, the respondent-university, vide its letter dated 30th April, 2012 recommended to the State Government for grant of permanent affiliation to petitioner No. 1 to run the B.Ed. courses. For these reasons, the petitioner No. 1 claimed that it was entitled to be included in the Counseling as at that time, they had the recognition as well as the affiliation. Petitioner Nos.2 and 3 were also placed in similar situation. However, the State Government on insignificant shortcoming refused the affiliation to petitioner Nos. 2 and 3 vide order dated 10th May, 2011. According to the petitioner, certain other colleges similarly placed were granted affiliation and even included in the list of counseling for the academic year 2012-2013.

22. The petitioners challenged the non-grant of affiliation by the State Government to conduct the courses of B.Ed. on account of their non-inclusion in the Bulletin for Counseling and admission to their colleges. The petitioners, thus, are aggrieved from non-inclusion in counseling process as well as non-grant of affiliation on account of the cut-off date of 10th May of the current academic year.

Writ Petition (Civil) No. 346 of 2012

23. This is also a petition filed under Article 32 of the Constitution of India. The petitioner is an unaided self-financing institution run by a registered society named J. Milton Shiksha Samiti. The petitioner college was granted recognition by the NCTE vide its order dated 14th May, 2008 for conducting B.Ed. courses for the academic year 2008-2009 whereafter the petitioner obtained affiliation from Dr. Bhimrao Ambedkar University, U.P., Respondent No.2, for that academic year and has been conducting the said course till the academic year 2011-2012. The respondent No.2-University granted provisional affiliation to the petitioner for the academic year 2011-2012 vide letter dated 7th July, 2011, subject to fulfillment of certain conditions. Vide letter dated 21st December, 2011, the petitioner informed the University

(respondent No.2) about fulfillment of the conditions as required by the letter dated 7th July, 2011 and requested the University to consider the case of the petitioner for grant of extension of provisional affiliation or grant of permanent affiliation. For the academic year 2012-2013, respondent No.3-University conducted Joint Entrance Test for admission to UP B.Ed. Colleges on 23rd April, 2012. Counseling was scheduled to be held from 7th June, 2012 to 22nd June, 2012. As noticed earlier, this Court had passed the order dated 22nd July, 2011 directing the last date for grant of affiliation as 10th May of the concerned academic year. Vide letter dated 13th June, 2012, respondent No. 2 University had forwarded the affiliation proposal of the petitioner to the State Government. Although, the State Government did not pass any written order rejecting the case of the petitioner, but according to the petitioner, they were orally informed that their case could not be processed now for the current academic year in view of the order passed by this Court.

24. The petitioner filed writ petition being Misc. Single No.4040 of 2012 before the Allahabad High Court. The High Court, vide its order dated 25th July, 2012, directed the respondents to pass fresh order.

25. It is the case of the petitioner that denial of affiliation and permission to participate in the counseling by the respondent is on account of the cut-off dates fixed by this Court and, therefore, has approached this Court under Article 32 of the Constitution of India with the above prayers.

Writ Petition (Civil) No. 345 of 2012

26. Writ Petition (Civil) No.345/2012 and Writ Petition (Civil) No. 347 of 2012 also has similar facts where the petitioner-college was granted recognition by the NCTE and had even been granted affiliation for the academic year 2011-2012. However, its application for extension of affiliation for the academic year 2012-2013 or grant of permanent affiliation was not decided and subsequently the petitioner was denied

affiliation and permission to participate in the counseling for the current academic year 2012-2013 in view of the cut-off date fixed by this Court. In both these writ petitions, the writ petitioners challenged the action of the respondents, and their non-inclusion in the list for counseling.

27. It is not necessary for us to note the facts of each case separately as in all other cases the facts are somewhat similar to either of the writ petitions, the facts of which we have afore-referred.

28. For regulation and proper maintenance of norms and standards in the teacher education system and for all matters connected therewith, it was considered to establish a Central National Council for Teacher Education, for which purpose the Indian Parliament enacted the National Council for Teacher Education Act, 1993 (for short, the 'Act'). The NCTE was to be established in terms of Section 3 of the Act and was to consist of the persons specified therein. For the purpose of the present case, we are required to refer to certain provisions of the Act. The first relevant provision which can be referred to is Section 12 of the Act which states the functions that are to be performed by the NCTE. Section 13 places an obligation upon the NCTE to conduct inspection of the Institute in the prescribed manner. Other very significant provision is Section 14 that deals with the recognition of the Institution offering course or training in teacher education. One of the important powers of the NCTE is the power of delegated legislation as contained in Section 32 of the Act. We shall deal with these provisions along with some other relevant provisions in some detail.

29. Under the Scheme of the Act, in terms of Section 12, it shall be the duty of the NCTE to take all such steps as it may think fit for ensuring planned and coordinated development of teacher education, as per the Preamble of the Act. It has to lay down guidelines for compliance by recognized institutions for starting new courses of training and for providing physical and instructional facilities, staffing pattern and staff qualification

amongst others, to examine and review periodically the implementation of the norms, guidelines and standards laid down by the NCTE and to suitably advise the recognised institutions and foremost, it must ensure prevention of commercialization of teacher education. For the purposes of ascertaining whether the recognised institutions are functioning in accordance with the provisions of this Act, the Council may cause inspection of any such institution to be made by such person as it may direct and in such manner as may be prescribed. A complete procedure has been provided under Section 13 for conducting inspection of the institution. After coming into force of the Act, every institution offering or intending to offer a course or training in teacher education on or after the appointed day may, for grant of recognition under the Act, make an application to the Regional Committee concerned in such form and in such manner as may be determined by the Regulations. Section 14(3)(a) provides the scope and requirement for establishing such institution. The recognition may be granted to an institution when it has adequate financial resources, accommodation, library, qualified staff, laboratory and it fulfills such other conditions required for proper functioning of the institution for a course or training in teacher education as may be determined by regulations and upon such conditions as may be imposed. If an institution does not satisfy the requirements of Section 14(3)(a), the Council may pass an order refusing recognition to the institution for reasons to be recorded. Such grant and/or refusal has to be published in the Official Gazette and communicated in writing to the institution and to the concerned examining body or the State Government and the Central Government in accordance with Section 14(4). Section 14(6) will be of some significance once we deal with the facts of the present case, as it is a provision providing interlink between recognition of an institution by the NCTE, on the one hand and affiliation by the examination body, on the other. Section 14(6) reads as under :

"14(6) Every examining body shall, on receipt of the order

under sub-section (4), -

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

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

30. Linked to this very provision is the provision of Section 16 of the Act that reads as follows :

"16. AFFILIATING BODY TO GRANT AFFILIATION AFTER RECOGNITION OR PERMISSION BY THE COUNCIL

Notwithstanding anything contained in any other law for the time being in force, no examining body shall, on or after the appointed day,--

(a) grant affiliation, whether provisional or otherwise, to any institution; or

(b) hold examination, whether provisional or otherwise, for a course or training conducted by a recognized institution,

Unless the institution concerned has obtained recognition from the Regional Committee concerned, under Section 14 or permission for a course or training under Section 15."

31. The institution which does not comply with the terms and conditions imposed or contravenes any terms and conditions subject to which the recognition was granted, any regulation, orders made under the Act and/or any provision of the Act, the NCTE may withdraw recognition of such recognized institution for reasons to be recorded in writing under Section 17(1) subject to compliance of the conditions stated therein. Once the recognition is withdrawn, the following very serious consequences follow in terms of Section 17(3) of the Act :

1. such institution shall discontinue the course or

training in teacher education;

2. the concerned University or the examining body shall cancel affiliation of the institution in accordance with the order passed under sub-section (1) with effect from the end of the academic session next following the date of communication of the said order.

32. Following the date of communication of such order, an institution which carries on and offers any course of training in teacher education in terms of Section 17(4), the degree obtained from such an institution shall not be treated as valid qualification for employment under any State Government or the Central Government, Government University or school, college or any other Government institution.

33. From the reading of the above provisions, it is clear that the NCTE is expected to perform functions of a very high order and to ensure maintenance of higher standards of education in teachers training. Default in compliance of its orders/directions can result in very serious consequences and, in fact, would render the concerned institute ineffective and inoperative. Where the recognition by the NCTE gives benefits of wide magnitude to an institute, there the withdrawal of recognition not only causes impediments in dispensation of teacher training courses by that institution but the institution is obliged to discontinue such courses from the specified time.

34. Section 16 opens with a non obstante language and has an overriding effect over all other laws for the time being in force. It requires that unless the institution concerned has obtained recognition from the Regional Committee concerned, no examining body 'shall', on or after the appointed day, grant affiliation, whether provisional or otherwise, or even hold examination, whether provisional or otherwise, for the courses in the teacher training programme. On the other hand, Section 17(3) also uses the expression 'shall' thereby making it mandatory for the University or the examining body to cancel

affiliation of the institution in accordance with the order passed by the NCTE withdrawing the recognition of the Institution. These provisions convey the significant, vital and overriding effect of this Act in comparison to other laws in force.

35. To perform its functions, the NCTE constitutes regional committees which are divided into four different regions. The purpose of constitution of these committees is to effectively deal with the aspect of grant, continuation or refusal of the recognition. It has two objectives to attain - (1) convenience for all stakeholders; and (2) more effective implementation of the provisions of the Act. Section 32 empowers the NCTE to make regulations not inconsistent with the provisions of the Act and the Rules made thereunder, generally to carry out the provisions of the Act. The Regulations are to deal with various subjects including providing of norms, guidelines and standards in respect of minimum qualification for a person to be employed as a teacher, starting of new courses or training in recognized institutions, standards in respect of examinations leading to teacher education, qualifications and other specified matters. The Central Government, in exercise of the power vested in it under Section 31(1) of the Act, framed the Rules called the 'National Council for Teacher Education Rules, 1997'. These Rules, in detail, deal with the expert members of the NCTE, powers and duties of the Chair-person, appeals which a person could make in terms of Rule 10 in relation to the orders passed under Sections 15, 16 and 17 of the Act. However, these Rules were subjected to amendment vide notification dated 15th September, 2003.

36. Vide notification dated 13th November, 2002, the 'NCTE (Form of application for recognition, the time limit of submissions of application, determination of norms and standards for recognition of teacher education programmes and permission to start new course or training) Regulations, 2002' were notified to deal with the prescribed procedure for making applications for recognition as well as how it is to be dealt with and grant and refusal of recognition. Under

Regulation 8, it was specified that the norms and standards for various teacher education courses should be separately provided for separate courses. Resultantly, under Appendix 3 to Appendix 14, norms and standards in relation to various courses, which were to be complied with by the applicant, were specified. The object was to bring greater transparency and specialization into the entire process of grant of recognition to the institutions. For example, norms and standards for secondary teacher education programme was provided under Appendix 7. Similarly, other courses were provided different standards. Appendix 1A prescribed the form of an application for grant of recognition of teacher education institutions/ permission to start a new course or increase in intake. This application contained all information that was necessary for the Regional Committee to entertain an application and know the requisite details, as contemplated under Section 14(1)(a).

37. Further, to facilitate the operation of the Regulations and for removal of functional difficulties, after consultation with different quarters, the NCTE framed regulations under Section 32 of the Act which were called the 'National Council for Teachers Education (Recognition, Norms and Procedure) Regulations, 2005'. Under these Regulations, different time limits were provided within which the applications were to be dealt with and responded to by different stakeholders involved in the process of grant/refusal of recognition. Under these Regulations, the applications which were complete in all respects had to be processed by the office of the concerned Regional Committee within 30 days of the receipt of such application. A written communication along with a copy of the application form submitted by the institution of the concerned State/Union Territory shall be sent to the State Government/UT Administration concerned. On receipt of the application, the State Government/UT Administration concerned was required to furnish its recommendations to the office of the Regional Committee concerned within 60 days from the receipt. If the recommendation was negative, the State Government was

required to provide detailed reasons/grounds thereof in terms of Regulation 7(3) of the Regulations. Then, the expert team was to be appointed which was to visit the institution. Video tapes of the visiting team were to be placed before the Regional Committee along with its recommendations and the Regional Committee was to decide grant of recommendation or permission to the institution only after all the conditions prescribed under the Act, Rules, Regulations and the norms and standards laid down were satisfied. The institution concerned was required to be informed of the decision for grant/refusal of recognition or permission. It could impose such conditions as the NCTE may deem fit and proper.

38. Thereafter, vide notification dated 27th November, 2007, again in exercise of its powers under sub-section (2) of Section 32, the NCTE revised the Regulations and these are called the 'National Council for Teacher Education (Recognition, Norms and Procedure) Regulations, 2009'. They deal with the applicability, eligibility, manner of making application and time limits, processing fee, processing of applications, conditions for granting recommendation, norms and standards, academic calendar, power to relax any of the provisions of these Regulations, etc. These Regulations are quite comprehensive and under Regulation 13, the Regulations of 2007 and 2005 both are repealed and it is stated in Regulation 13(3) that the repeal of the said earlier Regulations shall not affect previous operation of any Regulation so repealed or anything duly done thereunder. Under Regulation 5, the application has to be filed in the manner prescribed and within the time specified. Under Regulation 5(4), duly completed application in all respects may be submitted to the Regional Committee concerned during the period from 1st day of September, till 31st day of October of the preceding year to the academic session for which recognition has been sought. Regulation 5(4), however, provided that the condition of last date for submission of application shall not apply to any innovative programme of teacher education for which separate guidelines have been

issued by the NCTE. The final decision on all the applications received, either recognition granted or refused, shall be communicated to the applicant on or before 15th day of May of the succeeding year. These Regulations take note of even minute details like that if there is any omission or deficiency in the documents, the Regional Committee shall point out the deficiency within 45 days of the receipt of the application which the applicant shall remove within 60 days from the date of receipt of communication of such deficiency. In terms of Regulation 7(2), like in the 2007 Regulations, a written communication along with a copy of the application has to be sent to the State Government or the Union Territory Administration within 30 days from the date of the receipt of the application inviting recommendations or comments which are to be submitted by them within 45 days of the issue of letter to the State or the Union Territory, as the case may be. After consideration of the recommendations, the Regional Committee shall decide as regards the inspection of the institutions and communicate the same to the institution. The Regional Committee shall ensure that inspection is conducted within 30 days from the date of this communication to the institution. The experts are to visit the institution and submit their report. The inspection has to be video-graphed. Considering the recommendation of the State Government, the Regional Committee shall grant or refuse the recognition within the specified date. It is also required under these Regulations [Regulation 8(2)] that, in the first instance, an institution shall be considered for grant of recognition of only one course for the basic unit as prescribed in the norms and standards for the particular teacher education programme. After completion of three academic sessions of the respective course, it can submit an application for one basic unit only of an additional course or for an additional unit of the existing recognized course before the cut-off date prescribed for submission of applications in the year succeeding the completion of three academic sessions. After the recognition has been granted in terms of Regulation 11, it is incumbent upon the affiliating body to regulate the

process of admission in teacher education institutions by prescribing the schedule or academic calendar in respect of each of the courses listed in Appendix 1 to 13 to the Regulations and this has to be done at least three months in advance of the commencement of each academic session and upon due publicity.

39. This is the scheme of grant and/or refusal of the recognition to an institution dealing with various courses of teacher training programme.

40. Under the scheme of the NCTE Act, there are three principal bodies involved in processing the applications for grant or refusal of recognition for running of teacher training courses by various institutions. They are the NCTE, the State Government, the affiliating body or the University, as the case may be. Each of these stakeholders has been assigned a definite role under the provisions of the NCTE Act and even the stage at which such role is required to be performed. The provisions of the NCTE Act even identify the scope and extent of power which each of these bodies is expected to exercise. As already noticed, the NCTE Act has been enacted with the object of constituting a National Council with a view to achieve planned and coordinated development of teacher education system throughout the country and also to ensure maintenance of proper norms and standards in teacher education system. The NCTE is a specialized body and is expected to perform varied functions including grant of recognition, ensuring maintenance of proper norms and standards in relation to teacher education, inspection of the colleges through experts and to ensure strict adherence to the time schedule specified under the NCTE Act and rules and regulations framed therein.

41. The NCTE Act is a special act enacted to cover a particular field, i.e. teacher training education and, thus, has to receive precedence over other laws in relation to that field. No institution or body is empowered to grant recognition to any institution under the NCTE Act or any other law for the time being in force, except the NCTE itself. Grant of recognition

by the Council is a condition precedent to grant of affiliation by the examining body to an institute.

42. The non-obstante language of Section 16 requires the affiliating body to grant affiliation only after recognition or permission has been granted by the NCTE. The provisions of Section 16 give complete supremacy to the expert body/NCTE in relation to grant of recognition. In fact, it renders the role of other bodies consequential upon grant and/or refusal of recognition. When the NCTE is called upon to consider an application for grant of recognition, it has to consider all the aspects in terms of Section 14(1)(a) of the NCTE Act. The amplitude of this provision is very wide and hardly leaves any matter relatable to an educational institution outside its ambit. To put it simply, the NCTE is a supreme body and is vested with wide powers to be exercised with the aid of its expertise, in granting or refusing to grant recognition to an educational institution. The NCTE is the paramount body for granting the approval/recognition not only for commencing of fresh courses but even for increase in intake, etc. The Council has to ensure maintenance of educational standards as well as strict adherence to the prescribed parameters for imparting of such educational courses, including the infrastructure. The provision and scheme of the NCTE Act is pari materia to that of the Medical Council of India Act, 1956 and the All India Council for Technical Education Act, 1987 etc.

43. Now, we may examine some of the judgments of this Court which have dealt with these aspects. In the case of *State of Tamil Nadu and Anr. v. Adhiyaman Educational & Research Institute and Ors.* (1995) 4 SCC 104 , the Supreme Court while discussing various aspects in regard to constitutional validity of Tamil Nadu Private College Regulation Act, 1976 and the provisions of the All India Council for Technical Education Act clearly spelled out the preferential role of the Council as under:

"22. The aforesaid provisions of the Act including its preamble make it abundantly clear that the Council 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 Council is also required to regulate and ensure proper maintenance of norms and standards in the technical education system. The Council is further to evolve suitable performance appraisal system incorporating such norms and mechanisms in enforcing their accountability. It is also required to provide guidelines for admission of students and has power to withhold or discontinue grants and to de-recognise the institutions where norms and standards laid down by it and directions given by it from time to time are not followed. This duty and responsibility cast on the Council implies that the norms and standards to be set should be such as would prevent a lopsided or an isolated development of technical education in the country.

...It is necessary to bear this aspect of the norms and standards to be prescribed in mind, for a major debate before us centered around the right of the States to prescribe standards higher than the one laid down by the Council. What is further necessary to remember is that the Council has on it representatives not only of the States but also of the State Universities. They have, therefore, a say in the matter of laying down the norms and standards which may be prescribed by the Council for such education from time to time. The Council has further the Regional Committees, at present, at least, in four major geographical zones and the constitution and functions of the Committees are to be prescribed by the regulations to be made by the Council. Since the Council has the representation of the States and the provisional bodies on it which have also representation from different States and regions, they have a say in the constitution and functions of these Committees as well...."

44. Further, the Court, while noticing the inconsistency between the Central and State statutes or the State authorities acting contrary to the Central statute, held as under :

"41. (vi) However, when the situations/seats are available and the State authorities deny an applicant the same on the ground that the applicant is not qualified according to its standards or qualifications, as the case may be, although the applicant satisfies the standards or qualifications laid down by the Central law, they act unconstitutionally. So also when the State authorities de-recognise or disaffiliate an institution for not satisfying the standards or requirement laid down by them, although it satisfied the norms and requirements laid down by the Central authority, the State authorities act illegally.

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43. As a result, as has been pointed out earlier, the provisions of the Central statute on the one hand and of the State statutes on the other, being inconsistent and, therefore, repugnant with each other, the Central statute will prevail and the de-recognition by the State Government or the disaffiliation by the State University on grounds which are inconsistent with those enumerated in the Central statute will be inoperative."

45. Still, in another case of *Jaya Gokul Educational Trust v. Commissioner & Secretary to Government Higher Education Deptt., Thiruvananthapuram, Kerala State and Anr.* [2000) 5 SCC 231], the Court reiterating the above principle, held as under:

"22. As held in the *Tamil Nadu* case AIR 1995 SCW 2179, the Central Act of 1987 and; in particular, Section 10(K) occupied the field relating the `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, needed, 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 the Tamil Nadu case there were enough provisions in the Central Act for consultation by the Council of the 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, the 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 the Tamil Nadu 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 the 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."

46. This view of the Supreme Court was reiterated with approval by a larger Bench of the Supreme Court in the case of *State of Maharashtra v. Sant Dnyaneshwar Shikshan Shastra Mahavidyalaya and Ors.* [(2006) 9 SCC 1]. While discussing in detail the various legal issues in relation to grant of affiliation/ recognition to the institution and permission to start a new college, the Court held as under:

"53. The Court then considered the argument put forward

on behalf of the State that while it would be open for the Council to lay down minimum standards and requirements, it did not preclude the State from prescribing higher standards and requirements.

54. Negativing the contention, the Court quoted with approval the following observations of B.N. Rau, J. in *G.P. Stewart v. Brojendra Kishore Roy Chaudhury* (AIR 1939 Cal. 628 : 43 Cal. W.N. 913) :

> "It is sometimes said that two laws cannot be said to be properly repugnant unless there is direct conflict between them, as when one says `do' and the other 'dont', there is no true repugnancy, according to this view, if it is possible to obey both the laws. For reasons which we shall set forth presently, we think that this is too narrow a test; there may well be cases of repugnancy where both laws say `don't' but in different ways. For example, one law may say `no person shall sell liquor by retail, that is, in quantities of less than five gallons at a time' and another law may say, `no person shall sell liquor by retail, that is, in quantities of less than ten gallons at a time'. Here, it is obviously possible to obey both laws, by obeying the more stringent of the two, namely, the second one; yet it is equally obvious that the two laws are repugnant, for to the extent to which a citizen is compelled to obey one of them, the other, though not actually disobeyed, is nullified."

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64. Even otherwise, in our opinion, the High Court was fully justified in negativing the argument of the State Government that permission could be refused by the State Government on "policy consideration". As already observed earlier, policy consideration was negatived by this Court in *Thirumuruga*

Kirupananda Variyar Thavathiru Sundara Swamigal Medical Educational and Charitable Trust Vs. State of Tamil Nadu, 1996 DGLS (soft) 327 : 1996 (3) S.C.C. 15 : JT 1996 (2) S.C. 692 as also in Jaya Gokul Educational Trust.

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74. It is thus clear that the Central Government has considered the subject of secondary education and higher education at the national level. The Act of 1993 also requires Parliament to consider teacher-education system "throughout the country". NCTE, therefore, in our opinion, is expected to deal with applications for establishing new Bed colleges or allowing increase in intake capacity, keeping in view the 1993 Act and planned and coordinated development of teacher- education system in the country. It is neither open to the State Government nor to a university to consider the local conditions or apply "State policy" to refuse such permission. In fact, as held by this Court in cases referred to hereinabove, the State Government has no power to reject the prayer of an institution or to overrule the decision of NCTE. The action of the State Government, therefore, was contrary to law and has rightly been set aside by the High Court."

47. The above enunciated principles clearly show that the Council is the authority constituted under the Central Act with the responsibility of maintaining education of standards and judging upon the infra-structure and facilities available for imparting such professional education. Its opinion is of utmost importance and shall take precedence over the views 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 guideline or policy which would be in conflict with the Central

statute or the standards laid down by the Central body. State can frame its policy for admission to such professional courses but such policy again has to be in conformity with the directives issued by the Central body. In the present cases, there is not much conflict on this issue, but it needs to be clarified that while the State grants its approval, and University its affiliation, for increased intake of seats or commencement of a new course/ college, its directions should not offend and be repugnant to what has been laid down in the conditions for approval granted by the Central authority or Council. What is most important is that all these authorities have to work ad idem as they all have a common object to achieve i.e. of imparting of education properly and ensuring maintenance of proper standards of education, examination and infrastructure for betterment of educational system. Only if all these authorities work in a coordinated manner and with cooperation, will they be able to achieve the very object for which all these entities exist.

48. The NCTE Act has been enacted by the Parliament with reference to Entry 66 of List I of Schedule VII of the Constitution. There is no such specific power vested in the State Legislature under List II of the Seventh Schedule. Entry 25 of List III of the Seventh Schedule is the other Entry that provides the field for legislation both to the State and the Centre, in relation to education, including technical education, medical education and Universities; vocational and technical training and labour. The field is primarily covered by the Union List and thus, the State can exercise any legislative power under Entry 25, List III but such law cannot be repugnant to the Central law. Wherever the State law is irreconcilable with the Central law, the State Law must give way in favour of the Central law to the extent of repugnancy. This will show the supremacy of the Central law in relation to professional education, including the teacher training programmes. In the case of *Medical Council of India v. State of Karnataka* [(1998) 6 SCC 131], the Court had the occasion to discuss this conflict as follows: -

"27. The State Acts, namely, the Karnataka Universities

Act and the Karnataka Capitation Fee Act must give way to the Central Act, namely, the Indian Medical Council Act, 1956. The Karnataka Capitation Fee Act was enacted for the sole purpose of regulation in collection of capitation fee by colleges and for that, the State Government is empowered to fix the maximum number of students that can be admitted but that number cannot be over and above that fixed by the Medical Council as per the regulations. Chapter IX of the Karnataka Universities Act, which contains provision for affiliation of colleges and recognition of institutions, applies to all types of colleges and not necessarily to professional colleges like medical colleges. Sub-section (10) of Section 53, falling in Chapter IX of this Act, provides for maximum number of students to be admitted to courses for studies in a college and that number shall not exceed the intake fixed by the university or the Government. But this provision has again to be read subject to the intake fixed by the Medical Council under its regulations. It is the Medical Council which is primarily responsible for fixing standards of medical education and overseeing that these standards are maintained. *It is the Medical Council which is the principal body to lay down conditions for recognition of medical colleges which would include the fixing of intake for admission to a medical college.* We have already seen in the beginning of this judgment various provisions of the Medical Council Act. It is, therefore, the Medical Council which in effect grants recognition and also withdraws the same. Regulations under Section 33 of the Medical Council Act, which were made in 1977, prescribe the accommodation in the college and its associated teaching hospitals and teaching and technical staff and equipment in various departments in the college and in the hospitals. These regulations are in considerable detail. Teacher-student ratio prescribed is 1 to 10, exclusive of the Professor or Head of the Department. Regulations further prescribe, apart from other things, that the number of teaching beds

in the attached hospitals will have to be in the ratio of 7 beds per student admitted. Regulations of the Medical Council, which were approved by the Central Government in 1971, provide for the qualification requirements for appointments of persons to the posts of teachers and visiting physicians/surgeons of medical colleges and attached hospitals.

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29. *A medical student requires gruelling study and that can be done only if proper facilities are available in a medical college and the hospital attached to it has to be well equipped and the teaching faculty and doctors have to be competent enough that when a medical student comes out, he is perfect in the science of treatment of human beings and is not found wanting in any way.* The country does not want half-baked medical professionals coming out of medical colleges when they did not have full facilities of teaching and were not exposed to the patients and their ailments during the course of their study. The Medical Council, in all fairness, does not wish to invalidate the admissions made in excess of that fixed by it and does not wish to take any action of withdrawing recognition of the medical colleges violating the regulation. Henceforth, however, these medical colleges must restrict the number of admissions fixed by the Medical Council. After the insertion of Sections 10-A, 10-B and 10-C in the Medical Council Act, the Medical Council has framed regulations with the previous approval of the Central Government which were published in the Gazette of India dated 29-9-1993 (though the notification is dated 20-9-1993). Any medical college or institution which wishes to increase the admission capacity in MBBS/higher courses (including diploma/degree/higher specialities), has to apply to the Central Government for permission along with the permission of the State Government and that of the university with which it is affiliated and in conformity with

the regulations framed by the Medical Council. Only the medical college or institution which is recognised by the Medical Council can so apply."

49. A Constitution Bench of this Court in the case of *Dr. Preeti Srivastava & Anr. v. State of Madhya Pradesh & Ors.* [(1999) 7 SCC 120], while dealing with the provisions of the Medial Council of India Act and referring to Entry 25 of List III and Entry 66 of List I with reference to the Articles 245, 246, 254 and 15(4) of the Constitution, spelled out the supremacy of the Council and the provisions of the Central Act, particularly in relation to the control and regulation of higher education. It also discussed providing of the eligibility conditions and qualifications and determining the standards to be maintained by the Institutions. The Court in paragraph 36 of the judgment held as under: -

"36. It would not be correct to say that the norms for admission have no connection with the standard of education, or that the rules for admission are covered only by Entry 25 of List III. Norms of admission can have a direct impact on the standards of education. Of course, there can be rules for admission which are consistent with or do not affect adversely the standards of education prescribed by the Union in exercise of powers under Entry 66 of List I. For example, a State may, for admission to the postgraduate medical courses, lay down qualifications in addition to those prescribed under Entry 66 of List I. This would be consistent with promoting higher standards for admission to the higher educational courses. But any lowering of the norms laid down can and does have an adverse effect on the standards of education in the institutes of higher education. Standards of education in an institution or college depend on various factors. Some of these are:

(1) the calibre of the teaching staff;

(2) a proper syllabus designed to achieve a high level of education in the given span of time;

(3) the student-teacher ratio;

(4) the ratio between the students and the hospital beds available to each student;

(5) the calibre of the students admitted to the institution;

(6) equipment and laboratory facilities, or hospital facilities for training in the case of medical colleges;

(7) adequate accommodation for the college and the attached hospital; and

(8) the standard of examinations held including the manner in which the papers are set and examined and the clinical performance is judged."

50. The principle of repugnancy and its effects were discussed by this Court in the case of *S. Satyapal Reddy v. Government of A.P.* (1994) 4 SCC 391, wherein it held as under:

"7. It is thus settled law that Parliament has exclusive power to make law with respect to any of the matters enumerated in List I or concurrent power with the State Legislature in List III of the VIIth Schedule to the Constitution which shall prevail over the State law made by the State Legislature exercising the power on any of the entries in List III. If the said law is inconsistent with or incompatible to occupy the same field, to that extent the State law stands superseded or becomes void. It is settled law that when Parliament and the Legislature derive that power under Article 246(2) and the entry in the Concurrent List, whether prior or later to the law made by the State Legislature, Article 246(2) gives power, to legislate upon any subject enumerated in the Concurrent List, the law made by Parliament gets paramountcy over the law made by the State Legislature unless the State law is reserved for

consideration of the President and receives his assent. Whether there is an apparent repugnance or conflict between Central and State laws occupying the same field and cannot operate harmoniously in each case the court has to examine whether the provisions occupy the same field with respect to one of the matters enumerated in the Concurrent List and whether there exists repugnancy between the two laws. Article 254 lays emphasis on the words "with respect to that matter". Repugnancy arises when both the laws are fully inconsistent or are absolutely irreconcilable and when it is impossible to obey one without disobeying the other. The repugnancy would arise when conflicting results are produced when both the statutes covering the same field are applied to a given set of facts. But the court has to make every attempt to reconcile the provisions of the apparently conflicting laws and court would endeavour to give harmonious construction. The purpose to determine inconsistency is to ascertain the intention of Parliament which would be gathered from a consideration of the entire field occupied by the law. The proper test would be whether effect can be given to the provisions of both the laws or whether both the laws can stand together. Section 213 itself made the distinction of the powers exercisable by the State Government and the Central Government in working the provisions of the Act. It is the State Government that operates the provisions of the Act through its officers. Therefore, sub-section (1) of Section 213 gives power to the State Government to create Transport Department and to appoint officers, as it thinks fit. Sub-section (4) thereof also preserves the power. By necessary implication, it also preserves the power to prescribe higher qualification for appointment of officers of the State Government to man the Motor Vehicles Department. What was done by the Central Government was only the prescription of minimum qualifications, leaving the field open to the State Government concerned to prescribe if it finds necessary, higher qualifications. The

Governor has been given power under proviso to Article 309 of the Constitution, subject to any law made by the State Legislature, to make rules regulating the recruitment which includes prescription of qualifications for appointment to an office or post under the State. Since the Transport Department under the Act is constituted by the State Government and the officers appointed to those posts belong to the State service, while appointing its own officers, the State Government as a necessary adjunct is entitled to prescribe qualifications for recruitment or conditions of service. But while so prescribing, the State Government may accept the qualifications or prescribe higher qualification but in no case prescribe any qualification less than the qualifications prescribed by the Central Government under sub-section (4) of Section 213 of the Act. In the latter event, i.e., prescribing lesser qualifications, both the rules cannot operate without colliding with each other. When the rules made by the Central Government under Section 213(4) and the statutory rules made under proviso to Article 309 of the Constitution are construed harmoniously, there is no incompatibility or inconsistency in the operation of both the rules to appoint fit persons to the posts or class of officers of the State Government vis-a-vis the qualifications prescribed by the Central Government under sub-section (4) of Section 213 of the Act."

51. In the case of *Jaya Gokul Educational Trust* (supra), the Court, while referring to the case of *State of Tamil Nadu v. Adhiyaman Educational and Research Institute* (supra), took the view that where the provisions of the State Act overlap and are in conflict with the provisions of the Central Act in various areas, the matters which are specifically covered under the Central Act cannot be undermined and they shall prevail. The court further stated that a provision in the Universities Act requiring the University to obtain merely the views of the State Government could not be characterized as requiring 'approval'

of the State Government. If 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 and would, therefore, be void.

52. In the case of *Sant Dnyaneshwar Shikshan Shastra Mahavidyalaya* (supra), the Court, while dealing with the provisions of the Act with which we are concerned in the present case, held that field of teachers' education and matters connected therewith stood fully and completely occupied by the Act and hence the State legislature could not encroach upon that field. In the case of *Engineering Kamgar Union v. Electro Steels Castings Ltd. and Anr.* [(2004) 6 SCC 36], the Court was dealing with a direct conflict between the two provisions of different Acts and stated that direct conflict arises not only where the provisions of one of the Acts has to be disobeyed if the other is followed but also where both laws lead to different results. Extending the doctrine of repugnancy to that situation, the Court held in paragraph 18 of the judgment that the Central Law shall prevail. The said paragraph reads as under: -

> "18. In terms of clause (2) of Article 254 of the Constitution of India where a law made by the legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provisions repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to the matters, then the law so made by the legislature of such State shall, if it has been reserved for consideration of the President and has received its assent, prevail in that State. It is not in dispute that the 1983 Act has received the assent of the President of India and, thus, would prevail over any parliamentary law governing the same field."

53. From the above consistent view of this Court it is clear that wherever the field is covered by the Parliamentary law in terms of List I and List III, the law made by the State Legislature would, to the extent of repugnancy, be void. Of course, there has to be a direct conflict between the laws. The direct conflict

is not necessarily to be restricted to the obedience of one resulting in disobedience of other but even where the result of one would be in conflict with the other. It is difficult to state any one principle that would uniformly be applicable to all cases of repugnancy. It will have to be seen in the facts of each case while keeping in mind the laws which are in conflict with each other. Where the field is occupied by the Centre, subject to the exceptions stated in Article 254, the State law would be void.

54. In the present case, we are concerned with the provisions of the NCTE Act which is a Central legislation referable to Entry 66 of List I of the Seventh Schedule. Thus, no law enacted by the State, which is in conflict with the Central Law, can be permitted to be operative.

55. Now, let us examine the conflict that arises in the present cases. In terms of the provisions of the Act, the Regional Committee is required to entertain the application, consider State opinion, cause inspection to be conducted by an expert team and then to grant or refuse recognition in terms of the provisions of the Act. Once a recognition is granted and before an Institution can be permitted to commence the course, it is required to take affiliation from the affiliating body, which is the University.

56. Thus, grant of recognition or affiliation to an institute is a condition precedent to running of the courses by the Institute. If either of them is not granted to the institute, it would not be in a position to commence the relevant academic courses. There is a possibility of some conflict between a University Act or Ordinance relating to affiliation with the provisions of the Central Act. In such cases, the matter is squarely answered in the case of *Sant Dnyaneshwar Shikshan Shastra Mahavidyalaya* (supra) where the Court stated that after coming into operation of the Central Act, the operation of the University Act would be deemed to have become unenforceable in case of technical colleges. It also observed that provision of the Universities Act regarding affiliation of

technical colleges and conditions for grant of continuation of such affiliation by university would remain operative but the conditions that are prescribed by the university for grant and continuation of affiliation must be in conformity with the norms and guidelines prescribed by the NCTE.

57. Under Section 14 and particularly in terms of Section 14(3)(a) of the Act, the NCTE is required to grant or refuse recognition to an institute. It has been empowered to impose such conditions as it may consider fit and proper keeping in view the legislative intent and object in mind. In terms of Section 14(6) of the Act, the examining body shall grant affiliation to the institute where recognition has been granted. In other words, granting recognition is the basic requirement for grant of affiliation. It cannot be said that affiliation is insignificant or a mere formality on the part of the examining body. It is the requirement of law that affiliation should be granted by the affiliating body in accordance with the prescribed procedure and upon proper application of mind. Recognition and affiliation are expressions of distinct meaning and consequences. In the case of *Chairman, Bhartia Education Society v. State of Himachal Pradesh & Ors.* [(2011) 4 SCC 527], this Court held that the purpose of recognition and affiliation is different. In the context of the Act, affiliation enables and permits an institution to send its students to participate in public examinations conducted by the examining body and secure the qualification in the nature of degrees, diploma and certificates. On the other hand, recognition is the licence to the institution to offer a course or training in teaching education. The Court also emphasised that the affiliating body/examining body does not have any discretion to refuse affiliation with reference to any of the factors which have been considered by the NCTE while granting recognition.

58. The examining body can impose conditions in relation to its own requirements. These aspects are (a) eligibility of students for admission; (b) conduct of examinations; (c) the manner in which the prescribed courses should be completed;

and (d) to see that the conditions imposed by the NCTE are complied with. Despite the fact that recognition itself covers the larger precepts of affiliation, still the affiliating body is not to grant affiliation automatically but must exercise its discretion fairly and transparently while ensuring that conditions of the law of the university and the functions of the affiliating body should be complementary to the recognition of NCTE and ought not to be in derogation thereto.

59. In the case of *St. John Teachers Training Institute v. Regional Director, National Council for Teacher Education* [(2003) 3 SCC 321], this Court attempted to strike a balance between the role played by the NCTE, on the one hand and affiliating body and State Government, on the other. Once the affiliating body acts within the fundamentals of Section 14 of the Act, possibility of a conflict can always be avoided.

60. In these appeals, we are concerned with the colleges which are affiliated to different universities. Some of them are affiliated to Dr. Ram Manohar Lohia Avadh University, Faizabad, some to Dr. Bhimarao Ambedkar University, Agra while others to the University of Meerut. All these universities have been created by statutes and have their own ordinances. The Universities Act is the parent statute under which all these universities have been constituted. Under Section 2(20) of the Universities Act, 'University' means an existing University or a new University established after the commencement of this Act in terms of Section 4 of this Act. Section 4 empowers the State Government to establish a university in the manner prescribed by its notification in the Official Gazette. The provision provides for establishment of different universities and which had, in fact, been already established. Chapter VII of the Universities Act deals with Affiliation and Recognition. Section 37(1) states that the section shall apply to different universities under which all the universities which are respondent in these appeals are covered. In terms of Section 37(2), the Executive Council may, with the previous sanction of the State Government, admit any college which fulfils such conditions of affiliation as may be

prescribed, to the privileges of affiliation or enlarge the privileges of any college already affiliated or subject to the provisions of sub-section (8), withdraw or curtail any such privilege. It has further been provided that a college should substantially fulfill the conditions of affiliation in the opinion of the State Government, for it to sanction grant of affiliation to the college. In terms of Section 37(6), the Executive Council of the university shall cause every affiliated college to be inspected from time to time at intervals not exceeding five years. Section 37(8) states that the privileges of affiliation of a college which fails to comply with any direction of the Executive Council under sub-section (7) or to fulfill the condition of affiliation may, after obtaining the report from management of the college and with previous sanction of the chancellor, be withdrawn or curtailed by the Executive Council in accordance with the provisions of the Statutes. In terms of Section 37(10), a college which has been affiliated is entitled to continue the course of study for which the admissions have already taken place. To give an example, under the statute of the Meerut University, affiliation of new colleges is dealt with under statute 13.02 to 13.10 of Chapter XIII. This requires that every application for affiliation of a college has to be made so as to reach the Registrar in less than 12 months before the commencement of the course and before an application is considered by the Executive Council, the Vice-Chancellor must be satisfied that there is due compliance with the provisions of statutes 3.05, 13.06 and 13.07. Besides, it requires the conditions like adequate financial resources, suitable and sufficient building, adequate library, two hectares of land, facilities for recreation of students, etc. to be fulfilled. The constitution of the Management of every college has also been provided.

61. The fields which are sought to be covered under the provisions of Section 37 of the Universities Act and the Statutes of various universities are clearly common to the aspects which are squarely covered by the specific language under the Act.

That being so, all State laws in regard to affiliation in so far as they are covered by the Act must give way to the operation of the provisions of the Act. To put it simply, the requirements which have been examined and the conditions which have been imposed by the NCTE shall prevail and cannot be altered, re-examined or infringed under the garb of the State Law. The affiliating/examining body and the State Government must abide by the proficiency and command of the NCTE's directions. To give an example, existence of building, library, qualified staff, financial stability of the institution, accommodation, etc. are the subjects which are specifically covered under Section 14(3)(b) of the Act. Thus, they would not be open to re-examination by the State and the University. If the recognition itself was conditional and those conditions have not been satisfied, in such circumstances, within the ambit and scope of Sections 46 and 16 of the Act, the affiliating body may not give affiliation and inform the NCTE forthwith of the shortcomings and non-compliance of the conditions. In such situation, both the Central and the State body should act in tandem and, with due coordination, come to a final conclusion as to the steps which are required to be taken in regard to both recognition and affiliation. But certainly, the State Government and the University cannot act in derogation to the NCTE.

62. Now, we may deal with another aspect of this very facet of the case. It is a very pertinent issue as to what the role of the State should be after the affiliation is granted by the affiliating body. We have already discussed that the State opinion, as contemplated under Section 37 of the University Act, to the extent it admits to overreach, is reconcilable and its results are not in its orientation to the directives of the NCTE are void and inoperative to the extent they can be resolved in which case clear precedence is to be given to the directives of the NCTE during such resolution. The opinion of the State, therefore, has to be read and construed to mean that it would keep the factors determined by the NCTE intact and then examine the matter for grant of affiliation. The role of the State

Government is minimised at this stage which, in fact, is a second stage. It should primarily be for the University to determine the grant or refusal of affiliation and role of the State should be bare, minimum non-interfering and non-infringing.

63. It is on record and the Regulations framed under the Act clearly show that upon receiving an application for recommendation, the NCTE shall send a copy of the application with its letter inviting recommendations/comments of the State Government on all aspects within a period of 30 days. To such, application, the State is expected to respond with its complete comments within a period of 60 days. In other words, the opinion of the State on all matters that may concern it in any of the specified fields are called for. This is the stage where the State and its Department should play a vital role. They must take all precautions to offer proper comments supported by due reasoning. Once these comments are sent and the State Government gives its opinion which is considered by the NCTE and examined in conjunction with the report of the experts, it may grant or refuse recognition. Once it grants recognition, then such grant attains supremacy viz-a-viz the State Government as well as the affiliating body. Normally, these questions cannot be re-agitated at the time of grant of affiliation. Once the University conducts inspection in terms of its Statutes or Act, without offending the provisions of the Act and conditions of recognition, then the opinion of the State Government at the second stage is a mere formality unless there was a drastic and unacceptable mistake or the entire process was vitiated by fraud or there was patently eminent danger to life of the students working in the school because of non-compliance of a substantive condition imposed by either of the bodies. In the normal circumstances, the role of the State is a very formal one and the State is not expected to obstruct the commencement of admission process and academic courses once recognition is granted and affiliation is found to be acceptable.

64. In the case of *Sant Dnyaneshwar Shikshan Shastra Mahavidyalaya* (supra), the view of this Court was that the State

Government has no role whatsoever. However, in the case of *Bhartia Education Society* (supra), it was stated that the role of the State Government was limited to the manner of admission, eligibility criteria, etc. without interfering with the conditions of recognition prescribed by the NCTE. The exercise of discretion by the State Government and affiliating body has to be within the framework of the Act, the Regulations and conditions of recognition. Even in *St. John Teachers Training Institute* (supra), the Court stated that the State Government or the Union Territory has to necessarily confine itself to the guidelines issued by the NCTE while considering application for grant of 'No Objection Certificate'. Minimization of the role of the State at the second stage can also be justified on the ground that affiliation primarily is a subject matter of the University which is responsible for admission of the students laying down the criteria thereof, holding of examinations and implementation of the prescribed courses while maintaining the standards of education as prescribed.

65. Lastly, the question which is required to be discussed in light of the facts of the present cases is adherence to the Schedule. Once the relevant Schedules have been prescribed under the Regulations or under the Judge made law, none, whosoever it be, is entitled to carve out exceptions to the prescribed Schedule. Adherence to the Schedule is the essence of granting admission in a fair and transparent manner as well as to maintain the standards of education. The purpose of providing a time schedule is to ensure that all concerned authorities act within the stipulated time. Where, on the one hand, it places an obligation upon the authorities to act according to the Schedule, there it also provides complete clarity to other stakeholders as to when their application would either be accepted and/or rejected and what will be the time duration for it to be processed at different quarters. It also gives clear understanding to the students for whose benefit the entire process is set up as to when their examinations would be held, when results would be declared and when they are expected to take admission to different colleges in order of merit

obtained by them in the entrance examinations or other processes for the purposes of subject and college preference.

66. We are constrained to reiterate with emphasis at our command that the prescribed schedules under the Regulations and the judgments must be strictly adhered to without exceptions. None in the hierarchy of the State Government, University, NCTE or any other authority or body involved in this process can breach the Schedule for any direct or indirect reason. Anybody who is found to be defaulting in this behalf is bound to render himself or herself liable for initiation of proceedings under the provisions of the Contempt of Courts Act, 1971 as well as for a disciplinary action in accordance with the orders of the Court. In the case of *Parshavanath Charitable Trust & Ors. V. All India Council for Technical Education & Ors.* (Civil Appeal @ SLP(C) 26086 of 2012), decided on the same date, this Court held as under :

> "29… 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 judgment of this Court in the case of *Medical Council of India v. Madhu Singh,* [(2002) 7 SCC 258]."

67. Undoubtedly, adherence to Schedule achieves the object of the Act and its various aspects. Disobedience results in unfair admissions, not commencing the courses within the stipulated time and causing serious prejudice to the students of higher merit resulting in defeating the rule of merit.

68. We may very clearly state here that we adopt and reiterate the Schedule stated by this Court in the case of *College of Professional Education* (supra) in relation to admission as well as recognition and affiliation. This obviously includes the commencement of the courses in time. However,

in order to avoid the possibility of any ambiguity, we propose to state the schedule for recognition and affiliation in terms of the NCTE Regulations 2009 and the judgment of this Court in the case of *College of Professional Education* (supra) :

69. The process for grant of recognition, affiliation and thereby sanctioning of commencement of the courses in terms of the Regulations and the orders of this Court gives an outer period of approximately 270 days, i.e. 9 months, from 1st September to 10th May of the year immediately preceding the concerned academic year. Thus, for the entire process to be within this framework, it must be completed within the afore-stated period. The process inter alia includes various steps including comments of the State, inspection of the institution and compliance of the various conditions afore-noted in the order of recognition and affiliation by the affiliating body.

70. There appear to be some over-lapping periods and even contradictions between the dates and periods stated under the regulations inter se and even with reference to the judgments of this Court prescribing the Schedule. For example in terms of the judgment of this Court in the case of *College of Professional Education* (supra), the last date for grant of affiliation is 10th May of the concerned year, but as per Regulation 5.5 of the NCTE Regulations, 2009, the last date for grant of recognition is 15th May of the relevant year. Similarly, there is an overlap between the period specified in Regulation 7.1 and that under Regulation 7.2. Such overlapping is likely to cause some confusion in the mind of the implementing authority as well as the applicant. Thus, it is necessary for this Court to put to rest these avoidable events and unnecessary controversies. Compelled with these circumstances and to ensure that there exists no ambiguity, uncertainty and confusion, we direct and prescribe the following schedule upon a cumulative reading of the Regulations and judgments of this Court in relation to recognition and affiliation.

Schedule

1.	Submission of applications for recognition in terms of Regulation 5.4 relevant	1st September to 1st for October of the year immediately preceding the academic year
2.	Communication of deficiencies, shortcomings or any other discrepancy in the application submitted by the applicant to the applicant in terms of Regulation 7.1	Within 45 days from the date of receipt of the applications
3.	Removal of such deficiencies by the applicant	Within 60 days from the date of receipt of communication
4.	Forwarding of copy of the application to the State Government/UT Administration for its recommendations/ comments in terms of Regulation 7.2	Within 90 days from the date of receipt of the application
5.	Recommendations/ comments of the State Government/UT Administration to be submitted to the Regional Committee under Regulation 7.3	Within 30 days from the date of issue of letter to it.
6.	If recommendations/ comments are not received within 30 days, the Regional Committee shall send to the State Government/UT Administration a reminder letter for submission of the recommendations/ comments.	
7.	State Government/UT Administration shall furnish the recommendations/ comments	Within 15 days from the date of receipt of such reminder letter
8.	Intimation regarding inspection by the Regional Committee to the applicant under Regulation 7(4)	Within 10 days from final scrutiny of the application.
9.	Report by the Inspection Committee under Regulation 7(5)	20 days thereafter
10.	Letter of intent to the institution with respect to grant or refusal of recognition in terms of Regulation 7.9	10th of February of the succeeding year/relevant year
11.	Time to comply with certain specified conditions, in terms of Regulation 7(10) and 7(11)	20 days from the date of issuance of letter of intent
12.	Issuance of formal order of recognition	By 3rd March of each year
13.	Last date for submitting proposal for affiliation	By 10th March of each year
14.	Forwarding of proposal by the University to the State Government/UT A	By 10th March of each year

	dministration after inspection by expert team	
15.	Comments to be submitted by the State Government/ UT Administration, if any	By 10th March of each year
16.	Final date for issuance/ grant of affiliation for the relevant academic year	By 10th March of each year

- All notices/orders/requirements/letters in terms of the above schedule or under the provisions of the Act or terms and conditions of already granted recognition/affiliation shall be sent by the authority concerned by Speed Post/e-mail on the address given in the application for correspondence etc. and shall be posted on the website of the concerned Authority/Committee/Council/ Government.

- The recognition and affiliation granted as per above schedule shall be applicable for the current academic year. For example recognition granted upto 3rd March, 2013 and affiliation granted upto 10th May, 2013 shall be effective for the academic year 2013-2014 i.e. the courses starting from 1st April, 2013. For the academic year 2013-2014, no recognition shall be issued after 3rd March, 2013 and no affiliation shall be granted after 10th May, 2013. Any affiliation or recognition granted after the above cut-off dates shall only be valid for the academic year 2014-2015.

- We make it clear that no Authority/person/ Council/ Committee shall be entitled to vary the schedule for any reason whatsoever. Any non-compliance shall amount to violating the orders of the Court.

71. In all the appeals and petitions before us, the basic issue is whether the university and the State Government were

justified in rejecting the application or not granting application for affiliation on the ground that there was a cut-off date and/or the conditions of recommendation/affiliation had not been satisfied. In some cases, serious disputes have been raised with regard to the fulfillment of the conditions of recognition and/or affiliation. As far as the reason in relation to cut-off date is concerned, we cannot find any fault with the view taken by the authorities concerned. 10th of May has been provided as the cut-off date, after which no affiliation for the current academic year would be granted. This, being the law stated by this Court, is binding on all concerned, including any authority. The authorities have rightly acted in declining to entertain and/or refusing affiliation to the institutions being beyond the cut-off date. Adherence to the schedule was the obligation of the authorities and the institutions cannot raise any grievance in that regard. The said time schedule must become operative in all respects and nobody should be permitted to carve exceptions to this mandatory direction.

72. Coming to the cases where the plea has been taken by the respondents University/State that conditions of affiliation have not been satisfied. It is not for this Court to examine the compliance or breach of conditions and their extent in the special leave petitions or writ petitions as the case may be. In fact, the judgment of the High Court has been brought to our notice where it has been recorded that conditions in some cases have been complied with, but still the State has taken the stand that besides cut-off date, other conditions are also not satisfied. One of the examples relates to the matter where the State/affiliating body has found that even the building's boundary wall was not complete and the fire equipments have not been installed as prescribed. However, these were specifically disputed by the petitioners/appellants who contended that all conditions had been satisfied. Thus, these are disputes of very serious nature. They will squarely fall beyond the ambit of appellate or writ jurisdiction by this Court. This is for the specialised bodies to examine the matters upon

physical verification and to proceed with the application of the institute in accordance with law.

73. We may mention that firstly vide order dated 26th July, 2012 a stay in regard to counseling and admission was granted by this Court. However, this order was varied again by order dated 27th September, 2012 which reads as under:-

> "By our interim order dated 26th July, 2012, we had, while taking note of the fact that counselling for vacant seats in B.Ed. Course for different private colleges in the State of Uttar Pradesh was scheduled from 27th July, 2012 to 26th August, 2012, directed that the counselling will not be held for the time being.
>
> On 25th September, 2012, after hearing writ petition and all other connected matters, we had called upon the Universities to file an affidavit on the issue whether the students admitted to the institution which had already been affiliated will be able to complete the course during the academic session as per the Regulations of the NCTE if the interim order is vacated or modified now.
>
> Pursuant to the aforesaid orders passed on 25th September, 2012, an affidavit has been filed on behalf of respondent No. 2 - Dr. Ram Manohar Lohia Awadh University and it is inter alia stated therein that if the vacancies in the seats in different private colleges which are affiliated are filled up and students are admitted, the University will still be in a position to complete the mandatory requirements of 200 days as per the NCTE norms and Regulations, since the examinations for the last academic session 2011-12 have commenced from the second week of September, 2012 only. Along with the affidavit, a chart has been annexed to indicate that there were 13,435 vacant seats in self-financing colleges which are affiliated to the concerned Universities comprising 2762 vacant seats in the Arts and Commerce Stream and 10,673 seats in Science and Agriculture.

> Considering the aforesaid facts stated in the affidavit filed on behalf of respondent No. 2, we vacate the interim and permit the authorities to fill up the vacant seats in B.Ed. Course in different self-financing colleges which have already been granted affiliation as well as Government and Government aided Colleges. But we make it clear that the authorities will ensure that the students are admitted strictly as per the procedure that has been already notified on the basis of merit in the entrance examination and fresh counselling will take place after a fresh advertisement in the newspapers having circulation in the State of Uttar Pradesh and in the internet. The authorities will also ensure that the students admitted complete the mandatory period of 200 days' course in the B.Ed. as per norms of the NCTE.
>
> The matters are reserved for judgment."

74. In furtherance to the above order, we are informed that the admissions had been granted in the recognised and affiliated institutes. In the colleges which were neither recognised nor affiliated, whether or not included in the list of counseling, no admissions were given to the students. The petitioner/appellant colleges fall in that category. We do not propose to grant any relief to them in the present writ petitions and appeals except issuance of certain directions. Consequently and in view of our above discussion, we dispose of all these appeals/writ petitions with the following directions:-

A) The schedule stated in the case of College of *Professional Education* (supra) and in this judgment in relation to admissions, recognition, affiliation and commencement of courses shall be strictly adhered to by all concerned including the NCTE, the State Government and the University/ examining body.

B) In the event of disobedience of schedule and/or any attempt to overreach or circumvent the judgment of

this Court and the directions contained herein, the concerned person shall render himself or herself liable for proceedings under the Contempt of Courts Act, 1971 and even for departmental disciplinary action in accordance with law.

C) We hereby direct the NCTE/ State Government/ Examining or affiliating body to consider the applications and pass appropriate orders granting or refusing to grant recognition/affiliation to the petitioner institutions within three months from today.

D) If the institutions are aggrieved from the order passed by the authorities in terms of clause 'C' (supra), they will be at liberty to challenge the same in accordance with law.

E) The NCTE shall circulate the copy of this judgment to all Regional Committees, concerned State Governments and all affiliating bodies and also put the some on its website for information of all stakeholders and public at large.

F) The interim order dated 27th September, 2012 is made absolute.

75. All the writ petitions and appeals are accordingly disposed of, however, leaving the parties to bear their own costs.

K.K.T. Writ Petitions & Appeals disposed of.

KRISHAN

v.

STATE OF HARYANA

(Criminal Appeal No. 766 of 2008)

DECEMBER 13, 2012

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

Penal Code, 1860 - ss. 302, 498A and 109 - Prosecution under - Acquittal by trial court disbelieving the dying declaration in view of the hostility of witnesses - High Court convicted the accused relying on the dying declaration, evidence of the Judicial Magistrate and the Investigating Officer - On appeal, held: The hostility of the witnesses would not demolish the value of the dying declaration in view of the facts of the case - These witnesses support the prosecution case to some extent - Dying declaration was recorded in accordance with the established practice and procedure - Dying Declaration - Witness - Hostile witness.

Dying Declaration - Evidentiary value - Dying declaration can form the sole basis of conviction if it is true, reliable and recorded in accordance with established practice and principles - Evidence Act, 1872 - s. 32.

Witness - Hostile witness - Evidentiary value - Hostility of a witness is a relevant consideration, but not the sole determinative factor to decide the guilt of the accused.

Appellant-accused was prosecuted along-with another accused (his mother) u/ss. 302, 498A and 109 r/w. s. 34 IPC, for causing death of his wife by setting her on fire. The deceased had made her dying declaration alleging that the appellant-accused set her on fire and also used to beat her under influence of liquor and another accused used to instigate him. Trial court

acquitted both the accused on the ground that the material witnesses PWs 1,3 and 4 i.e. relatives of the deceased turned hostile and it was not safe to rely on the dying declaration. High Court convicted the appellant-accused relying on the dying declaration, the evidence of Sub Divisional Judicial Magistrate (PW10) and Investigating Officer PW11) while maintaining the acquittal of the other accused. Hence the present appeal.

Dismissing the appeal, the Court

HELD: 1. The hostility of PW1, PW3 and PW4 cannot demolish the value and reliability of the dying declaration of the deceased. The dying declaration has been proved in accordance with law, is a truthful version of the events that occurred and the circumstances leading to her death. The same is reliable and in fact, to some extent, finds corroboration from the statements of other witnesses. [Para 26] [900-E-F]

Khushal Rao v. State of Bombay **AIR 1958 SC 22: 1958 SCR 552 ;** *State of Uttar Pradesh v. Ram Sagar Yadav and Ors.* **(1985) 1 SCC 552: 1985 (2) SCR 621 ;** *Munnu Raja and Anr. v. State of MadhyaPradesh* **(1976) 3 SCC 104: 1976 (2) SCR 764 - relied on.**

2. It is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused when such dying declaration is true, reliable and has been recorded in accordance with the established practice and principles. In the present case, the dying declaration had been recorded in accordance with the established practice and procedures. To its correctness and authenticity, there can hardly be any challenge. The truthfulness of the dying declaration can further be evaluated from the fact that the deceased survived for another two-three days after the statement

was made from which it can reasonably be inferred that she was in a fit condition to make statement at the relevant time. In the dying declaration, the deceased did not unnecessarily involve the other family members of the appellant-accused. She only attributed the acts of cruelty and beating to her husband and that too, when he was under the influence of liquor. [Paras 18 and 19] [894-B-D-G-H; 895-A-B]

Ramilaben Hasmukhbhai Khristi v. State of Gujarat **(2002) 7 SCC 56: 2002 (1) Suppl. SCR 530 ;** *Bhajju @ Karan Singh v. State ofMadhya Pradesh* **(2012) 4 SCC 327: 2012 (5) SCR 37 - relied on.**

3. It is not only possible but quite feasible that the thumb impression of the deceased could rightly be taken by the SDJM. The answer of the doctor in his cross-examination, where he stated that "it is correct that both hands of the deceased were burnt, including fingers and thumb." does not bring any advantage, inasmuch as no specific question was put to the doctor that the extent of burns was such that her thumb impression could not have been taken. PW14, who performed the autopsy on the dead body of the deceased, clearly noticed that there were superficial to deep burns all over the body except her lower parts of both thighs, both legs and feet. [Para 21] [895-E-H]

4. PW1, PW3 and PW4 were declared hostile by the prosecutor with the leave of the court. However, this Court can still rely on and refer to the statements of these three witnesses to the extent that they support the case of the prosecution. These witnesses support the case of the prosecution to a limited extent. Keeping in view the social set up in rural areas, the fact that another daughter i.e. sister of the deceased had been married in the same family, gives a definite indication as to the reason why these witnesses turned hostile. The hostility of these

witnesses would, in no way, render the dying declaration doubtful, much less inadmissible or of no evidentiary value. The hostility of the witnesses is a relevant consideration, but is not the sole determinative factor for deciding the guilt or otherwise of an accused. PW9, PW11, PW14, SDJM, the other police witnesses and to some extent PW1 have also supported the case of the prosecution and partially the dying declaration. [Para 23] [896-C-F-G; 897-A-C]

Bhajju @ Karan Singh v. State of Madhya Pradesh **(2012) 4 SCC327: 2012 (5) SCR 37;** *Mrinal Das v. State of Tripura* **(2011) 9 SCC479: 2011 (14) SCR 411 - relied on.**

Case Law Reference:

1958 SCR 552	**Relied on**	**Para 12**
1985 (2) SCR 621	**Relied on**	**Para 16**
1976 (2) SCR 764	**Relied on**	**Para 16**
2002 (1) Suppl. SCR 530	**Relied on**	**Para 16**
2012 (5) SCR 37	**Relied on**	**Para 17, 24**
2011 (14) SCR 411	**Relied on**	**Para 25**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 766 of 2008.

From the Judgment & Order dated 17.07.2007 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 423-DBA of 2000.

Ram Naresh Yadav, Dr. Kailash Chand for the Appellant.

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

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. This appeal is directed

against the judgment of conviction and order of sentence dated 17th July, 2007 passed by the High Court of Punjab and Haryana at Chandigarh whereby the High Court reversed the judgment of acquittal passed by the Trial Court against the accused Krishan. However, it maintained the acquittal of another accused Shardi, mother of the accused Krishan.

2. In brief, the facts are that Ex. PH/1, FIR No. 134 was registered against accused Shardi and Krishan under Sections 307, 498A, 109 read with Section 34 of the Indian Penal Code, 1860 (for short "IPC") on 30th March, 1998. This FIR was registered in furtherance of the rukka, Ex.PH, received by the Police Station Sadar Narwana, from Civil Hospital, Jind. After receiving the rukka ASI Umed Singh, PW9 along with police officers reached the Civil Hospital, Narwana. That police officer obtained the evidence certificate in respect of Smt. Rani, wife of Krishan. She was admitted to the hospital with burn injuries. The doctor declared Rani fit to make the statement and also provided her medico-legal report to the Investigating Officer. Since Rani's condition was serious, the Investigating Officer summoned Sh. Baljit Singh, then SDJM Narwana for the purpose of recording the statement of Rani.

3. On the request of the police, the said SDJM came to the hospital and proceeded to record the statement of Rani. The statement of the deceased was recorded on 30th March, 1998 at about 11.40 a.m. As per the dying declaration, Ext. PR/2 she was married to Krishan approximately 18-19 years ago. Krishan was addicted to liquor and used to harass her. When she served food to Krishan, he would throw away the thali on the ground.

4. From this wedlock, two sons were born aged 9 years and 7 years respectively. According to Rani, accused Krishan used to give her beatings whenever he was under the influence of liquor. Krishan also used to make demands for a car, and used to ask Rani to bring money to purchase the car from her father. She also stated that her father-in-law used to help her,

but mother-in-law never helped. Shardi, mother of the accused used to instigate him.

5. On the fateful day, Rani herself took kerosene oil from the store at about 7 a.m. in the morning to burn the stove. At that time, her husband poured the kerosene oil on her body and set her on fire. On the night previous to the occurrence, Krishan had come with his friend Bedu, son of Teka and asked her to prepare tea which she prepared and served to both of them. According to Rani, when she was set on fire by the accused, her father-in-law and sister-in-law extinguished the fire and seeing them even her husband helped in putting off the fire. The father-in-law and sister-in-law had come to the place of occurrence after hearing her screams, but none of them were present when the accused Krishan had sprinkled kerosene on her body.

6. Vide Ext. PJ, PW9 had sought the opinion of the doctor, which was recorded vide Ext. PJ/1 wherein it was stated that "patient is fit to make her statement". The Investigating Officer then requested the SDJM to record the statement of the deceased which then was recorded vide Ext. PR/2 and thumb impression of Rani was taken. This was signed by the SDJM.

7. Based upon the dying declaration made by the deceased, FIR was registered under Sections 498A, 307, 109 and 34 IPC. However, subsequently on 2nd April, 1998 Rani died and the offence was converted to Section 302 IPC and FIR accordingly amended. The Investigating Officer prepared the site plan, recorded statement of PWs and prepared the Inquest Report, Ext.PN, with regard to the dead body of Rani. The doctor, PW14, who performed the post-mortem upon the body of the deceased and noticed the condition of the body and injuries upon the body of the deceased stated in his statement as follows:-

> "On dated 3.4.98 vide PMR No. 325/98 I conducted the autopsy of the dead body of Rani wife of Krishan Balmiki by Caste, resident of Sudkan Kalan, District Jind. Dead body was brought by H.C. Om Parkash 451 and Identified by Rajinder and Wazir. I found the following on Post-mortem examination.
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> Dead body was 160 cm. Long. It was naked. Rigour mortis was present in all the limbs. There was a golden colour nazle coca. There were superficial to deep bones over the whole body except lower parts of both thigh, both legs, and foot. Line of demarcation was present. Singeing was present. Redning, blackning and peeling of skin was present. Vesication was present. Bones were superficial to deep and approximately 75%.
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> The cause of death was due to burns and its complications which were anti-mortem in nature and sufficient to cause death in ordinary course of nature.
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> The following were handed over to the police.
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> 1. Dead body after Post Mortem Examination.
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> 2. Copy of PMR
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> 3. 11 Police papers duly signed.
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> The probable time that elapse between the injury and death was between 3-4 day (as per record and between death) and post mortem was within 4-36 hours. Ext. PT is the carbon copy of the PMR which bears my signature. On police request Ex. PO I conducted the P.M. Examination on the dead body of Rani wife of Krishan which is also accompanied by the inquest report Ex. PN which are in total 11 pages and I initial the same.
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> xxxxxxxxxxxxxx by defence counsel.
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> The burns were on the whole body except as mentioned in the statement. The burns are classified of three types. Epidermal, Dermo-epidermal and Deep. Burns were of superficial and deep burns. It is correct that due to burns there is severe pains, and the medication is prescribed. It is incorrect to suggest that I am deposing falsely."

8. The accused were directed to face trial before the Court of Sessions. The learned Trial Court vide its detailed judgment dated 15th November, 1999 confirmed the opinion that the prosecution had not been able to prove its case against the accused beyond shadow of reasonable doubt and, thus, while giving the benefit of doubt, acquitted both the accused. The Trial Court found that in the facts of the present case, it was not safe to rely upon the dying declaration of the deceased and acquitted both the accused. It will be useful to refer to the relevant findings of the trial court.

> "14.All the material witnesses examined by the prosecution namely, PW1 Ramdhari, PW3 Mamo, mother of deceased, PW4 Nirmala sister of accused Krishan have not supported the prosecution version in any manner and they were declared hostile on the request of the learned PP and were cross-examined by him but nothing favourable to the prosecution came out of them. The only piece of evidence against accused Krishan is the dying declaration recorded by Shri Baljeet Singh then SDJM, Narwana in which Rani has implicated her husband Krishan for the present occurrence. PW11 Dr. B.R. Kayat who admitted Rani has stated in the cross examination that Krishan accused was also admitted in the hospital at the same time on the same and he also suffered burn injuries and Krishan remained admitted in the hospital for 21 days. From this it is proved that Krishan tried to extinguish the fire and that is why he also received burn injuries along with Rani. DW2 Ram Rati who is real sister of Rani has stated that Krishan was not present in the house at the time of occurrence but he came to the spot from outside and he also helped the other family members in extinguishing the fire. So, from the evidence it is proved that Krishan accused took part in extinguishing the fire and Rani was got admitted in the hospital alongwith Krishan. The parents of the deceased have clearly stated that accused Krishan was not addicted to liquor and he never harassed Rani for

> bringing less dowry and that accused Krishan never demanded any dowry articles although the marriage took place more than 18/19 years ago. Similarly sister of the deceased who was married with the brother of the accused Krishan and who appeared as DW2 has also stated that it was a natural death because Rani caught fire while preparing tea and Rani told the witness that Krishan was not at fault and accused Krishan took part in extinguishing the fire. The material witnesses were declared hostile on the question of the learned PP and were cross-examined by him but nothing favourable to the prosecution came out them. There is no evidence on record that accused Krishan or her mother Sardhi might have ever treated Rani with cruelty for bringing fewer dowries or for bringing more dowries. It is also not proved from the evidence of the prosecution that accused Krishan might be addicted to liquor. So now we are left with the dying declaration.....
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> 15.....In the present case dying declaration cannot be believed because even parents of the deceased have not supported her versioning any manner. Similarly, even the sister of the deceased who was present at the time of occurrence has not implicated the two accused in any manner. Further she has stated that it was accidental fire and Krishan accused extinguished the fire."

9. The above reasoning of the Trial Court did not find favour with the High Court and the High Court while relying upon the dying declaration, the statement of SDJM PW10 and the statement of Dr. B.R. Kayat PW11, recorded the following reasoning:-

> "23. In this case, dying declaration does not leave anything vague. It is free from blemish. The act of the Magistrate cannot be suspected when he records the dying declaration as a part of the judicial function, which carries great sanctity. Opinion of the doctor was obtained and deceased remained fit to make statement during the course of recording the dying declaration. There is no

evidence that there was any body else to influence her.

24. Learned counsel for the accused-respondents, supporting the judgment of the trial Court, has pointed out that the benefit of doubt should be given to the husband because he was the person who tried to extinguish the fire and as a result thereof, he received burn injuries on his hands.

25. This Court does not concur with the contention of the learned counsel for the accused-respondents. When burn injuries are found on the hands etc. of the accused in case of bride burning etc. it shall be a relevant circumstance to be taken into consideration along with other circumstances pointing to the innocence of the husband or whoever is accused of the crime of causing death by burning. It was stated by the deceased in her statement (Exhibit PR/2) that her father-in-law and Nanad extinguished the fire. Her husband also extinguished the fire. Since father and sister of Krishan accused-respondent tried to extinguish the fire, Krishan husband had no option but to join them in extinguishing the fire. Had there been any falsity in the statement (Exhibit PR/2) of Rani, she would have been the last person to say that her husband also (sic) extinguished the fire. It is one of the factors, which strengthens the consideration that the dying declaration was spontaneous and truthful. Dr. R.K. Wadhwa (PW14) conducted the Post Mortem on the dead body of Rani on April 3, 1998 and opined that the death occurred due to burn injuries and the injuries were ante mortem and sufficient to cause death in the ordinary course of nature. The circumstance would further strengthen the duly proved and unequivocal dying declaration. Learned trial judge, in this case, fell in serious error by putting the circumstance of presence of burn injuries on the hands of the accused at a higher but unmerited pedestal and putting the dying declaration in the background. The importance and emphasis, which ought to have been put on the dying declaration, were wrongly

put on the said circumstance of burn injuries on the hands of the accused in negation of the settled proposition of law governing dying declaration. The entire approach of the trial judge was lopsided and rather contumacious."

10. The High Court convicted the accused Krishan while maintaining the acquittal of Shardi, mother of accused Krishan.

11. In light of the diametrically opposite views recorded by the Trial Court and the High Court, the primary question that arises for consideration in the present case is as to whether the court can safely rely upon the dying declaration and make the same as the basis for conviction of the accused Krishan, though other witnesses like PW1, PW3 and PW4 have not fully supported the case of the prosecution. In order to examine this aspect, it is necessary for us to bifurcate this proposition into the following two heads:-

a. Firstly, whether as a principle of law, a dying declaration can form the sole basis for conviction of an accused or not?

b. Secondly, whether the facts of the present case fully satisfy the settled principles and it would be safe to convict the accused Krishan solely on the basis of the dying declaration of the deceased?

DISCUSSION :

12. The learned counsel appearing for the appellant relied upon the judgment of this Court in the case of *Khushal Rao v. State of Bombay* [AIR 1958 SC 22] to contend that it is not safe to convict an accused merely on evidence furnished by a dying declaration, without further corroboration because such a statement is not made on oath and because the maker of it might be mentally and physically in a state of confusion and, therefore, the value to be attached to such a dying declaration cannot be such so as to form the sole basis of conviction of an accused.

13. On the contrary the counsel appearing for the State

relied upon the judgment of this Court in the case of *State of Uttar Pradesh v. Ram Sagar Yadav and Ors.* [(1985) 1 SCC 552] and argued that primary effort of the Court has to be to find out whether the dying declaration is true and if it is so, no question of corroboration arises. It is only if the circumstances surrounding the dying declaration are not clear or convincing that the court may, for its assurance, look for corroboration of the dying declaration.

14. We are not able to see any contradiction in these two judgments of this Court. The three-Judge Bench judgment in the case of *Khushal Rao* (supra) had stated the principle in paragraphs 16 and 17, which reads as under:

> "16. On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court, we have come to the conclusion, in agreement with the opinion of the Full Bench of the Madras High Court, aforesaid, (1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; (3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (5) that a dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and (6) that in order to test the reliability of a dying declaration, the court has to keep in view, the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.
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> 17. Hence, in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But once, the court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration.
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> If, on the other hand, the court, after examining the dying declaration in all its aspects, and testing its veracity, has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then, without corroboration it cannot form the basis of a conviction. Thus, the necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, as held in some of the reported cases, but from the fact that the court, in a given case, has come to the conclusion that that particular dying declaration was not free from the infirmities referred to above or from such other infirmities as may be disclosed in evidence in that case."

15. A bare reading of the above paragraphs shows that the Court opined that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of

conviction unless it is corroborated. The Bench further clarified that where the dying declaration is true and correct, the attendant circumstances show it to be reliable and it has been recorded in accordance with law, the deceased made the dying declaration of her own accord and upon due certification by the doctor with regard to the state of mind and body, then it may not be necessary for the court to look for corroboration. In such cases, the dying declaration alone can form the basis for the conviction of the accused. But where the dying declaration itself is attended by suspicious circumstances, has not been recorded in accordance with law and settled procedures and practices, then, it may be necessary for the court to look for corroboration of the same.

16. In the case of *Ram Sagar Yadav* (supra), this Court had followed the same principle and, in turn, specifically referred to the judgment of *Khushal Rao* (supra). Not only this, even in the case of *Munnu Raja and Anr. v. State of Madhya Pradesh* (1976) 3 SCC 104, this Court referred to the judgment in *Khushal Rao's* case (supra). In paragraph 6 of the judgment, the Court stated the same principle that where the dying declaration suffers from an infirmity, the Courts will have to adopt a different course to adjudicate the matter in accordance with law. In the case of *Ramilaben Hasmukhbhai Khristi v. State of Gujarat* (2002) 7 SCC 56, this Court held as under:

> "28. Under the law, dying declaration can form the sole basis of conviction, if it is free from any kind of doubt and it has been recorded in the manner as provided under the law. It may not be necessary to look for corroboration of the dying declaration. As envisaged, a dying declaration is generally to be recorded by an Executive Magistrate with the certificate of a medical doctor about the mental fitness of the declarant to make the statement. It may be in the form of question and answer and the answers be written in the words of the person making the declaration. But the court cannot be too technical and in substance if it feels convinced about the trustworthiness of the statement which

> may inspire confidence such a dying declaration can be acted upon without any corroboration."

17. In this regard, reference can also be made to a recent judgment of this Court in the case of *Bhajju @ Karan Singh v. State of Madhya Pradesh* (2012) 4 SCC 327.

18. From the above judgments, it clearly emerges that it is not an absolute principle of law that a dying declaration cannot form the sole basis of conviction of an accused when such dying declaration is true, reliable and has been recorded in accordance with the established practice and principles.

19. Having answered the first question, now we have to deal with the facts of the present case. As already noticed, the dying declaration had been recorded in accordance with the established practice and procedures. To its correctness and authenticity, there can hardly be any challenge. After receiving the rukka at the police station, PW9 had rushed to the hospital and vide Ex.PJ/2 submitted application for recording the statement of the deceased. The doctor vide Ex. PJ/1 issued a certificate of fitness to record the statement of Rani. They dying declaration is Ex.PR/2 and photocopy thereof was marked as Ex.PK. This was recorded by the SDJM in his handwriting after questioning the deceased. Ex.PR/2 was signed by the SDJM as well as the thumb impression of Rani was taken, which was duly identified by the Investigating Officer. The proceedings to that effect were duly recorded as giving complete details as to how the dying declaration came to be recorded and the proceedings were submitted to the SDJM and the Area Magistrate. The truthfulness of the dying declaration can further be evaluated from the fact that the same was recorded on 30th March, 1998 while Rani died on 2nd April, 1998, i.e. she survived for another two-three days after the statement was made from which it can reasonably be inferred that she was in a fit condition to make statement at the relevant time, as stated by PW9 and PW11. In the dying declaration, the deceased did not unnecessarily involve the other family members of the accused Krishan. On the contrary, she specifically stated that

her father-in-law and sister-in-law were always helping her and, in fact, even tried to douse the fire. She did not even make any allegations against her mother-in-law, except that she did not help Rani. She only attributed the acts of cruelty and beating to her husband and that too, when he was under the influence of liquor.

20. Dr.B.R. Kayat, when examined as PW11, specifically stated that the patient was conscious but the B.P. could not be recorded because of burns. She had 75% burns. The doctor issued the endorsement, Ex.PJ/1, declaring that the deceased was fit to make statement and he also permitted the Magistrate to record the statement of the deceased and she remained fit during the recording of her statement. According to this witness, he had granted endorsement (Ex. PJ/1) at 11.15 a.m. and then he granted the other certificate, Ex.PR/3 at about 11.42 a.m. certifying that she remained fit during recording of her statement. He also stated that the Magistrate remained present in the hospital for about 30 minutes.

21. The learned counsel appearing for the appellant heavily relied upon the answer of the doctor in his cross-examination, where he stated that "it is correct that both hands of Rani were burnt, including fingers and thumb." The deceased is stated to have suffered 75% burns. This answer of the witness in face of his statement in examination-in-chief does not bring any advantage, inasmuch as no specific question was put to the doctor that the extent of burns was such that her thumb impression could not have been taken. No such question was put to this witness. Not even a suggestion was made to the doctor and the Investigating Officer to the effect that it was not possible to take the thumb impression of the deceased in the state of health that she was in. Dr. R.K. Wadhwa, PW14, who performed the autopsy on the dead body of Rani clearly noticed that there were superficial to deep burns all over the body except her lower parts of both thighs, both legs and feet. In other words, it is not only possible but quite feasible that her thumb impression could rightly be taken by the SDJM.

22. The next submission was that since PW1, PW3 and PW4, the relatives of the deceased had themselves turned hostile, it cannot be said that the prosecution has been able to prove its case beyond any reasonable doubt. On the contrary, this will also take this case outside the category of cases where an accused can be convicted solely on the basis of a dying declaration.

23. No doubt, these three witnesses were declared hostile by the prosecutor with the leave of the court. However, this Court can still rely on and refer to the statements of these three witnesses to the extent that they support the case of the prosecution. PW1, father of the deceased, stated that he had four daughters and one son. His daughters, Rani and Ram Rati were married to Krishan and Sat Narain about 19 years back. He denied that Krishan used to treat his daughter with cruelty. But two vital pieces of information that clearly surfaced from his examination-in-chief are inferred by the following statement "about two years ago, Krishan came to me and demanded money for purchase of vehicle, but I refused. ..... Statement of my daughter was recorded before my arrival." It was, thereafter, that the witness was declared hostile and cross-examined. Similarly, PW3, mother of the deceased stated that her daughter was never harassed by the accused for bringing less dowry and was declared hostile. PW4 is the sister of Krishan and she stated that Krishan was not at home and the deceased caught fire while she was preparing the tea. Maybe, it was not possible for the Court to convict the accused on the basis of the statements of PW1, PW3 and PW4 respectively. These witnesses support the case of the prosecution to a limited. Rani and Ram Rati were two sisters who were married to two real brothers, i.e. Krishan and Sat Narain. This fact has duly been noticed by the Trial Court in its judgment. However, its impact on the case of the prosecution and the reason for not supporting of the prosecution case by these witnesses was completely ignored by the Trial Court. PW1 supports the dying declaration to the extent that money was demanded for purchase of a car

and he had refused to meet the demand. To that extent, this fully corroborates the dying declaration made by the deceased. Keeping in view the social set up in rural areas, the fact that another daughter Ram Rati, sister of the deceased Rani, had been married in the same family, gives a definite indication as to the reason why these witnesses turned hostile. The hostility of these witnesses would, in no way, render the dying declaration doubtful, much less inadmissible or of no evidentiary value. The hostility of the witnesses is a relevant consideration, but is not the sole determinative factor for deciding the guilt or otherwise of an accused. PW9, PW11, PW14, SDJM, the other police witnesses and to some extent PW1 have also supported the case of the prosecution and partially the dying declaration.

24. The judgment of this Court in the case of *Bhajju @ Karan Singh* (supra) can usefully be referred again as it has some similarity on facts. There also two witnesses had turned hostile and a dying declaration was involved. Considering the cumulative effect of hostile witnesses and the reliability of a dying declaration, the Court held as under:

> "33. As already noticed, none of the witnesses or the authorities involved in the recording of the dying declaration had turned hostile. On the contrary, they have fully supported the case of the prosecution and have, beyond reasonable doubt, proved that the dying declaration is reliable, truthful and was voluntarily made by the deceased. We may also notice that this very judgment, Munnu Raja (1976) 3 SCC 104 relied upon by the accused itself clearly says that the dying declaration can be acted upon without corroboration and can be made the basis of conviction.
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> 34. Para 6 of the said judgment reads as under: (Munnu Raja case, SCC pp. 106-07)
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> "6. … It is well settled that though a dying declaration must be approached with caution for the reason that the maker

> of the statement cannot be subject to cross-examination, there is neither a rule of law nor a rule of prudence which has hardened into a rule of law that a dying declaration cannot be acted upon unless it is corroborated (see Khushal Rao v. State of Bombay AIR 1948 SC 22). The High Court, it is true, has held that the evidence of the two eyewitnesses corroborated the dying declarations but it did not come to the conclusion that the dying declarations suffered from any infirmity by reason of which it was necessary to look out for corroboration."

35. Now, we shall discuss the effect of hostile witnesses as well as the worth of the defence put forward on behalf of the appellant-accused. Normally, when a witness deposes contrary to the stand of the prosecution and his own statement recorded under Section 161 Cr.PC, the prosecutor, with the permission of the court, can pray to the court for declaring that witness hostile and for granting leave to cross-examine the said witness. If such a permission is granted by the court then the witness is subjected to cross-examination by the prosecutor as well as an opportunity is provided to the defence to cross-examine such witnesses, if he so desires. In other words, there is a limited examination-in-chief, cross-examination by the prosecutor and cross-examination by the counsel for the accused. It is admissible to use the examination-in-chief as well as the cross-examination of the said witness insofar as it supports the case of the prosecution.

36. It is settled law that the evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident. The evidence of such witnesses cannot be treated as washed off the records, it remains admissible in trial and there is no legal bar to base the conviction of the accused upon such testimony, if corroborated by other reliable evidence. Section 154 of the Evidence Act enables the court, in its discretion, to permit the person, who calls a

witness, to put any question to him which might be put in cross-examination by the adverse party.

37. The view that the evidence of the witness who has been called and cross-examined by the party with the leave of the court, cannot be believed or disbelieved in part and has to be excluded altogether, is not the correct exposition of law. The courts may rely upon so much of the testimony which supports the case of the prosecution and is corroborated by other evidence. It is also now a settled canon of criminal jurisprudence that the part which has been allowed to be cross-examined can also be relied upon by the prosecution. These principles have been encompassed in the judgments of this Court in the following cases:

a. *Koli Lakhmanbhai Chanabhai v. State of Gujarat* (1999) 8 SCC 624.

b. *Prithi v. State of Haryana* (2010) 8 SCC 536.

c. *Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi)* (2010) 6 SCC 1.

d. *Ramkrushna v. State of Maharashtra* (2007) 13 SCC 525."

25. Even in the case of *Mrinal Das v. State of Tripura* (2011) 9 SCC 479, this Court held as under:

"68. In our case, the eyewitnesses including the hostile witnesses, firmly established the prosecution version. Five eyewitnesses, namely, PW 1, PW 4, PW 6, PW 7 and PW 8 clearly identified two convicts, appellants Tapan Das (A-5) and Gautam Das (A-11). PWs 1, 4, 7 and 8 identified accused Pradip Das (A-9). PWs 1 and 7 identified accused Somesh Das (A-7). PWs 1 and 4 identified Mrinal Das (A-4). PWs 4 and 8 identified Anil Das (A-1). It is clear that 6 accused persons including two convicts/appellants had been identified by more than one eyewitnesses. It is also clear that 6 accused could have been identified by

the eyewitnesses though all of them could not have been identified by the same assailants. However, it is clear that two or more than two eyewitnesses could identify one or more than one assailants. The general principle of appreciating evidence of eyewitnesses in such a case is that where a large number of offenders are involved, it is necessary for the court to seek corroboration, at least, from two or more witnesses as a measure of caution. Likewise, it is the quality and not the quantity of evidence to be the rule for conviction even where the number of eyewitnesses is less than two.

69. It is well settled that in a criminal trial, credible evidence of even hostile witnesses can form the basis for conviction. In other words, in the matter of appreciation of evidence of witnesses, it is not the number of witnesses but quality of their evidence."

(emphasis supplied)

26. In view of the settled position of law, we are of the considered view that the hostility of PW1, PW3 and PW4 cannot demolish the value and reliability of the dying declaration of the deceased, Ext. PR/2. The dying declaration has been proved in accordance with law, is a truthful version of the events that occurred and the circumstances leading to her death. The same is reliable and in fact, to some extent, finds corroboration from the statements of other witnesses.

27. For these reasons, we see no merit in the present appeal and the same is dismissed.

K.K.T. Appeal dismissed.

ANJU CHAUDHARY
v.
STATE OF U.P. & ANR.
(Criminal Appeal No. 2039 of 2012)

DECEMBER 13, 2012

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

Code of Criminal Procedure, 1973:

s.154 - FIR - Whether it is permissible to register two different FIRs in law - Held: There cannot be two FIRs registered for the same offence - However, where the incident is separate; offences are similar or different, or even where the subsequent crime is of such magnitude that it does not fall within the ambit and scope of the FIR recorded first, then a second FIR could be registered - It has to be examined on the merits of each case whether a subsequently registered FIR is a second FIR about the same incident or offence or is based upon distinct and different facts and whether its scope of inquiry is entirely different or not - This will always be a mixed question of law and facts depending upon the merits of a given case - The Court in order to examine the impact of one or more FIRs has to rationalise the facts and circumstances of each case and then apply the test of 'sameness' to find out whether both FIRs relate to the same incident and to the same occurrence, are in regard to incidents which are two or more parts of the same transaction or relate completely to two distinct occurrences - If the answer falls in the first category, the second FIR may be liable to be quashed - However, in case the contrary is proved, whether the version of the second FIR is different and they are in respect of two different incidents/crimes, the second FIR is permissible.

s.154 - FIR - Whether an accused entitled to hearing pre-registration of an FIR - Held: The scheme of CrPC does not

provide for any right of hearing at the time of registration of the FIR - The very purpose of fair and just investigation shall stand frustrated if pre-registration hearing is required to be granted to a suspect - There would be the pre-dominant possibility of a suspect escaping the process of law - The entire scheme of CrPC supports the theory of exclusion of audi alteram partem pre-registration of an FIR.

ss.154 and 220 - Common trial or a common FIR for one series of acts so connected together as to form the same transaction - Expression "same transaction" - Meaning of - Held: It is not possible to enunciate any formula of universal application for purpose of determining whether two or more acts constitute the same transaction - Such things to be gathered from the circumstances of a given case indicating proximity of time, unity or proximity of place, continuity of action, commonality of purpose or design.

s.156(3) - Power of the Magistrate under - Discussed.

In the present appeal, the appellant challenged the legality and correctness of the order of the High Court inter alia on the grounds: (i) that in law, there cannot be two FIRs registered in relation to the same occurrence or different events or incidents two or more but forming part of the same transaction and thus on facts, the direction to register a second FIR, was contrary to law and the very spirit of Section 154 of the Code; (ii) that the order of the High Court was in violation of the principles of natural justice inasmuch as the High Court neither gave any notice nor heard the appellant before passing the impugned order and (iii) that the High Court while virtually directing the Magistrate to get an FIR registered, foreclosed the exercise of judicial discretion by the Magistrate and as such, the order of the High Court was not sustainable.

Per contra, on behalf of the State as well as

respondent no.2 it was inter alia contended that there were no two separate FIRs in relation to the same offence or occurrence, but these FIRs related to two different incidents which was permissible in law and that the appellant was not entitled to any hearing in law at the stage of filing the FIR.

Dismissing the appeal, the Court

HELD:

Whether it is permissible to register two different FIRs in law

1.1. On the plain construction of the language and scheme of Sections 154, 156 and 190 of the Code of Criminal Procedure, it cannot be construed or suggested that there can be more than one FIR about an occurrence. However, the opening words of Section 154 suggest that every information relating to commission of a cognizable offence shall be reduced to writing by the officer in-charge of a Police Station. This implies that there has to be the first information report about an incident which constitutes a cognizable offence. The purpose of registering an FIR is to set the machinery of criminal investigation into motion, which culminates with filing of the police report in terms of Section 173(2) of the Code. It will, thus, be appropriate to follow the settled principle that there cannot be two FIRs registered for the same offence. However, where the incident is separate; offences are similar or different, or even where the subsequent crime is of such magnitude that it does not fall within the ambit and scope of the FIR recorded first, then a second FIR could be registered. [Para 15] [925-C-F]

1.2. The filing of report upon completion of investigation, either for cancellation or alleging commission of an offence, is a matter which once filed

before the court of competent jurisdiction attains a kind of finality as far as police is concerned, may be in a given case, subject to the right of further investigation but wherever the investigation has been completed and a person is found to be prima facie guilty of committing an offence or otherwise, re-examination by the investigating agency on its own should not be permitted merely by registering another FIR with regard to the same offence. If such protection is not given to a suspect, then possibility of abuse of investigating powers by the Police cannot be ruled out. It is with this intention in mind that such interpretation should be given to Section 154 of the Code, as it would not only further the object of law but even that of just and fair investigation. [Para 15] [925-H; 926-A-C]

1.3. It has to be examined on the merits of each case whether a subsequently registered FIR is a second FIR about the same incident or offence or is based upon distinct and different facts and whether its scope of inquiry is entirely different or not. It will not be appropriate for the Court to lay down one straightjacket formula uniformly applicable to all cases. This will always be a mixed question of law and facts depending upon the merits of a given case. [Para 16] [926-F-G]

1.4. The possibility that more than one piece of information is given to the police officer in charge of a police station, in respect of the same incident involving one or more than one cognizable offences, cannot be ruled out. The Court in order to examine the impact of one or more FIRs has to rationalise the facts and circumstances of each case and then apply the test of 'sameness' to find out whether both FIRs relate to the same incident and to the same occurrence, are in regard to incidents which are two or more parts of the same transaction or relate completely to two distinct

occurrences. If the answer falls in the first category, the second FIR may be liable to be quashed. However, in case the contrary is proved, whether the version of the second FIR is different and they are in respect of two different incidents/crimes, the second FIR is permissible. [Para 23] [936-E-H]

1.5. In the case at hand, even the offences which are stated to have been committed, and for which the two FIRs were registered were different and distinct. There were two different FIRs relatable to different occurrences, investigation of one was no way dependent upon the other and they are neither inter-linked nor inter-dependent. They were lodged by different persons in relation to occurrences which are alleged to have occurred at different points of time against different people and for different offences. Requirement of proof in both cases was completely distinct and different. Thus, there was no similarity and the test of similarity would not be satisfied in the present case. Thus, lodging of the subsequent FIR was not a second FIR for the same occurrence, and thus, could be treated as a First Information Report for all purposes including investigation in terms of the provisions of the Code. It was not in the form of a statement under Section 162 of the Code. [Para 28] [938-F-G; 939-A-C]

Rita Nag v. State of West Bengal **(2009) 9 SCC 129: 2009 (13) SCR 276;** *Vinay Tyagi v. Irshad Ali @ Deepak & Ors.* **SLP (Crl) No.9185-9186 of 2009;** *Ram Lal Narang v. State (Delhi Administration)* **(1979) 2 SCC 322;** *M. Krishna v. State of Karnataka* **(1999) 3 SCC 247: 1999 (1) SCR 780;** *T.T. Antony v. State of Kerala* **(2001) 6 SCC 181: 2001 (3) SCR 942;** *Upkar Singh v. Ved Prakash* **(2004) 13 SCC 292;** *Rameshchandra Nandlal Parikh v. State of Gujarat* **(2006) 1 SCC 732;** *Vikram v. State of Maharashtra* **(2007) 12 SCC 332: 2007 (6) SCR 185;** *Tapinder Singh v. State of Punjab* **(1970) 2 SCC 113: 1971 (1) SCR 599;** *Shiv Shankar Singh v. State of Bihar* **(2012) 1 SCC 130: 2011 (13) SCR 247;** *Babu Babubhai v. State of Gujarat and Ors.* **(2010) 12 SCC 254: 2010 (10) SCR 651 and** *Chirra Shivraj v. State of Andhra Pradesh* **(2010) 14 SCC 444: 2010 (15) SCR 673 - referred to.**

Is an accused entitled to hearing pre-registration of an FIR?

2.1. The scheme of the Criminal Procedure Code does not provide for any right of hearing at the time of registration of the First Information Report. The registration forthwith of a cognizable offence is the statutory duty of a police officer in charge of the police station. The very purpose of fair and just investigation shall stand frustrated if pre-registration hearing is required to be granted to a suspect. It is not that the liberty of an individual is being taken away or is being adversely affected, except by the due process of law. Where the Officer In-charge of a police station is informed of a heinous or cognizable offence, it will completely destroy the purpose of proper and fair investigation if the suspect is required to be granted a hearing at that stage and is not subjected to custody in accordance with law. There would be the pre-dominant possibility of a suspect escaping the process of law. The entire scheme of the Code unambiguously supports the theory of exclusion of audi alteram partem pre-registration of an FIR. [Para 30] [940-D-G]

2.2. It is clear that the law does not contemplate grant of any personal hearing to a suspect who attains the status of an accused only when a case is registered for committing a particular offence or the report under Section 173 of the Code is filed terming the suspect an accused that his rights are affected in terms of the Code. Absence of specific provision requiring grant of hearing

to a suspect and the fact that the very purpose and object of fair investigation is bound to be adversely affected if hearing is insisted upon at that stage, clearly supports the view that hearing is not any right of any suspect at that stage. [Para 32] [942-B-D]

2.3. Even in the cases where report under Section 173(2) of the Code is filed in the Court and investigation records the name of a person in column (2), or even does not name the person as an accused at all, the Court in exercise of its powers vested under Section 319 can summon the person as an accused and even at that stage of summoning, no hearing is contemplated under the law. [Para 33] [942-E]

2.4. The situation, however, will be different where the complaint or an application is directed against a particular person for specific offence and the Court under Section 156 dismisses such an application. In that case, the higher court may have to grant hearing to the suspect before it directs registration of a case against the suspect for a specific offence. [Para 34] [942-F-G]

State of Uttar Pradesh v. Bhagwant Kishore Joshi **AIR 1964 SC 221: 1964 SCR 71;** *Union of India v. W.N. Chadha* **(1993) Suppl. (4) SCC 260: 1992 (3) Suppl. SCR 594 and** *Samaj Parivartan Samuday v. State of Karnataka* **(2012) 7 SCC 407 - referred to.**

Power of the Magistrate under Section 156(3) CrPC

3.1. While dealing with the application or passing an order under Section 156(3), the Magistrate does not take cognizance of an offence. When the Magistrate had applied his mind only for order an investigation under Section 156(3) of the Code or issued a warrant for the said purpose, he is not said to have taken cognizance. It is an order in the nature of a pre-emptory reminder or

intimation to the police to exercise its primary duty and power of investigation in terms of Section 151 of the Code. Such an investigation embraces the continuity of the process which begins with collection of evidence under Section 156 and ends with the final report either under Section 159 or submission of chargesheet under Section 173 of the Code. [Para 35] [944-D-F]

3.2. The Magistrate exercises a very limited power under Section 156(3) and so is its discretion. It does not travel into the arena of merit of the case if such case was fit to proceed further. This distinction has to be kept in mind by the court in different kinds of cases. In the present case, the Magistrate had not dealt with the case on merits, but on a legal assumption that it was not a case to direct investigation because investigation was already going on under an earlier FIR. There was thus no error of jurisdiction in the order of the High Court requiring the Magistrate to deal with the cases afresh and pass an order under Section 156(3) of the Code. [Para 38] [946-G-H; 947-A-B]

Mona Pawar v. High Court of Allahabad **(2011) 3 SCC 496: 2011 (2) SCR 413;** *Dilawar Singh v. State of Delhi* **(2007) 9 SCR 695;** *Tula Ram & Ors. v. Kishore Singh* **(1977) 4 SCC 459: 1978 (1) SCR 615;** *Rameshbhai Pandurao Hedau v. State of Gujarat* **(2010) 4 SCC 185: 2010 (3) SCR 522 and** *Srinivas Gundluri & Ors. v. SEPCO Electric Power Construction Corporation & Ors.* **(2010) 8 SCC 206: 2010 (9) SCR 278 - referred to.**

4.1. It is true that law recognizes common trial or a common FIR being registered for one series of acts so connected together as to form the same transaction as contemplated under Section 220 of the Code. There cannot be any straight jacket formula, but this question has to be answered on the facts of each case. The expression 'same transaction' from its very nature is

incapable of exact definition. It is not intended to be interpreted in any artificial or technical sense. Common sense in the ordinary use of language must decide whether or not in the very facts of a case, it can be held to be one transaction. [Para 40] [947-D-F]

4.2. It is not possible to enunciate any formula of universal application for the purpose of determining whether two or more acts constitute the same transaction. Such things are to be gathered from the circumstances of a given case indicating proximity of time, unity or proximity of place, continuity of action, commonality of purpose or design. Where two incidents are of different times with involvement of different persons, there is no commonality and the purpose thereof different and they emerge from different circumstances, it will not be possible for the Court to take a view that they form part of the same transaction and therefore, there could be a common FIR or subsequent FIR could not be permitted to be registered or there could be common trial. [Para 41] [947-G-H; 948-A]

4.3. Similarly, for several offences to be part of the same transaction, the test which has to be applied is whether they are so related to one another in point of purpose or of cause and effect, or as principal and subsidiary, so as to result in one continuous action. Thus, where there is a commonality of purpose or design, where there is a continuity of action, then all those persons involved can be accused of the same or different offences "committed in the course of the same transaction". [Para 42] [948-B-C]

Mohan Baitha v. State of Bihar **(2001) 4 SCC 350 - referred to.**

Case Law Reference:

2009 (13) SCR 276	**referred to**	**Para 15**
(1979) 2 SCC 322	**referred to**	**Para 16, 18**
1999 (1) SCR 780	**referred to**	**Para 17, 18**
2001 (3) SCR 942	**referred to**	**Para 18, 19**
(2004) 13 SCC 292	**referred to**	**Para 19**
(2006) 1 SCC 732	**referred to**	**Para 20**
2007 (6) SCR 185	**referred to**	**Para 21**
1971 (1) SCR 599	**referred to**	**Para 21**
2011 (13) SCR 247	**referred to**	**Para 21**
2010 (10) SCR 651	**referred to**	**Para 22**
2010 (15) SCR 673	**referred to**	**Para 23**
1964 SCR 71	**referred to**	**Para 29**
1992 (3) Suppl. SCR 594	**referred to**	**Para 30**
(2012) 7 SCC 407	**referred to**	**Para 31**
2011 (2) SCR 413	**referred to**	**Para 35**
(2007) 9 SCR 695	**referred to**	**Para 35**
1978 (1) SCR 615	**referred to**	**Para 36**
2010 (3) SCR 522	**referred to**	**Para 37**
2010 (9) SCR 278	**referred to**	**Para 37**
(2001) 4 SCC 350	**referred to**	**Para 40**

CRIMINAL APPELLATE JURISDCTION : Criminal Appeal No. 2039 of 2012.

From the Judgment and Order dated 26.09.2008 of the High Court of Judicature at Allahabad in CRLR No. 2346 of 2008.

Ravindra Shrivastava, Irshad Ahmad, AAG, Siddharth Dave, Kaushik Poddar, Abhinav Shrivastava, Anshuman Shrivastava, Suvigya Awasthy, M.R. Shamshad, Aparna Bhat, Pukhrambam Ramesh Kumar for the appearing parties.

The Judgment of the Court was delivered by

SWATANTER KUMAR, J. 1. Leave granted.

2. A cardinal question of public importance and one that is likely to arise more often than not in relation to the lodging of the First Information Report (FIR) with the aid of Section 156(3) of the Code of Criminal Procedure (for short, 'the Code') or otherwise independently within the ambit of Section 154 of the Code is as to whether there can be more than one FIR in relation to the same incident or different incidents arising from the same occurrence.

3. The above question arises from the factual matrix which, shorn of the unnecessary details, can be stated as follows:

4. On 16th November, 2007, one Parvez Parwaz, Respondent No.2, claiming himself to be a social activist filed an application under Section 156(3) in the Court of the Chief Judicial Magistrate, Gorakhpur. According to this complaint, one Mahant Aditya Nath Yogi, Member of Parliament and leader of an unregistered organization called the Hindu Yuva Vahini had been spreading hatred amongst Hindus and Muslims for a number of years and has also been causing fear amongst the Muslim community and harming them, demolishing the properties of Muslims and carrying out other acts of harassment. On 27th January, 2007 when the complainant, Respondent No.2 herein, was returning home from the Railway Station, Gorakhpur at about 8.00 p.m., Yogi Aditya Nath,

Member of Parliament, Dr. Radha Mohan Dass Aggarwal, Member of the Legislative Assembly, Dr. Y. D. Singh, Member of the Legislative Council and Anju Chowdhary, Mayor of Gorakhpur, the Minister of State and BJP Leader Shiv Pratap Shukla, other office bearers and thousands of activists of Hindu Yuva Vahini, BJP and Vyapar Mandal, Gorakhpur, as well as various other persons whom the petitioner does not know by name but can recognise, were holding a meeting as "Warning Meeting". The meeting which was addressed by Yogi Aditya Nath who was saying that if blood of one Hindu be shed then they will not register any FIR with the administration against the bloodshed of one Hindu in the times to come, instead they will get ten persons (Muslims) killed. If damage is done to the shops and properties of Hindus, they would indulge in similar activities towards the Muslims. Anything can be done to save the glory of Hindus and all should prepare for a fight. Amongst others, it was also stated in the complaint as under:

> "He stated that we will not allow lifting of Tazia anywhere in the Gorakhpur City and the Gorakhpur District and we will also celebrate our Holi with these Tazias. He stated that we will have to take harsh steps for the welfare of Hindus and we do not want that the generations to come remember us with bad names. He stated that I do not understand that we will be ready to take up those names, therefore, be ready to fight your final battle. Member of Parliament Yogi Aditya Nath stated that once you stand up then you see that Gorakhpur will remain peaceful for many years. If the administration does not take revenge of the murder of the Trader's son, then we will take ourselves, we will ourselves take revenge of that murder. Member of Parliament Yogi Aditya Nath, in his speech, termed the administration as worthless and eunuch and the incidents as Government sponsored terrorism and challenging the democratic Government he stated that they will destroy the law and order and will take law in their own hands. He also called for bandh of Gorakhpur and Basti Divisions and

directed the activists to inform about this to every place through every media. Thereafter, Member of Parliament Yogi Aditya Nath led a torch procession and hundreds of activists along with abovenamed persons participated and raised slogans in support of Yogi Aditya Nath. In this procession, the slogan related to spreading of hatred against Muslims and sentiments of killing and harming them was being raised with primary importance, which was pronounced as "Katuye Kaate Jayenge, Ram - Ram Chillanyenge". The petitioner got afraid very much by the above incident and keeping in view the danger to his life, went to the house of a relative. The petitioner saw at many places in the way that these elements raising exciting slogans behaved improperly by passing humiliating comments on Burqa - clad women and beared Muslim passers by and beat them and fired several rounds in the air. All these incidents including the public meeting and torch procession was witnessed by a number of people apart from me, who I know by name and address, but I do not deem it proper to reveal their names in the present situation due to reason of insecurity.

5. That after the night of 26th January, 2007, due to highly sensitive condition prevailing in the town Gorakhpur, curfew was imposed on three Police Station areas of the Gorakhpur town and Section 144 was in force in entire Gorakhpur city area including the places of public meeting and the torch procession. Despite this, the aforesaid unconstitutional meeting and torch procession was organized and conducted openly violating the Section 144 in presence Police Officers and the public was provoked and directed to perform criminal acts by the activists present there and the activists of other places were provoked through them. Aditya Nath Yogi provoked Hindus to kill Muslims and rob and set afire their houses and shops and to destruct their religious places and Tazias for the reason of the murder of Raj Kumar Agrahari (incident

of 26/27th January, 2007 Gorakhpur Town) and the alleged incidents happending since 24th January, 2007 and also provoked Muslims to not to celebrate Muharram which was a conspiracy hatched by him on the basis of his maligned thought and to fulfil which, he was looking for an appropriate situation. Under this very conspiracy, criminal incidents were carried out in the Gorakhpur and Basti Divisions, which caused disruption of Law and Order.

6. That as a result of the speech given by Yogi Aditya Nath in the public meeting on 27th January, 2007, torch procession and conspiracy hatched by abovenamed persons present with him, the shops, houses, godowns and vehicles of Muslims were robbed and set afire in Gorakhpur Police Station Areas in Gorakhpur Town by the Yogi supported Hindu Yuva Vahini, activists of BJP, Vyapar Mandal, which created an atmosphere of fear and terror. Gorakhnath temple became main centre of communal miscreant activities of the followers of this Yogi Aditya Nath and their refuge and these miscreants attacked the houses of Muslims residing in the area adjoining the temple premises, their shops and godowns and the vehicles of Muslims standing there (Trucks, Rickshaw, Scooters, Cars, etc.) and set them afire which caused which loss. Under the criminal conspiracy and instigation of Member of Parliament Yogi and the abovenamed persons, the followers of Yogi Aditya Nath killed Rashid R/O Sahabgunj S/O Rasheed R/O Rahmat Nagar, P.S. Rajghat in the Rajghat Police Station area and such followers also tried to kill by setting afire by pouring petrol on Peshimam Tufail Ahmad S/O Munnavar Hussain R/O Singharia in Cantt. Police Station area and such followers also caused huge loss by destructing Mosque situated at Menhadia village under Police Station Gagaha and such followers also set afire the religious epic Kuran in the Mosque of Village Etkhauli and caused loss by destructing the Mosque under the Police Station Gagaha and such followers also set afire

the madarsa situated in village Vasudiha under Police Station Gagaha and also set afire Tazias and such followers also set afire the shops of Abdulla S/O of Sharfuddin, Shahur, Riyaz all Muslims at Bhaluan Chouraha under Police Station Gagaha and the shops of Muslims named Fakharuddin and Islam were also set afire apart from Irshad Tent House at Jaitpur Couraha under Sahajnawan Police Station and such followers also destructed and destroyed the Eidgaah situated in village Rudlapur P.S. Khorabar and Eidgaah situated in village Dumri (Niwas) P.S. Sahajanawan, and Eidgaah situated in village Mustafabad @ Mallaur P.S. Sahjanawan and the Mosque situated in village Bhhopgarh P.S. Gola District Gorakhpur. Tazias were not allowed to be lifted at many places in Gorakhpur district and at many places where the Tazia procession were carried out, they were destructed and set afire there by doing miscreant acts there. The shops of Salim S/O Shaukat in village Jaddupatti, Ashiq Band, Anwar barber, Hafizullah and Jabbar in village Menhdeva under Police Station Sikrigunj were also set afire under the same conspiracy. These miscreants also robbed and set afire the shop of Tajammul Hussain in village Dhabra of Police Station Sikrigunj. In the same way, the shops of Nadir, Ashiq Mukhtar were robbed and set afire in Belghat and such miscreants also attacked the mosque situated in village Bhainsa P.S. Bansgaon and destroyed it's gate and also destructed shops of two Muslims in the market.

7. That the followers of Aditya Nath Yogi and activists - miscreants of the abovenamed organization robbed and set afire the buses of the roadways by blocking the roads and the government and private other vehicles were also robbed and set afir4e. The conduction of roadways buses in Gorakhpur and Basti Division remained effected during the period from 29.01.2007 to 5th February, 2007 and other adjoining Division also remained effected. During

the period from 9th January to 31st January, 2007, the followers and activists of Yogi Aditya Nath destroyed more than 22 buses of the roadways on different places under this conspiracy and also caused loss by setting them afire, in which 14 roadways buses belonged to Gorakhpur areas and 8 buses belonged to outer areas. On date 31st January, 2007 road buses in the Nichnaul depot in Maharajgunj district were also destructed and set afire by the followers of Yogi Aditya Nath.

8. That Railways was disrupted by the followers of Yogi Aditya Nath Hindu Yuva Vahini, BJP and Vyapar Mandal and about more than 14 trains were set afire causing loss and the Yogi supported miscreants of these organizations pelted stones and destructed the office of the SDM situated in Bansgaon and office of the DM at Gorakhpur under the criminal conspiracy and flamboyant speech against the government and instigation for criminal acts by the persons abovenamed and in the same way the miscreants of these organizations robbed and set afire the shops of Muslims in other Kasbas Khajani, Kauriram, Bansgaon, etc. of the Gorakhpur district. In Kasba Khajani, these miscreants entered the mosque and and Madarsa Arabia Ahal-e-Sunnat and robbed and destroyed the same and also robbed and set afire the shops of 15 Muslims, whose details have been mentioned in the petition dated 5th July, 2007 written by Mohammad Asad Hayat to the Senior Superintendent of Police, Gorakhpur and the vehicles of Muslims plying on the road were also made targets. In Kasba Gola, the shops of Akhtar Hussain S/O Muhhamad Umar, Gulab Hussain S/O Ismail, Abrar S/O Sarfaraz, Aftab S/O Noor Alam, Feroz and Tahir were also robbed and set afire. In Kasba Kauriram, the shops of Nabi Muhammad, Nizamuddin, Majnu and Yusuf were also set afire. In Kasba Bansgaon, the shops of Tazammul Hussain and Dr. Siraz Ansari were also robbed and burnt. The Muslims aggrieved by these incidents were not heard

by the Police. Apart from this, the shops, houses and Tazias of Muslims were robbed and burnt in many rural areas of Gorakhpur district. All these incidents have been published in Newspapers from 29th January, 2007 to 15th February, 2007. All these criminal acts were done by the follower activists of Yogi Aditya Nath connected to Hindu Yuva Vahini, BJP and Vyapar Mandal on instigation by aforesaid enraging speech by Yogi Aditya Nath and under the conspiracy hatched by Yogi Aditya Nath and other abovenamed persons.

9. That Yogi Aditya Nath delivered a enraging speech addressing "Hindu Chetna Rally" in Kasba Kasaya District Padrauna on 28th January, 2007 and asked the Hindus that they shed fear of death from their hearts. It is necessary to mention here that in Purvanchal, Hindu Yuva Vahini under the leadership of Yogi Aditya Nath was hatching a conspiracy to disrupt communal harmony, to annoy Muslims and to harm them since earlier times and was looking for an appropriate situation for the same and it's activists were active for the same. This appropriate situation met them in the background of murder of Rajkumar Agrahari in Gorakhpur town in the night of 26/27th January, 2007. The activists of Hindu Yuva Vahini and BJP were jointly holding public meetings at the different places since first week of January 2007 itself in Kotwali Padrauna area of Kushinagar district and were raising slogans that if you have to live in Purvanchal, then you must have to chant name of Yogi and whoever chants the name of Ali, he will be beaten in every street. The office bearers and activists of Hindu Yuva Vahini were delivering communal speeches and were canvassing that Muslims must be taught a lesson and they have to be harmed to such an extent that they do not dare raise their heads and any of their religious ceremony has not to be allowed to be completed. In this respect, all such information are recorded in the G.D. of Kotwali Padrauna town on different

dates in the month of January, 2007.

10. That all the preparations to carry out such wrongful acts and spread the same in Gorakhpur Division and Basti Division had been completed by Hindu Yuva Vahini, BJP and Vyapar Mandal under the leadership of Yogi Aditya Nath and the speech delivered by Yogi Aditya Nath in the aforesaid "Warning" meeting and the torch procession conducted on Gorakhpur Railway Station in the night of dated 27th January, Gorakhpur Railway Station in the night of date 27th January, 2007 and the "Hindu Chetna Rally" conducted in Kasaya of district Kushinagar on 28th January, 2007 further provoked and directed their activists and thereafter Yogi Aditya Nath got himself arrested at the border of Gorakhpur district on 28th January, 2007 while returning from Kasaya under conspiracy and it was canvassed by the activists of Hindu Yuva Vahini, BJP and Vyapar Mandal under conspiracy only that the administration has arrested the prophet of Hindu Welfare, hence got the brawl spread in relation to this arrest the background background of the public provocation on account of aforesaid speech. And robbed, burnt and destroyed and properties of Muslims, their religious places, epics, emblems, Tazias and government vehicles and buildings, offices buses of roadways and railways and in this sequence, condemnable crimes killings of Muslims and attempt to kill Muslims were carried out."

5. Another very vital fact, that requires to be noticed at this stage itself, is that on 26th January, 2007, Rajkumar Agrahari, a Hindu boy was murdered in Gorakhpur, which resulted in breaking out of communal violence in the city and imposition of curfew under Section 144 of the Code. On 27th January, 2007 a condolence meeting for the murder of Raj Kumar was organised which was attended by many persons including Anju Chaudhary, the Mayor of Gorakhpur and Yogi Aditya Nath, Member of Parliament from that constituency. It appears from

the record that the High Court had also passed some orders in regard to the investigation of the case and finally the police had registered a case under Section 302 of the Indian Penal Code, 1860 (for short 'IPC'), and had even filed a charge sheet under Section 173 of the Code before the Court of competent jurisdiction against six unknown accused persons.

6. Apart from this incident and before the public meeting attended by above-stated Anju Chaudhary, another incident took place at the shop of one Hazrat S/o Bismilla under Police Station Cantt. In this incident, the shop of Hazarat was set on fire at about 6 p.m. on 27th January, 2007 causing heavy damage to the same. In fact, as per the report lodged by him, he was working in that shop and owner of the shop was one Md. Isa Ansari. According to him, some unknown persons, claiming to be from Hindu Yuva Vahini, had set the shop on fire. He neither knew their names nor their addresses. This report was sent by post and was, thus, received by the Police Station and registered as FIR No.145 of 2007 on 3rd February, 2007. The police had registered a case against unknown persons under Sections 147, 427, 436 and 506 IPC read with Section 23 of the U.P. Gangsters and Activists Prevention Act and Section 7 of the Criminal Law Amendment Act.

7. The complaint application under Section 156 IPC was filed by Parvaz on 16th November, 2007, nearly 10 months after the date of occurrence. This application, which was heard by the learned Chief Judicial Magistrate, was rejected vide order dated 29th July, 2008. The learned Magistrate expressed the opinion that since Crime Case No.145 of 2007 had already been registered, as noticed above, there was no propriety to register an FIR again. The intention of the legislature was to provide speedy criminal law and justice to all. Thus, there was no need to conduct fresh investigation by another person merely by lodging a fresh FIR. The Court held that to pass such an order was not justifiable and rejected the application. The thrust of the order of the learned Magistrate was primarily on this aspect of the case.

8. Aggrieved from the order dated 29th July, 2008, Parvaz filed a revision petition before the High Court. The High Court vide its judgment dated 26th September, 2008 set aside the order of the learned Magistrate under revision and directed the Magistrate to pass a fresh order on the application of respondent No.2. While passing this order, the Court held as under :

> "11. In addition to the aforesaid averments, various other allegations have also been made in the application under Section 156(3) Cr.P.C. From all these allegations, prima facie cognizable offences of very serious nature requiring police investigation are disclosed. Hence, the learned CJM Gorakhpur ought to have passed the order in present case for registration of FIR against the persons named in the application under Section 156(3) Cr.P.C. and its investigation by the police, but it is very unfortunate that due to lack of adequate legal knowledge, without going into the allegations made in that application, the learned CJM has rejected the application merely on the ground that in view of the FIR registered at case Crime No.145 of 2007 at P.S. Cantt., there is no justification to get the second FIR registered. This view of the learned CJM is wholly erroneous. Annexure (iv) is the copy of the FIR, which was registered at Case Crime No.145 of 2007 at P.S. Cantt Gorakhpur on the basis of the application of Hazarat S/o Vismilla. On perusal of this FIR, it is revealed that the said FIR relates to the incident, which had occurred on 27.01.2007 at about 6.00 p.m., in which damage was caused to the shop of the complainant Hazarat by some named persons of Hindu Yuwa Wahini. That FIR was lodged regarding one incident only, whereas in the application under Section 156(3) Cr.P.C. a number of incidents have been mentioned, which occurred on different places affecting different persons. Therefore, it cannot be said that the FIR registered at Case Crime No.145 of 2007 covers all the incidents mentioned in the

application under Section 156(3) Cr.P.C. As such, there was no legal bar in this case to get the First Information Report registered on the basis of the application moved by the applicant revisionist under Section 156(3) Cr.P.C. and its investigation by the police, because all the allegations made in the said application and in the FIR registered at Case Crime No.145 of 2007 are not the same.

12. Although, in view of law laid down by a Division Bench of this Court in the case of *Sukhwasi Vs. State of U.P.* 2007 (59) ACC 739 in which Full Bench decision of the case of *Ram Babu Guta & Ors. Vs. State of U.P.* 2001 (43) ACC 50 has been relied upon, application under Section 156(3) Cr.P.C. can be treated as complaint, but on the basis of the allegations made in the application under Section 156(3) Cr.P.C. in the present case prima facie cognizable offences of very serious nature requiring police investigation are disclosed. Hence, treating the application under Section 156(3) Cr.P.C. as complaint in present case would not be legal and justified. While passing order for treating the application under Section 156(3) Cr.P.C. as complaint, the following observations made by the Full Bench of this Court in the case of *Ram Babu Gupta* (supra) must be kept in mind by the Magistrate/Judges:-

> "However, it is always to be kept in mind that it is the primary duty of the police to investigate in case involving cognizable offences and aggrieved person cannot be forced to proceed in the manner provided by Chapter XV and to produce his witnesses at his cost of bring home the charge to the accused. It is the duty of the state to provide safeguards to the life and property of a citizen. If any intrusion is made by an offender, it is for the State to set the law into motion and come to the aid

> of the person aggrieved."

13. Therefore,, having regard to the afore cited observations made by the Full Bench, the Magistrates/ Judges should not shirk their legal responsibility to pass an order for registration of the FIR and its investigation by the police on the applications under Section 156(3) Cr.P.C. in the cases where on the basis of the averments made therein and the material, if any, brought on record in support thereof, prima facie cognizable offence of serious nature requiring police investigation is made out and in such cases the aggrieved person should not be compelled to collect and produce the evidence at his cost to bring home the charges to the accused by passing an order to treat the application under Section 156(3) Cr.P.C. as complaint thereby forcing the aggrieved person to proceed in the manner provided by Chapter XV Cr.P.C.

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19. Consequently, the revision is allowed. The impugned order is hereby set aside the Chief Judicial Magistrate Gorakhpur is directed to pass fresh order on the application dated 16.11.2007 moved by the applicant-revisionist Parvaz Parwaz, under Section 156(3) Cr.P.C. and it must be ensured that after registration of the FIR on the basis of that application, proper investigation is carried out."

9. In the present appeal by way of special leave, the appellant Smt. Anju Chaudhary challenges the legality and correctness of the order of the High Court primarily on the following grounds :

(a) The order passed by learned CJM dated 29th July, 2008 did not suffer from any error of jurisdiction and, thus, the High Court could not have upset the said order in exercise of its revisional jurisdiction.

(b) While making certain observations, the High Court, in the impugned order held that prima facie cognizable offences were made out and while virtually directing the learned Magistrate to get an FIR registered, has foreclosed the exercise of judicial discretion by the learned Magistrate. As such, the order of the High Court is not sustainable.

(c) In law, there cannot be two FIRs registered in relation to the same occurrence or different events or incidents two or more but forming part of the same transaction. The direction to register a second FIR, therefore, is contrary to law and the very spirit of Section 154 of the Code.

(d) The order of the High Court is in violation of the principles of natural justice inasmuch as the High Court neither gave any notice nor heard the appellant before passing the impugned order dated 26th September, 2008.

10. Contra to the above submissions made by the appellant, the counsel appearing for the State as well as respondent No.2 have supported the order of the High Court in law as well as with reference to the facts of the case in hand. It is contended on their behalf that there were no two separate FIRs in relation to the same offence or occurrence, but these FIRS related to two different incidents which is permissible in law. The appellant was not entitled to any hearing in law at the stage of filing the FIR, and in any case no direction has been made to register a case particularly against the appellant for any given offence. Thus, the order of the High Court does not call for any interference.

11. Having noticed the contentions of the parties and in order to complete the factual matrix of the case, we may also notice at this stage that in furtherance to the order of the High Court dated 26th September, 2008, the learned CJM, vide

order dated 17th October, 2008 accepted the application of respondent No.2 and directed the Police Station Cantt., Gorakhpur to register the case under appropriate sections and to ensure the investigation in terms of the order passed by the High Court. A copy of the order was placed before this Court during the course of hearing.

12. Since all these contentions are inter-related and inter-dependant, it will be appropriate for the Court to examine them collectively. Of course, the foremost contention raised before us is as to whether it is permissible to register two different FIRs in law. We may deal with the legal aspect of this issue first and then turn to the facts.

13. Section 154 of the Code requires that every information relating to the commission of a cognizable offence, whether given orally or otherwise to the officer in-charge of a police station, has to be reduced into writing by or under the direction of such officer and shall be signed by the person giving such information. The substance thereof shall be entered in a book to be kept by such officer in such form as may be prescribed by the State Government in this behalf.

14. A copy of the information so recorded under Section 154(1) has to be given to the informant free of cost. In the event of refusal to record such information, the complainant can take recourse to the remedy available to him under Section 154(3). Thus, there is an obligation on the part of a police officer to register the information received by him of commission of a cognizable offence. The two-fold obligation upon such officer is that (a) he should receive such information and (b) record the same as prescribed. The language of the section imposes such imperative obligation upon the officer. An investigating officer, an officer-in-charge of a police station can be directed to conduct an investigation in the area under his jurisdiction by the order of a Magistrate under Section 156(3) of the Code who is competent to take cognizance under Section 190. Upon

such order, the investigating officer shall conduct investigation in accordance with the provisions of Section 156 of the Code. The specified Magistrate, in terms of Section 190 of the Code, is entitled to take cognizance upon receiving a complaint of facts which constitute such offence; upon a police report of such facts; upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

15. On the plain construction of the language and scheme of Sections 154, 156 and 190 of the Code, it cannot be construed or suggested that there can be more than one FIR about an occurrence. However, the opening words of Section 154 suggest that every information relating to commission of a cognizable offence shall be reduced to writing by the officer in-charge of a Police Station. This implies that there has to be the first information report about an incident which constitutes a cognizable offence. The purpose of registering an FIR is to set the machinery of criminal investigation into motion, which culminates with filing of the police report in terms of Section 173(2) of the Code. It will, thus, be appropriate to follow the settled principle that there cannot be two FIRs registered for the same offence. However, where the incident is separate; offences are similar or different, or even where the subsequent crime is of such magnitude that it does not fall within the ambit and scope of the FIR recorded first, then a second FIR could be registered. The most important aspect is to examine the inbuilt safeguards provided by the legislature in the very language of Section 154 of the Code. These safeguards can be safely deduced from the principle akin to double jeopardy, rule of fair investigation and further to prevent abuse of power by the investigating authority of the police. Therefore, second FIR for the same incident cannot be registered. Of course, the Investigating Agency has no determinative right. It is only a right to investigate in accordance with the provisions of the Code. The filing of report upon completion of investigation, either for cancellation or alleging

commission of an offence, is a matter which once filed before the court of competent jurisdiction attains a kind of finality as far as police is concerned, may be in a given case, subject to the right of further investigation but wherever the investigation has been completed and a person is found to be prima facie guilty of committing an offence or otherwise, reexamination by the investigating agency on its own should not be permitted merely by registering another FIR with regard to the same offence. If such protection is not given to a suspect, then possibility of abuse of investigating powers by the Police cannot be ruled out. It is with this intention in mind that such interpretation should be given to Section 154 of the Code, as it would not only further the object of law but even that of just and fair investigation. More so, in the backdrop of the settled canons of criminal jurisprudence, re-investigation or de novo investigation is beyond the competence of not only the investigating agency but even that of the learned Magistrate. The courts have taken this view primarily for the reason that it would be opposed to the scheme of the Code and more particularly Section 167(2) of the Code. [Ref. *Rita Nag v. State of West Bengal* [(2009) 9 SCC 129] and *Vinay Tyagi v. Irshad Ali @ Deepak & Ors.* (SLP (Crl) No.9185-9186 of 2009 of the same date).

16. It has to be examined on the merits of each case whether a subsequently registered FIR is a second FIR about the same incident or offence or is based upon distinct and different facts and whether its scope of inquiry is entirely different or not. It will not be appropriate for the Court to lay down one straightjacket formula uniformly applicable to all cases. This will always be a mixed question of law and facts depending upon the merits of a given case. In the case of *Ram Lal Narang v. State (Delhi Administration)* [(1979) 2 SCC 322], the Court was concerned with the registration of a second FIR in relation to the same facts but constituting different offences and where ambit and scope of the investigation was entirely different. Firstly, an FIR was registered and even the charge-

sheet filed was primarily concerned with the offence of conspiracy to cheat and misappropriation by the two accused. At that stage, the investigating agency was not aware of any conspiracy to send the pillars (case property) out of the country. It was also not known that some other accused persons were parties to the conspiracy to obtain possession of the pillars from the court, which subsequently surfaced in London. Earlier, it was only known to the Police that the pillars were stolen as the property within the meaning of Section 410 IPC and were in possession of the accused person (Narang brothers) in London. The Court declined to grant relief of discharge to the petitioner in that case where the contention raised was that entire investigation in the FIR subsequently instituted was illegal as the case on same facts was already pending before the courts at Ambala and courts in Delhi were acting without jurisdiction. The fresh facts came to light and the scope of investigation broadened by the facts which came to be disclosed subsequently during the investigation of the first FIR. The comparison of the two FIRs has shown that the conspiracies were different. They were not identical and the subject matter was different. The Court observed that there was a statutory duty upon the Police to register every information relating to cognizable offence and the second FIR was not hit by the principle that it is impermissible to register a second FIR of the same offence. The Court held as under :

> "20.Anyone acquainted with the day-to-day working of the criminal courts will be alive to the practical necessity of the police possessing the power to make further investigation and submit a supplemental report. It is in the interests of both the prosecution and the defence that the police should have such power. It is easy to visualize a case where fresh material may come to light which would implicate persons not previously accused or absolve persons already accused. When it comes to the notice of the investigating agency that a person already accused of an offence has a good alibi, is it not the duty of that agency to investigate

the genuineness of the plea of alibi and submit a report to the Magistrate? After all, the investigating agency has greater resources at its command than a private individual. Similarly, where the involvement of persons who are not already accused comes to the notice of the investigating agency, the investigating agency cannot keep quiet and refuse to investigate the fresh information. It is their duty to investigate and submit a report to the Magistrate upon the involvement of the other persons. In either case, it is for the Magistrate to decide upon his future course of action depending upon the stage at which the case is before him. If he has already taken cognizance of the offence, but has not proceeded with the enquiry or trial, he may direct the issue of process to persons freshly discovered to be involved and deal with all the accused in a single enquiry or trial. If the case of which he has previously taken cognizance has already proceeded to some extent, he may take fresh cognizance of the offence disclosed against the newly involved accused and proceed with the case as a separate case. What action a Magistrate is to take in accordance with the provisions of the CrPC in such situations is a matter best left to the discretion of the Magistrate. The criticism that a further investigation by the police would trench upon the proceeding before the court is really not of very great substance, since whatever the police may do, the final discretion in regard to further action is with the Magistrate. That the final word is with the Magistrate is sufficient safeguard against any excessive use or abuse of the power of the police to make further investigation. We should not, however, be understood to say that the police should ignore the pendency of a proceeding before a court and investigate every fresh fact that comes to light as if no cognizance had been taken by the Court of any offence. We think that in the interests of the independence of the magistracy and the judiciary, in the interests of the purity of the administration of criminal justice and in the interests of the comity of the various

agencies and institutions entrusted with different stages of such administration, it would ordinarily be desirable that the police should inform the court and seek formal permission to make further investigation when fresh facts come to light.

21. As observed by us earlier, there was no provision in the CrPC, 1898 which, expressly or by necessary implication, barred the right of the police to further investigate after cognizance of the case had been taken by the Magistrate. Neither Section 173 nor Section 190 lead us to hold that the power of the police to further investigate was exhausted by the Magistrate taking cognizance of the offence. Practice, convenience and preponderance of authority, permitted repeated investigations on discovery of fresh facts. In our view, notwithstanding that a Magistrate had taken cognizance of the offence upon a police report submitted under Section 173 of the 1898 Code, the right of the police to further investigate was not exhausted and the police could exercise such right as often as necessary when fresh information came to light. Where the police desired to make a further investigation, the police could express their regard and respect for the court by seeking its formal permission to make further investigation.

22. As in the present case, occasions may arise when a second investigation started independently of the first may disclose a wide range of offences including those covered by the first investigation. Where the report of the second investigation is submitted to a Magistrate other than the Magistrate who has already taken cognizance of the first case, it is up to the prosecuting agency or the accused concerned to take necessary action by moving the appropriate superior court to have the two cases tried together. The Magistrates themselves may take action suo motu. In the present case, there is no problem since the

earlier case has since been withdrawn by the prosecuting agency. It was submitted to us that the submission of a charge-sheet to the Delhi court and the withdrawal of the case in the Ambala court amounted to an abuse of the process of the court. We do not think that the prosecution acted with any oblique motive. In the charge-sheet filed in the Delhi court, it was expressly mentioned that Mehra was already facing trial in the Ambala Court and he was, therefore, not being sent for trial. In the application made to the Ambala Court under Section 494 CrPC, it was expressly mentioned that a case had been filed in the Delhi Court against Mehra and others and, therefore, it was not necessary to prosecute Mehra in the Ambala court. The Court granted its permission for the withdrawal of the case. Though the investigating agency would have done better if it had informed the Ambala Magistrate and sought his formal permission for the second investigation, we are satisfied that the investigating agency did not act out of any malice. We are also satisfied that there has been no illegality. Both the appeals are, therefore, dismissed."

17. In the case of *M. Krishna v. State of Karnataka* [(1999) 3 SCC 247], this Court took the view that even where the article of charge was similar but for a different period, there was nothing in the Code to debar registration of the second FIR. The Court opined that the FIR was registered for an offence under Sections 13(1)(e) and 13(2) of the Prevention of Corruption Act related to the period 1.8.1978 to 1.4.1989 and the investigation culminated into filing of a report which was accepted by the Court. The second FIR and subsequent proceedings related to a later period which was 1st August, 1978 to 25th July, 1978 under similar charges. It was held that there was no provision which debar the filing of a subsequent FIR.

18. In the case of *T.T. Antony v. State of Kerala* [(2001) 6 SCC 181], the Court explained that an information given

under sub-Section (1) of Section 154 of the Code is commonly known as the First Information Report (FIR). Though this term is not used in the Code, it is a very important document. The Court concluded that second FIR for the same offence or occurrence giving rise to one or more cognizable offences was not permissible. In this case, the Court discussed the judgments in *Ram Lal Narang* (supra) and *M. Krishna* (supra) in some detail, and while quashing the subsequent FIR held as under :

"23. The right of the police to investigate into a cognizable offence is a statutory right over which the court does not possess any supervisory jurisdiction under CrPC. In Emperor v. Khwaja Nazir Ahmad the Privy Council spelt out the power of the investigation of the police, as follows:

"In India, as has been shown, there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities, and it would, as Their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the court."

24. This plenary power of the police to investigate a cognizable offence is, however, not unlimited. It is subject to certain well-recognised limitations. One of them, is pointed out by the Privy Council, thus:

"[I]f no cognizable offence is disclosed, and still more if no offence of any kind is disclosed, the police would have no authority to undertake an investigation…."

25. Where the police transgresses its statutory power of investigation the High Court under Section 482 CrPC or Articles 226/227 of the Constitution and this Court in an

appropriate case can interdict the investigation to prevent abuse of the process of the court or otherwise to secure the ends of justice.

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35. For the aforementioned reasons, the registration of the second FIR under Section 154 CrPC on the basis of the letter of the Director General of Police as Crime No. 268 of 1997 of Kuthuparamba Police Station is not valid and consequently the investigation made pursuant thereto is of no legal consequence, they are accordingly quashed. We hasten to add that this does not preclude the investigating agency from seeking leave of the Court in Crimes Nos. 353 and 354 of 1994 for making further investigations and filing a further report or reports under Section 173(8) CrPC before the competent Magistrate in the said cases. In this view of the matter, we are not inclined to interfere with the judgment of the High Court under challenge insofar as it relates to quashing of Crime No. 268 of 1997 of Kuthuparamba Police Station against the ASP (R.A. Chandrasekhar); in all other aspects the impugned judgment of the High Court shall stand set aside."

19. The judgment of this Court in *T.T. Antony* (supra) came to be further explained and clarified by a three Judge Bench of this Court in the case of *Upkar Singh v. Ved Prakash* [(2004) 13 SCC 292], wherein the Court stated as under :

"17. It is clear from the words emphasised hereinabove in the above quotation, this Court in the case of *T.T. Antony v. State of Kerala* has not excluded the registration of a complaint in the nature of a counter-case from the purview of the Code. In our opinion, this Court in that case only held that any further complaint by the same complainant or others against the same accused, subsequent to the registration of a case, is prohibited under the Code because an investigation in this regard

would have already started and further complaint against the same accused will amount to an improvement on the facts mentioned in the original complaint, hence will be prohibited under Section 162 of the Code. This prohibition noticed by this Court, in our opinion, does not apply to counter-complaint by the accused in the first complaint or on his behalf alleging a different version of the said incident.

18. This Court in *Kari Choudhary v. Sita Devi* discussing this aspect of law held:

> "11. Learned counsel adopted an alternative contention that once the proceedings initiated under FIR No. 135 ended in a final report the police had no authority to register a second FIR and number it as FIR No. 208. Of course the legal position is that there cannot be two FIRs against the same accused in respect of the same case. But when there are rival versions in respect of the same episode, they would normally take the shape of two different FIRs and investigation can be carried on under both of them by the same investigating agency. Even that apart, the report submitted to the court styling it as FIR No. 208 of 1998 need be considered as an information submitted to the court regarding the new discovery made by the police during investigation that persons not named in FIR No. 135 are the real culprits. To quash the said proceedings merely on the ground that final report had been laid in FIR No. 135 is, to say the least, too technical. The ultimate object of every investigation is to find out whether the offences alleged have been committed and, if so, who have committed it."
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> (emphasis supplied)

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23. Be that as it may, if the law laid down by this Court in *T.T. Antony* case is to be accepted as holding that a second complaint in regard to the same incident filed as a counter-complaint is prohibited under the Code then, in our opinion, such conclusion would lead to serious consequences. This will be clear from the hypothetical example given hereinbelow i.e. if in regard to a crime committed by the real accused he takes the first opportunity to lodge a false complaint and the same is registered by the jurisdictional police then the aggrieved victim of such crime will be precluded from lodging a complaint giving his version of the incident in question, consequently he will be deprived of his legitimated right to bring the real accused to book. This cannot be the purport of the Code.

24. We have already noticed that in T.T. Antony case this Court did not consider the legal right of an aggrieved person to file counterclaim, on the contrary from the observations found in the said judgment it clearly indicates that filing a counter-complaint is permissible.

25. In the instant case, it is seen in regard to the incident which took place on 20-5-1995, the appellant and the first respondent herein have lodged separate complaints giving different versions but while the complaint of the respondent was registered by the police concerned, the complaint of the appellant was not so registered, hence on his prayer the learned Magistrate was justified in directing the police concerned to register a case and investigate the same and report back. In our opinion, both the learned Additional Sessions Judge and the High Court erred in coming to the conclusion that the same is hit by Section 161 or 162 of the Code which, in our considered opinion, has absolutely no bearing on the question involved. Section 161 or 162

of the Code does not refer to registration of a case, it only speaks of a statement to be recorded by the police in the course of the investigation and its evidentiary value."

20. Somewhat similar view was taken by a Bench of this Court in the case of *Rameshchandra Nandlal Parikh v. State of Gujarat* [(2006) 1 SCC 732], wherein the Court held that the subsequent FIRs cannot be prohibited on the ground that some other FIR has been filed against the petitioner in respect of other allegations filed against the petitioner.

21. This Court also had the occasion to deal with the situation where the first FIR was a cryptic one and later on, upon receipt of a proper information, another FIR came to be recorded which was a detailed one. In this case, the court took the view that no exception could be taken to the same being treated as an FIR. In the case of *Vikram v. State of Maharashtra* (2007) 12 SCC 332, the Court held that it was not impermissible in law to treat the subsequent information report as the First Information Report and act thereupon. In the case of *Tapinder Singh v. State of Punjab* [(1970) 2 SCC 113] also, this Court examined the question as to whether cryptic, anonymous and oral messages, which do not clearly specify the cognizable offence, can be treated as FIR, and answered the question in the negative.

22. In matters of complaints, the Court in the case of *Shiv Shankar Singh v. State of Bihar* (2012) 1 SCC 130 expressed the view that the law does not prohibit filing or entertaining of a second complaint even on the same facts, provided that the earlier complaint has been decided on the basis of insufficient material or has been passed without understanding the nature of the complaint or where the complete facts could not be placed before the court and the applicant came to know of certain facts after the disposal of the first complaint. The Court applied the test of full consideration of the complaints on merits. In paragraph 18, the Court held as under: -

"18. Thus, it is evident that the law does not prohibit filing or entertaining of the second complaint even on the same facts provided the earlier complaint has been decided on the basis of insufficient material or the order has been passed without understanding the nature of the complaint or the complete facts could not be placed before the court or where the complainant came to know certain facts after disposal of the first complaint which could have tilted the balance in his favour. However, the second complaint would not be maintainable wherein the earlier complaint has been disposed of on full consideration of the case of the complainant on merit."

23. The First Information Report is a very important document, besides that it sets the machinery of criminal law in motion. It is a very material document on which the entire case of the prosecution is built. Upon registration of FIR, beginning of investigation in a case, collection of evidence during investigation and formation of the final opinion is the sequence which results in filing of a report under Section 173 of the Code. The possibility that more than one piece of information is given to the police officer in charge of a police station, in respect of the same incident involving one or more than one cognizable offences, cannot be ruled out. Other materials and information given to or received otherwise by the investigating officer would be statements covered under Section 162 of the Code. The Court in order to examine the impact of one or more FIRs has to rationalise the facts and circumstances of each case and then apply the test of 'sameness' to find out whether both FIRs relate to the same incident and to the same occurrence, are in regard to incidents which are two or more parts of the same transaction or relate completely to two distinct occurrences. If the answer falls in the first category, the second FIR may be liable to be quashed. However, in case the contrary is proved, whether the version of the second FIR is different and they are in respect of two different incidents/crimes, the second FIR is permissible, This is the view expressed by this Court in the

case of *Babu Babubhai v. State of Gujarat and Ors.* [(2010) 12 SCC 254]. This judgment clearly spells out the distinction between two FIRs relating to the same incident and two FIRs relating to different incident or occurrences of the same incident etc.

24. To illustrate such a situation, one can give an example of the same group of people committing theft in a similar manner in different localities falling under different jurisdictions. Even if the incidents were committed in close proximity of time, there could be separate FIRs and institution of even one stating that a number of thefts had been committed, would not debar the registration of another FIR. Similarly, riots may break out because of the same event but in different areas and between different people. The registration of a primary FIR which triggered the riots would not debar registration of subsequent FIRs in different areas. However, to the contra, for the same event and offences against the same people, there cannot be a second FIR. This Court has consistently taken this view and even in the case of *Chirra Shivraj v. State of Andhra Pradesh* [(2010) 14 SCC 444], the Court took the view that there cannot be a second FIR in respect of same offence/event because whenever any further information is received by the investigating agency, it is always in furtherance of the First Information Report.

25. Now, we should examine the facts of the present case in light of the principles stated supra. The complaint/ application under Section 156(3) filed by respondent No. 2 was founded on the condolence meeting which was attended by a large number of persons including the persons named in the complaint. According to respondent No. 2, named persons had given speeches which were communal, provoking and were creating disharmony between the communities, and encouraging people to commit criminal offences rather than to follow the due process of law. The complaint of respondent No. 2 did not relate to any event prior to the holding of the meeting

and participation of the stated persons. This complaint was of a general nature and related to various communal riots that occurred subsequent to and as a result of the meeting. Thus, it related to a different case, grievance and alleged commission of offences at the time and subsequent to the holding of the meeting.

26. The First Information Report 145/2007 lodged by Hazrat son of Bismillah related to burning of a shop prior to holding of a meeting. He categorically stated that he did not know the persons or names of the perpetrators who attacked the shop where he was working. This incident occurred at 6 p.m. as per the records while the meeting itself, as per respondent No. 2 was held after 8 p.m., though on the same date. His report clearly states that when he was going back to his house at about 8.30 p.m., he stopped at the place where the meeting was being held. The FIR registered by Hazrat was against unknown persons and related to a particular event and commission of a particular crime. There was no question of any provocation, conspiracy or attempt by the persons premeditatedly committing the offences which they committed.

27. As per the FIR, it was an offence committed at random by some unknown persons. The registration of such FIR was neither intended to be nor was it in fact in relation to a matter of larger investigation, or commission of offences, as alleged by the respondent no.2.

28. Even the offences which are stated to have been committed, and for which the two FIRs were registered in these respective cases were different and distinct. In the complaint filed by Parvez Parwaz, which was registered as a FIR, names of the persons were mentioned and a general investigation was called for, while FIR 145/2007 registered by Hazrat, was against unknown persons for damage of his property, which was for a specific offence, without any other complaint or allegation of any communal instigation or riot. In other words,

these were two different FIRs relatable to different occurrences, investigation of one was no way dependent upon the other and they are neither inter-linked nor inter-dependent. They were lodged by different persons in relation to occurrences which are alleged to have occurred at different points of time against different people and for different offences. Requirement of proof in both cases was completely distinct and different. Thus, there was no similarity and the test of similarity would not be satisfied in the present case. Thus, we have no hesitation in coming to the conclusion that lodging of the subsequent FIR was not a second FIR for the same occurrence as stated in FIR 145/2007, and thus, could be treated as a First Information Report for all purposes including investigation in terms of the provisions of the Code. It was not in the form of a statement under Section 162 of the Code.

Is an accused entitled to hearing pre-registration of an FIR?

29. Section 154 of the Code places an unequivocal duty upon the police officer in charge of a police station to register FIR upon receipt of the information that a cognizable offence has been committed. It hardly gives any discretion to the said police officer. The genesis of this provision in our country in this regard is that he must register the FIR and proceed with the investigation forthwith. While the position of law cannot be dispelled in view of the three Judge Bench Judgment of this Court in *State of Uttar Pradesh v. Bhagwant Kishore Joshi* [AIR 1964 SC 221], a limited discretion is vested in the investigating officer to conduct a preliminary inquiry pre-registration of a FIR as there is absence of any specific prohibition in the Code, express or implied. The subsequent judgments of this Court have clearly stated the proposition that such discretion hardly exists. In fact the view taken is that he is duty bound to register an FIR. Then the question that arises is whether a suspect is entitled to any pre-registration hearing or any such right is vested in the suspect.

30. The rule of audi alteram partem is subject to exceptions. Such exceptions may be provided by law or by such necessary implications where no other interpretation is possible. Thus rule of natural justice has an application, both under the civil and criminal jurisprudence. The laws like detention and others, specifically provide for post-detention hearing and it is a settled principle of law that application of this doctrine can be excluded by exercise of legislative powers which shall withstand judicial scrutiny. The purpose of the Criminal Procedure Code and the Indian Penal Code is to effectively execute administration of the criminal justice system and protect society from perpetrators of crime. It has a twin purpose; firstly to adequately punish the offender in accordance with law and secondly to ensure prevention of crime. On examination, the scheme of the Criminal Procedure Code does not provide for any right of hearing at the time of registration of the First Information Report. As already noticed, the registration forthwith of a cognizable offence is the statutory duty of a police officer in charge of the police station. The very purpose of fair and just investigation shall stand frustrated if pre-registration hearing is required to be granted to a suspect. It is not that the liberty of an individual is being taken away or is being adversely affected, except by the due process of law. Where the Officer In-charge of a police station is informed of a heinous or cognizable offence, it will completely destroy the purpose of proper and fair investigation if the suspect is required to be granted a hearing at that stage and is not subjected to custody in accordance with law. There would be the pre-dominant possibility of a suspect escaping the process of law. The entire scheme of the Code unambiguously supports the theory of exclusion of audi alteram partem pre-registration of an FIR. Upon registration of an FIR, a person is entitled to take recourse to the various provisions of bail and anticipatory bail to claim his liberty in accordance with law. It cannot be said to be a violation of the principles of natural justice for two different reasons. Firstly, the Code does not provide for any such right at that stage. Secondly, the absence of such a provision

clearly demonstrates the legislative intent to the contrary and thus necessarily implies exclusion of hearing at that stage. This Court in the case of *Union of India v. W.N. Chadha* (1993) Suppl. (4) SCC 260 clearly spelled out this principle in paragraph 98 of the judgment that reads as under:

> "98. If prior notice and an opportunity of hearing are to be given to an accused in every criminal case before taking any action against him, such a procedure would frustrate the proceedings, obstruct the taking of prompt action as law demands, defeat the ends of justice and make the provisions of law relating to the investigation lifeless, absurd and self-defeating. Further, the scheme of the relevant statutory provisions relating to the procedure of investigation does not attract such a course in the absence of any statutory obligation to the contrary."

31. In the case of *Samaj Parivartan Samuday v. State of Karnataka* (2012) 7 SCC 407, a three-Judge Bench of this Court while dealing with the right of hearing to a person termed observed that there was no right of hearing. Though the suspects were already interveners in the writ petition, they were heard. Stating the law in regard to the right of hearing, the Court held as under :

> "50. There is no provision in CrPC where an investigating agency must provide a hearing to the affected party before registering an FIR or even before carrying on investigation prior to registration of case against the suspect. CBI, as already noticed, may even conduct pre-registration inquiry for which notice is not contemplated under the provisions of the Code, the Police Manual or even as per the precedents laid down by this Court. It is only in those cases where the Court directs initiation of investigation by a specialised agency or transfer investigation to such agency from another agency that the Court may, in its discretion, grant hearing to the suspect or affected parties. However, that also is not an absolute rule of law and is primarily a matter in the judicial discretion of the Court. This question is of no relevance to the present case as we have already heard the interveners."

32. While examining the above-stated principles in conjunction with the scheme of the Code, particularly Section 154 and 156(3) of the Code, it is clear that the law does not contemplate grant of any personal hearing to a suspect who attains the status of an accused only when a case is registered for committing a particular offence or the report under Section 173 of the Code is filed terming the suspect an accused that his rights are affected in terms of the Code. Absence of specific provision requiring grant of hearing to a suspect and the fact that the very purpose and object of fair investigation is bound to be adversely affected if hearing is insisted upon at that stage, clearly supports the view that hearing is not any right of any suspect at that stage.

33. Even in the cases where report under Section 173(2) of the Code is filed in the Court and investigation records the name of a person in column (2), or even does not name the person as an accused at all, the Court in exercise of its powers vested under Section 319 can summon the person as an accused and even at that stage of summoning, no hearing is contemplated under the law.

34. Of course, situation will be different where the complaint or an application is directed against a particular person for specific offence and the Court under Section 156 dismisses such an application. In that case, the higher court may have to grant hearing to the suspect before it directs registration of a case against the suspect for a specific offence. We must hasten to clarify that there is no absolute indefeasible right vested in a suspect and this would have to be examined in the facts and circumstances of a given case. But one aspect is clear that at the stage of registration of a FIR or passing a direction under Section 156(3), the law does not contemplate

grant of any hearing to a suspect. Coming to the facts of the present case, the complaint under Section 156 had named certain persons, but it had also referred to a number of other persons and the investigation prayed for was of a generic nature and not against a particular person for commission of any specified offence. The substance and nature of the allegations made in the complaint were such that it was not possible to state with certainty as to how the offences were committed and by whom. Thus, the Court was called upon to pass an order directing general investigation of very wide scope. It was to be investigated, as to who besides the named persons gave speeches, incited the public at large, what its impact was on the violence as alleged and who were the persons who had participated in the alleged communal violence. Thus, it was not a case where one or more persons committed the murder of someone and clearly fell under Section 302 IPC. The merit of the case was not disclosed by the learned Magistrate while passing the order dated 29th July, 2008 under Section 156(3) of the Code. The Court did not analyze at all the ingredients of an offence, participation of persons and their other effects. The court primarily proceeded on a legal issue without reference to the facts of the case stating that since one FIR had been recorded i.e. FIR No. 145/ 2007, it was not permissible to register second FIR and direct investigation thereof. This view, as already discussed above was, in fact and in law, not sustainable. The Court had not recorded any finding in favour of the appellant to the effect that she was not present, she had not participated or that she was in no way connected with communal violence. We must not be understood to state that the appellant was involved in any manner in the commission of the said crime. This has to be investigated as directed by the court in accordance with law and that too without prejudice to the rights and contentions of the appellant. The grievance of non-grant of hearing in any case loses its significance as we have heard the appellant at some length and have dealt with the contentions raised before us. In the facts of the present case, thus, no prejudice is caused to the appellant.

Power of the Magistrate under Section 156(3)

35. Investigation into commission of a crime can be commenced by two different modes. First, where the police officer registers an FIR in relation to commission of a cognizable offence and commences investigation in terms of Chapter XII of the Code, the other is when a Magistrate competent to take cognizance in terms of Section 190 may order an investigation into commission of a crime as per the provisions of that Chapter XIV. Section 156 primarily deals with the powers of a police office to investigate a cognizable case. While dealing with the application or passing an order under Section 156(3), the Magistrate does not take cognizance of an offence. When the Magistrate had applied his mind only for order an investigation under Section 156(3) of the Code or issued a warrant for the said purpose, he is not said to have taken cognizance. It is an order in the nature of a preemptory reminder or intimation to the police to exercise its primary duty and power of investigation in terms of Section 151 of the Code. Such an investigation embraces the continuity of the process which begins with collection of evidence under Section 156 and ends with the final report either under Section 159 or submission of chargesheet under Section 173 of the Code. Refer *Mona Pawar v. High Court of Allahabad* [2011) 3 SCC 496]. In the case of *Dilawar Singh v. State of Delhi* [2007) 9 SCR 695], this Court as well stated the principle that investigation begin in furtherance to an order under Section 156(3) is not anyway different from the kind of investigation commenced in terms of Section 156(1). They both terminate with filing of a report under Section 173 of the Code. The Court signified the point that when a Magistrate orders investigation under Chapter XII he does so before taking cognizance of an offence. The court in paragraph 17 of the judgment held as under:-

"The clear position therefore is that any Judicial Magistrate, before taking cognizance of the offence, can order investigation under Section 156(3) of the Code. If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein. For the purpose of enabling the police to start investigation it is open to the Magistrate to direct the police to register an FIR. There is nothing illegal in doing so. After all registration of an FIR involves only the process of entering the substance of the information relating to the commission of the cognizable offence in a book kept by the officer in charge of the police station as indicated in Section 154 of the Code. Even if a Magistrate does not say in so many words while directing investigation under Section 156(3) of the Code that an FIR should be registered, it is the duty of the officer in charge of the police station to register the FIR regarding the cognizable offence disclosed by the complainant because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter."

36. Caution in this process had been introduced by this Court vide its judgment in the case of *Tula Ram & Ors. v. Kishore Singh* [1977) 4 SCC 459] where it was held that the Magistrate can order the police to investigate the complaint, but it has no power to compel the police to submit a charge sheet on a final report being submitted by the police.

37. Still another situation that can possibly arise is that the Magistrate is competent to treat even a complaint termed as an application and pass orders under Section 156(3), but where it takes cognizance, there it would have to be treated as a regular complaint to be tried in accordance with the provisions of Section 200 onwards falling under Chapter XV of the Code. There also the Magistrate is vested with the power to direct investigation to be made by a police officer or by such other person as he thinks fit for the purposes of deciding whether or not there is sufficient ground for

proceeding. This power is restricted and is not as wide as the power vested under Section 156(3) of the Code. The power of the Magistrate under Section 156(3) of the Code to order investigation by the police have not been touched or affected by Section 202 because these powers are exercised even before the cognizance is taken. In other words, Section 202 would apply only to cases where Magistrate has taken cognizance and chooses to enquire into the complaint either himself or through any other agency. But there may be circumstances where the Magistrate, before taking cognizance of the case himself, chooses to order a pure and simple investigation under Section 156(3) of the Code. These cases would fall in different class. This view was also taken by a Bench of this Court in the case of *Rameshbhai Pandurao Hedau v. State of Gujarat* [(2010) 4 SCC 185]. The distinction between these two powers had also been finally stated in the judgment of this Court in the case of *Srinivas Gundluri & Ors. v. SEPCO Electric Power Construction Corporation & Ors.* [(2010) 8 SCC 206] where the Court stated that to proceed under Section 156(3) of the Code, what is required is a bare reading of the complaint and if it discloses a cognizable offence, then the Magistrate instead of applying his mind to the complaint for deciding whether or not there is sufficient ground for proceeding, may direct the police for investigation. But where it takes cognizance and decides as to whether or not there exists a ground for proceeding any further, then it is a case squarely falling under Chapter XV of the Code.

38. Thus, the Magistrate exercises a very limited power under Section 156(3) and so is its discretion. It does not travel into the arena of merit of the case if such case was fit to proceed further. This distinction has to be kept in mind by the court in different kinds of cases. In the present case, the learned Magistrate while passing the order dated 29th July, 2008, had not dealt with the case on merits, but on a legal assumption that it was not a case to direct investigation because investigation was already going on under FIR No. 45/

2007. Once it is held as done by us above, there were two different and distinct offences committed by different persons and there was no commonality of transaction between the two. We do not find any error of jurisdiction in the order of the High Court requiring the learned Magistrate to deal with the cases afresh and pass an order under Section 156(3) of the Code. Once, that view is taken, the direction passed by the learned Magistrate directing further investigation under Section 156(3) can also not be complied with though there is no specific challenge to that order before us.

39. Thus, we are called upon to deal with from the point of view as to whether the investigating agency should be restrained from conducting further investigation or there should be stay of such investigation.

40. It is true that law recognizes common trial or a common FIR being registered for one series of acts so connected together as to form the same transaction as contemplated under Section 220 of the Code. There cannot be any straight jacket formula, but this question has to be answered on the facts of each case. This Court in the case of *Mohan Baitha v. State of Bihar* [(2001) 4 SCC 350], held that the expression 'same transaction' from its very nature is incapable of exact definition. It is not intended to be interpreted in any artificial or technical sense. Common sense in the ordinary use of language must decide whether or not in the very facts of a case, it can be held to be one transaction.

41. It is not possible to enunciate any formula of universal application for the purpose of determining whether two or more acts constitute the same transaction. Such things are to be gathered from the circumstances of a given case indicating proximity of time, unity or proximity of place, continuity of action, commonality of purpose or design. Where two incidents are of different times with involvement of different persons, there is no commonality and the purpose thereof different and they emerge from different circumstances, it will not be possible for

the Court to take a view that they form part of the same transaction and therefore, there could be a common FIR or subsequent FIR could not be permitted to be registered or there could be common trial.

42. Similarly, for several offences to be part of the same transaction, the test which has to be applied is whether they are so related to one another in point of purpose or of cause and effect, or as principal and subsidiary, so as to result in one continuous action. Thus, where there is a commonality of purpose or design, where there is a continuity of action, then all those persons involved can be accused of the same or different offences "committed in the course of the same transaction".

43. For the reasons afore-stated, we find no jurisdictional or other error in the judgment of the High Court and that leads us to direct the dismissal of this appeal.

B.B.B. Appeal dismissed.